

Jeffrey Jupp who practises in commercial litigation and employment law explores the issues that arise when an employee blows the whistle on corporate wrongdoing.

THE INTERNAL WHISTLEBLOWER AND CORPORATE WRONGDOING

The allegation which surfaced at the recent Treasury Select Committee hearing into the banking crisis; that the former Head of Group Regulatory Risk at HBOS, Mr Paul Moore, was fired by the then Chief Executive, Sir James Crosby, after warning senior management of the bank of the risk of excessive growth and over reliance on sales targets, highlights, once more, the travails of the corporate whistleblower.

This paper will examine what is a whistleblower and how a whistleblower should be dealt with by their employer in the context of corporate fraud. The paper is not concerned with whistleblowing in the international context¹ nor with whistleblowers who make a disclosure for reward to the Office of Fair Trading (OFT) under the OFT initiative announced in February last year².

¹ For example under the Sarbanes-Oxley Act which provides a cause of action for the employees of US public companies in the event that they are retaliated against for disclosing any conduct which they reasonably believe violates any provision of Federal law relating to fraud against shareholders. This may apply in certain circumstances to US affiliates (see *O'Mahoney v Accenture LLP* (07 Civ. 7916 (VM) (S.D.N.Y. Feb. 5, 2008)).

² This initiative is to run alongside the leniency programme.

What is a Whistleblower?

In the context of employment law the term 'whistleblower' is now generally taken to mean a person who makes a 'qualifying disclosure' within the meaning of s. 43B of the *Employment Rights Act 1996*³. Under the provisions of this Act a worker can bring a claim in the employment tribunal for unlimited compensation if he suffers any detriment (for example, by being ostracised, suspended, disciplined, demoted or dismissed) as a consequence of making a qualifying disclosure.

What is a Qualifying Disclosure?

A qualifying disclosure is any disclosure of information which, in the reasonable belief of the worker⁴, tends to show that any of the following has occurred or is likely to occur: The commission of a criminal offence; the failure of any person to comply with a legal obligation⁵; a miscarriage of justice; the endangering of health and safety; damage to the environment; or the deliberate concealment of any of these matters. It is immaterial whether the conduct or failure complained about occurred either in the UK or elsewhere. It will not be a qualifying disclosure if the person making it commits a criminal offence by making it.

In order to acquire the protection of the Act the disclosure must be made to any of the following:

- a. The employer or other responsible person⁶.
- b. A legal adviser during the course of taking legal advice.
- c. A prescribed person⁷, provided the disclosure is made in good faith and the worker reasonably believes that the disclosure falls within any description of the matters in respect of which the person is so prescribed and that the information or allegation is substantially true.

³ ERtsA

⁴ The reference to 'worker' indicates that the protection is afforded to people who may not be employees but to a wider class of persons (essentially those falling between being an employee and being genuinely self employed).

⁵ The complaint does not have to be about the wrongdoing of the employer but can be of any person *Hibbens v Hesters Way Neighbourhood Project* UKEAT 0275/08

⁶ Section 43C ERtsA.

⁷ Prescribed persons include, for example: The FSA, HSE, OFT, Environment Agency, HMRC and Audit Commission. See *Public Interest disclosure (Prescribed Persons) Order 1999 SI 1549*

- d. In limited circumstances to any other person, for example, where the worker believes he will suffer a detriment or evidence will be concealed or destroyed, and he makes the disclosure in good faith, in the belief that the information disclosed and the allegation are substantially true, he does not make the disclosure for personal gain and it is reasonable for him to make the disclosure⁸.

Applying the law

It is useful to apply the principles to a factual scenario. For example, A Ltd, a UK registered company, has a subsidiary, B Ltd, also registered in the UK. B Ltd has secured a contract to construct a power station in a West African country. A manager, Smith, of A Ltd is seconded to B Ltd after the contract has been secured and is in the process of being performed. He is sent out to Africa to carry out a technical report. During his time in Africa he is told, in conversation in the hotel bar one night, that B Ltd secured the contract by paying a substantial bribe to a local government official who is identified by name. On his return to London he writes an email to his line manager in which he informs the line manager of what he has been told and expresses concern about it.

Provided that Smith reasonably believes that the information he passed on tends to show that a bribe has been given by B Ltd, he will be making a qualifying disclosure. The disclosure is made to his employer, it tends to show that a criminal offence has been committed (s. 43B(a)) and/or that a person (in this case B Ltd and the recipient of the bribe) has failed to comply with the legal obligations to which they are subject (s. 43B(d)).

Assuming that at the time that the bribe was given it was not an offence in the UK for B Ltd to bribe the foreign official but it was an offence in the country concerned, would the disclosure still amount to a qualifying disclosure? The answer to this

⁸ Section 43G ErtSA. In determining whether it is reasonable regard has to be had to a list of matters in s. 43(4) ErtSA which include the identity of the person to whom the disclosure was made, the seriousness of the matter, whether there is any breach of confidentiality etc

question is clearly yes. Section 43B(2) of the Act provides that it is immaterial whether the relevant failure occurred, occurs, or would occur in the UK or elsewhere and whether the law applying to it is that of the UK or any other country or territory.

What should the employer do with a whistleblower on learning of the disclosure?

