Employees who report bullying and harassment of other staff may qualify as whistleblowers

Two recent Employment Tribunal decisions have made it clear that employees who report the bullying or harassment of other members of staff may qualify as whistleblowers in law, meaning that they will have special protection from detriment and dismissal from Day 1 of their employment.

What happened in these cases?

Case 1 – Cameron-Peck v Ethical Social Group Ltd and others

The claimant was employed by Ethical Social Group as the CEO of one of its two subsidiaries, Wndr Social. She was employed from 1 August 2021 until she resigned with immediate effect on 28 October 2021.

The claimant received complaints from staff members about bullying by Ms Alexander, the CEO of Fluttr, the other subsidiary company. On 3 September 2021, around one month into her employment, the claimant sent a WhatsApp message to Mr Pullam, the Founder and Group CEO, telling him about staff contacting her in tears about the bullying and rudeness they had experienced and the way they had been treated. On 4 September 2021, the claimant expanded on her concerns in a telephone call with Mr Pullam. On 6 September 2021, she sent

an email to Mr Pullam explaining her concerns further, setting out 19 numbered examples of Ms Alexander's bullying behaviour. She did not receive any response or follow-up to the message, discussion or email.

On 15 October 2021, the claimant had a telephone conversation with Mr Pullam, which she secretly recorded. She asked Mr Pullam why there had been no follow-up to her complaints about the bullying. Mr Pullam said they had discussed it and asked her what further discussions she wanted. The claimant said nothing had been done and that the behaviour had carried on. Mr Pullam asserted that he did address the bully and he asked others who all said they had not seen or experienced any bullying. After the phone call, the claimant was removed from certain meetings, ostensibly so she did not have to come into contact with Ms Alexander. However, this left her feeling isolated and vulnerable.

On 18 October 2021, the claimant attended a video meeting with the Chief People Officer and Chief Talent Officer of Ethical Social Group. In the course of that discussion, the claimant revealed she had recorded the telephone call with Mr Pullam. On 19 October 2021, the claimant was removed from a company WhatsApp group and suspended pending a disciplinary investigation. She was not told why she had been suspended. The claimant resigned the next day giving three months' notice. The claimant was then invited to a disciplinary hearing to be held on 5 November 2021. She was not told of the allegations of misconduct that she had to answer. In the meantime, a colleague told the claimant that she had been asked to write a new HR policy stating that the making of covert recordings constituted gross misconduct. The colleague said she thought the claimant was being "set up" and that the newly created policy was going to be used to dismiss the claimant for gross misconduct.

On 28 October 2021, the claimant resigned with immediate effect. She did not have sufficient service to bring an "ordinary" unfair dismissal claim. However, she claimed that had been automatically unfair dismissed for blowing the whistle (for which no minimum period of service is required). At the hearing, the Employment Tribunal had to decide whether the claimant's disclosures about bullying amounted to protected disclosures, which would attract protection as a whistleblower.

Case 2 – Mysakowski v Broxborn Bottlers Ltd

The claimant was employed by Broxborn Bottlers Ltd between 7 November 2022 and 19 April 2023. On 13 April 2023, around five months into his employment, he raised concerns with a manager about an incident of sexual harassment he had witnessed. He said he had seen a senior male manager massaging the shoulders and neck of a junior female employee. The claimant said he understood that the female employee was uncomfortable, and that he felt that it was inappropriate conduct. When asked to name the individuals involved, he refused on the basis that the female employee involved had asked him not to. The manager told the claimant that the company could not investigate the matter unless it knew who was involved. The claimant said he did not feel he could name the individuals and asked whether, instead, the company could issue a general reminder to staff about appropriate conduct in the workplace.

The claimant's employment was terminated on 19 April 2023. He claimed that he had been automatically unfair dismissed for blowing the whistle. A Preliminary Hearing was held to determine whether the claimant had, in fact, made a protected disclosure.

What was decided?

In order for a disclosure to amount to a "protected disclosure" it must pass the following test:

1. The disclosure must be a disclosure of information, which means it must convey facts and not just allegations.

2. The disclosure must relate to one of six defined types of malpractice/wrongdoing and the worker must reasonably believe that the information disclosed tended to show such malpractice. Included in the six types of malpractice are reports about breaches of any legal obligation or dangers to the health and safety of any individual.

