April 2010

Review

Employment

Whistleblowing: disclosure made in previous employment can result in claim against current employer

The Employment Appeal Tribunal ('EAT') has ruled in *BP v Elstone* [2010] UKEAT/0141/09/DM that a worker can bring a whistleblowing claim against his current employer in respect of its response to a protected disclosure he made whilst working for a different previous employer. This is the first time this particular issue has been considered and the EAT took a robust and purposive approach in interpreting the relevant legislation.

"Can a worker pursue a claim against a current employer for a disclosure made during previous employment?"

THE LAW

The Public Interest Disclosure Act 1998 amended the Employment Rights Act 1996 in order to protect employees from suffering a detriment at the hands of their employer (including disciplinary action, loss of work or pay or victimisation) as a result of their making a 'protected disclosure' about alleged wrongdoing to their employer or another prescribed person (usually known as 'whistleblowing'). An employee who considers that he has suffered such a detriment is able to bring a claim in the Employment Tribunal.

The wording of the legislation means that the **disclosure** does not strictly need to be about the employer or the employer's business and as the disclosure can be made to a prescribed third party, it need not be made to the employer. The **detriment**, however, must relate to the worker's employment, as otherwise he could not suffer a detriment such as dismissal or disciplinary action.

THE EAT'S FINDINGS

In this case the issue for consideration was whether a worker can pursue a whistleblowing claim in the Employment Tribunal against his **current** employer in respect of a disclosure made during a **previous** employment. Under the whistleblowing legislation a claimant has to be employed when making the disclosure. The legislation does not, however, stipulate that the employer at the time of the disclosure and the employer against which a claim is brought have to be the same.

Mr Elstone alleged that he had made several protected disclosures about safety issues whilst employed by a company called Petrotechnics, which carried out work for clients which included BP. Petrotechnics dismissed him for gross misconduct as a result. Three days later Mr Elstone started working as a consultant for BP but was subsequently told that BP did not want him to work for them any longer, as Petrotechnics had now told BP that he had been dismissed for disclosing confidential information. Mr Elstone brought a successful Employment Tribunal claim against BP alleging that he had suffered a detriment through his dismissal for making a protected disclosure to Petrotechnics.

BP appealed, but the EAT agreed with the Employment Tribunal that whilst a protected disclosure under the whistleblowing legislation can only be made by someone who is a 'worker' at the time, the legislation does not require that he has to be working for the **same** employer at the time of the alleged detriment. Therefore, although Mr Elstone's disclosure had been made against Petrotechnics, the detriment he suffered was at the hands of his subsequent employer, BP.

The main reasons for the EAT's decision were as follows:

- the EAT considered previous case law including *Woodward v Abbey National* in which the Court of Appeal held that a detriment which occurred after the termination of the employee's

employment could be actionable in the Employment Tribunal, although on the facts in that case the actual disclosure had occurred during the same employment;

- the EAT noted that all the cases it considered were unanimous in the view that the whistleblowing legislation should be interpreted to advance the overall purpose of the legislation, which is to protect those who have 'blown the whistle' in the public interest. The EAT concluded that the legislation's purpose would be less well served if the statutory protection were lost as soon as someone changed employer; and
- with this purpose in mind, although sections 43A and 43B of the Employment Rights Act 1996 require an individual making a protected disclosure to be a 'worker', they do not need to be interpreted in a way which restricts their meaning and protection so that only disclosures made during current employment are protected.

Although the EAT's decision clearly appears to follow the spirit and intent of the legislation, a couple of questions are left. As part of its appeal, BP argued that the EAT's interpretation of the whistleblowing legislation could not be what Parliament had originally intended. It also argued that there appeared to be an omission in the protection afforded by the legislation if an employer rejected a job applicant because he had made a disclosure against a previous employer, the job applicant would have no remedy because a claim that a worker has suffered a detriment under the whistleblowing legislation can only be brought once the employment relationship has begun. However, if he was taken on and then dismissed immediately for exactly the same reason he would, based on *Elstone*, have full protection.

"A job application rejected solely on the basis that the applicant blew the whistle on a former employer would give him no remedy against a prospective new employer."

The EAT actually agreed with BP that the whistleblowing legislation does not protect a prospective worker or job applicant and that this might be an omission in the whistleblowing legislation, but on the facts of *BP v Elstone*, this issue was irrelevant.

Therefore, as the law stands at present, a job application rejected solely on the basis that the applicant blew the whistle on a former employer would give him no remedy against the prospective new employer. This contrasts with the position under other types of discrimination legislation. As soon as the candidate is employed, however, he is protected from day one by the whistleblowing legislation. If the new employer is on notice (because the employee or former employer discloses the fact) that the employee blew the whistle on the previous employer, it runs the risk that the employee can allege that any detriment he suffers in the workplace is because of the earlier whistleblowing. The creation and maintenance of records showing the actual reason for any less favourable treatment will be key in overturning any such suggestion.

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