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Practice Group(s):

*Labor, Employment
and Workplace Safety*

Case Alert: Employee Fairly Dismissed for Contacting the Information Commissioner's Office Against Instructions

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What happened?

In *Barton v Royal Borough of Greenwich*, the Employment Appeal Tribunal (the "EAT") decided that an employee was fairly dismissed for misconduct after failing to adhere to his employer's instructions not to contact the Information Commissioner's Office (the "ICO") whilst internal investigations were being conducted into an alleged breach of the employer's data protection obligations. The Claimant had claimed unfair dismissal due to whistleblowing, and argued that the employer's prohibition was unlawful. Both the Employment Tribunal and EAT dismissed his claims.

The UK's whistleblowing legislation protects employees from being subjected to any detriment or dismissal that arises as a result of that employee making a "qualifying disclosure" of information to his employer. However, where the employee makes a disclosure to an external body such as the ICO (which is a "prescribed person" under the whistleblowing legislation), additional requirements must be met for the disclosure to be protected including, in particular, that the employee must reasonably believe that the information disclosed and any allegation contained in it are substantially true. The employee must also be able to demonstrate causation, i.e. that he was subjected to detriment or dismissal because of whistleblowing.

In this case, the Claimant initially contacted the ICO (not his employer) upon hearing allegations that a senior manager had breached certain data protection obligations. He subsequently discussed the issue with his employer who told him that his concerns would be investigated promptly and directed him not to contact the ICO or any other external authorities again without permission from his line manager. Ignoring this instruction, the Claimant then telephoned the ICO to ask for advice (this was not a "qualifying disclosure" for whistleblowing purposes) which his employer regarded as a serious breach of duty. Given that the Claimant was already subject to a final written warning for an unrelated matter and was also found to have committed gross misconduct in a separate incident, the Claimant was summarily dismissed.

Although the EAT agreed that the Claimant's first communication with the ICO was a qualifying disclosure for the purposes of the whistleblowing legislation, the higher threshold required for protection when a disclosure is made to a prescribed person was not met and so the disclosure was not protected. The information disclosed turned out to be wholly untrue, but the Claimant had "jumped the gun" and disclosed it to the ICO without seeking any sort of verification as to the truth of the allegations. In any event, the Claimant would have had difficulty demonstrating causation as he was not dismissed due to his initial communication with the ICO. Instead, he was dismissed due to his failure to comply with a reasonable instruction from his employer not to contact the ICO without his manager's consent, along with other incidents which resulted in disciplinary proceedings.

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Although it was not required to decide this point, the EAT considered the instruction not to contact the ICO to be lawful as the prohibition was for a short duration, only prohibited the Claimant from contacting the ICO without the consent of his manager and there was no evidence to suggest that such a request would have been refused.

The EAT therefore dismissed the Claimant's whistleblowing claims. It concluded that his misconduct was the reason for his dismissal and that the decision to dismiss him was reasonable, taking into account his disciplinary history.

What does this mean?

The whistleblowing legislation was intentionally drafted to encourage employees to disclose information to their employers in the first instance and this case emphasises the difficulty for employees seeking protection where they instead choose to make a disclosure to an external authority. If the Claimant had disclosed the alleged breach of the data protection regulations to his employer, he would not have been required to meet the higher threshold of having a reasonable belief in the truth of the allegations and his disclosure may have been protected. It is also essential that the employee is able to demonstrate that he was dismissed because he made a protected disclosure - it is not sufficient to demonstrate that a protected disclosure was made at a similar time to any detriment or dismissal suffered without establishing a casual link.

What should we do?

Employers should not take this case as meaning that they are able to restrict an employee's ability to contact external authorities. In this instance, both the Employment Tribunal and EAT viewed the employer's prohibition as reasonable; however it was a very limited restriction in that the employer did not seek to impose a blanket ban on the employee contacting the ICO. In any event, such an instruction would not be effective in preventing a protected disclosure being made to an external authority (in this case, the Claimant's first call to the ICO was a qualifying disclosure but it was not protected as the higher threshold was not met).

However, employers should strongly encourage employees to make disclosures internally in the first instance, as this enables employers to conduct their own internal investigations and also works to the employee's advantage as he or she will not have to meet the more stringent requirements to receive protection under the whistleblowing legislation.

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