WARE & KAY SOLICITORS

Employment Law

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YORK

Address
Sentinel House
Peasholme Green
York
YO1 7PP

Tel 01904 716 000
Fax 01904 716 100

WETHERBY

Address
The Aire Suite
Brunswick Court
Victoria Street
Wetherby
LS22 6RE

Tel 01937 583 210
Fax 01937 587 556

Whistleblowing

What constitutes "The Public Interest?"

Since the qualifying period for claiming unfair dismissal was raised to 2 years, dismissed employees without the 2 year qualifying period will only be able to make claims if they can show that their dismissal was for a reason which is covered by a category deemed to be automatically unfair and does not require a qualifying period of employment.

One of these categories is dismissal for making a "protected disclosure." The law is specific on what counts as a qualifying disclosure and to whom the employee must report it to.

1. It must be a disclosure of "information" (an opinion alone is not enough)
2. It must normally be made to the employer (although there are exceptions)
3. It must in the reasonable belief of the worker "tend to show" either that:-

   (a) a criminal offence has been committed, is being committed or is likely to be committed,

   (b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

   (c) a miscarriage of justice has occurred, is occurring or is likely to occur,

   (d) the health or safety of any individual has been, is being or is likely to be endangered,

   (e) the environment has been, is being or is likely to be damaged, or

   (f) 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.

Note that whether it is true or not, the worker need only reasonably believe it to be true, and reasonably believe it to show one of the above. The worker need not categorically spell out the allegation as long as it "tends to show" one of these 6 circumstances applies, and as long as it is clear from the circumstances what wrongdoing is being alleged and why it is wrong.

When protection was first introduced for "whistleblowers" it was upheld in case law that failure to comply with a legal obligation (b) [above] could also apply to a contractual obligation between employer and employee.

In 2013 the scope was narrowed by adding section 43B to the Employment Rights Act 1996 which required that for a disclosure to be protected the worker must hold a reasonable belief that it is made "in the public interest."

The concept of what is "in the public interest" has been widened in some recent cases including the case of Underwood v Wincanton plc where the EAT has held that an employee can be protected for raising a contractual matter that affects a group of employees. This followed a similar finding by the EAT in Chesterton Global Ltd v Nurmohamed (Currently subject to an appeal to the Court of Appeal and due to be heard in October 2016)

www.bailii.org/uk/cases/UKEAT/2015/0335_14_0804.html

Mr. Underwood worked as a driver for until he was dismissed and he brought claims of automatically unfair dismissal and detriment for having made protected disclosures. The disclosure on which he relied was a letter from himself and 3 others which complained of bullying and victimisation due to the unfair allocation of overtime. The letter also hinted that overtime was being withheld from drivers who were scrupulous about vehicle safety and roadworthiness.

Wincanton defended the case on the basis that this was a purely contractual matter and could not reasonably be believed to be in the public interest. However, it was held that:-

1. The Chesterton case was authority for the proposition that the 'public interest' requirement may be met by a relatively small group of persons, and that those persons may all be employees of the same employer because the term 'public', can refer to a subset of the general public,

Email law@warekay.co.uk
Web www.warekay.co.uk

even one composed solely of employees of the same employer.

2. The test was what was in the "reasonable belief" of the employee making the disclosure.

3. Dispute about terms and conditions of employment could constitute matters in the public interest.

4. The EAT considered it significant that an aspect of the allegation was that drivers who reported safety concerns with their vehicles were being penalised, so it might be a matter of public interest to other road users.

www.bailii.org/uk/cases/UKEAT/2015/0163_15_2708.html

It should also be noted that protection for "whistleblowers" applies to a wider category than just "employees" and extends to "workers" a wide definition in this context.

It also covers subjecting the worker or employee to a "detriment" whether or not there was also a "dismissal."

Practical Lessons to be applied

Even where an employee does not have the qualifying period of 2 years to be protected from unfair dismissal, it is as well to use a procedure which identifies the reason for termination their employment, even though this does not have to be as rigorous as might be required to be "fair" if the employee had 2 years employment.

Secondly, grievances should be taken seriously and investigated, even where on the face of it they appear to be private grievances with no wider "public interest."

NB. This article does not provide a full statement of the law and readers are advise to take legal advice before taking any action based on the information contained herein

Ware & Kay

Contact us

For a free, no obligation discussion call **Gill Wilkinson** on York **01904 716000** or Wetherby **01937 583210**.

Email law@warekay.co.uk
Web www.warekay.co.uk