Employment Bulletin

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Whistleblowing about employee's own position could be protected

Summary: The Employment Appeal Tribunal held that a whistleblowing disclosure could qualify for protection under the Employment Rights Act 1996 where the employee had a reasonable belief that the disclosure was in the public interest, even if the employee had made the disclosure primarily in response to performance issues (*Okwu v Rise Community Action*).

Key practice point: This case illustrates that employees may have protection if they make a whistleblowing disclosure, even where their intention is to defend their own position.

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Facts: O was employed by a small domestic violence charity. Having raised a number of issues about her performance, the charity extended O's probation period by three months. O wrote to the charity about her concerns that it was acting in breach of data protection legislation by failing to provide her with her own mobile phone and with secure storage, given that she was dealing with sensitive and confidential personal information. Her employment was then terminated, the letter of termination saying: "*The decision was made because of your unsatisfactory work performance, unacceptable conduct and failure to communicate effectively during your probation period. This decision was compounded by a recent communication you sent to the trustees, the content of which demonstrated your contempt for the charity, its work, and its client group*".

O claimed she had been unfairly dismissed for making protected disclosures. The Tribunal rejected the claim. It found that the matters raised by O were not in the public interest but concerned her own contractual position and that the dismissal was for performance issues.

Decision: The EAT held that the Tribunal had taken the wrong approach and sent the case back to the Tribunal for reconsideration.

The Tribunal had failed to ask whether O had a reasonable belief that her disclosure relating to potential data protection breaches was in the public interest. As was made clear in *Chesterton Global v Nurmohamed* (see our Employment Bulletin dated 14 July 2017), even if O had primarily raised the matters as relevant to her own performance, that would not necessarily mean that she did not have reasonable belief that her disclosure was in the public interest. Given the sensitive information involved, it was "*hard to see*" how it

would not - in O's reasonable belief - be a disclosure made in the public interest, even if O also had in mind the impact on her in terms of work performance. The public interest does not have to be the only motivation for making the disclosure.

As for the reason for dismissal, O's case was that the decision to dismiss must have been informed by the content of her letter to her employer because, apart from that letter, nothing had happened between the decision to extend her probation period and the decision to terminate her employment. In addition, both the dismissal letter and the employer's evidence in the Tribunal linked the decision to the letter. Although the Tribunal referred to the evidence that supported the employer's case - that it had genuine concerns about O's performance - it had not made a clear finding that this was the reason that had led to the decision to dismiss.

Analysis/commentary: The EAT did not resolve the question of whether the employee had a reasonable belief that her disclosure was in the public interest – it sent the case back to the Tribunal to decide that point. The Court of Appeal in *Chesterton Global v Nurmohamed* held that whether a disclosure is in the public interest depends on the character of the interest served by it, rather than simply on the number of people sharing that interest. The Court set out the factors to be considered, including the number of people whose interests the disclosure served, the size (in terms of staff, suppliers and clients) of the employer, and the importance of the interests affected. In this case, the EAT's comments suggest that, although the employer was a small charity, the nature of the interests (data protection and confidentiality) was significant.

However, cases on public interest are fact-specific – in *Ibrahim v HCA International* the EAT held that a complaint about a breach of hospital patient confidentiality was not in the public interest. The evidence showed that the claimant was seeking to protect his personal interest by clearing his name, rather than having a reasonable belief that his disclosure was in the public interest (see our Employment Bulletin dated February 2019).

Meanwhile, an Employment Tribunal recently decided that preliminary steps to making a whistleblowing disclosure could be protected. The Tribunal found that an employee was subject to a detriment when he was suspended for having researched ways of making a protected disclosure to the Information Commissioner about a breach of data protection (*Bilsbrough v Berry Marketing Services Ltd*). Although this was a Tribunal decision, and therefore not binding, it is the first reported decision to suggest that preparatory acts can be protected, despite the legislation requiring that the employee "has made" a protected disclosure.

