

Employees and workers planning to blow the whistle protected by whistleblowing laws

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Employees and workers planning to blow the whistle protected by whistleblowing laws

A recent decision of the Employment Tribunal has significantly expanded whistleblowing protection in the UK. In *Bilsbrough v Berry Marketing Services Ltd* the Employment Tribunal ruled that whistleblowing protection extends to those who are perceived or believed to be preparing to blow the whistle but have not yet done so.

What does the law say?

Workers who blow the whistle have the right not to be subjected to detrimental treatment on the ground that they have made a protected disclosure. In addition, employees have the right not be dismissed because they have made a protected disclosure. On the face of it, the legislation does not protect those who are preparing to blow the whistle but have not yet done so.

What happened in this case?

Mr Bilsbrough, was employed by Berry Marketing Services Ltd. He discovered a potential data security issue and reported it to a director of the company, rather than his line manager, Ms Swatkins. Although the disclosure had been made in accordance with the company's whistleblowing policy, Ms Swatkins was unhappy about being bypassed and very firmly told Mr Bilsbrough that he should "*engage his brain*" in future.

Mr Bilsbrough resented being spoken to in this manner and later told a colleague that he planned to "*take the company down*" by externally reporting the data security issues that he had uncovered. He began researching how to make a disclosure to the Information Commissioner's Office (ICO). Ms Swatkins heard about Mr Bilsbrough's plan and decided to suspend him pending disciplinary action. At the end of the disciplinary process, Mr Bilsbrough was summarily dismissed for having declared an intention to damage the company.

Mr Bilsbrough went on to bring claims alleging he had been subjected to detriments and dismissed because he was planning

to blow the whistle.

What was decided?

Mr Bilsbrough had to convince the Employment Tribunal that the whistleblowing legislation covered proposed protected disclosures as well as actual protected disclosures in order to give effect to his right to freedom of expression under the European Convention of Human Rights.

Breaking new ground, the Tribunal accepted this argument. They agreed that detrimental treatment meted out on the ground that a worker had researched and considered whistleblowing (or a dismissal because they had done so) would interfere with the right to freedom of expression. The Tribunal noted that *"...without such an interpretation, effective protection in the context of whistleblowing is not given... [I]f employers are permitted lawfully to sanction workers whom they perceive to have considered making or be liable to make a protected public interest disclosure this would have a chilling effect on the making on public interest disclosure."*

The result was that the detriment claim succeeded. The suspension decision had been driven by the belief that Mr Bilsbrough had researched and considered making a protected disclosure to the ICO. However, the requirements to remove work-related material from a laptop and to cease contact with other employees were not separate whistleblowing detriments. Instead, they were *"consequences"* of the suspension, albeit they made the impact of the suspension worse. Taking all of this into account, the Tribunal awarded the sum of £2,500 for injury to feelings.

Yet the more valuable dismissal claim failed. The Tribunal decided that Mr Bilsbrough had been dismissed because of his threat to bring the company down, not because of the actual or proposed whistleblowing. The Tribunal was satisfied that the threat had caused legitimate concern about how he would behave

in future if he became angry with his manager.

What are the learning points?

This is a significant decision signalling the expansion of whistleblowing protection. However, as a first instance decision on a novel point of law, it is quite possible that there will be further appeals. Therefore, it may be some time before we have a binding authority on whether potential whistleblowers are protected. However, it is worth noting that the whistleblowing charity, Protect, is lobbying for the legislation to be amended to cover both potential whistleblowers (such as Mr Bilsbrough) and perceived whistleblowers (i.e. those who are wrongly assumed to have blown the whistle).

In the meantime, employers would be wise to exercise caution when it comes to employees who they suspect or believe may blow the whistle. The safest course of action would be to work on the assumption that they are protected from detrimental actions and dismissal and seek legal advice on your options.

[Bilsbrough v Berry Marketing Services Ltd](#)

If you would like to discuss any of the issues raised in this article, please contact [Amanda Steadman](#) on 020 3828 0363 or email amandasteadman@bdbf.co.uk.

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