



Update & Comment

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Is the Whistle Being Blown On Whistleblowing?

Over recent years, we have seen a general expansion in whistleblowing rights, whereby a person who identifies actual or suspected illegality or unlawfulness in the conduct or activities of their employer is protected at law. There are some safeguards in as much as the 'protected disclosure' has to be made in the public interest (i.e. not in the interests of the complainant alone) and needs to be made in good faith.

This has generally been lauded as a good thing, but a new case raises questions over its effectiveness in practice.



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Kong v Gulf International Bank (UK) Ltd

This Court of Appeal case has put the employee's conduct front and centre of the list of relevant issues before an employment tribunal.

In this case, there was a question over the manner of the employee's behaviour when making a protected disclosure which led to her dismissal. The employee argued that the core question was whether her dismissal resulted from her whistleblowing disclosure, in which case it would be unlawful regardless, entitling her to compensation. The employer argued that the dismissal was not because of the protected disclosure per se, but the manner in which the employee conducted herself when making that allegation.

The Court of Appeal confirmed that it was legitimate for a tribunal to consider how the protected disclosure was made, enabling the employer in this case to fairly dismiss the employee for overstepping the mark. That conduct was viewed as separate from the underlying concern raised.

To put it another way, an employee's protection for whistleblowing might not save them from dismissal if they go around the complaint the wrong way.

Comment

Employers can perhaps breathe a sigh of relief at this judgment. It means that there is an additional route of defence open to them, whereby they can allege unreasonable conduct in the manner of the disclosure, justifying disciplinary action.

Employees, on the other hand, appear not quite so well protected as they might have assumed previously.

It is inevitable that the approach of the complaint will now be used as a shield by employers attempting to avoid liability.

On public policy grounds, we find this ruling troublesome in that it is likely to put genuine whistleblowers off making a disclosure. In certain circumstances, this might have catastrophic implications.

Employers also need to be careful when deploying this defence, as what is considered unreasonable by them might not be considered so by a tribunal.

This case is potentially of greatest relevance to the Professional and Regulated sector - such as GPs, dental, care providers and financial institutions. For more information on how we can help you navigate such issues in practice, visit www.apers.co.uk

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