

Whistleblowing: Whistle-blowers' conduct was separable from the act of whistleblowing so her dismissal was fair

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The Court of Appeal has upheld tribunal and EAT decisions that a whistle-blower who was dismissed for criticising a colleague when making a whistle-blowing allegation was not automatically unfairly dismissed even though, viewed objectively, her conduct was reasonable.

THE FACTS

Ms Kong was employed by Gulf International Bank (UK) Ltd as head of financial audit. She had concerns about a template legal agreement relating to an investment product, and raised these concerns verbally and in emails to Ms Harding, the Head of Legal who was responsible for the template. It was later accepted in the employment tribunal that, in raising these concerns, Ms Kong was a whistle-blower.

Ms Harding disagreed with Ms Kong's concerns. She went to Ms Kong's office and confronted her. During this meeting, Ms Kong questioned Ms Harding's legal awareness. This was followed by exchanges of emails. Ms Harding thought that Ms Kong had impugned her integrity and raised the matter with the Head of HR and the CEO. Ms Kong said that she was very upset, and gave the impression that she could not work with Ms Harding again. She declined mediation.

The Head of HR, the CEO and Ms Kong's manager came to a collective decision that Ms Kong should be dismissed. Ms Kong was told that her behaviour, manner and approach with colleagues had resulted in colleagues not wanting to work with her, but that the dismissal was not connected to the protected disclosures. The dismissal letter specifically referred to Ms Kong having questioned Ms Harding's integrity when she met with her, which was described as falling "well short of the standard of professional behaviour" expected.

Ms Kong claimed in the employment tribunal that she had been unfairly and wrongfully dismissed and that she had suffered detriment and been automatically unfairly dismissed for having blown the whistle.

As we reported [here](#), Ms Kong was successful in her unfair dismissal claim. The employment tribunal found that her claim for unlawful detriment, which related to how Ms Harding had treated her, would have succeeded, but was out of time. Her claim that she had been automatically unfairly dismissed for whistleblowing failed. She appealed unsuccessfully to the EAT, and appealed again to the Court of Appeal, which also dismissed her appeal.

Key points arising from the courts' decisions are:

- If the reason or principal reason for a dismissal is that the worker has blown the whistle, the dismissal will be automatically unfair. If a whistleblowing disclosure materially influences an employer's detrimental treatment of the employee, they will have suffered whistleblowing detriment.
- Though difficult, employers can potentially show that the dismissal or detrimental treatment of an employee can be separated from their whistleblowing disclosure.
- When considering whether a dismissal or detrimental treatment can be separated from the employee's whistleblowing, the reason in the minds of those making decisions about the treatment of the employee will be critical.
- The tribunal and the courts found that this was a case where the employee's whistleblowing disclosures could properly be separated from the reason why Ms Kong was dismissed.

The decision makers in relation to Ms Kong's dismissal were the dismissing managers - the CEO, Ms Kong's manager, and the Head of HR.

- Ms Harding's motivation was relevant to the detriment claim, which would have been successful had it not been out of time. Her motivation could not be ascribed to the dismissing managers, although the fact that Ms Harding had been motivated by Ms Kong's whistleblowing was a reason for the tribunal's particularly close scrutiny of the factors influencing the decision makers.
- The dismissing managers had not been motivated by the content or fact of Ms Kong's disclosures, but by the way in which she conveyed her personal criticisms to Ms Harding, showing a lack of emotional intelligence and insensitivity. Ms Kong's personal criticism of Ms Harding's had not been necessary for her to blow the whistle.

- The tribunal had found that Ms Kong’s behaviour had been broadly reasonable. Where a whistle-blower’s conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that the conduct will be found to be the real reason for the treatment of the whistle-blower.
- Detrimental treatment of an innocent whistle-blower should result in particularly close scrutiny of the reason given by the employer for the detrimental treatment/dismissal.
- The Court of Appeal held that there is no need for behaviour objectively to reach a particular threshold of seriousness before it can be viewed as separable from the disclosure.
- Although, objectively, Ms Kong’s behaviour had been reasonable, the decision makers subjectively considered that she had acted unreasonably. Because the critical question is “what was in the minds of the decision makers?”, in this case, the dismissal could properly be separable from the fact that Ms Kong had blown the whistle.

WHAT DOES THIS MEAN FOR EMPLOYERS?

This case shows that it is possible for a whistle-blowing allegation to provide context for detrimental treatment and/or dismissal without being the reason for the treatment. However, employers must be careful of taking action against a whistle-blower for their conduct in the context of whistle-blowing. It is a natural reaction for those about whom a whistle-blowing disclosure has been made to be upset and it is common for a whistle-blower to be scared and defensive. This can result in the employee’s manner in blowing the whistle and their repetition of the whistle-blowing allegation being perceived as aggressive or otherwise unreasonable. The fact that a whistle-blower upsets other employees is unlikely in most cases to result in their conduct being separable from treatment to which they are subjected by their employer.

Protect, the whistle-blowing charity, has issued a [statement](#) expressing its concern that this judgment will undermine the protection given to whistle-blowers.

It is possible that the case will be appealed to the Supreme Court.

[Ling Kong v 1\) Gulf International Bank \(UK\) Limited and 2\) Protect \(the Whistleblowing Charity\)](#)

Authors



Ceri Fuller

London - Walbrook
+44 (0)20 7894 6583
cfuller@dacbeachcroft.com



Hilary Larter

Leeds
+44 (0)113 251 4710
hlarter@dacbeachcroft.com



Zoë Wigan

London - Walbrook
+44 (0)20 7894 6564
zwigan@dacbeachcroft.com