Thomas More Chambers

COVID-19 and Whistleblowing

The COVID-19 pandemic has given rise to a host of stories in the national media about frontline NHS workers and others making disclosures that amount to whistleblowing on issues such as inadequate PPE and other COVID-19 health and safety risks in the workplace. Reports have been made of employees and workers being treated detrimentally as a result of these disclosures, including being threatened with dismissal. Some NHS employees and workers have received letters from their NHS trusts, expressly prohibiting all discussion of conditions on the frontline with those outside the NHS, including members of the media.

This article sets out the general rules and issues that apply to whistleblowing claims with a particular emphasis on health and safety whistleblowing claims.

Legal framework

Protection for employees and workers against detrimental treatment for whistleblowing (legally termed public interest disclosures) in the workplace was introduced into the Employment Rights Act 1996 (ERA) by the Public Interest Disclosure Act 1998. The key provisions in the ERA are sections 43A to 43L, 47B and 103A.

Who can make a protected public interest disclosure?

In order to obtain the protection provided by the aforementioned legislation, a disclosure must be made by 'a worker'. The standard definition of 'worker' is set out section 230(3)

ERA[1]. For the purposes of public interest disclosure protection, however, the definition of worker is extended by section 43K ERA and includes contractors acting under the control of the employer and (relevant in the current crisis) doctors, pharmacists, dentists and opticians who are providing services under statutory schemes.

Agency workers are also protected. In McTigue v University Hospital NHS Foundation Trust [2016] IRLR 742 EAT, it was held that an agency worker could bring a public interest disclosure claim against an end user client under the section 43K definition even though the agency worker was also an employer or worker of the agency through whom their services were provided to the client.

A similar approach was taken by the Court of Appeal in Day v Lewisham and Greenwich NHS Trust [2017] IRLR 623 in relation to a junior doctor who was, in principle, permitted to bring a public interest disclosure detriment claim against a NHS Trust with whom he had a training contract but who was not his employer. The matter was remitted to the employment tribunal to determine if the NHS Trust with whom the claimant had the training contract 'substantially determined' the terms of the engagement for the purposes of section 43K ERA.

In Hinds v Keppel Seghers UK Ltd [2014] IRLR 754, a health and safety consultant who provided his services via a personal service company was found to be a worker entitled to public interest disclosure protection.

What is a protected disclosure?

Section 43A ERA provides that:

> "…a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H".

[1] Defined as an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

A 'qualifying disclosure' is a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following six categories of wrongdoing:

a. that a criminal offence has been committed, is being committed or is likely to be committed;
b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
c. that a miscarriage of justice has occurred, is occurring or is likely to occur;
d. that the health and safety of any individual has been, is being or is likely to be endangered;
e. that the environment has been, is being or is likely to be damaged; or
f. the information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed (section 43B(1) ERA).

In the context of the COVID-29 pandemic, the health and safety qualifying disclosure is likely to have particular relevance.

What is a disclosure of information?

In order for a disclosure to amount to a qualifying disclosure, there must be a disclosure of information.

This issue was considered in Geduld v Cavendish Munro Professional Risks Management Limited [2010] ICR 325 EAT where it was held that there was a distinction between communication of information (which is protected) and making an allegation without providing a factual basis (which is not protected). The example given in the judgment of Mrs Justice Slade was in relation to hypothetical disclosures made in relation to the state of a hospital. To say "health and safety requirements are not being complied with" was an unprotected allegation. To say "the wards of the hospital have not been cleaned for two weeks and sharps were left lying around" is conveying information and would amount to a protected disclosure.

This issue was considered further by the Court of Appeal in Kilraine v London Borough of Wandsworth [2018] IRLR 846. The Court held that the concept of "information" was capable of covering statements which might also be characterised as allegations, although not every statement involving an allegation would constitute information and amount to a qualifying disclosure. In order for a statement to be a qualifying disclosure it has to have sufficient factual content and specificity to show one or more of the six matters set out in section 43B(1) ERA. Whether any statement met that standard would be a matter for evaluative judgment by the employment tribunal in the light of all the facts and the particular context in which they were made.