It is perhaps best to start with what the employer should not do. The employer should not suspend the employee, nor should he institute disciplinary proceedings. The employee who makes the qualifying disclosure is doing nothing wrong and any suggestion that he is, either expressly or by implication, is likely to be regarded as a detriment and breach of the implied term of trust and confidence. Should the employee choose to resign in the face of it he is likely to have the foundation for a constructive dismissal claim with the added attraction of a potentially unlimited award in the employment tribunal and of course the negative impact of any attendant publicity.

In most large organisations there will be a whistle blowing policy which should be followed. In some cases the complaint will be made anonymously through a confidential helpline in which case any investigation will have to be conducted without recourse to the whistleblower.

Assuming, as in the example above, the whistleblower is known, the most sensible approach, before the allegation becomes widely known and tainted or influenced by other factors, is to interview him.

Preparing for the Interview

Before interviewing the whistleblower it must be stressed to him, preferably in writing, that the company takes the allegation very seriously, that the employee is thanked for bringing the allegation to the company's attention and that the interview is simply to gather as much information as possible before investigating the matter further. The tone should, so far as possible, be informal and there should be no hint or suggestion of any disapproval on the part of the employer. The

invitation to the interview should be made internally and not from external legal advisers

Interviewing the Whistleblower

Prior to the Interview the person who conducts it must have a clear objective as to what he wishes to achieve. He should have a clear understanding of the potentially criminal and regulatory issues that arise. He should understand the context of the allegation and the factual circumstances surrounding it. In the context of a case of the nature of the allegation above he would be well advised to have sought legal advice as to the regulatory and criminal issues that arise.

Issues that commonly arise

Who should conduct the interview? The interview will be part of an investigation into the wrongdoing. It is important therefore that any person who may ultimately be involved in the disciplinary procedure or any disciplinary appeal does not oversee the investigation.

Is the whistleblower entitled to be legally represented? What if the whistleblower indicates that he is only prepared to be interviewed with a solicitor present? Technically, whether or not to permit a solicitor to be present is a matter for the employer and generally, to use the Obama phrase, it is better that everybody is not 'lawyered up' because this is likely to prohibit full and frank discussion. However, practically, if the matter is serious (as in the example above) and the employee wishes to be represented at his own cost, then it would probably look unnecessarily defensive to prohibit this without good reason.

Is the interview confidential? Yes. At the commencement of the interview the interviewer should make it clear to the whistleblower that what the interview is confidential and that the allegations should not be discussed other than with the

employee's own legal advisor so as not to taint other information or lead to unnecessary speculation.

Will any interview notes be privileged? A simple interview carried out by a manager as part of an investigation will not be privileged. A document prepared where the dominant purpose is for the seeking of legal advice will be privileged under the legal advice privilege principle. It might be thought that if the intention is to obtain the whistleblower's account before seeking legal advice that a claim for privilege may succeed. It is arguable but no more than that. The dominant purpose is as likely to be regarded as an intention to establish facts⁹ for the wider purpose of the investigation of wrongdoing and/or in cases where there are reporting obligations to regulators, such as the FSA, for the purpose of fulfilment of those obligations¹⁰. If the interview is conducted by a qualified lawyer then a claim for privilege may be more readily sustainable. It is of course a question of balance. On the one hand the involvement of lawyers will inhibit full and frank discussions. On the other hand it may be possible to claim legal privilege more readily if lawyers are involved although this is by no means certain.

Can the whistleblower remain anonymous? The whistleblower may, and often will, ask that his name is not revealed in the investigation. Whilst the whistleblower should be encouraged to proceed on the basis that his name may at some point be revealed, if he refuses to provide the detail of the complaint unless anonymity is guaranteed then practically the employer will have little choice but proceed on that basis. The employer should not refuse to hear the complaint because the whistleblower is not prepared to be identified as the complainant.

Should interview notes be disclosed to the whistleblower? If notes are to be taken then consideration should be given as whether a copy should be made available. An employee has no right to see such notes. But in the case of a whistleblower who is

⁹ See *Three Rivers District Council v Bank of England* [2003] 3 WLR 667

¹⁰ Note s. 413 Financial Services and Markets Act 2000 which enacted the right to claim legal professional privilege in statutory form in FSA investigations..

not implicated in any wrongdoing there is no reason why such notes recording simply what was said should not be made available on a confidential basis, subject to the issue of privilege.

A distinction should be drawn between a simple record of what was said and any note which adds comment by way of points to note on which to seek legal advice. A note of the latter kind, if it is intended to be sent to the company's legal advisers, will attract legal advice privilege. If it is thought that there may be advantages in seeking to claim privilege in respect of the interview generally then even the simple record of what was said should not be disclosed as to do so will waive privilege.

Should a witness statement be taken? Consideration should be given at the earliest stage to reducing the interview notes to the form of a written statement particularly where it is considered that criminal and/or regulatory issues arise.

Is the whistleblower entitled to be kept informed of the progress of the investigation? There is no obligation to keep the whistleblower informed of the detail of the investigation although it is good practice to do so. He may, from time to time, seek reassurance that his complaint has been acted on and if he does then such reassurance should be given and some indication of what progress the investigation has made without revealing its detail can be given.

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12th February 2009

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