

REVIEW



Blowing the Whistle on Employers - A Manx Update



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March 2018

Blowing the Whistle on Employers - A Manx Update

Advocate John Aycock of M&P Legal reviews a recent whistleblowing case which provides helpful guidance to those with protected disclosure dilemmas.

The right of an employee to make a protected disclosure and receive consequent protection against action by the employer has been enshrined in Manx law for over a decade. But there have not been many reported Manx cases on this often misunderstood area of employment law. This is in contrast to England and Wales where protected disclosure or, colloquially, whistleblowing cases are frequently litigated before Tribunals.

There is now a significant High Court ruling on protected disclosures in the Isle of Man following an appeal against a Manx Employment Tribunal decision which found the employee had been unfairly dismissed principally because of making a protected disclosure. The employer's challenge to this Tribunal decision failed at the High Court where the Deemster upheld the first instance decision.

Essentially, the Employment Act 2006 protects workers from detriment for making or proposing to make a protected disclosure. Detriment can involve adverse action taken against the employee short of dismissal. Protected disclosure claims are more widely available and potentially more financially

rewarding than certain other employment rights. For instance, in this genre of claim:

- The normal Employment Tribunal statutory cap on compensatory awards (currently £56,000) is removed if the Tribunal finds the employee was unfairly dismissed principally because of making a protected disclosure. That can have a significant effect on the compensation awarded to a successful whistleblowing claimant;
- Whistleblower claimants require neither a period of continuous employment to make a claim nor employee status since worker status (a growing halfway house category between employment and self employment) suffices to bring a detriment claim. Only employees can bring an unfair dismissal claim so a whistleblowing worker makes a detriment claim if his/her contract is terminated for making a protected disclosure. A standard unfair dismissal case requires both an employment relationship and one year's continuous service to found the claim; and
- Unlike some other protection, the right to make a disclosure extends beyond the normal retirement age, albeit the advent of the Equality Act 2017 will mean other employment rights will eventually share that extension as age-related bars are phased out.

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The essential characteristics of a protected disclosure are that:

- The information revealed must be a qualifying disclosure, legislation defines this but it normally involves a wrongdoing such as breach of legal obligation or endangering health and safety. Interestingly, environmental damage is also included which is food for thought in an increasingly green society; and
- It must be revealed to the right person and in the right way, again legislation clarifies this as meaning the employer or a prescribed third party (for example various regulators).

The recent Manx case heard that the employee involved had made a suspicious transaction report to the Financial Services Authority in connection with certain aspects of client dealings. Regulatory contact followed and the employee who made the disclosure was placed on garden leave and subsequently dismissed. The dismissal was ostensibly on the basis of alleged gross misconduct involving alleged unauthorised use of social media messaging. The Employment Tribunal found however that the principal reason for the employer's decision to dismiss was that he made the protected disclosure and therefore the dismissal was automatically unfair (meaning there is no assessment of reasonableness as might otherwise be the case).

In his judgment His Honour Deemster Rosen QC highlighted law material to protected disclosures in the Isle of Man. Citing case law, the Deemster confirmed that to ascertain the employer's true reason for dismissal it is necessary to analyse what set of facts or beliefs were known to the employer, or held by it at the time, and whether that caused the dismissal. The disclosure has to be more than a material factor in the dismissal, it must be the reason or the principal reason for the dismissal. If there are several possible reasons for the dismissal together with a protected disclosure then a Tribunal should consider each of these separately and cumulatively. The mere fact the employee made a protected disclosure and that was known to the employer does not entail that this was the reason, or principal reason, for the dismissal.

This recitation of relevant law will be useful for local whistleblowing litigants. Understanding the legal and evidential burdens and hurdles of proving or disproving a case is paramount when contemplating such legal action. Protected disclosure cases are rarely straightforward, there are frequently multiple evidential complications involved. Establishing the protected disclosure as being the principal cause of the detriment or dismissal is often the key grey area.

In the increasingly regulated business world which we occupy, the workforce is becoming more alive to reporting an employer's shortcomings or illegalities.

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Watchdogs have more teeth and larger businesses have their own compliance departments. Environmental concern is rightly rising up the social agenda. Prior to whistleblowers being protected by law, one can easily understand how an employee might have preferred to keep calm and carry on for fear of retribution. Some may be emboldened by the developing local case law which provides genuine whistleblowers with a ring of steel, and we might see more such cases in the Isle of Man. But establishing that a detrimental action or a dismissal was prompted principally by a protected disclosure and navigating the relevant law remain potentially difficult tasks with significant technical and evidential hurdles. The decision will turn on the facts of each individual case.

For employers, it can assist greatly to have in place an internal whistleblowing policy accessible to staff. This gives concerned employees a framework to work within and encourages notification of wrongdoing without retribution. This in turn can help head off potentially expensive and time consuming claims.

Advocate John Aycock is head of M&P Legal's Employment Unit and has twenty seven years' experience of employment law in three jurisdictions.

M&P Legal is an established Manx law firm with highly experienced Advocates and Solicitors who regularly feature as recommended in the Legal 500 and Chambers & Partners legal directories. The practice deals with Isle of Man litigation such as debt recovery, personal injury, employment, contract, data protection, injunctions, enforcement of UK judgments, professional negligence; private client matters such as probate and wills, conveyancing, matrimonial and corporate/commercial, banking, trusts and insolvency. M&P also offers Spanish related legal services.

Please contact the practice manager Honor Beard - hkb@mplegal.im with any questions.




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