UK: EMPLOYMENT UPDATE

In this month's briefing there is a single theme: 'whistleblowing'. We take a look at recent decisions exploring a number of different aspects of whistleblowing claims: when will a tribunal have the jurisdiction to hear a whistleblowing detriment claim brought against co-workers who worked exclusively outside the UK; whether the lawful expulsion of a partner from an LLP precluded his claim for damages in relation to pre-expulsion detrimental treatment by the other LLP members; and finally a case which considers whether the individual who subjects a whistleblower to detrimental treatment has to be personally motivated by the protected disclosure.

Key issues

- Whistleblowing claims against individual employees based overseas
- Whistleblowing: LLP members can claim post-expulsion financial losses attributable to detrimental treatment
- Detrimental treatment: who has to be personally motivated by the protected disclosure?

Whistleblowing claims against individual employees based overseas

Generally speaking most statutory employment claims are pursued against the employer (or former employer). In some circumstances, however, claims can be brought against named individuals who were colleagues of the claimant. The Equality Act 2010 permits discrimination claims to be brought against named individuals, similarly whistleblowing detriment claims can be pursued against other workers engaged by the claimant's employer. Claims may be pursued against individual respondents for a variety of reasons: as a tactical measure, in circumstances where the financial situation of the employer is questionable and the individuals have deep pockets or where the claimant simply feels the need for vindication by means of a judicial declaration in the form of a Tribunal judgment against the individual in question.

Can a claim be brought against a colleague who is based outside the UK? Does the Tribunal have territorial jurisdiction in these circumstances? How is this determined? The Employment Appeal Tribunal (EAT) has considered these issues for the first time in relation to a whistleblowing detriment claim.

The claimant, C, worked in Kosovo for the FCO. C alleged that two of her colleagues, F and R, subjected her to unlawful detriments in the course of their employment by the FCO because she had made protected disclosures. Amongst the alleged detriments was R commencing a series of investigations

into C's conduct and F recommending that C be suspended without any investigation.

There are now well established principles for determining whether an employee who was based wholly outside the UK can pursue an unfair dismissal, discrimination or whistleblowing claim in the employment tribunal. In short the Tribunal has to assess whether the facts demonstrate that there is a sufficiently strong connection with Great Britain and British employment law than with any other system of law.

The EAT held that by analogy the same test should be applied to determine whether an employment tribunal can hear a whistleblowing claim brought against the claimant's co-workers, who worked wholly outside the UK.

F and R were based in Kosovo. The EAT held that this fact alone did not determine the issue of whether a claim could be brought against them in the Tribunal. It held that a careful assessment of all the facts had to be carried out to determine if there was a closer connection to the UK than to any other country. Factors that were relevant included: their secondment contracts were with the UK Government, they were required to be UK passport holders, the governing law of their contracts was English law, they were treated differently to locally employed staff on local contracts, they were subject to the control and disciplinary action of the FCO; and they were paid by the FCO. All of these factors indicated an overwhelmingly stronger connection with UK employment law than any other system of law. As such, the tribunal did have territorial jurisdiction to hear the claims against C's colleagues.

Clearly the facts of this case were not run of the mill; however, there will be many situations where employees are temporarily seconded from abroad to the UK or vice versa. If such secondees subject a UK based colleague to some form of discrimination or detrimental treatment because a protected disclosure has been made what test will the tribunal apply to decide whether it has jurisdiction to hear a claim against the colleague personally?

By analogy to the EAT's reasoning in this case, arguably the same test should be applied as is applied to decide whether a claimant who is seconded abroad (or to the UK) can bring a discrimination or whistleblowing claim? Is the colleague seconded overseas a peripatetic employee with a UK base bringing them within the scope of the tribunal's jurisdiction? Does the colleague seconded to the UK have a non UK base causing them to fall outside the tribunal's jurisdiction? As yet we have no definitive judicial answer to this. Employers and their employees should, however, be alert to the potential for claims being brought against individuals who are based outside the UK in some circumstances.

[Bamieh v Eulex (Kosovo) & Ors]

Whistleblowing: LLP members can claim post-expulsion financial losses attributable to detrimental treatment

The Court of Appeal has considered the extent to which an LLP member who has 'blown the whistle' can claim compensation for post-termination financial loss even if the member was lawfully expelled from the LLP.

