Whistleblowing: reason for dismissal and differentiating between disclosure and associated conduct

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It is well-known that s.103A Employment Rights Act 1996 provides that a dismissal is unfair where the reason or principal reason was that an employee made a protected disclosure. That test, whilst ostensibly simple, requires a number of considerations:

1. Where there is more than one protected disclosure, it is not necessary to isolate which one or more specific disclosures was/were the cause of dismissal. The tribunal should also ask whether, cumulatively, disclosures were the reason for dismissal;

2. It is not sufficient for the disclosure to have a material influence on the decision to dismiss or for the disclosure to be in the employer's mind. The disclosure(s) must be the fact that causes dismissal;

3. It follows that if a protected disclosure was a secondary reason, it will not be the principal reason, and therefore a dismissal with another reason as principal reason will not be automatically unfair.

With that in mind, what of the situation in which an employee makes a protected disclosure and, at or around the same time, commits misconduct associated with that disclosure? If the conduct is closely linked to the disclosure, and dismissal is because of that conduct, can it be said that the reason for dismissal was the disclosure itself? On the face of the above, the legal position is that, even where disclosure leads to misconduct, provided the conduct was the reason for dismissal, the fact that it arose from or with a protected disclosure would not make dismissal unfair.

That proposition is nothing new and the authorities provide for it. In Bolton School v. Evans [2007] ICR 641, the claimant made protected disclosures about the security of the respondent's IT system. He also, with a view to demonstrating the security failings, hacked into the system. He was given a written warning, after which he claimed he had been subjected to a detriment and resigned. He claimed that that resignation was an automatically unfair constructive dismissal. The question was whether or not the principal reason for the breach of contract (being disciplined) was the protected disclosure. The Court of Appeal held that the word "disclosure" has its ordinary meaning so that the question was whether or not the whole of the claimant's conduct amounted to a disclosure. The decision, at [17], was that it was not: "when performing the physical act of entering the system he was not then communicating with the school about the vulnerability of the system". The conduct and the disclosure of information were severable.

That case was followed by the EAT in Panayiotou v. The Police and Crime Commissioner for Hampshire UKEAT/0436/13 (albeit a detriment claim rather than unfair dismissal). There, the claimant made protected disclosures. However, he also began to campaign for the respondent to take appropriate action. When the respondent did not take the action that he

believed appropriate, he believed that matters were being covered up and this made him more determined to try other channels to secure redress in those cases. He sought and gained support from officers in representative bodies. The tribunal found that the reason for the respondent's detrimental acts was the claimant's campaigning, and that there was a distinction between the disclosures themselves and the pursuit of the issues raised within those disclosures. The EAT, in upholding the tribunal's decision, said at [52] that the "authorities demonstrate that, in certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. The employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did".

From the above, it is clear that there can be, in a given case, a difference between a disclosure on the one hand and related conduct on the other. The following is perhaps a summary of the position:

1. The distinction between disclosure and conduct is maintained even where the disclosure provides the context for the conduct;

2. The distinction is maintained even where the conduct may be said to be a follow-on from the disclosure;

3. The distinction is maintained even where the conduct directly arises from the disclosure or the content of the disclosure;

4. It should not be forgotten that the tribunal can still conclude that the disclosure was the reason for dismissal because either (a) the employer's explanation that the reason was conduct may be a sham or pretext, or (b) unconsciously the employer's real reason was the disclosures; and

5. Conduct and disclosure may not be separable.

What of the situation in which the employee tells the employer that carrying out part of their role, for example, is unsafe, and at the same time refuses to carry out that part of their role, which the employer then considers to be misconduct? Is the conduct distinct from the disclosure (assuming the respondent genuinely dismissed because of the conduct only)?

On the face of it, there is a clear distinction. That situation easily sits alongside those in Evans and Panayiotou. The disclosure may well have provided the premise for the misconduct, but the latter is not necessarily part and parcel of the former. Nor is it an extension of the disclosure. A refusal to work cannot be a disclosure of information.

It might be said on the other hand that the information disclosed is in fact the explanation for the conduct, and therefore the two are intertwined to such a degree that they cannot be separated. However, that would require the analysis to be that dismissal for conduct is

dismissal for its rationale, which is what is contained within the disclosure, meaning that the disclosure is therefore the reason for dismissal. That appears to require too many steps, and still does not address the point that the conduct is one action based on a concern and the disclosure is another action. In particular it is an informative expression of that concern. It could not be said, for example, that the conduct furthers the disclosure. In addition, the disclosure can exist without the conduct and vice versa.

To take an analogy, s.100(1)(c) Employment Rights Act 1996 provides for automatic unfair dismissal in circumstances where an employee brings to the employer's attention circumstances connected to health and safety. Such an act might well also be a protected disclosure. s.100(1)(d-e) alternatively provides that an employee is able to absent themselves from the workplace or take appropriate steps to protect themselves where there is serious and imminent danger present. Two points arise:

1. There is a statutory distinction between bringing health and safety issues to an employer's attention and taking action (with the protection in the latter case ostensibly going further than that for those making protected disclosures);

2. The protection afforded to those taking action is only in limited circumstances, meaning the employer is free to dismiss for misconduct where the employee absents themselves from the workplace (or takes protective steps) but the danger was not reasonably believed to be serious and imminent.

Were the scenario posed above pleaded under s.100 rather than s.103A, it is likely that dismissal would not be automatically unfair (assuming the health and safety issue were not reasonably believable as serious and imminent). The employee would fall in the gap between s.100(1)(c) and s.100(d-e) Should, therefore, the position be any different under s.103A? Should the distinction between disclosure and conduct be harder to draw under s.103A? It appears from the authorities and a comparison with s.100 that, realistically, only in few cases will the line between disclosure and conduct be impossible to draw. For the most part, the disclosure will likely only be in the employer's mind or may even have an influence on the ultimate decision, if it is in the employer's mind at all. A disclosure may be context for conduct only, and it must surely be a rare case in which dismissal for conduct can in fact be said to be because of the expression of concern as opposed to otherwise, separately, acting on the concern. Certainly it is difficult to envisage of circumstances in which conduct is inseparable from disclosure but it must always be borne in mind that it is possible.

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