Is a Complaint about a Private Workplace Dispute Whistleblowing?

Update - Whistleblowing in the Workplace

The Court of Appeal in the case of *Chesterton Global Ltd v Nurmohamed* (the Chesterton case) has concluded that matters which are in the worker's private interests does not prevent the matter also being in the public interest. As a result employers should consider whether complaints made by employees about a private workplace matter are also protected disclosures ("whistleblowing").

What is Whistleblowing?

"Whistleblowing" is the common term given to a situation where an employee makes a what is known legally as a "protected disclosure"

A protected disclosure is made where a worker discloses information about an organisation which is made in the **public interest** for example, breach of a legal obligation, criminal offences, concerns about health and safety practices. Workers who "blow the whistle" have, in certain circumstances, a right not to be dismissed or subjected to any other detriment as a result.

- Employees do not need to have 2 years' service in order to bring a claim that they have been dismissed for making a protected disclosure. It is often the case that an employee with less than 2 years' service will argue that they have "blown the whistle" in order to challenge their dismissal as they are not eligible to bring an ordinary unfair dismissal claim.

- A worker will be protected under the whistleblowing legislation where they make a disclosure which relates to specified kinds of malpractice. The disclosure could be made in an email, during a meeting or raised as part of a grievance. In addition, the disclosure does not have to relate to the employer's business and could concern a client or supplier.

- A worker who makes a disclosure will be protected where they have a reasonable belief in the disclosure and the disclosure is made in the public interest. If a worker can point to objective grounds to justify their belief, it does not matter that no legal obligation exists or the belief is based on incorrect facts.

- Although the legislation in this area is drafted to encourage workers to make disclosures internally, workers who make external disclosures will be protected in some circumstances. In particular, disclosures can be made to "prescribed persons" identified in legislation. Provided the worker believes the information is substantially true and concerns a matter within that person's remit, there is no need to tell the employer first. Employers should ensure that workers are aware that it is preferable to report matters internally in the first instance by putting appropriate policies and procedures in place to encourage employees to do so.

What is in the public interest?

In the recent Chesterton case the Court of Appeal considered this question:

- Mr Nurmohamed was employed as an estate agent and was paid commission along with 100 of his colleagues. He alleged his employer exaggerated its expenses in order to depress profits by

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£2-3million and thus reduce commission payments paid to him and his colleagues. He argued his allegation was a protected disclosure as he reasonably believed it was true and it was in the public interest to make the disclosure.

- Mr Nurmohamed was dismissed after he had made his disclosure and successfully claimed unfair dismissal on the grounds of whistleblowing.

- Chesterton Global appealed initially to the Employment Appeal Tribunal and subsequently to the Court of Appeal on the grounds that the allegation made by Mr Nurmohamed was not in the public interest.

- The Court of Appeal in the Chesterton case found that Mr Nurmohamed's disclosure was in the public interest. The Court stated that the following factors would normally be relevant in determining whether a disclosure is in the public interest:

    - The numbers in the group whose interests are affected by the disclosure;

    - Whether the nature of the disclosure of wrongdoing is serious affecting a very important interest rather than a disclosure of a trivial wrongdoing;

    - The disclosure should relate to deliberate wrongdoing rather than disclosure of inadvertent wrongdoing; and

    - The identity of the alleged wrongdoer- the larger or more prominent the wrongdoer, the more likely the public interest will be engaged.

However, the Court of Appeal went on to state that Employment Tribunals should be cautious about finding that a worker making disclosure about a private workplace disputes is in the public interest. The broad intent behind the legislation is that workers making disclosures about private workplace disputes should not attract whistle blowing protection even when more than one worker involved.

We now await further case law to find out how broadly the Chesterton case will be interpreted. In the meantime, employers are advised to ensure that they have suitable mechanisms in place so that concerns raised in the workplace are dealt with appropriately and to take legal advice **before** making decisions in relation to potential whistleblowing matters. Taylor Walton is able to advise employers on all aspects of whistleblowing and their potential liabilities in this complex area of employment law.

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