Employment

Long Awaited Court of Appeal decision considers 'public interest' test in whistleblowing protection

Posted on 11 July, 2017 by | Alice Mayhew | Marianne Tutin

The Court of Appeal has considered the meaning of the words "in the public interest" which were added to whistleblowing legislation by the Enterprise and Regulatory Reform Act 2013 in order to reverse the effect of *Parkins v Sodexho Ltd* [2002] IRLR 109. Its decision requires Employment Tribunals to apply a pragmatic and fluid approach to the question of what "a reasonable belief in the public interest" means.

The Claimant was employed by Chesterton Global Limited ('Chestertons') as Director of its Mayfair office. Following his dismissal, he brought proceedings in the Employment Tribunal alleging that he had suffered detriments and been dismissed because he had made protected disclosures within the meaning of section 43B of the Employment Rights Act ('ERA') 1996.

At first instance, Mr Nurmohamed was found to have made disclosures that accounts had been incorrectly stated to the benefit of shareholders, which affected the commission of over 100 senior managers including himself. The Tribunal concluded that the disclosures were made in the belief of Mr Nurmohamed that it was in the interest of 100 senior managers, which was a sufficient group of the public to amount to being a matter in the public interest. Chestertons appealed the decision of the Tribunal to the Employment Appeal Tribunal. At the Employment Appeal Tribunal the argument centred on whether the correct test was that the worker had to have a reasonable belief that the disclosure was in the public interest [2015] IRLR 614. However, by the time the matter came before the Court of Appeal in *Chesterton Global Limited & Anor v Nurmohamed* [2017] EWCA Civ 979, the argument had moved on to concern the meaning of the words "in the public interest".

In the Court of Appeal, Lord Justice Underhill confirmed that a worker's reasonable belief that their disclosure was made in the public interest has a subjective and objective element, applying *Babula v Waltham Forest College* [2007] EWCA Civ 174. A claimant's belief may be reasonable even if it is wrong. As a result, there may be more than one reasonable view as to whether a disclosure was in the public interest and Tribunals should avoid substituting its own view of whether the disclosure was in the public interest for that of the worker. This was to be expected and the real question turned on what the words "in the public interest" meant.

Lord Justice Underhill held that a worker's reasons for making a protected disclosure are not strictly relevant to the legal issues. The necessary belief is simply that the disclosure is in the public interest: the particular reasons why the worker believes that to be so are not of the essence. A worker making the disclosure can seek to '*justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it*'. Further, while the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be their predominant motive in making it. That said, the judge recognised that this is an evidentiary matter: if the worker cannot give credible reasons for why he thought at the time that the disclosure was in the public interest that may cast doubt on whether they really thought so at all.

The particular issue which arose in this case 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. Whilst making it clear that he did not think that there was much value in putting a general gloss on the phrase "in the public interest", Lord Justice Underhill concluded that, where a disclosure relates to a breach of the worker's own contract of

employment, there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker. The Court of Appeal confirmed that factors such as the number of workers affected, nature of interests affected, nature of wrongdoing disclosed and identity of the alleged wrongdoer may be relevant. The Tribunal deciding the matter must consider all the circumstances of the case before it. The clarity provided by the guidance is welcomed.

In the context of Mr Nurmohamed's case, the Tribunal had found the disclosures to be in the public interest. The Court of Appeal upheld that finding noting that, even if there had been an error of law by the Tribunal, that error was immaterial. In addition to the number of managers affected, the disclosures were said to be of deliberate wrongdoing, the alleged wrongdoing to the tune of £2-3 million was sizeable and the employer was a substantial and prominent business in the London property market. Chestertons' appeal was dismissed.

Alice Mayhew acted for Mohamed Nurmohamed at the Employment Tribunal, Employment Appeal Tribunal and in the Court of Appeal.

Marianne Tutin assisted Alice Mayhew whilst in pupillage at the Employment Appeal Tribunal stage.

Alice Mayhew is a specialist in employment litigation. Her work covers a wide spectrum of complex cases including all types of discrimination, equal pay, whistleblowing and breach of contract claims. She regularly appears in the Employment Tribunal and High Court, as well as the appellate courts. Alice is recommended as a leading junior for employment by both Chambers UK and Legal 500.

Marianne Tutin is developing a strong and diverse practice in Employment and Discrimination Law. She has considerable experience representing both Claimants and Respondents in Employment Tribunals and has worked for a variety of large organisations, including multinational companies, SMEs, airlines, local authorities, police forces and other public bodies. Marianne is forging a particular specialism in complex whistleblowing and discrimination cases and has written extensively on the scope of protection.