R was a member and managing partner of WS LLP. He investigated a complaint of bullying of an employee by the senior partner together with an associated compliance issue. He presented a report to the LLP board. The report was due to be discussed at a members' meeting but the other members delivered a notice saying that they would not attend the meeting and refused to discuss the matter. Just over one month later the other LLP members

demanded that R resign as managing partner and they voted to remove him from the post and from the position of compliance officer.

R took the view that the other LLP members' conduct made his position as an LLP member untenable. By a subsequent letter he asserted that the LLP and its members had acted in repudiatory breach of the terms of the Members' Agreement and his Deed of Adherence; accordingly he was going to accept the repudiatory breach which would have the consequence of immediately terminating the Members' Agreement and the Deed of Adherence.

The LLP's position was that the Members' Agreement remained in force, R continued as a member of the LLP because he had not provided a valid resignation notice. However, as R had been absent from office asserting that he was no longer a member, he was considered to be in serious breach of the Members' Agreement. R was then expelled from the LLP.

R then brought a claim in the Employment Tribunal for compensation for the detriment he had suffered as a worker as a result of making a protected disclosure.

It was accepted by all parties that following the High Court's decision in Flanagan v Lion Trust Investment Partners LLP, it was clear that the doctrine of repudiatory breach does not apply to LLP agreements; R's resignation was therefore ineffective.

The issue before the EAT and the Court of Appeal was whether an LLP member who is a worker and is protected by the whistleblowing legislation can claim compensation for post termination financial loss even if lawfully expelled.

The LLP effectively argued that R's expulsion from the LLP broke the chain of causation; only the termination of the LLP membership could cause post termination loss of earnings not the members' behaviour beforehand.

The Court of Appeal held that there was no general principle of law that a lawful termination will always break the chain of causation.

In rejecting the LLP's argument the Court of Appeal considered the example of a woman who is subjected to appalling sexual harassment in the workplace for many months who eventually responds in a way that amounts to misconduct justifying dismissal. On the LLP's argument, in such a case the woman could never recover compensation for the sexual harassment because the lawful dismissal would break the chain of causation; that, it held, simply could not be correct.

The Court of Appeal agreed with the EAT that it is a pure question of fact whether the allegedly unlawful pre termination detrimental conduct of the other LLP members gave rise to R's post-expulsion financial losses which he asserted were in the millions.

[Wilson's Solicitors v Roberts]

Detrimental treatment: who has to be personally motivated by the protected disclosure?

A worker is entitled not to be subjected to detrimental treatment by his employer and co-workers because he has made a protected disclosure. An issue considered by the EAT is whether the co worker that subjects the whistleblower to the detriment has to be personally motivated by the protected disclosure in order for a detriment claim to succeed. If another person who knew about the whistleblowing has manipulated the decision maker is that sufficient for a detriment claim to succeed?

In the case in question, M complained that he was subjected to a detriment when C initiated an investigation in relation to his relationship with a third party. C had no knowledge of the protected disclosures that M had made, however, he was prompted to investigate following the receipt of information from two of M's colleagues who may have been motivated by M having blown the whistle.

The EAT held that the knowledge and motivation of another cannot be attributed to an innocent decision maker.

This decision follows other recent whistleblowing and discrimination cases which explored the knowledge of the decision maker (see the November Briefing here). The general principle arising from all these decision is that in whistleblowing detriment and unfair dismissal claims, and, discrimination claims personal knowledge and motivation on the part of the decision maker is required in order to establish liability. However, the courts have acknowledged that in some circumstances in a whistleblowing/unfair dismissal claim if a senior member of management had manipulated evidence to secure the dismissal the manipulator's knowledge and motivation could be imputed to the employer.

This decision highlights the advantages of adopting a 'silo' approach to the management and resolution of: concerns raised by an employee, and, contemporaneous disciplinary or management performance issues of the whistleblower. If there is no knowledge of any protected disclosure on the part of the disciplinary manager it will be very difficult for the employee to complain that any aspect of the process is a detriment motivated by his/her protected disclosure.

[Malik v Cenkos Securities Plc]

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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CONTACTS

Chris Goodwill
Partner

T +44 207 006 8304
E chris.goodwill@cliffordchance.com

Mike Crossan
Partner

T +44 207 006 8286
E michael.crossan@cliffordchance.com

Alistair Woodland
Partner

T +44 207 006 8936
E alistair.woodland@cliffordchance.com

Tania Stevenson
Senior PSL

T +44 207 006 8938
E tania.stevenson@cliffordchance.com