Protected disclosures under the Employment Rights Act 1996

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Employment analysis: Under what circumstances can an employee claim that protected disclosures were made in the public interest? Nicholas Lakeland, partner and head of the employment and pensions team at Silverman Sherliker, considers the anticipated judgment in Chesterton Global Limited v Nurmohamed.

Original news

Chesterton Global Limited (t/a Chestertons) and another v Nurmohamed UKEAT 0335/14/DM, [2015] All ER (D) 194 (May)

The employee was dismissed for making three 'alleged protected disclosures' relating to his employer's accounting figures. The employee believed that his employer had misstated its costs and liabilities, and that that had affected over 100 senior managers. He brought a claim before the employment tribunal, claiming that his disclosures had been 'in the public interest', pursuant to the Employment Rights Act 1996, s 43B(1) (ERA 1996). The tribunal found in favour of the employee, and the employer appealed. The Employment Appeal Tribunal (EAT), dismissing the appeal, held that the test to be applied was whether the employee had a reasonable belief that his disclosure was made in the public interest.

What were the issues raised in this case?

The case centres on the definition of ERA 1996, s 43B(1) as amended by the Enterprise and Regulatory Reform Act 2013, s 17 (ERRA 2013)--in particular, what the meaning/definition of 'public interest' was after the amendment had been made.

This is the first case to be decided after the legislation amended the definition and has therefore been eagerly anticipated. The case also considered what number of people make up a group large enough to determine that something is in the public interest and how many is too few to fall within the definition.

Also considered was whether there is a subjective element to the test and whether the worker had had to have reasonable belief that the disclosure was in the public interest and whether the belief had to be made on an objectively reasonable basis. The question is: Does this operate to override the claim being defeated if it is subsequently found not to be in the public interest but the claimant has a reasonable belief that it was?

Other questions considered were whether it matters that the employer is a private company and whether individuals may still be able to make a disclosure about their contract of employment under the Public Interest Disclosure Act 1998 (PIDA 1998) if they reasonably believe that the disclosure has wider public interest obligations (potentially creating a loophole which circumvents the intention of the new legislative changes).

How did the court arrive at its decision and what was decided?

On appeal, the appellant put forward the argument that the respondent had made a disclosure that benefitted him financially and that the majority of his evidence showed that he has acted for his own personal gain. The facts of this case were such that 100 managers of the firm were affected, along with the claimant for reasons of financial manipulation, which was held sufficient to create a public interest.

The EAT found that even though the claimant's evidence determined that he acted for his own personal gain (to receive a larger bonus), the fact that other employees were affected meant that the public interest test was satisfied.

Was it relevant that the disclosure related to a private contract?

Yes. PIDA 1998 was originally enacted with the condition that a disclosure must be made 'in good faith'. This had the unwanted effect of meaning that there was no requirement for a disclosure to be in the public interest. This unintended effect of PIDA 1998 meant that individuals were able to make a 'protected disclosure' about breaches to their own contract of employment.

On 25 June 2013, Parliament amended PIDA 1998 and the effect of this was to insert s 43B into ERA 1996. This replaces the good faith requirement with a public interest test to prevent personal contractual disclosures being made.

The decisions of the employment tribunal and the EAT finding for the employee in this case means that the updated public interest test has been found to be a relatively low barrier to surmount. This case has established that disputes relating to an individual's contract of employment can still be brought following the amendment to PIDA 1998. The size of the group can be relatively small and the question is fact-sensitive.

How does this change or clarify the law on 'public interest' in whistleblowing cases?

The purpose of the amendment to ERA 1996, s 43B(1) by ERRA 2013, s 17 was to reverse the effect of the decision of *Parkins v Sodexho Ltd* [2002] IRLR 109--the test of 'in the public interest' was introduced to prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

ERRA 2013 closes a 'loophole' in PIDA 1998 on whistleblowing that allows employees to claim that 'blowing the whistle' about a breach of their own employment contract is a protected disclosure. ERRA 2013 provides for protection to be restricted to disclosures that are 'in the public interest'. However, the loophole may not be entirely sealed, given that disputes relating to one's own contract may still be disclosed, as in this case and where:

- the employee has a reasonable belief that there is a public interest
- if you can show that other employees contracts are affected then this could be sufficient to establish a public interest

What impact will this decision have on the advice lawyers must provide to clients?

The impact of this case will be that clients need to be made aware that protected disclosures will have to be made in the public interest or that they must have a reasonable belief that it is in the public interest. The change in test may bar some claimants bringing actions under the updated ERA 1996. When framing claims on behalf of individuals, one can still claim that protesting a breach of one's own contract of employment is a matter of public interest if it can be shown to have effected a wider group of individuals.

Interviewed by Diana Bentley.

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