Employers must show a potentially fair reason for constructive dismissal

Summary: The Employment Appeal Tribunal decided that an employee who was suspended for taking unauthorised absence had been unfairly constructively dismissed. The employer had not pleaded a potentially fair reason for dismissal but had merely stated that all claims were denied. The suspension was unwarranted and a breach of the employer's duty of trust and confidence, so the Tribunal had been entitled to conclude that the dismissal was unfair (*Upton-Hansen Architects Ltd v Gyftaki*).

Key practice point: Employers facing a constructive unfair dismissal claim must show a potentially fair reason for dismissal, even if they are disputing that a dismissal has occurred.

Facts: In July 2017 the claimant, G, took leave for travel to Greece, for which permission was granted retrospectively. Two months later, G asked for a short period of unpaid leave to travel to Greece for family reasons. Due to a misunderstanding, she thought her employer had agreed to the request. However, her

manager emailed her on the evening before she was due to travel, declining her request. She travelled anyway, telling her manager that she would take it as unpaid leave. When she returned to work, she was suspended pending an investigation. The reason given by the employer in the Tribunal for the suspension was that managers were nervous that G would behave inappropriately at work if she was not suspended. She resigned in response to her suspension, arguing that it was a breach of the implied duty of trust and confidence.

The Tribunal upheld her claim. The suspension was not warranted. The decision to suspend, and the inclusion of G's conduct in relation to the July 2017 absence as potential acts of serious misconduct, constituted a breach of the implied duty of trust and confidence. As there had been a breach of the implied term, it was inevitable that the employer's actions were also outside the range of reasonable responses and therefore the dismissal was unfair. The employer appealed.

Decision: The appeal failed. The Tribunal had been entitled to find that there was no fair reason for the dismissal.

The employer had not pleaded a potentially fair reason for dismissal. It had merely stated that all G's claims were denied. Under Section 98 of the Employment Rights Act 1996, the onus was on the employer to show the reason for dismissal and that it was a potentially fair reason. A generic denial was not sufficient.

In the absence of the employer giving a reason for the dismissal, the reason had to be taken to be the decision to suspend and the inclusion in the disciplinary investigation of G's conduct in July 2017. The employer's argument that misconduct was the reason for dismissal failed. It was clear from evidence that the employer's reason for the suspension was not G taking unauthorised absence, but fear about how she might react to being told about a disciplinary investigation. That was not a reason relating to her conduct.

Analysis/commentary: A constructive dismissal will not necessarily be unfair. However, to avoid a finding of unfair dismissal, the employer has to show a potentially fair reason for dismissal, to enable the fairness of the dismissal to be considered.

It is not safe to assume that any charge of gross misconduct that is being investigated will warrant the suspension of the employee. Employers need to consider whether there are factors other than the seriousness of the disciplinary allegations that justify a suspension.

Contractor providing services through company was a worker

Summary: The Employment Appeal Tribunal held that a doctor providing out-of-hours GP services, who had worked regular shifts at a single establishment for about 12 years, had been correctly characterised as a "worker", even though there was no mutuality of obligation and she had provided her services through a personal services company (*Community Based Care Health Ltd v Narayan*).

Key practice point: This decision shows the difficulties of defending a claim for worker status in circumstances where the contractor is integrated into the business and the relationship is long-term.

Facts: Community Based Care Health Ltd (C) provided the services of NHS doctors. N, a GP, worked for C from 2005. She also did locum GP work through an agency, which was treated as self-employed work. Features of the arrangements between C and N included:

- N worked regular shifts on a 12-week rota, normally following a set shift pattern.

- She was not obliged to accept work and C was not obliged to provide any.
- N provided her own equipment and took holidays when she pleased, after warning C.
- Her terms of service required performance by herself personally or by a qualified, approved substitute.
- The NHS required providers to ensure that the doctors were competent and properly qualified. C had to audit the services provided by the doctors on their books.

From October 2015, N set up a company. She did not tell C but gave them her company's bank details and received payments into its account. The company also received payments from her locum work. She accounted for tax and national insurance through the company. Neither she nor her company sent invoices to C.

Following issues about N's work, C wrote to her in February 2017 saying it was not going to offer her further work. She brought tribunal claims of unfair dismissal, race and sex discrimination, breach of contract and unpaid holiday pay, although by the time the case came to the EAT the only live issue was holiday pay.

