

**Mishcon de Reya** Solicitors

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Tribunals to forward whistleblowers' allegations  
directly to regulators

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## Tribunals to forward whistleblowers' allegations directly to regulators



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IN A MOVE THAT IS LIKELY TO CAUSE concern for many employers, Employment Tribunals will soon be given the power to pass on details of whistleblowing claims directly to regulators. The new Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010 (the Regulations) are a response to concerns that some genuine allegations of malpractice were not being notified to, or investigated by, regulators. The government hopes that the new measures will facilitate the investigation of more instances of unlawful behaviour. The measures will be implemented for all whistleblowing claims submitted on or after 6 April 2010.

### WHAT IS A WHISTLEBLOWING CLAIM?

A whistleblowing claim arises where a worker alleges that they have been dismissed or suffered some other detriment as a result of making a disclosure, in good faith, about wrongdoing in the workplace. The alleged wrongdoing can relate to a range of unlawful acts and breaches, including matters such as financial irregularities, health and safety breaches, and tax evasion. To qualify for protection, the whistleblower must satisfy several tests (see box, 'Qualifying protected disclosures').

### HOW WILL THE NEW SYSTEM WORK IN PRACTICE?

The new system will apply to any claim form (ET1) containing a public interest disclosure claim. However, information will only be passed to a regulator if the claimant has expressly consented by ticking a box on the ET1. The *pro forma* ET1 will be amended to include the new box, and the guidance accompanying it will be updated to explain the process and the consequences of opting into the new scheme. It will also remind claimants that they may choose to provide information directly to a regulator instead.

A centralised system will be set up whereby administrative tribunal staff (as opposed to employment judges) will review ET1 forms that are subject to the new policy to identify the claim and the relevant regulator. The regulators are listed in the Annex to the Regulations and are broadly the same as those listed in the whistleblowing legislation as prescribed persons for the purposes of making protected disclosures to third parties (for example the Financial Services Authority,

the Environment Agency, the Health and Safety Executive and HM Revenue & Customs). Where such a claim is identified, the ET1 (or relevant extracts from it) will be sent directly to the prescribed regulator.

Once the tribunal has passed the information on, letters will be sent to the parties informing them of exactly what has been sent on and to which regulator.

The Regulations confer a discretion on the Secretary of the Employment Tribunals to forward information only where they consider it appropriate to do so. However, it remains to be seen whether the tribunals will make use of such discretion. As administrators will be tasked with reviewing ET1 forms, they are unlikely to be qualified to exercise such judgement. In any event, the tribunals themselves are only concerned with the employment rights arising out of protected disclosures, not with the substance of the allegations themselves. In addition, the government's intention is to enable regulators, not tribunals, to determine, as part of their 'normal regulatory duties, procedures and processes', whether allegations of malpractice merit further investigation.

### EFFECT ON LITIGATION

The government says that the Regulations will have no impact on the underlying litigation. However, it is possible that the disclosure of a report from a regulator could affect the ongoing tribunal claim. A damning report of malpractice, dishonesty or concealment by an organisation may well make it more difficult for a tribunal to accept that it has not subjected the whistleblower to a detriment.

Similarly, a report concluding that the underlying complaint was ill-founded may also have an impact on preliminary issues in the litigation. In these cases, claimants may find it more difficult to argue that a disclosure was made in good faith or with a reasonable belief in its veracity. A finding that the underlying complaint was spurious or malicious will almost inevitably defeat a whistleblowing claim.

Further, although the government states that tribunals will not be influenced by whether or not the claimant has ticked the box on the ET1, it may nevertheless

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be possible for employers to argue that a lack of consent is an indication of the employee's lack of good faith.

### ARE THERE ANY OTHER PITFALLS?

It is already well-known that whistleblowing claims are sometimes brought purely for tactical litigation purposes. Many employers will have been frustrated in the past by seeing a whistleblowing claim thrown in with a claim for unfair dismissal, either to defeat the statutory cap on compensation for unfair dismissal (damages in successful whistleblowing cases are potentially unlimited, whereas compensatory awards in normal unfair dismissal claims are capped – currently at £65,300), or to get round the one-year length of service requirement for 'ordinary' unfair dismissal claims.

The advent of the Regulations could see this frustration replaced with potentially far more serious concerns for employers against whom such claims are threatened. It is not inconceivable that claimants will use the new procedure as a bargaining tool against employers reluctant to have their affairs scrutinised, using it to leverage higher financial settlements in return for not pursuing allegations. The Regulations are likely to put increased pressure on employers to proceed with quick settlements before an ET1 is issued and employees are offered the easy option of having details forwarded to regulators on their behalf, regardless of whether a potential claim has any merit in law. Conversely, if it is apparent that the employer is exposed, a quick settlement with the whistleblower may be preferable to waiting until an ET1 is filed, to try and prevent allegations finding their way into the regulator's in-tray.

However, whistleblowers themselves should also consider the impact of the new measures carefully. For example, those whose regulated status is a pre-condition of future employment may think twice about ticking the box on an ET1 that contains false or unsubstantiated allegations, which, if discovered, could threaten that regulated status.

Whatever happens, the Regulations are likely to raise the stakes for both employees and employers involved in whistleblowing claims.

