Browne Jacobson

Employment and Workforce Survey 2021: Blowing the whistle

Whistleblowing claims continue to grab headlines. We provide a recap of whistleblowing tribunal decisions from 2021 and looking ahead to possible changes in 2022.

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Whistleblowing claims continued to grab the headlines last year across every sector of industry specific claims about Facebook's use of data to allegations made about the UK's evacuation from Afghanistan. Indeed, at the time of publishing this article, 10 Downing Street is engaged in a number of issues which could lead to whistleblowing claims of various shapes and sizes.

In December 2021, there were press reports about the resignation of the Chair of an NHS Foundation Trust following the publication of a review earlier that month into the Trust's actions following an anonymous letter sent in October 2018 to a relative of a patient who had died. The Trust had focussed on the mission to 'find the whistle blower' (including requesting fingerprint samples from staff), rather than on whether something had gone wrong with patient care and, if so, how the organisation could learn from it.

Injury to feelings awards

In 2021, we saw injury to feelings compensation of £20,000 awarded to a whistleblower in the case of Appleby v Tavistock and Portman NHS Foundation Trust. In this case, the Claimant was employed as part of the Trust's central Safeguarding team. She made disclosures concerning the reporting of safeguarding issues and the Trust did not dispute that these amounted to protected disclosures. The issue was whether the Claimant had been subjected to detriments as a result. The detriments alleged were grouped into two categories by the Tribunal. The first largely related to the Respondent's treatment of confidential comments made about the Claimant during an internal enquiry. There was no formal investigation process relating to these comments, nor any formal disciplinary sanction awarded; however, the Claimant was informed that a note would be kept on her file. The second group were summarised as disparagement of the Claimant as Safeguarding lead. The Tribunal accepted both groups as detriments to which the Claimant had been subjected because of the protected disclosures. The Claimant did not have any loss of earnings (having remained employed) but was awarded £12,500 for injury to feelings in respect of the first group of detriments, and £7,500 in respect of the second.

Whistleblowing stats

The Ministry of Justice published employment tribunal statistics for the 2019/2020 financial year in September 2020. These statistics showed an increase in whistleblowing claims from 2018/2019 – rising from 2,599 claims to 2,827 claims (their highest number for any of the years included in the statistics (2007/2008 to 2019/2020)).

Employment Tribunal statistics for the period of the pandemic are still awaited but the chances are that this upward trajectory will continue. The 2020/21 statistics have not yet been published; and the quarterly Tribunal statistics for both April to June 2021 (published in September 2021) and July to September 2021 (published in December 2021) do not include Employment Tribunal data due to a migration to a new case management system.

Indeed, Covid-19 is likely to prove a fertile ground for whistleblowing claims, and likely that whistleblowing claims will continue to rise due to pandemic-related concerns – such as those relating to furlough-fraud, the provision of (or rather failure to provide) adequate PPE, and failures to adhere to social-distancing requirements. Concerns arising from management and culture also appear also to be a frequent source of whistleblowing allegations. Prevent, a whistleblowing advice service, reported a 20% rise in callers seeking advice on

whistleblowing in 2020. It also reported that in the first six months of the pandemic, 20% of callers who raised Covid-19 related concerns were dismissed, with this figure rising to one in four employees in the period between September 2020 and March 2021. This is a fairly startling statistic that, sooner or later, is bound to make its way before Employment Tribunals in cases up and down the country.

Our survey indicated that the vast majority of responders were happy with their approach to whistleblowing and the policies in place – with over 80% having no plans to review their arrangements. This is perhaps not that surprising – whilst whistleblowing claims may be on the rise, there have been no substantive changes to the underlying legislation during the course of the pandemic. However, read on for potential changes ahead which may require a re-think in the not too distant future…

In the Tribunal

We've already seen Covid-19-related whistleblowing claims make their way through the Tribunal system – for example:

- Zabelin v SPI Spirits UK Ltd and others - in which an employee was found to have been unfairly dismissed after making protected disclosures, including raising concerns about pay-cuts in breach of contract where the employer was alleged to have been using the pandemic as an excuse to make adverse decisions against staff.
- Arthur v The Protector Group Ltd - in which an employee raised protected disclosures about instructions to breach self-isolation requirements and was found to have been subjected to detriments as a result. Although his dismissal was not because of those disclosures – he was dismissed for attending work during a period of suspension (and lockdown) without authorisation – it was nevertheless held to be both procedurally and substantively unfair.

Covid-19-related whistleblowing claims may well be combined with health and safety claims – not least as one of the categories for qualifying disclosures relates to disclosures that the health or safety of any individual has been, is being or is likely to be endangered. Both of these types of claims have the "advantage" that there is no continuity of service required to bring them, and that unfair dismissal compensation is uncapped.

Interim relief

Whistleblowing claims also have the added possibility of being able to seek "interim relief" – this is a special type of remedy which allows a claimant to seek an urgent hearing where following a dismissal, to consider whether the claimant is "likely" to establish at the full hearing that the protected disclosure was the reason (or principal reason) for dismissal. If this can be established then the Tribunal can order reinstatement, re-engagement or an order for continuation of employment (a right to continue to receive salary and benefits without any obligation to work) will be made.

As well as upping the ante in respect of compensation, even dealing defending an interim relief application is a challenge from a practical perspective. As the stakes are so high, often companies feel compelled to present something close to a full defence of the claim when opposing interim relief applications. What this means in reality is that respondents have to prepare 100% of the defence of a claim but in perhaps 25% (or even less) of the usual preparation time.

Whistleblowing reform?

In March 2021, press reported that a spokesperson for the Department for Business, Energy and Industrial Strategy (BEIS) had indicated that whistleblowing reforms (understood to be changes made in 2017 requiring annual reporting on whistleblowing from regulators) would be reviewed to ensure that they remain fit for purpose. The spokesperson also added that the Government was planning to introduce a single body to enforce workers' rights – including whistleblowing protections – as part of its employment bill.

However, the Queen's Speech delivered on 11 May 2021 did not include any mention of whistleblowing reform, nor in fact any mention of the employment bill that had previously been included in December 2019.

On 8 June 2021, the Government published its response to the consultation on the creation of a single enforcement body for employment rights, indicating that this would be taken forward. The remit, however, was stated to cover responsibility for tackling modern slavery, enforcing the minimum wage and protecting agency workers. There was no specific mention of wider whistleblowing responsibility, despite previous calls from the All Party Parliamentary Group for Whistleblowing for an "Office of the Whistleblower".

On the same day, Paul Scully, the Parliamentary Under-Secretary of State for Business, Energy and Industry, in response to a question about whether the time was now right for the creation of an office of the whistleblower, declined to confirm this and instead said "*It is right and*

proper that we review the whistleblowing framework, and we will do that once we have sufficient time to build the necessary evidence of the impact of the most recent reforms, so we will consider the scope and timing of a review."

17 December 2021 was the deadline for EU Member States to comply with the new EU Whistleblowing Directive (2019/1937/EU). Whilst the UK is no longer obliged to implement this Directive, it is required to maintain "a level playing field" and this could see further changes being introduced to increase whistleblowing protection. This could, for example, include a widening of the categories of who is able to claim whistleblowing protection or requiring certain internal reporting procedures to be introduced.

The area of whistleblowing reform is therefore definitely one to keep an eye out for as we move into 2022 – "parliamentary time allowing", of course.

If you would like discuss the impact of any of the issues raised above on your organisation, please feel free to contact Ian Deakin.

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