The Employment Tribunal judge ruled that N was a worker and that, after October 2015, C had continued to contract with her personally, notwithstanding that she received her remuneration through her company. C appealed.

Decision: The appeal was dismissed.

C argued that it had unknowingly become a client of N's company from October 2015, and from that point N was no longer a contracting party. She could not be a worker, therefore. The EAT rejected this - those performing the GP service had to satisfy strict qualification and performance requirements imposed by the NHS nationally. It was not possible for a company to meet those requirements because it was not human, not a doctor, and not capable of exercising medical judgment. In any event, the terms of N's relationship with C before October 2015 precluded her from substituting a company.

Analysis/commentary: Some of the findings in this case related specifically to the individual's role as a doctor. More generally, however, the key factors in favour of worker status were the constraints on the use of a substitute, the lack of marketing of services by the contractor, and work at one establishment over a number of years.

New off-payroll working rules (known as IR35) are scheduled to apply from April 2020 to those engaging individuals through personal service companies (see our Incentives Bulletin dated March 2019). Clients should start making sure that they have full records of all contractors to whom the new rules could apply. At the moment, if a client contracts with an individual, the client must determine whether the individual is an employee or self-employed for tax purposes. However, if a client contracts with a service company, it is the service company's responsibility to decide whether they fall within IR35. This requires a determination as to whether any individual provided to do the work would be, if not for the service company, an employee/office holder of the client for tax purposes. On the new legislation as it is currently drafted, it will be the responsibility of clients to make the determination of the contractor's employment status, and to give reasons.

Investment Association guidelines on executive director pension provision

On 27 September 2019, the Investment Association (IA) announced new guidelines on executive director pension provision for the 2020 AGM season. The guidelines set out investors' expectations that executive directors should be paid pension contributions in line with those of the majority of the workforce, reflecting changes made in 2018 to the UK Corporate Governance Code and the IA's Principles of Remuneration.

For companies with year-ends starting on or after 31 December 2019, IA's Institutional Voting Information Service (IVIS) will:

- "Amber top" (flagging to investors a serious issue to be considered) any company with an existing director who has a pension contribution of 25% of salary or more, as long as they have set out a credible plan to reduce that pension to the level of the majority of the workforce by the end of 2022. If there is no credible plan, the company will be "red-topped" (the highest level of warning).

- Red top any company who appoints a new executive director (or a director changes role) with a pension contribution out of line with the majority of the workforce, or seeks approval for a new remuneration policy which does not explicitly state that any new director will have their pension contribution set in line with the majority of the workforce.

The guidelines also note that:

- IVIS will highlight those companies that do not disclose in their remuneration report the pension contribution rate for the majority of the workforce. The Remuneration Committee should also explain how this rate has been derived – such as average of all employees, UK employees only, or rate for all new joiners.

- Companies should consider the pension contributions provided to all employees, not just executive directors. IVIS will highlight those companies that have increased pensions contributions for all employees.

- Fixing the monetary value of pension contributions over time is not a credible action plan to bring contributions in line with the majority of the workforce.

- For defined benefit pension schemes, companies are expected to confirm that future accrual of benefits is open to other employees on the same terms as the executive directors. If they do not, the remuneration report will be amber topped.

- Where companies pay a cash supplement in lieu of further accrual above an earnings limit, companies should confirm that cash supplements are also paid to other employees on an equivalent basis. Without this confirmation, the remuneration report will be amber topped.

Horizon scanning

What key developments in employment should be on your radar?

31 October 2019	European Union (Withdrawal) Act 2018 expected to take full effect
9 December 2019	Extension of the SMCR to FCA solo-regulated firms
April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation will be lowered from 10% to 2% of employees
6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks
6 April 2020	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers)

- **Data protection**: *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers' personal data by rogue employee); *López Ribalda v Spain* (ECtHR: covert workplace surveillance)

- **Discrimination / equal pay**: *Gray v Mulberry Company (Design) Ltd* (Court of Appeal: philosophical belief); *X v Y* (Court of Appeal: iniquity exception to legal advice privilege); *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Ibrahim v HCA International* (Court of Appeal: public interest)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).

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