Disclosure must be made in the public interest

Significant changes were made to the statutory provisions with effect from 25 June 2013. Perhaps the most important of these was the introduction of a public interest requirement. Disclosures must now be in the public interest in order for them to be protected.

The objective of this statutory amendment was to reverse the decision in Perkins v Sodexho [2002] IRLR 109 where it was held that a worker could rely upon a complaint of a breach of his or her own contract of employment (as a failure to comply with any legal obligation) as a protected disclosure. As the law now stands, an employee or worker cannot rely upon a disclosure in relation to his or her own contract of employment as a protected disclosure unless that disclosure involves wider public interest considerations.

In Chesterton Global Limited v Numohhamed [2015] IRLR 614 EAT it was held that the disclosure does not actually have to be in the public interest. The key issue is whether the disclosing employee or worker reasonably believes that the disclosure was made in the public interest. The Court of Appeal considered the public interest further on further appeal ([2017] IRLR 837). They reiterated that the question was whether the worker believed, at the time of making it, that the disclosure was in the public interest and, if so, whether that belief was reasonable. Tribunals must keep in mind that there could be more than one reasonable view as to whether the disclosure was in the public interest. The necessary belief was simply that the disclosure was in the public interest, the particular reasons why the worker believed that to be so was not a key consideration. Providing that the worker had a genuine belief that

the disclosure was in the public interest, that does not have to be the predominant reason for the disclosure.

The employment tribunals generally take a wide approach in determining whether or not the disclosure at issue was in the public interest. In Morgan v Royal Mencap Society [2016] IRLR 428 EAT, a health and safety disclosure case, the EAT emphasised that it was reasonably arguable that an employee might consider health and safety complaints to be made in the wider interests of employees generally, even where the worker was the principal person affected.

Reasonable belief

There is no requirement that the legal obligation actually exists, the objective reasonableness of the employee's belief that such an obligation exists is the determining issue. The issue of reasonable belief was considered in Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 EAT. The test is objective but this has to be considered in the context of the personnel circumstances of the disclosure. The question is whether it was reasonable for the disclosing employee or worker to believe. Where an employee or worker relies upon multiple disclosures, reasonable belief must be established in relation to each of the disclosure. A general belief in the broad gist of the contents of the disclosures is not enough. Where a disclosure is made purely out of self-interest, the fact that the disclosing employee or worker could have had a reasonable belief that the disclosure was in the public interest does not satisfy the reasonable belief requirement.

To whom must the disclosure be made?

In order for a qualifying disclosure to amount to a protected disclosure, it must be made only the category of persons set out in section 43C to 43H ERA. Qualifying disclosures amount to protected disclosures if they are made to:

a. the employee's or worker's employer or to another person having legal responsibility for the conduct complained of, or to a person authorised by the employer (section 43C);

b. to a legal adviser in the course of obtaining legal advice (section 43D);

c. to a Minister of the Crown where the employee or worker's employer is (a) an individual appointed under any enactment by a Minister of the Crown or (b) a body whose members are appointed by a Minister of the Crown (section 43E);

d. to a person prescribed by an order made by the Secretary of State where the employee or worker reasonably believes the disclosed information and any allegation contained in it are "substantially true". The details of the persons so prescribed and the relevant matters in respect of which they are prescribed are set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 SI 1999/1349. Prescribed persons include the Health and Safety Executive and HMRC (sections 43F and 43FA)

e. to another person, where the worker reasonably believes he or she will be subjected to a detriment if he or she discloses the information to his or her employer, or if he or she reasonably believes that evidence will be concealed or destroyed, or if he or she has already complained to the employer, and where the worker believes the allegations are substantially true, taking account of the seriousness of the relevant failure (section 43G);

f. to another person, where the allegation about the employer's conduct is of an exceptionally serious nature, and which the worker believes are substantially true (section 43H).

In the vast majority of cases disclosure will be made (at least initially) to the employer.

Causation

An employee or worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee or worker has made a protected disclosure: section 47B(1) ERA. On a complaint of detriment under section 47B ERA, it is for the employer to show that the ground on which any act, or deliberate failure to act, was done: section 48(2) ERA.

