Employment

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Whistleblowing in a coronavirus (COVID-19) world

Posted on 09 April, 2020 by | Alice Mayhew | Samuel Nicholls | John Platts-Mills

In layman's terms, whistleblowing is the raising of a concern, either within the workplace or externally, about a danger, risk, malpractice or wrongdoing. From Dr Li Wenliang to Captain Brett Crozier, whistleblowers are emerging as an important and high-profile part of society's response to and management of coronavirus (COVID-19). They have already helped expose and test the way that government institutions and businesses have responded to the crisis.

The object of this article is not to undertake an exhaustive review of the statutory protection afforded to whistleblowers. Rather, it is to identify some of the sorts of issues that have already been raised in a corporate context and which might start to be articulated as claims under the whistleblower legislation; before addressing some considerations for employers and employees as these claims take shape.

Whistleblowing in the COVID-19 world

We are already starting to see press coverage of workers raising concerns that government guidance may not be being observed. Factory workers are raising concerns that social distancing is not taking place, face-masks are not being worn and hygiene policies not being followed.

Agencies, looking to meet the demand for additional workers in key sectors, are facing allegations that workers are being required to travel in over-crowded coaches. As well as NHS workers - transport, prison and airline workers have raised concerns about a lack of PPE and testing. Until schools were closed, teachers were raising concerns about being pressured to teach in-person despite government guidance dictating that they ought to be self-isolating.

Statutory Overview

The framework of protection contained in sections 43A to 43L and 103A of the Employment Rights Act 1996 requires employers to refrain from subjecting whistleblowers to any detriment, including dismissal, provided their activities fall within the scope of a 'protected disclosure'.

To be a 'protected disclosure', there must be a 'qualifying disclosure' as defined in section 43B ERA 1996 and the 'qualifying disclosure' must be made the right way, it must be made in accordance with sections 43C-43H ERA 1996. A 'qualifying disclosure' is made in accordance with section 43C if the worker makes the disclosure to his employer – without further definition. Disclosures, such as to the police or to the media, will only qualify in very limited cases, see section 43G ERA 1996.

The applicability of the statutory framework is broad. It stretches beyond the definition of 'worker' within section 230 ERA 1996, which includes former workers (see section 230(3)), to categories including those set out in the extended definition contained in section 43K ERA 1996. However, job applicants (with the exception of the specific category of NHS job applicants); volunteers and interns; and self-employed workers are not covered.

There is no financial cap on compensation in whistleblowing claims and there is no requirement for a minimum period of service, making it a potentially powerful claim for employees and a significant area of risk for employers.

Relevant considerations

When making a disclosure or considering if a disclosure has been made, any relevant policies which the employer has in place should be consulted. Most will have a separate whistleblowing procedure or an applicable general grievance procedure. However, in these times, when many may not have access to workplace policies due to remote working, it may be difficult to work out how and to whom to make a disclosure according to those policies or how to respond if a disclosure has been made. In practice, making a disclosure in accordance with section 43C is likely to involve making it to a line manager or human resources, alternatively, the employer may have a 'whistleblowing hotline'. If the line manager is the person involved in the activities causing concern it is appropriate to blow the whistle to the person higher up the line management chain.

A worker making a disclosure should, ideally, make the disclosure in writing, as this can serve as a permanent record and assist in limiting disputes at a later date about what was disclosed. Employees might sensibly seek advice from a lawyer or union representative before disclosing information, such a step will not in itself render a subsequent disclosure of information incapable of qualifying for protection.

A manager in receipt of what they suspect might be a protected disclosure should, as a first step, contact human resources if they have not already been included in the disclosure. This highlights the need for managers to be appropriately trained in recognising what might amount to a protected disclosure and how to respond. The worker should not be punished in any way for raising those concerns – to do so would be unlawful. All an employee has to do is demonstrate that they were subjected to a detriment, which is a low hurdle, it will be enough for the employee to show that their actual condition is worse off, in a more than trivial way, than would otherwise be the case.

