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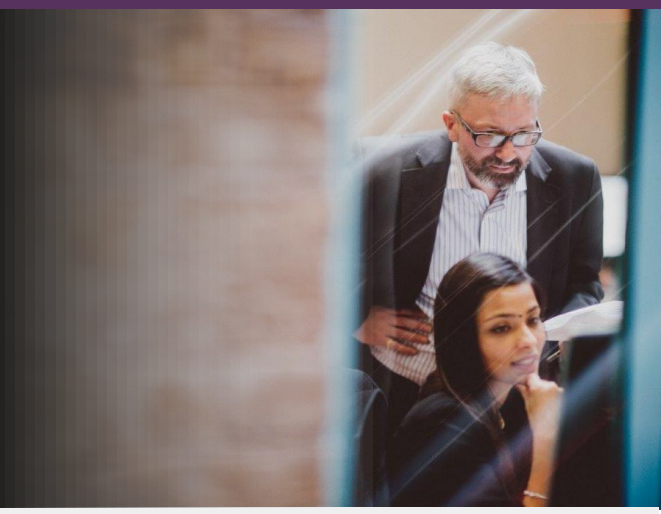
Whistleblowing and the Public Interest Test



July 2017

On 10 July 2017, in the case of Chesterton Global Ltd (t/a Chestertons) & Anor v Nurmohamed, the Court of Appeal reached a decision after considering the meaning of the words '*in the public interest'*.

The public interest test

Under current whistleblowing legislation, a worker must make a 'qualifying disclosure' to be protected against any detriment or dismissal.

A 'qualifying disclosure' is any disclosure of information, which is made and believed to be in the public interest and tend to show that one or more of the six specified types of wrongdoing has, have or is likely to take place, i.e.:

1. a criminal offence;
2. someone's health and safety is in danger;
3. risk or actual damage to the environment;
4. a miscarriage of justice;
5. the company is breaking the law; and/or
6. you believe someone is covering up wrongdoing.

There is no definition of '*public interest*' in the Employment Rights Act 1996 (ERA 1996), but the Employment Appeal Tribunal (the EAT) have considered it twice and the words '*in the public interest*' were added to section 43B(1) of the ERA 1996 for disclosures made on or after 25 June 2013.

This was intended to reverse the effect of Parkins v Sodexho Ltd, in which the EAT held that the definition of a '*qualifying disclosure*' was broad enough to cover a breach of the whistle-blower's employment contract, despite the fact that the case did not appear to have a '*public interest*' aspect.

Chesterton Global Ltd (t/a Chestertons) & Anor v Nurmohamed

The facts

Mr Nurmohamed was employed by the estate agent, Chestertons. In 2013, following changes to the company's commission structure, Mr Nurmohamed made disclosures to the directors, in which he complained about the manipulation of the company's accounts, which he believed had an adverse effect on his commission income.

Mr Nurmohamed claimed that the company was deliberately supplying inaccurate profit and loss figures to its accountants, which overstated the company's costs and liabilities. This resulted in lower commission payments for around 100 senior managers (including Mr Nurmohamed). This in turn made the company appear more profitable to its shareholders.

Mr Nurmohamed was subsequently dismissed and took legal action against Chestertons.

Employment tribunal findings

An employment tribunal found that Mr Nurmohamed had been automatically unfairly dismissed and that Chestertons had subjected him to detriments because he had made protected disclosures.

Noting the lack of authority on the meaning of '*in the public interest'*, the tribunal said that it was not required that a disclosure had to be of interest to the entirety of the public, as it was inevitable that only a section of the public would be directly affected by any given disclosure.

The tribunal concluded that it was Mr Nurmohamed's reasonable belief that the disclosures were in the interest of the 100 other senior managers of Chestertons and that this was a sufficient group of the public to constitute being '*in the public interest, and* even though Mr Nurmohamed had been motivated by concerns about his own income.

Chestertons appealed the finding in the EAT arguing that:

- It could not be said that disclosures made in the interest of 100 senior managers were '*in the public interest*', as this was not a sufficient section of the public.
- It was for the tribunal to determine objectively whether the disclosures were of real public interest, and it failed to do so.

The EAT dismissed the appeal.

Court of Appeal Decision

Chestertons then appealed the meaning and the application of the facts of the phrase '*in the public interest*' in the Court of Appeal.

The question considered was whether a disclosure, which is in the private interest of the worker making it, becomes '*in the public interest'* simply because it serves the (private) interests of other workers as well.

Lord Justice Underhill considered whether the '*public interest'* should be determined by the number of people affected or whether it depended on the nature of the disclosure itself. He considered the example of doctors' hours; stating that when hospital doctors are required to work excessive hours, this might well be in the public interest, as well as in the personal interests of the doctors themselves, because of the risk to patients.

The appeal was dismissed. Lord Justice Underhill stated that it is necessary to consider all the circumstances in the case and that the following factors are a useful tool to consider in determining whether the disclosure is of real '*public interest'*:

1. the number of those in the group whose interest the disclosure serves;
2. the nature of the interest affected and the extent to which they are affected by the wrongdoing disclosed;
3. the nature of the wrongdoing disclosed; and
4. the identity of the alleged wrongdoer.

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Conclusion

Following the Court of Appeal's decision, it is important for employers to be aware that where an employee makes a disclosure of an alleged wrongdoing, certain circumstances may make it reasonable for the disclosure to be considered '*in the public interest'*.

It is vital that employers seek legal advice before making any decisions regarding a potential whistle-blower and ensure that they have adequate whistleblowing policies in place.

Emma de Graauw
020 7299 6928
emma.degraauw@riaabg.com
www.riaabarkergillette.com