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West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

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Protected Disclosures – Whistleblower protection?

We all know that whistleblowers are important. By bringing attention to wrongdoing that would otherwise stay hidden they perform an important public service. In extreme cases what they do can save lives and few would begrudge those with the courage to stand up and say that something is not right the employment protections that they enjoy.

Dismissal for making a public interest disclosure (the legislation never uses the word 'whistleblowing') is automatically unfair and there is no qualifying service required. Nor is there any cap on compensation – this is essential to ensure that whistleblowing protection is meaningful to even the most senior and well remunerated employees, for whom a normal unfair dismissal claim has little to offer.

But there is a problem. By their nature, those likely to make a stand on what they believe to be right are not always the easiest people to work with. From the employer's point of view the difference between an employee who is always complaining about something, and an employee who is making a protected disclosure can be difficult to see. The employer may also feel –quite genuinely – that a complaint is being made maliciously as a way of attacking colleagues or the employer itself. Making deliberately false allegations is of course gross misconduct, but a recent case shows the need for employers to treat such a case with real caution.

In *Beatt v Croydon Health Services NHS Trust* Dr Beatt, was (appropriately enough) a heart surgeon. He worked in a department characterised by very poor working relationships, which extended to senior figures accusing each other of professional misconduct. Dr Beatt worked closely with a particular nurse who was called into an investigatory meeting prompted by allegations that she had been abusive towards some colleagues.

Dr Beatt accompanied her to the meeting but was forced to leave to carry out an emergency procedure. While he was away she was suspended and sent home. Unfortunately, the procedure was not successful and the patient died. Dr Beatt said that the death of the patient was in part caused by the fact that the nurse was suspended during her shift meaning that she was unable to assist. An internal investigation reached the firm conclusion that there was no basis for this, but Dr Beatt persisted. The employer believed that he was making unfounded allegations in an attempt to have the nurse's suspension lifted rather than out of any concern for patient safety. He was eventually dismissed.

The Tribunal found Dr Beatt to be an impressive witness and accepted his version of events. They upheld his claim of automatically unfair dismissal and the NHS Trust appealed. The employer's argument was that they had genuinely believed that the allegations made by Dr Beatt were unsubstantiated and made in bad faith. They relied on the classic case from 1974 of *Abernethy v Mott Hay and Henderson* where the Court of Appeal held that the reason for dismissal was the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee." The NHS Trust argued that on this basis the reason for dismissal was not a belief that Dr Beatt had made a protected disclosure, but rather a belief that he was guilty of gross misconduct.

The EAT rejected this. There were two separate issues: firstly, whether Dr Beatt was dismissed for making the disclosures in question and, secondly, whether those disclosures were 'protected'. The Abernethy case applied to the first issue but not the second. Once it was established that the reason for the dismissal was the disclosure, the question of whether the disclosure was protected or not was a matter for the Tribunal.

So if an employer believes that an allegation is deliberately false and decides to dismiss as a result – then it takes a risk. The issue for the tribunal will not be whether the employer's conclusion was genuine or reasonable – but whether it was correct. If the Tribunal reaches a different view of the facts then the result will be that the dismissal is unfair even if the employer genuinely believed that the employee was guilty of making malicious allegations.

The lesson is obviously that the employer must be very sure of its ground before proceeding against an employee for making false allegations. There is good reason for this. If we accept the importance of protecting whistleblowing then we should not make it too easy for employers to escape liability by hiding behind their genuine belief that the employee was behaving maliciously. Whistleblowers can be difficult and awkward people to work with – but that just means that employers must be careful to look beyond that fact and consider whether the substance of their allegations qualifies for protection.

This is particularly the case given recent changes in the law. At the time of Dr Beatt's dismissal, any disclosure made by a whistleblower had to be made 'in good faith'. That meant that if the employee was motivated by hostility or resentment towards the employer then the disclosure would not be protected. That requirement was removed in 2013. What matters now is not why the disclosure is made (that may affect compensation) but whether the facts disclosed, in the reasonable belief of the employee, do tend to show the required legal wrongdoing. If the same case arose today, the issue would not be Dr Beatt's motivation but whether he genuinely believed the substance of his allegations.

There is, however, a new requirement. To be protected the disclosure must, in the reasonable belief of the employee, be made in the public interest. There is no doubt that Dr Beatt's allegations – which involved the death of a patient – would meet this test but there are many other disclosures made by employees where the issue is far from straightforward. The Court of Appeal is currently considering this issue in the case of *Chesterton Global Ltd v Nurmohamed* where the allegation concerns the calculation of an employee's commission. The EAT held that the allegations were in the public interest because they concerned a group of about 100 employees as well as the employee himself. Is this the sort of allegation that the whistleblowing legislation was designed to protect? We should have an answer to this question in the next few weeks.

Keep in Touch

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HR Disrupted: It's Time for Something Different

In the next newsletter, we shall be covering this book as part of a new section where we review a book, article or something that we have seen on Social Media which we think might have some helpful hints and tips for your role. After all, in our journey to continually improve ourselves and seek out the latest trends, we may as well share the love!

Our first instalment covers the Number 1 bestseller by Lucy Adams, former HR Director of BBC who you may recall had a very hard time in the media about BBC severance payments. Rather than slip away and retire from HR, she chose to use her experience to talk about what in her view was wrong with it. So she decided to set up on her own to explore this concept of 'disrupting HR'

The book focuses on treating your employees as adults, consumers and human beings and asks where is your organisation now? Does it trust its people or does it assume there's a need to protect itself from what she calls 'the lowest common denominator?'. We have been contacted recently to do some exploratory work around refining policies and know a number of you out there are looking at this, but as Lucy says the culture is key here, you can change anything but if your leaders do not trust their staff and prefer to adopt command and control behaviour it will not succeed, we have to start in her view with the underpinning beliefs and how we can view things differently.

We'd better not spoil the review but do tell us if you find the section interesting when you get the newsletter.