Protected disclosures: how not to draft a list of issues

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Mrs R Kealy v Westfield Community Development Association [2023] EAT 96

1. The Respondent was a charity operating a large community centre which included Early Years provision. The Claimant was an Early Years Co-ordinator employed by R since October 2016.

2. The Claimant brought a claim asserting among other things, protected disclosure detriment and automatic unfair dismissal on the basis of protected disclosures.

3. Of the nine disclosures asserted by the Claimant, three were made to her employer and six were made externally, including to Ofsted.

4. Seven detriments were asserted, with the seventh occurring after resignation.

5. The list of issues that the Employment Tribunal relied on is partly set out within HHJ Tayler's judgment and was described by the Employment Appeal Tribunal as "a bad starting point" as the questions it posed did not reflect the correct legal tests for determining what constitutes a protected disclosure.

6. The EAT stressed the importance of sticking to the map laid out by the Employment Rights Act 1996 to determine such claims, and how it is vital not to try to "skip waymarks". The EAT then laid out the correct framework and the result is a useful synopsis of the law and a guide to what can go wrong when each stage is not given careful consideration.

The legal framework and the EAT's conclusions

"Qualifying"

7. First, a tribunal should consider if a qualifying disclosure has been made. A qualifying disclosure is defined by section 43B ERA 1996. A useful summary is provided by HHJ Auberach in ***Williams v Michelle Brown AM UKEAT/0444/19/OO***.

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

8. In this regard the defective list of issues provided for a consideration of whether the disclosures 'related to' relevant failures, so this was the question the ET asked at final hearing. Instead, the ET should have been considering whether the worker reasonably believed that the information 'tends to show' a relevant failure, a relevant failure being one of those laid out in sub-paragraphs (a) to (f).

9. Further, the ET did not consider whether the claimant reasonably believed the disclosures were in the public interest in the original decision. When the EAT asked the ET to amplify its reasoning it became clear that the ET had confused "reasonable belief in public interest" with "motive for making the disclosure".

10. In both ways, the ET at first instance failed to properly consider if the disclosures were qualifying disclosures.

"Protected"

11. Next, an ET should consider if a qualifying disclosure is protected. As the EAT explained, this largely concerns to whom the disclosure was made. In this case, the disclosures were said to have been made to the employer in accordance with section 43C, and in relation to the disclosures made to OfSted, were caught by the general provisions in section 43G. For the disclosures made to the employer, no additional requirements are imposed by the statute. However, where the disclosure is made to someone other than the employer, additional requirements are imposed.

12. By way of example, one additional requirement when making a disclosure in accordance with section 43G is that the worker reasonably believes that the information disclosed and any allegation contained in it, are substantially true. The result is that a higher standard of belief is required when making disclosures to someone other than an employer. As explained by HHJ Richardson in ***Soh v Imperial College of Science, Technology and Medicine UKEAT/0350/14/DM*** it is the difference between saying '*I believe X is true*' and saying *'I*

believe this tends to show that X is true'. But, HHJ Tayler cautioned, in neither instance is it a requirement that the statement made is objectively true.

13. At first instance, the ET found as fact that some of the allegations the Claimant made were not true and concluded that as a result she was precluded from having "reasonable belief in the truth" of those disclosures. The EAT directed that this was problematic because the legislation does not require a disclosure to be objectively true, only for the Claimant to have a reasonable belief that it tends to show a relevant failure (if made to the employer) or to have a reasonable belief it is true (if made in accordance with section 43G). As the EAT pointed out, one can have a reasonable belief in something that later proves to be false.

14. The EAT judgment also concludes that there were other flaws with the ET's reasoning. It considered the ET's finding that failure to respond to a grievance raised after resignation cannot amount to a detriment was incorrect and the ET had not shown how it had reached such a conclusion. Further, the EAT considered that the ET had drawn contradictory conclusions as to whether the Claimant had made certain remarks to Ofsted which the EAT concluded, amounted to perversity.

15. Finally, HHJ Tayler expressed deep dissatisfaction at the ET having read across their findings from the detriment claim into the unfair dismissal claim. He considered this to be insufficient given the different statutory tests and different burden placed on the Respondent to show the reason for the dismissal in an unfair dismissal claim.

Practical Implications

16. This case is an excellent reminder of the impact a list of issues can have on how a tribunal considers a claim. This appears to be particularly so in claims involving protected disclosures where it is important not to attempt shortcuts through the legislative tests.

17. The judgment reminds us of the importance of not interchanging the terms 'protected disclosure' and 'qualifying disclosure'. When dealing with disclosures to employers there may not always be much to separate the two terms, but where the disclosure is made to another party in accordance with section 43G, a disclosure that can properly be considered qualifying is not 'protected' before the extra qualifications in s 43G ERA 1996 are met.

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