

Employment Rights Update

July 2010



As the referee's whistle has blown goodbye to the aspirations of England in South Africa, our thoughts turn (if the pun can be excused) to Whistleblowing of a different kind.

As the EAT makes an employer-friendly decision in *Goode v Marks & Spencer Plc* (mentioned earlier in our April edition, and more later) now is a good time to revisit the essentials of the Public Interest Disclosure Act.

We very often see the claim "I've been dismissed for blowing the whistle" – but the hurdles that a possible Whistleblowing Claimant has to overcome are significant.

By way of reminder:

1. The disclosure must be made in good faith – Tribunals are quick to spot Claimants who have ulterior motives for their statements.

2. There must be a "qualifying disclosure". The "disclosure" must be more than a mere allegation against an employer – some information must be imparted. A disclosure only becomes "qualifying" if it is about one or more of the specific items listed on the statutory shopping list including complaints about criminal offences, threats to health and safety, damage to the environment and "failure to comply with a legal obligation".

3. The qualifying disclosure must be "protected" – that means that the disclosure must be made in a certain way. In most cases that will require that (in the first instance, at least) the disclosure should be made by the employee to his or her employer, not to the Press or some other external agency. The rules are complicated and worth checking carefully in every case.

These already complex provisions have resulted in some controversial decisions. In *Parkins v Sodexho Limited* the EAT applied the Whistleblowing provisions to contractual disputes between employer and employee. So an employee who said "you are acting in breach of my contract of employment" was arguably making a public interest disclosure, protected by the Act, because this amounted to an allegation of a failure to comply with a legal obligation (the legal obligation arising of course out of the contract of employment).

We have settled more than one case in the not too distant past on just that basis – but the road to compensation for Whistleblowers in this area is fraught with difficulty.

Did the dismissal in fact arise by virtue of the act of Whistleblowing? In many cases, the whistle will have been blown as part and parcel of e.g. other disciplinary proceedings, which might have led to dismissal in any event. It does not follow, just because you have blown the whistle, that any subsequent dismissal will necessarily be a result of that act.

In the *Goode* case mentioned above, the EAT has applied the Parkins principle with a dose of circumspection. The employee blew the whistle about changes to the employer's redundancy proposals. The employee suggested that this might have amounted to an interference with contractual rights (i.e. a contractual redundancy policy). EAT (Wilkie J) rejected the employee's appeal: he had expressed an opinion about the employer's plans – indeed he had roundly condemned them – but that was a disclosure of the fact that he, the employee, was unhappy about the

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employer's plans. That was not the same thing as a disclosure about a failure to comply with a legal obligation.

Goode by no means indicates the demise of Parkins-style Whistleblowing complaints – but it does perhaps reflect the controversy that has arisen in this area. Some commentators suggest that it was never the intention of Parliament to grant “Whistleblowing rights” to employees in what might ordinarily be regarded as private disputes between them and their employers. Is there a “public interest” in that sort of dispute?

For the time being, there is, but the moral of the story seems to be that extreme care should be taken in the way that any disclosure is framed and communicated if the employee wishes to avail him or herself of PIDA protection.

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or suggestions for improvement to jayne.phillips@morrishsolicitors.com

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