An employee's dismissal is automatically unfair if the reason or, if more than one, the principal reason for the dismissal is that the employee made a protected disclosure: section 103A ERA.

The two causation tests for public interest disclosure detriment and public interest disclosure dismissal are different. The test for detriment was considered by the Court of Appeal in NHS Manchester v Fecitt [2012] IRLR 64. The test is whether the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the employee or worker making the public interest disclosure.

Where a complaint of protected interest disclosure detriment is made, it is for the employer to show the ground upon which any act, or deliberate failure to act, was done: section 48(2) ERA.

For dismissals on the grounds of having made a protected disclosure, the causation requirement is greater. Material influence is not enough, the disclosure must be the reason or, at the very least, the principal reason for the dismissal: Eiger Securities LLP v Korshunova [2017] IRLR 115.

In certain cases the tribunal will have to consider whether the detriment or dismissal was not caused by the disclosure but by the way the disclosure was made. If the treatment at issue was because of the offensive or illegal manner in which the disclosure was made and not the disclosure itself, the causation element will not be made out: Panyiotou v Kernaghan [2014] IRLR 500.

Public interest disclosure detriment claims

Where an employee or worker suffers detriment as set out in section 47B ERA, he or she can bring a claim under section 48 ERA and claim compensation pursuant to the provisions of section 49 ERA.

Employees and workers can bring a claim where they suffer detriment on the grounds that they made a protected interest disclosure (the causation test is set out above) pursuant to section 47B ERA.

The protection does not just apply to detrimental treatment by the employer but also detrimental treatment (any act or deliberate failure to act) by another employee or worker of the discloser's employer in the course of that other employee/worker's employment or by an agent of the discloser's employer with the employer's authority: section 47(1A) ERA. Where the disclosing employee/worker is subject to detriment at the hands of a fellow employee/worker/agent that detriment is treated as also being done by the discloser's employer: section 47(1B) ERA. It is immaterial whether the thing is done with the employer's knowledge or approval: section 47(1C) ERA. The rules in relation to vicarious liability will apply in determining whether the employer is liable for the employee/worker/agent's detrimental treatment of the discloser.

It is, however, a defence to a claim against an employer in relation to detrimental treatment by another employee/worker/agent if the employer can show that it took all reasonable steps to prevent the other employee/worker/agent from doing that thing, or from doing anything of that description: section 47(1D) ERA.

Injury to feeling awards may be made in relation to section 47B ERA but not for public interest disclosure dismissals pursuant to section 103A ERA. Awards for injury to feelings for detriment suffered as a result of making a public interest disclosure will be calculated in the same way as in discrimination claims using the Vento guidelines: Virgo Fidelis Senior School v Boyle [2004] IRLR 268 EAT.

Section 47B(2) ERA precludes a detriment claim against an employer in respect of the employer's own act of dismissal. However, in Timis v Osipov [2019] IRLR 52, the Court of Appeal held that it was open to a disclosing worker to bring a claim against an individual co-worker for subjecting the disclosing worker to the detriment of dismissal under section 47B(1A) ERA and to bring a claim of vicarious liability for that act against the employer pursuant to section 47B(1B) ERA. Section 47B(2) does not bar recovery of compensation for losses flowing from a dismissal which was caused by a prior act of public interest disclosure detriment.

The practical effect of the Timis decision is that if an employee brings a claim for public interest disclosure dismissal (pursuant to section 103A) and also brings a claim against a co-worker

for subjecting him or her to the detriment of dismissal (under section 47B(1A) and a vicarious liability claim against the employer (under section 47B(1B) ERA) they may seek to claim an injury to feelings award against the co-worker and the employer in relation to the act of dismissal

In detriment claims, it is not a requirement that a protected disclosure must be made in good faith. Whether a protected disclosure is made in good faith is, however, relevant to the issue of remedy. When assessing compensation for detriment, the tribunal may make a reduction of any award by up to 25% if it was not made in good faith and the tribunal considers it just and equitable to do so: section 49(6A) ERA.

