Keeping it real – the quest for reason in whistleblowing cases (UK)

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In earlier posts on this blog you will find a handful of cases which consider the distinction between the fact of a protected whistle-blowing disclosure and the manner of it. Accepted wisdom, thanks in part to the unimprovable words of then Mr Justice Underhill in *Martin -v- Devonshires Solicitors* here is that an employer can in principle respond negatively to the manner as distinct from the fact, but only where the manner goes well beyond the ordinary unreasonableness or aggression or inaccuracies implicit in the making of employee disclosures.

That is not just an issue of being unnecessarily persistent or irritating or throwing one’s perceived moral weight around a little – the traditional authorities suggest that the employee will only forfeit protection for “*wholly unreasonable, extraneous or malicious acts*”, or behaving in a way which was “*untruthful or irrelevant to the task in hand*” [NB. one must be careful not to extract individual words from that and rely on
them to justify retaliatory action – many disclosures will contain material which is factually or legally irrelevant, for example, simply because the employee does not necessarily know the difference. It is also well established that a disclosure which is not true will not cease to be protected so long as the employee thinks it is.

Substantially identical considerations apply in relation to acts or allegations protected under the trade union or discrimination legislation – in each case, conduct which would normally be protected against retaliation can forfeit that air-cover if it is made in a way which goes well beyond “ordinary unreasonableness”. In such circumstances the Employment Tribunal considering the underlying reason for the employer’s actions is entitled to conclude that it is the employee’s conduct, not his complaint or disclosure. That merely forms the context for the misconduct and does not excuse it. However, if the employer is found to have reacted to conduct on the employee’s part in making his disclosure which falls below that threshold, it will be treated as retaliating against the disclosure itself and so probably liable for victimisation or whistle-blowing/trade union detriment as the case may be.

Nothing new so far, but now we have the Court of Appeal’s decision this month in Ling Kong -v- Gulf International Bank which shines a light into a previously-unexplored corner of this question – what if the employee’s conduct in connection with the disclosure was objectively not that serious but the employer genuinely thought it was?

The facts of the case are somewhat convoluted, but in broad terms the Claimant made a disclosure around the Bank’s use of a loan document for a purpose to which it was not suited. She made it in terms which, shall we say, lacked subtlety and which were taken by the Head of Legal as attacking her professional integrity. In the Head’s view, that slight was repeated in a follow-up meeting the next day in consequence of which there was a degree of slamming of doors and refusal by the Head of Legal to seek common ground through a mediation. Ling Kong was asked to apologise to the Head of Legal but did not, and was then dismissed for her conduct. In the Bank’s view, it formed further evidence of her lack of emotional intelligence in dealing with colleagues and represented the continuation of a style of communication which she had been (informally) warned about in the past.

In the Employment Tribunal, the Claimant was found to have made a protected disclosure and to have been unfairly dismissed on more or less every possible ground except whistle-blowing. Since that would have lifted the statutory cap off her compensation claim, she challenged that conclusion.

Ling Kong said (and both the ET and Court of Appeal accepted) that she had not attacked the Head’s integrity at all, only her legal awareness, i.e. her competence. Though that is still an affront of sorts, it is implicit in almost all protected disclosures that someone’s conduct or professional competence or compliance is impeached. Therefore it could hardly be said that this reached the dizzy outer limits of the “wholly unreasonable” in the way that an obviously unwarranted assault on someone’s personal integrity might be argued to have done. On the face of it, therefore, the Bank’s dismissal of the Claimant should surely have walked it straight into the deepest of trouble.

The Court of Appeal went back to The Law, specifically section 103A Employment
Rights Act, which requires the Employment Tribunal to consider exclusively and above all what was the actual reason for the employee’s dismissal. With the other Judges, the now Lord Justice Underhill looked back on the established authorities, particularly including his own in Martin, and liked what he saw. The question was the genuineness of the employer’s rationale for the dismissals and not whether that belief was reasonable or objectively correct. Of course, the less reasonable and less factually sustainable the claimed rationale, the harder the scrutiny the Employment Tribunal should apply. However, if it were nonetheless found genuine, that was the end of it.

Here there was indeed some evidence of prior unhappiness with the Claimant’s sometimes “inflexible, challenging and pernickety” dealings with her colleagues, so it could not be said that the Bank’s claimed reasons came completely out of the blue. The Tribunal found that it was this, not the fact or subject matter of her initial disclosure (which was scarcely considered at all by the decision-makers) which had led to the dismissal. As a result, Ling Kong’s claim to have been automatically unfairly dismissed for whistle-blowing failed.

**Lessons for employers:**

- if you dismiss someone who has even arguably made a protected disclosure (or carried out a protected act under the Equality Act or some form of trade union activity) then be very clear as to your precise reason for doing so;

- if that reason is the manner of that act then you will need to show a genuine belief that it went well beyond ordinary unreasonableness or that some other consequence of the disclosure gave you no option but to dismiss. The Court of Appeal declined the invitation to define any set threshold of badness or barminess for that purpose, so you should assume that hurdle to be a very high one; and

- simply insisting that you had such a belief without the evidence to back it up is unlikely to get you far – the less reliable the facts you rely upon and the less reasonable the conclusions you reach from them, the less likely it is that your belief will be found genuine in the first place.

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