

Welcome to our December edition

Welcome to this month's e-alert. In this issue our Q&A looks at 'whistleblowing' and there is also our usual 'In Brief' section.

Q&A

What is whistleblowing?

The correct term for whistleblowing is, in fact, 'making a disclosure in the public interest'. Whistleblowing concerns the reporting of wrong-doings in the workplace. Provided the whistleblowing is genuine, whistleblowers are protected from suffering a detriment from their employer. This is on grounds of public interest and to encourage workers to speak out if they find malpractice in an organisation or workplace. In so doing, workers are not discouraged from 'blowing the whistle' in the workplace by the fear that they will be victimised because of their actions.

Who is protected by this legislation?

To be protected an individual has to fulfil the following categories:

- be a 'worker';
- believe that malpractice in the workplace is happening, has happened in the past or will happen in the future;
- reveal information that amounts to a 'qualifying disclosure'; and
- reveal the information to the right person and in the right way. In legal terms; they must make a 'protected disclosure'.

'Worker' is widely defined to include employees, agency workers and people who aren't employed but are in training with employers. Some self-employed people may be considered to be workers for the purpose of whistleblowing if they are supervised or work off-site.

What is a 'qualifying disclosure'?

To be protected as a whistleblower you need to make a 'qualifying disclosure'. This is a disclosure about a malpractice including:

- criminal offences;
- failure to comply with a legal obligation;
- miscarriages of justice;
- threats to an individual's health and safety;
- damage to the environment; or
- a deliberate attempt to cover up any of the above.

There are some disclosures that can not be qualifying disclosures. Workers will not be protected for whistleblowing if:

- they break the law when making a disclosure (for example if they signed the Official Secrets Act as part of their employment contract); or
- the information is protected under legal professional privilege (i.e. if the information was disclosed to the worker when someone wanted legal advice).

What is a 'protected disclosure'?

In order for the qualifying disclosure to be protected by the whistleblowing law, it should be made to the right person and in the right way. The worker must:

- make the disclosure in good faith, with honest intent and without malice;
- reasonably believe that the information is substantially true; and

- reasonably believe that they are making the disclosure to a ‘prescribed person’.

If a qualifying disclosure is made in good faith to the employer, or through a process that the employer has agreed, the worker is protected. For this reason, employers should have a whistleblowing process either in the staff handbook or employment contract.

How is a worker who has blown the whistle on an organisation protected?

The extent of the protection depends on whether the worker is an employee or not. Employees who are dismissed as a result of making a protected disclosure are entitled to make a claim for unfair dismissal. It is important to remember that, in these circumstances, the employer does not require the usual one year’s service. If the employee has been victimised or suffered detrimental treatment, such as demotion or being denied a promotion, because of blowing the whistle, he may claim detrimental treatment at the employment tribunal.

Non-employees have less favourable rights, but can claim detrimental treatment if they are dismissed, victimised or suffer other detrimental treatment.

In Brief

Whistleblowing

Leading on from this month’s Q&A is the Employment Appeal Tribunal (EAT) decision in *Cavendish Munro v Geduld* which determined that in order to make a protected disclosure it is not enough to make an allegation; the worker must disclose information by conveying facts about a situation. The EAT illustrated the distinction by hypothetical examples in a hospital scenario: ‘The wards have not been cleaned for the past two weeks’ discloses information; whereas saying ‘You are not complying with Health and Safety legislation’ is an allegation.

Service-Related Pay

In *Wilson v Health & Safety Executive (HSE)*, Mrs Wilson made an equal pay claim stating that she was paid less than three comparators whose work was rated as equivalent to hers under a job evaluation scheme. Her pay was governed by a pay scheme which, in part, fixed increases in pay according to length of service over 10 years, after which no further increases were awarded.

The employment tribunal’s decision was fettered by the EAT’s decision in *Cadman v HSE* which was issued while *Wilson v HSE* was being heard. Cadman, based on European Court of Justice (ECJ) case law, held that an employer did not have to provide justification for a pay difference resulting from length of service criterion. Therefore, Wilson’s claim had to fail. However, Cadman was subsequently appealed with success and in light of that, Wilson proceeded, eventually, to the Court of Appeal (CA).

The CA had several issues to determine and its decision re-ignited the debate over service-related pay scales and whether they unfairly discriminate against women. Pay scales (where increases in pay are dependant on an employee’s length of service) are common, and it is well-established that, as a general rule, an employer does not have to show special justification for adopting service-related pay as the law recognises that employers are entitled to reward experience. But, in *Wilson*, the CA has made it clear that there is still scope for female employees to challenge service-related pay.

Following the ECJ’s decision in *Cadman*, it seemed that employers would rarely be called upon to justify service-related pay, but here the CA suggested that the employee only needs to cross a lower threshold to require the employer to justify not only the existence of the service-related pay scheme, but also its application. Employers will find it hard to defend service-related pay in jobs where employees learn the main skills required relatively quickly and there is little or no evidence that longer service has a positive impact on performance.

Race Discrimination

The case of *Amnesty International v Ahmed* has interesting implications. It confirms that it is irrelevant whether an employer acts with good intentions where an employee is subjected to a detriment on the grounds of race, sex, age, sexual orientation, disability or religion, or belief. However, the case also makes it clear that an act of discrimination will not always be sufficient to entitle an employee to resign and claim constructive dismissal. In many – if not most – cases, an employer that discriminates will also act in breach of the implied duty of trust and confidence, but this will not always be the case.