Post termination detriment

In Wilsons Solicitors LLP v Roberts [2018] IRLR 1042, the Court of Appeal held that post termination loss attributable to pre termination detrimental treatment could be recovered under section 49 ERA.

Dismissal

As previously stated, an employee's dismissal is automatically unfair if the reason or, if more than one, the principal reason for the dismissal is that the employee made a protected disclosure: section 103A ERA.

Unlike "ordinary" unfair dismissals, there is no qualifying period of employment that has to be served before an employee can claim for unfair dismissal on grounds of making a protected disclosure. Further, there is no limit on the level of compensation that may be awarded (although other rules in relation to compensation, such as the duty to mitigate, continue to apply).

As with detriment claims, where the reason or principal reason for dismissal is because the employee made a protected disclosure but that disclosure was not made in good faith, the tribunal may, if it considers it just and equitable to do so, reduce the compensatory award by up to 25%: section 18(5) Enterprise and Regulatory Reform Act 2013.

Prohibition on contractual clauses precluding employees and workers from making protected disclosures

Section 43J ERA states that a provision in an agreement (including a contract of employment) which purports to preclude an employee or worker from making protected disclosures is rendered void.

COVID-19 health and safety disclosures to the Health and Safety Executive

Employees, workers and other individuals may make disclosures raising workplace COVID-19 health and safety issues with the Health and Safety Executive (HSE).

Before making a disclosure, individuals are asked to visit the HSE's coronavirus latest information pages and read the HSE's answers to questions. If assistance is then needed, the HSE can be contacted by telephone or by filling in an online working safely enquiry form.

NHS whistleblowing

The NHS Constitution (last updated 2015) refers to the rights of staff to:

"…raise any concern with their employer, whether it is about safety, malpractice or other risk, in the public interest".

To make this right effective, the document also promises to "encourage and support all staff in raising concerns at the earliest reasonable opportunity about safety, malpractice or wrongdoing at work, responding to and, where necessary, investigating the concerns raised and acting consistently with the Employment Rights Act 1996".

NHS staff have a mirror responsibility under the Constitution to "raise any genuine concern [they] may have about a risk, malpractice or wrongdoing at work (such as a risk to patient safety, fraud or breaches of patient confidentiality), which may affect patients, the public, other staff or the organisation itself, at the earliest reasonable opportunity".

The Handbook which accompanies the NHS Constitution expressly states that all NHS staff should have "protection from detriment in employment and the right not to be unfairly dismissed for 'whistleblowing' or reporting wrongdoing in the workplace".

Since April 2016, there has been a single national integrated whistleblowing policy entitled *Freedom to speak up: raising concerns (whistleblowing) policy for the NHS*. NHS trusts were expected to adopt the policy as the minimum standard since March 2017. The policy provides for investigatory processes to be established into allegations, keeping staff informed of progress, and which are led by someone suitably independent of the organisation.

In most circumstances of ordinary alleged wrongdoing by the employer, a NHS employee or worker who wishes to gain the whistleblower protections should make the disclosure via the internal routes prescribed by the relevant NHS policies.

Non-disclosure agreements and whistleblowing

Some employers have entered settlement or non-disclosure agreements (NDAs) with employees which purport to prevent the employee or worker from making public interest disclosures. It is essential that both parties receive independent legal advice before signing any NDA. In relation to employment settlement agreements, it is a statutory requirement that the employee receive independent legal advice.

In relation to the employee/worker and employee agreements, it is likely that any clause prohibiting the employee/worker from making a public interest disclosure will be void pursuant to section 43J ERA.

It is increasingly common for employment settlement agreements to include a provision that expressly states that the agreement does not prohibit the employee or worker from making a public interest disclosure.

For those professionals advising on or drafting NDAs, the Solicitors Regulatory Authority published a Warning Notice (updated November 2019) setting out its position that it would be improper to use an NDA as a means of preventing the "making of a protected disclosure

under the Public Interest Disclosure Act 1998" (amongst other matters). The Warning Notice suggests that drafting such agreements may itself be a breach of the SRA Standards and Regulations.

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