



WHISTLEBLOWING – IS A PERCEIVED DISCLOSURE SUFFICIENT?

In other words, for a Claimant to succeed in a whistleblowing complaint, does s/he need to show that s/he actually blew the whistle, or just that the Respondent *believed* s/he blew the whistle?

Employment Judge Buchanan, in Newcastle, recently had to wrestle with this issue in *Smith v Crown Care V Ltd*, in which I was instructed for the successful Respondent, via DAS Law.

As the case progressed, it was apparent that some of the disclosures upon which the Claimant relied had not actually been made *by her* (if they were made at all). In respect of these disclosures, she had not ‘blown the whistle’ but, nonetheless, it was her case that she was dismissed because the Respondent *believed* she had blown the whistle.

Reference was made to **Abernethy v Mott, Hay & Anderson** and the well-known words of Cairns LJ: “*A reason for the dismissal is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*”.

It was very ably submitted by Mr Antoine Tinnion on behalf of the Claimant that a dismissal would be unfair if the person who dismissed her knew *or believed* she had made a protected disclosure and that knowledge *or belief* caused him to dismiss her. (Neither Counsel nor the judge were aware of any antecedent authority specifically on this issue).

Of course, beliefs - unlike facts - may be false or mistaken. Thus, the Claimant’s position was that, as the employer had erroneously believed that she had made a protected disclosure and dismissed her by reason of that belief, applying **Abernethy**, the dismissal was automatically unfair pursuant to s103A of the 1996 Act.

Having heard the parties evidence, EJ Buchanan found that the dismissing officer dismissed the Claimant for the reasons given by the Respondent; not because of whistleblowing.

Although the Tribunal found that the Claimant’s disclosures had nothing whatever to do with her dismissal, the judge stated, *obiter*, that he did not accept that a mistaken belief by the dismissing officer could have given rise to liability for the Respondent.

In presenting our closing, we had relied upon the wording s27 of the Equality Act 2010, as compared to 103A of the Employment Rights Act 1996. A distinction is apparent.

Section 103A ERA says as follows:



An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

In contrast, s27(1) EqA asserts:

A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

The definition of victimisation under section 27(1)(b) expressly covers situations where victimisation occurs as a result of a belief, even absent any actual protected act. There is no such wording in s103A, despite the whistleblowing legislation having been updated fairly recently.

We also suggested that, to read s103A as if it included a reference to ‘belief’ would make the legal position unsatisfactorily complicated and unclear.

What would the Respondent need to have had a belief of? Would a mere vague belief that a disclosure had been made be sufficient? Or would the Respondent need to have believed that that the disclosure contained information? And that it related to a relevant breach? And that the disclosure was based upon a subjectively held, objectively reasonable belief on the part of the Claimant?

Finally, would the Respondent’s belief about the Claimant’s belief have to be have been objectively reasonable? (Assessing the Respondent’s belief about the Claimant’s belief might lead to some interesting and unusual cross-examination, but it would make the Tribunal’s job even more difficult that it is at present).

As one might have anticipated, the legal position *appears* to remain that, for s103A to bite, the Claimant will need to establish that he/she actually *made* a protected disclosure.

An actual disclosure is a prerequisite to a claim under s103A.

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