THE
NATIONAL LAW REVIEW

Sounding off or whistleblowing? – the Devil's in the detail

SQUIRE PATTON BOGGS
Article By
David Whincup
Squire Patton Boggs (US) LLP
Employment Law Worldview

- Labor & Employment
- Litigation / Trial Practice
- Global

- United Kingdom

Monday, July 9, 2018

How often have you had an employee make some vague and unspecific complaint about your "unlawful" or "improper" or "inappropriate" conduct (often among a welter of other gripes and grievances) only to find him later claiming protection as a whistle-blower. Is that sort of gripe really enough for him to gain that protection?

In **Kilraine –v- London Borough of Wandsworth** last month, the Court of Appeal has taken a useful look at how specific a whinge of this sort has to be in order to count as a disclosure of information tending to show breach of a legal obligation, as required by Section 43 ERA 1996 to confer that protection.

The legal background to the case was whether a mere allegation could count as "information" for those purposes and whether, as the Employment Tribunal in this case had initially found, the two were mutually exclusive, i.e. that which was an allegation could not also be Section 43-type information. The Court noted that there is no reference in the legislation to "allegation" and so what is said is either enough to be "information tending to show" or it is not. Whether it may also be or feel like an allegation is therefore irrelevant.

So what does that mean in practical terms of the detail required? By Section 43, the information disclosed by the employee must "tend to show" the breach of a legal obligation. That means that if when he has said his piece you genuinely still have no

idea what he is talking about, he has not "tended to show" you anything. Quoting an earlier case, the Court of Appeal agreed that the ordinary meaning of giving information is that it conveys facts – it used the example of an employee in a hospital stating to his manager "You are not complying with health and safety requirements". Without more, this is clearly an allegation, or at least does not contain any facts "tending to show". The Court compared this with a statement in the same hypothetical hospital that "The wards have not been cleaned for two weeks" which clearly does identify what breach the employee 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:

- **Kilraine** does not say so, but it must be the case that if the employee says enough that a reasonably diligent manager could discern the issue with a little thought or brief further enquiry, that probably would be enough to saddle him with at least a constructive awareness of the issue. An employer cannot turn a blind eye to something and thereby hope to prove that it didn't "tend to show".
- In addition, if the employer does subject the employee to a detriment for raising what it says is merely an allegation, the Employment Tribunal may be sympathetic to him – if there were nothing to the employee's concerns, why did the employer lean on him as a result? If you have a sympathetic Employment Tribunal, it really takes very little to allow it to form the basis of a protected disclosure – see (https://www.employmentlawworldview.com/new-uk-whistleblowing-case-less-scary-for-employers-than-it-appears-so-far/).
- It may be tempting to retaliate against a mere allegation in part because of the manner in which it is raised, or where the employee has declined to elaborate, or has baselessly repeated the same contention even after the position has been fully explained to him. These are certainly circumstances worth explaining to an Employment Tribunal in your own defence, but remember that Tribunals will 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 – (https://www.employmentlawworldview.com/m5-or-a303-unmanageable-public-interest-complainant-runs-out-of-road-in-uk-tribunal/).
- Therefore, as a rule the employer should not base its response to the employee on some immediate analysis of whether what is said or written by him is "information tending to show" or merely an allegation. In both cases the sensible approach is to take the issue seriously. If necessary, ask the employee to specify in full detail what law or legal obligation he says is being (or is likely to be) breached, by what act or omission, when and by whom. 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 he may be more reluctant to make such allegations in future without good reason.
- Where it is necessary to take some action detrimental to an employee who has made such an allegation/disclosure, then it will clearly make sense to be very clear why that is, so that you can demonstrate if need be that the two were not connected.

Source URL: https://www.natlawreview.com/article/sounding-or-whistleblowing-devil-s-detail