Whistleblowing: Public interest test

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A claimant must have the opportunity to give direct evidence about whether they had a subjective belief that they were acting in the public interest when making a whistleblowing disclosure.

THE FACTS

To be protected by the whistleblowing legislation, a worker must have made a "qualifying disclosure". This is any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of a list of acts of wrongdoing. This list includes a concern that a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject.

As we reported here previously, Mr Ibrahim was an interpreter in a private hospital. He asked his manager to investigate rumours circulating among patients and their families that he was responsible for breaches of patient confidentiality so that he could "clear his name". He also complained that colleagues had been slandering him. After investigation, his complaint was rejected. He was later dismissed and claimed (among other things) that his complaint had been a whistleblowing allegation, and that he had been dismissed for having made the complaint.

The employment tribunal dismissed his whistleblowing claim. One of the grounds for doing so was that his disclosures were not made in the public interest: Mr Ibrahim had made the complaint with a view to clearing his name and re-stablishing his reputation. Mr Ibrahim appealed to the EAT which held that the tribunal had permissibly concluded, as a matter of fact, that Mr Ibrahim did not have a subjective belief that his complaint was in the public interest and that he was not therefore protected as a whistleblower.

Mr Ibrahim appealed to the Court of Appeal on the ground that the tribunal had not applied the correct two stages of the public interest test, which is a) whether the claimant genuinely believed, at the time of making a disclosure, that it was in the public interest and b) if so, whether that the belief was reasonable. This two-stage test was set out for the first time in the case of *Chesterton Global Ltd v Nurmohamed*, which was handed down by the Court of Appeal after the conclusion of the employment tribunal hearing but before the tribunal's judgment.

The Court of Appeal overturned the EAT's decision. It found that the tribunal should have directly asked Mr Ibrahim whether at the time of his disclosure he believed he was acting in the public interest. Mr Ibrahim had been unrepresented at the tribunal, and the tribunal should therefore have made sure he had a proper opportunity to explain his case. Mr Ibrahim's evidence had established his motive (i.e clearing his name) but it had not established whether he had a genuine belief that making the disclosure was in the public interest. Therefore, as this critical point had not been covered fully by the claimant's evidence, the case was remitted back to the same tribunal so that this could be done.

WHAT DOES THIS MEAN FOR EMPLOYERS?

The Court of Appeal's decision is not surprising given the Chesterton decision. The claimant may not be successful at the tribunal hearing if it can be shown that his complaint was purely personal in nature (and in this case there will already have been some relevant evidence presented about his reasons for making disclosures which the court recognised will mean it may be difficult for the claimant to convincingly explain why he considered he had a genuine belief he was acting in the public interest). However generally in practice, the public interest test involves a relatively low threshold which most claimants should able to meet – the real battle continues be around whether an employer has chosen to act in a detrimental way because of a protected disclosure.

Ibrahim v HCA International Ltd [2019] EWCA Civ2007

Authors

Ceri Fuller
London - Walbrook
cfuller@dacbeachcroft.com

Hilary Larter
Leeds
hlarter@dacbeachcroft.com

Zoë Wigan
London - Walbrook

zwigan@dacbeachcroft.com

DAC BEACHCROFT