Post-lockdown working, Part 4 - whistleblowing for beginners (UK)

Tuesday, June 23, 2020

On top of the flexible working rules (see Parts 1-3), another piece of existing law likely to get a pandemic-related dusting-off in the months to come is our old friend whistleblowing.

If you face what is otherwise a fairly clear redundancy situation because Covid-19 has gutted your employer’s market, what better way of upping the ante than to assert that your selection is retaliation for complaints you have made about the inadequacy of your employer’s health and safety measures? In a stroke, you can side step both the requirement of two years’ service before you can claim unfair dismissal, and/or the cap on compensation if you do.

Well yes, sometimes. But it is both harder for the employee to make a protected disclosure than it sounds and easier for the employer to dodge the bullet in its response than you might think.

Blowing the whistle at law requires you to do more than air unspecific reservations about your employer’s approach to the virus. Under section 43 Employment Rights Act 1996, you must disclose “information tending to show” that it has been, is or is likely to be acting in breach of a legal obligation, and that you reasonably believe your disclosure to be a matter in the public interest. There is little to no chance of
contending that issues around adequate health and safety precautions are not in the public interest, so in these cases the question will revolve around whether the disclosure is of information tending to show the actual or likely breach.

This implies some element of specificity. It is not enough just to say to your employer that it is not complying with Government guidance. Instead there must be some detail sufficient for it to know in what particular respect. [NB, even though Government guidance is not technically law, non-compliance with it is going to put the employer on the back foot in contending that it has taken all reasonably practicable measures to ensure the health and safety of its staff, and so an allegation of breach of the guidance is very likely to be seen as a protected disclosure nonetheless].

The ordinary meaning of giving information is that it conveys facts. That means that if when the employee has said his piece you genuinely still have no real idea of what he is talking about, he has not “tended to show” you anything. One judicially often-used example is of an employee in a hospital who says to his manager “You are not complying with health and safety requirements”. Without more, that is clearly just an allegation, or at least does not contain any facts “tending to show” the breach he relies upon. On the other hand, if that hypothetical hospital employee goes on to say that “The wards have not been cleaned for two weeks”, that clearly does identify what breach he is talking about, even if he does not quote chapter and verse of the relevant health and safety law or medical practice rules.

**Lessons for employers**

(i) It must be the case that if the employee makes a complaint which is enough that a reasonably diligent manager *could* discern the issue with a little thought or brief further enquiry, that would probably get him home. An employer which turned a blind eye to material which might reveal a breach of the law, especially around something as potentially scary and lethal as covid-19, could expect a fairly sceptical response from the Tribunal.

(ii) It may be tempting to retaliate against an unformed complaint in part because of the unreasonable manner in which it is raised, or where the employee baselessly repeats the same contention even after the true position has been explained to him fully. These are certainly circumstances worth explaining to an Employment Tribunal in your own defence, but remember that it will still be reluctant to draw too simple or easy a distinction between the content of a disclosure and the manner in which it is surfaced by the employee. It takes a very special kind of unreasonable to deny him the protections of the law here.

(iii) Therefore, the employer should not base its response to the employee on some instant analysis of whether what is said or written by him is “information tending to show” or not. The sensible approach is to take the issue seriously anyway. If necessary, ask him to specify in full detail what law or legal obligation he says is being breached, by what act or omission, when and by whom. This will almost certainly be a reasonable management request where you need that information to investigate and/or remedy an alleged breach of obligation which the employee himself has complained about. If he can fill in those blanks for you then he
may be doing you a favour, but if when called on it, actually he cannot, then this may point away from its being a protected disclosure, and/or cast some shadow on his claim to believe the matter to be a proper subject for the public interest.

(iv) Where it is necessary to take some action detrimental to an employee who has made a complaint or disclosure of this sort, then it will obviously make sense to be very clear why that is, so that you can demonstrate if need be that the action and the disclosure were not connected. So coming back to our opening scenario of someone facing redundancy having made a protected disclosure, you will need to demonstrate a clear redundancy situation (sadly, unlikely to be too difficult for a while) and in particular, robust and untainted selection criteria and processes.

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National Law Review, Volume X, Number 175

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