Whistleblowing: it's for the tribunal to decide if a disclosure is protected

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In this case the Court of Appeal restored an employment tribunal's decision that a consultant doctor had been automatically unfairly dismissed because he made protected disclosures about patient safety.

The facts

An employment tribunal found that a consultant cardiologist had been dismissed for making protected disclosures about the consequences to patient safety of the suspension of a nurse and his concerns about the resultant absence of sufficient specialist nursing staff. Contrary to the Trust's decision at the internal disciplinary and appeal hearings which had found that the allegations were vexatious and designed to hamper the safe running of the interventional cardiology department, the employment tribunal held that the disclosures had been made in good faith (which was still the relevant test in 2011 when these facts occurred). It decided that the disclosures had been the real reason for dismissal rather than alleged misconduct, and that the dismissal was automatically unfair. The tribunal made no Polkey deduction.

The Trust appealed to the EAT. The Trust did not challenge the finding that protected disclosures had been made, but challenged the tribunal's decision about the reason for the dismissal. Agreeing with the Trust, the EAT overturned the tribunal's decision finding that their reasoning had been flawed. In particular, the EAT found that the employment tribunal had embarked on its own assessment of the conduct charges, and having found them less than compelling decided that the reason for dismissal had been the protected disclosures. According to the EAT the tribunal failed to identify why it did not believe the Trust's evidence that conduct has been the reason for the dismissal.

The Consultant appealed to the Court of Appeal.

The Trust argued that (1) the decisive issue was not whether the tribunal found that the disclosures were protected, but whether the Trust's decision-makers had believed that they were, and that the tribunal had made a mistake when assessing what had been the principal reason for the dismissal; (2) the tribunal had not given reasons for rejecting its submissions that the consultant would have been fairly dismissed in any event because he had refused to return to work unless two nurses were removed.

In rejecting the Trust's case the Court of Appeal identified two questions which need to be asked when considering whether an employee has been automatically unfairly dismissed for whistleblowing namely:

(i) whether the making of the disclosure was the principal reason for the dismissal; and

(ii) whether the disclosure was a protected disclosure.

The first question required an enquiry into what facts or beliefs caused the decision-maker to decide to dismiss. The second question of whether a disclosure was protected was to be determined objectively by the tribunal. It would enormously reduce the scope of the protection afforded by the whistleblowing provisions if liability could only arise where the employer itself believed that the disclosures for which the employee was being dismissed were protected. Parliament had deliberately conferred a high level of protection on whistleblowers.

The tribunal had disagreed with the Trust's decision-maker and had found that the disclosures were protected. It had repeatedly returned to the fact that the Trust itself had relied on the making of the disclosures in four of the six charges set out in the dismissal letter. There had been no error in the tribunal's conclusion that the consultant had been automatically unfairly dismissed.

In respect of the Trust's submissions on Polkey it was legitimate to look at the judgment as a whole which made it clear that the tribunal had taken the view that the consultant's stance towards the two nurses could not have led to his dismissal, and it was appropriate not to have made a deduction. The nature of the Polkey exercise was to make an assessment, of a broad-brush nature, about what might have happened in a hypothetical situation which never transpired.

What does this mean for employers?

This decision makes it clear to employers that whether a disclosure is protected is for a tribunal to decide. Furthermore, it reminds employers that unless they wish to adopt a high risk strategy they should only dismiss a whistleblower where they

are as confident as they reasonably can be that the disclosures are not protected, or that the disclosures and the manner in which they are made can be clearly distinguished so that conduct, and not whistleblowing, is the reason for the dismissal. For disclosures that are now being made, the decision about whether they are protected will hang on whether they are

made reasonably "in the public interest"; a test which the Court of Appeal will look at in the *Chesterton* case later this month.

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