Miss Ahmed, who is of northern Sudanese ethnic origin, was employed as a campaigner by Amnesty International. In 2007, she was considered for promotion as a researcher for Sudan, she was short-listed but was not appointed. Amnesty had two concerns about staff of a particular nationality or national or ethnic origin undertaking work in or related to their country of origin. One concern was that their impartiality or perceived impartiality might be prejudiced; this in turn might have implications for their effectiveness and the organisation's reputation. The other concern was that the employee in question might be at greater risk of ill treatment or violence when visiting the country in question. When considering Miss Ahmed's appointment, Amnesty concluded that these concerns meant that she should not be appointed to the post. Miss Ahmed resigned and claimed constructive dismissal, direct and indirect race discrimination.

Amnesty denied discrimination and claimed that such an appointment and travel to Sudan would have amounted to a breach of its duty under the Health and Safety at Work Act 1974. At first instance, the employment tribunal upheld Miss Ahmed's claims. On appeal, Amnesty argued that the underlying motive was benign. The EAT rejected this argument, confirming that motive is irrelevant; the only question for the tribunal was whether Amnesty's decision not to appoint Miss Ahmed was on grounds of ethnic origin. It did, however, overturn the tribunal's decision that Amnesty had committed a repudiatory breach of conduct entitling Miss Ahmed to resign and claim constructive dismissal.

Volunteers & Disability Discrimination

The EAT has handed down its decision in *X v Mid-Sussex CAB*, stating that volunteers, such as unpaid charity or Citizen Advice Bureau (CAB) workers, are not protected by the Disability Discrimination Act or the EU Framework Directive.

The claimant was a volunteer part-time advisor at the CAB. No contract regulated her work for the organisation. She left in circumstances that she alleged amounted to discrimination on grounds of disability. She argued that she was protected by the EU Directive, and that the domestic Disability Discrimination Act should be 'read down' to provide that protection.

The claim was struck out on the basis that the Directive requires a material contract between the parties in order for such protection to be afforded to a worker. It was held, particularly owing to the word 'occupation' in the directive, that it was not intended to protect volunteers such as the claimant.

Reasonable Adjustments

Another case concerning Disability Discrimination. Section 4A (3) of the Disability Discrimination Act 1995 states that employers do not need to make reasonable adjustments in certain circumstances. The EAT case *DWP v Alam* clarifies that two questions should be asked when deciding whether this exemption applies. The first is whether the employer knows that the employee was disabled in accordance with the Disability Discrimination Act. Secondly, if not, should the employer have known this? The employer will be exempt from any duty to make reasonable adjustments if both these questions are answered in the negative.

Discrimination Compensation

The Court of Appeal has handed its decision in *Chaggers v Abbey National*, which makes the following points:

- In cases of discrimination dismissal where the claimant would have been dismissed lawfully in any event, a tribunal should reduce compensation to reflect this.
- If other employers are unwilling to offer employment because the claimant has brought proceedings, the dismissing employer is liable for 'stigma loss'. This will usually be factored into the normal loss of earnings calculation of how long it will be before another job can be found.

Discrimination by Association

The EAT has given another important judgement in the long running case of *Attridge Law v Coleman*. Previously, direction was sought from the ECJ concerning the question of associative discrimination. Following the ECJ's judgement, words were added to the Disability Discrimination Act to outlaw associative discrimination. The employer, Attridge Law, appealed on the basis that the tribunal had "distorted and rewritten" the Disability Discrimination Act and that the act of alleged discrimination occurred before December 2006, the date when domestic legislation was required to be interpreted in line with the European Directive.

The EAT rejected Attridge Law's appeal and upheld the tribunal's decision. Furthermore, new subsections (3A (5A) and 3B (3)) were added to the Disability Discrimination Act. For further information, contact Wilsons' Employment team.

Age Discrimination

The Mayor and Burgess of the London Borough of Tower Hamlets v Wooster considers the case where a local authority dismissed an employee on the grounds of redundancy and made insufficient efforts to redeploy them in order to avoid additional early retirement costs arising from a pension scheme that would trigger when the employee reached 50. The dismissal was found to be both unfair and motivated by unlawful age discrimination.

Mr Wooster, the claimant, was employed by the Council for 33 years and was seconded to work for a registered social landlord. In October 2006 he was notified that his secondment was no longer needed and that he would be made redundant unless an alternative position or secondment could be found. He was offered an enhanced voluntary redundancy which he reluctantly accepted to avoid losing further if he was made compulsorily redundant.

Mr Wooster brought a claim alleging that, by making him redundant at age 49, the Council had deliberately prevented him from accessing the unreduced early retirement benefits he would have been entitled to had he been made redundant at age 50. The employment tribunal found in his favour and, on appeal, the EAT found that avoiding further costs had significant bearing on the Council's decision to make Mr Wooster redundant. It rejected the appeal but reiterated that the age discrimination legislation did not require the Council to keep Mr Wooster in employment: an employer may dismiss employees who are genuinely redundant regardless of their age, however, in Mr Wooster's case the Council had failed to fully explore meaningful alternatives and that his failure resulted from their desire to avoid the increased pensions liability.

Discrimination on the Grounds of Belief

The EAT has held in *Grainger plc v Nicholson* that a belief in man-made climate change, and the moral imperatives resulting from such a belief, is capable of being a 'philosophical belief' for the purpose of the Employment Equality (Religion or Belief) Regulations 2003. The judgement includes guidelines as to what constitutes a 'philosophical belief'.