There have been reports that some employers, including NHS Trusts, have told their employees not to raise concerns about lack of equipment. An employer cannot stop a worker from appropriately blowing the whistle. They certainly should be very careful about telling (or threatening) workers not to raise concerns about the actions their employer is taking to respond to COVID-19. It is exactly the COVID-19 sort of situation – requirement for a mass response to serious health and safety issues – that the whistleblowing legislation was enacted for.

When assessing how to make a disclosure or whether a disclosure you have received constitutes a 'qualifying disclosure', there are four key issues to consider in the current circumstances:

It does not have to be a disclosure of new information to be a 'qualifying disclosure', it can involve drawing a person's attention to a matter of which they are already aware (section 43L(3) ERA 1996). This is relevant in circumstances where concerns around the response to coronavirus are part of the public discourse, such that different workers may be raising similar concerns at the same time. Consider the detail being provided – it is not enough that an allegation has been raised – the disclosure should contain sufficient facts underlying the allegation to constitute information.

Does the disclosure constitute a 'qualifying disclosure'? Where a breach of 'government guidance' is identified, further analysis should be undertaken to see if it fits within the gateways. For example, a complaint by a key worker, perhaps in the NHS or a supermarket, that inadequate PPE is being provided, is likely to be a disclosure relating to health and safety failures pursuant to section 43B(1)(d) ERA 1996. However, other gateways may be engaged, including:

- 43B(1)(a): 'that a criminal offence has been committed, is being committed or is likely to be committed';
- 43B(1)(b): 'that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject'; and
- 43B(1)(f): 'that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed'.

The worker making the complaint must have a reasonable belief that the information tends to show one of the relevant

failures; this will be assessed from the perspective of the person making the disclosure (the subjective element of the test). If therefore, the person making the disclosure is a manager in a distribution warehouse, their disclosure will be assessed according to their insider knowledge – for instance is their view that certain PPE is required reasonable (the objective element of the test)?

Whilst the worker must also have a reasonable belief that the disclosure is in the public interest, disclosures concerning potential or actual health and safety breaches related to COVID-19 are likely to be made in the public interest. Consider the organisation, the work it is doing and the number of people affected by the concerns being raised. An individual making the disclosure does not have to have all the reasons why they believe a disclosure is in the public interest at the time they make the disclosure – that can be developed after the disclosure has been made. The key is that the individual has a reasonable belief that the matter is in the public interest at the time they make the disclosure.

With many employers overwhelmed by the tasks required of them in responding to COVID-19, there may be a feeling that they simply do not have time to consider complaints being raised by their workers. In these circumstances, it may be sensible to appoint a person to receive complaints that are being made and to respond accordingly. As a first step, they should inform the whistleblower that the concerns have been noted and to explain, if they are accepted, what is being done to remedy those concerns (e.g. more masks or ventilators are on order; steps to ensure social distancing in warehouses are being adopted). The employer may also wish to consider steps to protect the whistleblower – for instance should the whistleblower receive anonymity? A full-blown investigation may not be possible at this stage but the key is to address those concerns and not to punish the individual making them in any way. As far as possible, the internal policies relevant to whistleblowing should be followed – if not there ought to be an explanation. Many workers will want to know their concerns are being taken seriously and communication is key.

Some useful sources of guidance

- union-news.co.uk reports news from the UK's trade union movement – it contains a range of useful articles identifying issues being raised by workers across different industries.
- The All Party Parliamentary Group on Whistleblowing produced a detailed report in June 2019, containing useful information and statistics, including that the highest percentage of disclosures occur in the health and social care sector - 42% - and that was before COVID-19.
- The Whistleblowing Commission, established in 2013 by the charity Protect, has produced a Whistleblowing Code of Practice, which provides practical guidance to employers, workers and their representatives and sets out recommendations for raising, handling, training and reviewing whistleblowing in the workplace.
- In March 2015, BEIS published Whistleblowing: Guidance for Employers and Code of Practice. This guidance is designed to help employers: understand the law relating to whistleblowing; put in place a whistleblowing policy; and recognise the benefits whistleblowing can bring to an organisation. The code of practice gives examples of what a whistleblowing policy should commit too and how it should be managed.

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