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## Whistleblowing: how easy is it to make a qualifying disclosure?

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**Thomas Wood**

**Barrister**

**St John's Buildings**

It is generally assumed that the threshold for a statement made by a worker to qualify for whistleblowing protection is not high. After all, the information provided need only 'tend' to show, in the 'reasonable belief' of the worker that one of the wrongs identified in s.43B Employment Rights Act 1996 is being, has been, or will be committed. Often therefore, an unfair dismissal, or detriment, claim will proceed on the basis, without more, that the worker told the employer something to do with health and safety (or legal obligation or crime etc.). A deeper analysis of the s.43B requirements shows that qualification for protection is not as simple as first appears.

A typical (and entirely fictitious) example of a disclosure is: 'I have worked extra hours this week, and that is in breach of the Working Time Regulations'. The worker alleges a series of detriments and says that that series was caused by this disclosure. The over-simplistic analysis is that the worker told their employer about a breach of a legal obligation, and was therefore protected from suffering detriment as a consequence. Leaving aside the fact of the worker having to demonstrate a causal link between disclosure and detriment, any such claim may not get past the stage of establishing protection. Before presenting that claim, time spent considering the following issues, amongst others, will probably be time well-spent.

The first hurdle that this worker must overcome is that of showing that the disclosure was one 'of information'. Whilst a strict information / allegation dichotomy is now disapproved, its use as illustration of the difference between a statement disclosing information and one that does not remains useful. A disclosure of information conveys facts. There must be sufficient factual content and specificity in the disclosure such that the same is capable of showing a breach of a legal obligation (in this case). There is nothing factual in our example. Assuming the worker is contracted to work 40 hours per week, 'extra' does not tell the listener anything specific about what has actually been worked. Take 'extra' out, and the statement says nothing at all specific. One cannot take the statement and assess whether or not the Working Time Regulations (maximum weekly working time) have been breached. To do so would require, at least, the number of hours to be stated. The importance of first determining whether information has been disclosed cannot be overlooked.

A common error that is then made is to then consider whether the worker reasonably believed that the employer was in breach of the legal obligation. The assessment, instead, is of whether it was reasonable for the worker to believe that the information tended to show the breach. In our example, that question can go hand-in-hand with the question of whether there was information at all: if the disclosure is too vague, arguably it cannot be reasonable to believe that it tended to show a breach of a legal obligation. However, the analysis does not end there. It is one thing to simply refer to 'the Working Time Regulations', but reasonably believing in a breach of the same is another. A Tribunal should consider the allegedly-breached provision

in question. The maximum weekly working time provision (r.4 Working Time Regulations) tells us that a breach would occur if an average of 48 hours were worked over a 17-week period. It is arguably then not reasonable to believe that 'extra' hours 'this' week would result in excessive working time after applying this particular calculation.

This is a brief example of two of the issues that deserve proper consideration when proposing (or defending) a claim based on whistleblowing. The example, of course, says nothing of whether or not it would be reasonable to believe that this personal complaint was in the public interest, which is another issue subject to potentially lengthy argument. The permutations with any disclosure are obviously endless but are worth evaluating before putting pen to paper.

**THOMAS WOOD**

**Barrister St John's Buildings**

**Email – [clerk@stjohnsbldings.co.uk](mailto:clerk@stjohnsbldings.co.uk)**

**Tel – 0161 214 1500**