World Whistleblowers' Day: recent developments in whistleblowing law in the UK

To mark World Whistleblowers' Day on 23 June 2023, we take stock of some of the most important recent developments in whistleblowing law in the UK and consider what they mean for whistleblowers.

RECENT LEGISLATIVE DEVELOPMENTS

Review of the UK's whistleblowing framework

On 27 March 2023, the Government announced the launch of a review **of the current UK whistleblowing legal framework** (you can read our detailed briefing on the review here). The purpose of the review is to take stock of the UK's existing whistleblowing framework and consider whether it is meeting its original objectives. The terms of reference of the review state that the review will look at the following core questions:

- How the whistleblowing framework facilitates disclosures.
- How the whistleblowing framework protects workers (and the review will also consider the definition of "worker" for whistleblowing purposes).
- Whether information about whistleblowing is available

and accessible to workers, employers and others.

- What have been the wider benefits and impacts of the whistleblowing framework on employers, prescribed persons and others.
- What best practice looks like in terms of responding to disclosures.

The review is expected to conclude by Autumn 2023 and could, eventually, lead to improvements to the legal landscape and greater protection for whistleblowers.

Private Members' Bill seeks ambitious reforms

The Protection for Whistleblowers Bill 2022 -23 is currently on its passage through Parliament. It is a Private Members' Bill, sponsored by the Liberal Democrat peer, Baroness Kramer. The aim of the Bill is to increase protection and support for whistleblowers. The Bill seeks to introduce an ambitious set of reforms to the legal landscape including:

- Making it easier to blow the whistle (for example, it would expand the types of malpractice about which a protected disclosure could be made, it would widen the persons to whom a disclosure could be made, and it would extend protection to individuals who were intending to make a disclosure).
- Introducing an independent "Office of the Whistleblower", whose role would be to provide

information and support to whistleblowers, set minimum standards for whistleblowing policies, enforce compliance and have the power to make interim relief orders of any sort it considered appropriate.

- Introducing civil penalties for persons and organisations that failed to comply with notices and orders of the Office of the Whistleblower. Individuals could be fined up to £50,000 and organisations up to 10% of annual global turnover, capped at £18 million.
- Making the mistreatment of whistleblowers a criminal offence punishable by a fine or a maximum 18-month prison term.
- Protecting whistleblowers against criminal or civil action.

As a Private Members' Bill (which does not have the Government's backing) it is unlikely that the Bill will ever make its way onto the statute books. However, it could help the cause of whistleblowers by drawing attention to the need for better protection of whistleblowers and it may also influence future Government legislation. This is particularly pertinent given the current review of the legal framework.

Expansion of the list of "prescribed persons" to whom individuals can blow the whistle

In order for whistleblowing disclosures to acquire protection in law they must be made to certain specified categories of people. For example, the worker's own employer or the person responsible for the failure in question. However, it also includes people prescribed by law, known as "prescribed

persons". On 15 December 2022, the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2022 (SI 2022/1064) expanded the list of "prescribed persons".

New prescribed persons were added, namely, Social Work England, Members of the Scottish Parliament, the Scottish Public Services Ombudsman, Environment Standards Scotland and the Natural Resources Body for Wales. Further, the types of matters for which certain bodies are prescribed was expanded. This affected the Financial Conduct Authority, the Gas and Electricity Markets Authority, the Health and Safety Executive and the Secretary of State for Health and Social Care.

Although technical, these changes give workers wishing to blow the whistle more options about where to direct their disclosure, at the same time ensuring that they acquire legal protection as a whistleblower.

RECENT CASE LAW DEVELOPMENTS

Blowing the whistle: conduct related to a whistleblowing disclosure may be separated from the disclosure itself

One recent decision that is not particularly helpful to whistleblowers is the Court of Appeal's decision in Kong v Gulf International Bank (UK) Ltd (you can read our detailed briefing on this decision here). Here, Ms Kong blew the whistle and was later dismissed for her conduct when discussing the disclosure with a colleague.

The Court said that, in principle, there can be a distinction between the whistleblowing disclosure itself and the worker's conduct when making the disclosure. The role of a Tribunal is to identify the reason or reasons that operated on the mind of the decision maker when deciding to dismiss. Provided a

Tribunal is able to identify a feature of the conduct that is "genuinely separable" from the whistleblowing disclosure, then the principal reason for the dismissal will be the conduct, not the whistleblowing. In this case, the Court agreed with the Tribunal that Ms Kong had been dismissed for her conduct. This decision is concerning for whistleblowers, who often deliver unwanted messages which can result in tense or difficult conversations. Whistleblowers concerned about this risk should seek legal advice on how to make the disclosure and manage the aftermath.

