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Employment

A Beginner's Guide to Whistleblowing - Part 2 - Whistleblower Protection

Introduction

In the second part of this two-part whistleblowing guide we are looking at the protection afforded to whistleblowers by the Public Interest Disclosure Act 1998 ('PIDA').

The impact of PIDA was to create protection for an individual from suffering dismissal or other detrimental treatment at the hands of their employer because they had raised a concern about the business' activities.

For guidance on what disclosures will give rise to protection, please see part one of this whistleblowing guide, available on our website.

Protection - Dismissal and detriment

Where the individual makes a protected disclosure, they will be protected from being dismissed or subjected to a detriment because of the disclosure. Simply put, this means that the individual cannot be persecuted or victimised simply because they have made the disclosure.

It is important to note also that there is no minimum service requirement to make an individual eligible for protection under PIDA. This is why employees with less than the two years' service necessary to claim normal unfair dismissal will often argue detriment under PIDA to bring them into the realm of the automatic unfair dismissal legislation that protects whistleblowers. Workers would bring a claim for whistleblowing detriment (rather than automatic unfair dismissal).

The reason for the treatment

It is possible to consider disciplining an individual because of the manner in which they make the disclosure or for the manner in which they obtained the information. The making of a disclosure will not protect the individual from everything.

Take, for example, an employee who breaks into the company safe in order to steal information that proves a health and safety failing by the employer. That employee can be disciplined for the security breach but not for revealing the information. In this example, it is highly likely that the individual would bring a claim for unfair dismissal based on the disclosure and it would fall to the employer to prove that the decision had nothing to do with the disclosure itself.

Another example would be where an employee is underperforming but coincidentally makes a disclosure at the same time as they are being performance managed. In this example, the employee may believe that they were actually disciplined or dismissed because of the disclosure whereas the truth is that they were properly performance managed and terminated because of their poor capabilities. This case may well see the inside of a tribunal unless the employer has a good paper trail evidencing the poor performance and the management process that was adopted prior to dismissal.

Ultimately, the question of whether an individual has been dismissed or subjected to a detriment because they made a disclosure will be determined by following the paper trail and asking questions of the decision-making manager. Where a tribunal has doubt about the reason for a decision, for example because the true reason is unclear or illogical, then there is a significant risk that the decision will go against the employer. Given that the potential compensation award for a successful whistleblowing unfair dismissal claim is uncapped, it can be a very expensive error.

Guidance for employers

It may come as a surprise to employers how often individuals rely on whistleblower protection to defend themselves against normal management decisions. In order to safely manage an employee who has made a protected disclosure, it is good management practice to keep clear and accurate records of the reasons for management decisions. Engaging professional advice to assist with reviewing dismissal decisions can help protect against claims from employees.

If you have any queries about whistleblowing, or would like further information, please contact our Employment team.

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