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Whistleblower Protection in the UK

On 25 June 2013, four key changes came into effect in the U.K. law protecting whistleblowers in the workplace. The first two changes are subtle amendments to the test applied to identify a protected disclosure, and the second two potentially broaden the scope of an employer's liability for the acts of its employees. What does this mean for employers?

Background

Since the Public Interest Disclosure Act was introduced in 1998, employees in the U.K. have had limited protection from detrimental treatment by their employers if they blow the whistle on their employer's unlawful practices by making a "protected disclosure."

Employees are able to seek compensation if they receive detrimental treatment from their employer on the ground that they have made a protected disclosure and, any dismissal where the reason (or principal reason) is that the employee has made such a disclosure is automatically deemed unfair. If the protected disclosure is the reason for the dismissal, the qualifying period of service to claim unfair dismissal (now two years) is not required and the cap on compensation for unfair dismissal (currently £74,200) does not apply.

However, as demonstrated by recent publicity surrounding the National Health Service (whose severance agreements, like those of many other employers, typically include so-called "gagging clauses" requiring the employee's confidentiality), as well as series of claims in the Employment Tribunals, numerous issues exist surrounding protected disclosures, including disingenuous claims and demand for increased employee protection to encourage workers to come forward.

Removal of the Good Faith Requirement

As originally implemented, the Public Interest Disclosure Act required protected disclosures to be made "in good faith." Following a series of cases where employees had made disclosures of matters that were in the public interest but failed in their unfair dismissal claims because their employers were able to show that the employee's primary motive was to discredit the employer, the "good faith" requirement came under much scrutiny. The employee's motive is rarely clear-cut and in a number of the unsuccessful claims the breakdown in the relationship between the employer and the employee is often inextricably linked to the tension caused by the employer's conduct.

In the Fifth Report on the Shipman Inquiry (into the failure to identify Dr. Shipman's now notorious serial murder of elderly patients), Dame Janet Smith questioned the good faith requirement as focussing the test for protected disclosures on the messenger, rather than the message, stating that "the public interest would be served [by encouraging disclosures], even in cases where the motives of the messenger might not have been entirely altruistic."

The changes to the protected disclosure legislation introduced by the Enterprise and Regulatory Reform Act 2013 (the Act), address this point: for disclosures made before 25 June 2013, the disclosure must be made in good faith, but from 25 June 2013, this requirement does not apply. The employee's motive in making the disclosure is, how-

*If you have any questions regarding the matters discussed in this memorandum, please contact **Helena Derbyshire**, +44.20.7519.7086, helena.derbyshire@skadden.com or your regular Skadden contact.*

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40 Bank Street, Canary Wharf, London, England
Telephone: + 44.20.7519.7000

Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

ever, still relevant, as any compensation awarded to the employee can be reduced by up to 25 percent if the disclosure has been made in bad faith.

In the Public Interest

In place of the good faith requirement, the employee must now have a reasonable belief that their disclosure is "made in the public interest." The change in the legal test is intended to address the situation that arose in a number of cases, culminating in *Parkin v. Sodexho*, where employees were able to rely on their own grievances about their employer's breach of their individual contracts of employment or failure to follow due process as protected disclosures. These claims would no longer succeed unless they also give rise to an issue that is in the public interest *(Department of Business Innovation and Skills Policy Paper June 2013)*.

There is no prescribed test for what is in the public interest, and this will inevitably lead to case law on the point, but the expectation among employment lawyers is that it will be rare that breaches of the employer's legal obligations (for example financial irregularity, discrimination, health and safety, environmental and criminal issues) are not in the public interest. There is likely to be a "triviality" threshold in practice, however, and being "in the public interest" is not the same as "of interest" to the public.

Extension of Liability: Colleagues' Actions

Although the replacement of the good faith requirement with the public interest test makes a subtle difference to the circumstances when a disclosure will be protected, where an employee has a genuine reason to blow the whistle they are likely to be protected from detriment. Employers need to focus on how they will respond to such disclosures to ensure that the detriment does not occur and the more significant change for employers is the extension of liability to fellow employees.

Following the Court of Appeal's decision in *NHS Manchester v. Fecitt [2012]* employees have not had a remedy where they have been victimised by a colleague for making a protected disclosure, even where the employer has done nothing to address the co-worker's conduct. This was a clear deterrent to genuine disclosures.

The Act now provides that workers should not be subjected to a detriment at the hands of a co-worker, for example, in a case where an employee has made a disclosure about a colleague's unlawful conduct.

Individual liability

A co-worker can now be individually liable for subjecting a colleague to a detriment and, therefore, added as a co-respondent to any subsequent claim in the Employment Tribunal (in much the same way as co-workers can be named respondents in discrimination claims if they are the perpetrator of the discriminatory act).

The worker will have a defence if his actions are in reliance on a statement by the employer that the detriment does not contravene the Act and it is reasonable for the co-worker to rely on the employer's statement.

Vicarious liability

Furthermore, the employer can now be liable for the co-worker's actions, whether or not the employer is aware of or approves the conduct in question. The test will be whether the co-worker's actions were in the course of his employment. Assuming that existing case law relating to tortious conduct is followed, the detriment in question should be in connection with what the co-worker is employed

to do. For example, if the co-worker is the employee's line manager and the detriment occurs in the course of the employee's performance review, it clearly would be covered.

Employer's Defence

The employer will have a defence to any claim about a worker's conduct if the organisation can demonstrate that it "took all reasonable steps" to prevent the worker from "doing that thing" or "doing anything of that description." This defence mirrors that already in place for employers to defend claims of vicarious liability for their workers' discriminatory acts in breach of the Equality Act 2010.

As for equality and bribery, to benefit from this defence employers in the U.K. should therefore introduce and proactively implement effective whistleblowing policies identifying what amounts to a protected disclosure, the action to be taken when a disclosure is made and the potential disciplinary sanctions for victimising co-workers for making such a disclosure.