Seeking interim relief after dismissal: applications should be heard in public

Interim relief is only available to claimants bringing a small number of specific claims for automatic unfair dismissal in the Employment Tribunal, including whistleblowing dismissals. If successful in an interim relief application, the employer must either reinstate the claimant in their previous role (or reengage them in a suitable alternative role), pending the determination of the claim at the final hearing. If the employer is not willing to do this, the Tribunal will make a 'continuation order', meaning the respondent is ordered to pay the claimant as if their employment contract was still continuing, until the final hearing. Sums paid to a claimant under a continuation order are irrecoverable. This means that a claimant does not have to repay the salary paid under the order even if they ultimately lose their claim. This makes interim relief a potentially very valuable remedy for claimants.

In Queensgate Investments LLP v Millet **the EAT ruled that applications for interim relief should be heard in public, save where an order is made to restrict publicity (you can read our detailed briefing on this decision** here**).** Orders restricting publicity are not made lightly – a risk that the

employer will suffer commercial embarrassment is not enough. Rather, the employer would need to demonstrate that publicity could have catastrophic consequences for the business, such that justice could not be done unless the hearing was held in private. This is the first appellant authority on this point and is of particular importance given the public interest nature of whistleblowing cases.

Pleading a whistleblowing claim before a Tribunal: claimants should focus on the protected disclosures that gave rise to the alleged detriments or dismissal

In Frewer v Google UK Ltd and others the EAT reminded whistleblowers to think carefully about how they put their claims before the Tribunal – the focus should be on quality not quantity. In obiter remarks, the EAT Judge said claimants in whistleblowing claims should focus on pleading only the protected disclosures that gave rise to the alleged detriments or dismissal. Here, Mr Frewer had pleaded close to 100 alleged protected disclosures.

The EAT said that parties to a dispute should have regard to the fact that the Tribunal's resources are limited and must be fairly distributed among the many parties that have a right to have their claims heard. The Judgecommented that those drafting whistleblowing complaints often feel that the greater the number of disclosures and detriments that are asserted, the greater the prospects of success, when, in fact, the converse is often the case.

The "public interest" test: public interest can be engaged even where a disclosure concerns a small number of people

In Dobbie v Felton t/a Feltons Solicitors, the EAT underlined that disclosure of information relevant to only one person may

still be a matter of "public interest". In this case, a consultant solicitor had made disclosures about alleged overcharging by the firm at which he had worked. The Employment Tribunal decided that these disclosures had not been made in the public interest, because the disclosures concerned one client only. As such, it was a private matter between that client and the firm.

The EAT said this was wrong. The disclosures could have advanced the general public interest in solicitors' clients not being overcharged, and solicitors complying with their regulatory obligations. Further, a belief in the public interest did not have to be the *primary* motivation for making the disclosures. Disclosures do not cease to be protected merely because they are made in the context of other concerns (in this case, the client's prospects of recovering costs from its opponent). This decision is useful for whistleblowers since it underlines that the threshold of "public interest" is not set unachievably high – public interest can be engaged even if the information relates to a small number of people.

Compensation for whistleblowers: substantial compensation awarded for career loss, psychiatric injury and injury to feelings

In October 2022, an Employment Tribunal awarded a substantial sum to a whistleblower to compensate for detriments and dismissal suffered because she had blown the whistle. In Jhuti v Royal Mail Group, the Tribunal found that the claimant had suffered a *"lengthy and intense period of bullying"* over five months, before she went off sick and was then eventually dismissed. The Tribunal recognised that this treatment had *"destroyed the claimant's life"*. She suffered with PTSD and severe depression, and her relationship with her teenage daughter broke down. The medical evidence was that she would never work again.

The Tribunal awarded:

- financial compensation for career long loss until the age 67.
- £55,000 general damages for psychiatric injury.
- £40,000 for injury to feelings.
- £12,500 aggravated damages to reflect the employer's oppressive conduct at the remedy hearing.
- A 0.5% uplift for unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures.

Although this case was at the more severe end of the spectrum, the decision shows that Tribunals are empowered to make significant awards of compensation to whistleblowers where justified.

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.