

# REVIEW



## The Cost of Penalising Whistleblowers



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August 2019

## The Cost of Penalising Whistleblowers

The Isle of Man Employment Tribunal surprised many in its treatment of a whistleblowing claim in August 2018 when it awarded £685,000 to a 32 year old portfolio manager sacked from a £42,000 a year job. Believed to be by far the largest award ever made by the Isle of Man Employment Tribunal, the award has now been the subject of detailed consideration at Appeal level. This article explores the reasons for and ramifications of the decision.

Robert Sutton was employed by Creechurch Capital. He was found to be dismissed for making protected disclosures about Creechurch systems both to Creechurch's compliance officers in May 2015 and then to the Financial Services Authority (Creechurch's regulator) in December 2015.

The Tribunal found that following a regulatory visit that raised issues about Creechurch's procedures, Creechurch essentially portrayed Mr Sutton as a scapegoat or loan rogue to deflect attention from their own failings by instigating disciplinary proceedings against him. The Tribunal conclusion that Mr Sutton was dismissed for blowing the whistle was challenged on appeal but in January 2018 the High Court rejected the appeal. On 19 June 2018 the case came back before the Tribunal to determine the appropriate compensation payable.

The Tribunal awarded £685,000, a startling figure when one considers that the highest previous award was probably substantially less than £100,000.

### Compensation

It is first necessary to say a little more of Mr Sutton's position. He had given notice of his resignation on 4 January 2016 because he had been offered a position as an associate partner of St James' Place ("SJP"), the financial advice company. This was to be based in Shanghai. His expected last day of employment was 26 February 2016. However, Creechurch's internal disciplinary procedure resulted in a decision to dismiss him summarily on that very day. On 11 March 2016 Creechurch notified SJP of its decision and Mr Sutton's offer of employment with them subsequently fell through. A promising opportunity was lost.

### *Loss of Earnings*

The Tribunal found that Mr Sutton would have had a successful career with SJP. The Tribunal was prepared to countenance 4 years loss and indeed give some support to the suggestion that the claimant could have claimed for a longer period. This was said to be worth £139,019. The Appeal Court accepted this.

### *Sale of business*

Mr Sutton was also successful in persuading the Tribunal that had he joined SJP he would have done so with partner status and would have been able subsequently to sell his business to another partner in approximately 4 years' time. Expert evidence, accepted by the

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Tribunal, suggested that this in itself might be worth over £300,000 and the Tribunal decided to award £316,182 as compensation for this lost opportunity. The High Court agreed.

### *Injury to feelings / Aggravated damages*

The Tribunal awarded the full amount of £5,000 for Mr Sutton's hurt feelings. The Tribunal was only able to award £5,000 for injury to feelings because there exists a statutory cap in that regard. However, by reference to UK case law where substantially more has been awarded for injury to feelings arising out of protected disclosures (and where no cap applies), the Tribunal decided to make the award up to £20,000 - being the capped £5,000 plus an additional £15,000 for aggravated damages. On appeal, the Court disallowed the aggravated damages altogether and thus reduced the award by £15,000. As the law currently stands, it appears unlikely that awards for such aggravated damages will henceforth be made by the Isle of Man Employment Tribunal.

### *Exemplary damages*

The Tribunal found that "Creechurch through its officers and in house counsel, had previously nearly got away with perverting the course of justice and had persistently misled the Tribunal". It found that Creechurch concealed the existence of the hostile final FSA report which should have been disclosed. This failure might have led to a miscarriage of justice. The Tribunal also felt it unnecessary for Creechurch to have alerted SJP to the summary dismissal of Mr Sutton. As the

Tribunal noted "exemplary damages are available if the conduct of the respondent has been oppressive, arbitrary or unconstitutional". They are "designed to punish the wrongdoer". The Tribunal awarded £75,000. However, as the High Court observed, this head of damages is only available if the conduct is by a public body and if the employer has calculated that it would be cheaper to pay damages than abide by its obligations. The Court abolished the award altogether. It seems unlikely that such exemplary damages will be awarded in the Isle of Man as the current law stands.

### *Expenses*

The claimant was awarded certain out of pocket expenses and costs associated with attending the hearing and moving off island.

### *Interest*

Interest at 4% was awarded on past pecuniary losses from the halfway point between the termination date and the date of calculation.

### *Legal costs*

The Tribunal ordered Creechurch to pay Mr Sutton's legal costs to be assessed by the High Court. The Tribunal felt Creechurch had acted vexatiously, abusively and unreasonably at the original hearing and that was the rationale for the order. The employee put in a claim for some £70,000 of costs and the Court ordered detailed assessment and an interim payment of half of the sum.

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### *Discussion*

This 77 page decision and the appeal are of landmark significance in the calculation of how much compensation should be awarded to whistleblowers. What will be encouraging for claimants beyond the obviously large sum awarded is the willingness of the Tribunal to award a multi-year loss where a career has been destroyed, and its approval by the High Court.

Employers will be cheered that the aggravated and exemplary heads of damage have been rejected.

However, employers should continue to resist any temptation to be vindictive towards staff perceived as 'troublemakers'. The Tribunal reiterated that there is an implied term in an employment contract that the employer will behave with integrity and honesty.

The case is an example of the expensive nature of long running Tribunal litigation and an encouragement to reasonable behaviour.

*Advocate Chris Brooks is a senior employment lawyer in M&P Legal's employment unit. This article is not intended to advise on any individual situation.*




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**Christopher J Murphy**  
Joint Managing Director  
[cjm@mplegal.im](mailto:cjm@mplegal.im)



**John T Aycock**  
Joint Managing Director  
[jta@mplegal.im](mailto:jta@mplegal.im)



**Christopher M Brooks**  
Consultant  
[cmb@mplegal.im](mailto:cmb@mplegal.im)



**Damian P Molyneux**  
Director  
[dpm@mplegal.im](mailto:dpm@mplegal.im)



**Consuelo Suay**  
Consultant  
[csc@mplegal.im](mailto:csc@mplegal.im)



**Amelia J Quinn**  
Associate Advocate  
[ajq@mplegal.im](mailto:ajq@mplegal.im)



**Carol A Young**  
Conveyancing Manager  
[cay@mplegal.im](mailto:cay@mplegal.im)



**Niall M Prentice**  
Senior Paralegal Assistant  
[nmp@mplegal.im](mailto:nmp@mplegal.im)