3. The worker must reasonably believe that the disclosure is in the "public interest". Public interest is not defined in law, but relevant factors include the numbers of people whose interests are affected, the nature of the interests affected, the nature of the wrongdoing and the identity of the wrongdoer.

4. The disclosure must be made to one of a number of specified persons and made in the right way.

The public interest test was introduced in 2013 and was intended to prevent workers from claiming that grievances

about breaches of their *own* employment contracts were breaches of a legal obligation capable of amounting to a protected disclosure. The cases discussed in this article concerned grievances about breaches of *someone else's* employment contract or rights. In both cases, the employers sought to argue that this meant the disclosures were not in the "public interest" and, therefore, were not protected disclosures.

In Cameron-Peck, the Employment Tribunal approached the disclosures about the bullying of staff not as disclosures about breaches of a legal obligation, but, rather, as disclosures that tended to show that the health or safety of individuals had been, was being or was likely to be endangered. The fact that the claimant had explained how she and other employees were upset by the bullying was sufficient to show this. The health and safety of employees is an important matter and several staff had been affected. As such, it was reasonable for the claimant to have believed the disclosures were in the public interest. The Tribunal concluded that the claimant's disclosures about Ms Alexander's bullying passed the necessary tests and were protected disclosures. The claimant went on to win her claim and was awarded compensation of £185,000.

In Mysakowski, the Employment Tribunal approached the disclosures as disclosures which tended to show a failure to comply with a legal obligation, namely, obligations under the Equality Act 2010. The Tribunal concluded that the claimant believed that the information disclosed was in the public interest and it was reasonable for him to have held that belief. It noted that he had given evidence to the effect that he had heard rumours about the senior male manager's conduct towards female employees and wanted to raise what he had witnessed to try to protect others in the workplace. Given these findings, the Tribunal concluded that the claimant made

a protected disclosure, meaning his claim may now proceed to a final hearing on the merits of his claim.

What do these decisions mean for employers?

These decisions highlight that complaints about the mistreatment of others may amount to protected disclosures attracting whistleblowing protection. Although the complaints may, on their face, concern individual employment relationships, they may still engage matters of public interest.

As far as bullying is concerned, while there is no statutory protection against bullying *per se*, it stands to reason that bullying is going to harm the wellbeing of the victim and risk their health and safety. Alternatively, it could be viewed as a "breach of a legal obligation", such as the Health and Safety at Work Act 1974, or the implied contractual duty to take reasonable care of an employee's health and safety at work. The fact that only one or two staff may have been affected will not mean the disclosure is outside the public interest. Ultimately, it will come down to what the employee reasonably believed at the time of making the disclosure, but it is not difficult to see how a disclosure aimed at protecting people from a serial bully would be enough to pass the test.

As far as harassment or other forms of discrimination are concerned, this would represent a potential breach of the Equality Act 2010. Depending on the circumstances, it could also be something which risks health and safety and/or breaches health and safety law. Again, the fact that a small number of staff are affected (even just one, as in Mysakowski)

will not make a difference. It will likely be reasonable for an employee who witnesses an act of discrimination or harassment from a senior manager to say they believed that the disclosure was aimed at protecting other staff from such treatment in the future.

Practically speaking, this means that employers in this situation should consider dealing with such complaints under internal whistleblowing procedures (where there is one) instead of, or in addition to, an individual grievance procedure. For organisations subject to the FCA's and PRA's whistleblowing framework, this will mean, amongst other things, ensuring that the confidentiality of the whistleblower is preserved, escalating the concerns appropriately both internally and to the FCA or PRA, providing appropriate feedback to the whistleblower and including information about the matter in the annual report to the Board.

It is important to identify when an employee might acquire whistleblowing protection. If a whistleblower is mistreated as a result of having made a protected disclosure, they will be entitled to bring a detriment claim seeking compensation for losses flowing from that detriment and for injury to feelings. In the event that they are dismissed, they will be entitled to claim automatic unfair dismissal from Day 1 of their employment and seek uncapped compensation for losses flowing from the dismissal. Further, an employee who has blown the whistle about discrimination or harassment could also have a separate claim for victimisation under the Equality Act 2010 if they are subjected to detrimental treatment for having raised those concerns.

Cameron-Peck v Ethical Social Group Ltd and others

Mysakowski v Broxborn Bottlers Ltd

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.