### ARE THERE ANY OTHER PITFALLS?

It will be interesting to see what the various regulators think of the new process, which will inevitably increase their workload, and what they will be able to do with the snippets of information that they are sent. It may be impossible for regulators to determine whether a disclosure merits further investigation on the basis of an ET1 form alone. Only a limited amount of information is required for an individual to file a tribunal complaint. In theory, for a claim to be accepted by the tribunal, a whistleblower should identify not only the detriment for which they are seeking a remedy, but also how the requirements of a qualifying and protected disclosure are met. However, in practice, ET1 forms do not currently have sections specifically for these elements and claims submitted by unrepresented claimants may well contain very sparse information about the nature of a protected disclosure. Even if an individual

is represented, there is no requirement for a specific level of particularisation of the disclosure itself and grounds of complaint are unlikely to be drafted with the regulator in mind.

Furthermore, unqualified administrative staff at the tribunal may have difficulty identifying whether, and which parts of, claims should be forwarded on, and employers will not welcome the idea that full ET1 forms may be sent to the regulators, where those forms might also include details of other allegations, for example discrimination or harassment.

Particularly frustrating for employers will be the fact that the whistleblower's reasonable belief in the truth of the allegations and whether or not they were made in good faith, will not have been tested when ET1 forms are sent to regulators, yet employers will be powerless to prevent the allegations being passed

## QUALIFYING PROTECTED DISCLOSURES

To qualify for protection, whistleblowers must ensure that the disclosure is a qualifying protected disclosure, ie:

- 1) actual information about wrongdoing must be disclosed;
- 2) the information must relate to one of the following six types of relevant failure:
  - a) criminal offences;
  - b) failure to comply with any legal obligation;
  - c) miscarriages of justice;
  - d) the endangerment of an individual's health and safety;
  - e) damage to the environment; or
  - f) the deliberate concealment of information regarding any of the above;
- 3) the worker must have a reasonable belief that the information disclosed indicates one of the relevant failures;
- 4) the disclosure must be made to the correct entity (either the employer or a third party stipulated by the legislation (a prescribed person)); and
- 5) it must be made in good faith.

Note that, in addition, there are further specific requirements for a protected disclosure where the disclosure is made to certain prescribed persons other than the employer.

on. Equally concerning will be the fact that details are forwarded to regulators before lawyers for the respondent have the opportunity to persuade the tribunal at a pre-hearing review that a claim, or part of it, should be struck out because it is scandalous, vexatious or has no reasonable prospect of success.

Faced with this risk, whether or not employers should make representations to

the regulator as soon as they are notified that an ET1 has been forwarded will be a judgement call in each case, potentially leading to a significant amount of extra work for an employer at a time when it is also facing the prospect of defending a potentially substantial piece of litigation. It is also unclear whether regulators will welcome such direct submissions from employers in defence of matters not yet under investigation.

### HOW CAN EMPLOYERS PROTECT THEMSELVES?

Effective whistleblowing policies are key to ensuring that whistleblowers are properly recognised and handled internally (see Box 'Whistleblowing policies: tips in light of the new regulations'). The Combined Code on Corporate Governance requires UK-listed companies to maintain written whistleblowing policies (or explain why they do not) and the government

## WHISTLEBLOWING POLICIES: TIPS IN LIGHT OF THE NEW REGULATIONS

- 1) Consider appointing a whistleblowing officer.
- 2) Where there is one, consider whether the audit committee should have overall responsibility for monitoring and implementing the policy and ensuring that any measures identified during an investigation are properly implemented.
- 3) Consider consulting with employees or representatives when upgrading your policy. This will publicise the policy, show you take whistleblowing seriously, encourage employees to buy into its purpose and effectiveness, and ensure the policy is easy to use and works for your business.
- 4) Remember that whistleblowing protection applies to workers as well as employees. Ensure the policy covers these individuals, or that they are covered by the policy of, for example, their third-party employer.
- 5) Put mechanisms in place to report complaints back quickly from managers to avoid delays and allegations of detriment by the whistleblower.
- 6) Senior people should investigate complaints. They must have a good knowledge of the regulatory environment and be available to act quickly.
- 7) Provide training for investigators on the regulatory environment, how to handle complaints and how to minimise complaints of victimisation.
- 8) Consider dealing with misguided complaints with a preliminary discussion. This may be enough to set the record straight. (Remember though that workers will still be protected in these circumstances, so carefully monitor their subsequent treatment.)
- 9) Ensure that, where possible, investigations are kept confidential and as few people as possible are involved so as to minimise the risk of subsequent detriment being perpetrated by colleagues.
- 10) Ensure that a commitment is made to update whistleblowers regularly on the progress of their investigation. This should prevent employees feeling disenfranchised and minimise any perception that they are being kept in the dark. Any perceived delay or inaction will alienate the employee, who will be more likely to perceive detrimental treatment and may be more inclined to litigate.
- 11) Keep full records of investigations so that you can defend your position if the regulator subsequently investigates.
- 12) Ensure feedback to whistleblowers is full and thorough.
- 13) Deal with any malpractice that is uncovered swiftly and openly.
- 14) Ensure there is a mechanism by which employees can speak to senior management if they are not satisfied with the process or outcome of the investigation.
- 15) Remember that whistleblowers can only bring a claim if there is retaliation. Ensure that it is made clear that the employer will not tolerate any reprisals against workers who make disclosures and equally that employees making knowingly false allegations will be subject to disciplinary proceedings.

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expects public bodies to do the same. There are other compelling business reasons to implement and regularly review such policies, as they will assist with internal compliance, minimise litigation risk and help to avoid external disclosures, either to regulators or to the press. Employers can also stress in these policies that they will discipline anyone who retaliates against whistleblowers in the workplace. If employers can prevent detriments occurring in the first place, they will be halfway towards keeping the regulators at bay.

Given the significant impact that the Regulations may have on employers, carrying out robust internal investigations

of whistleblowing allegations becomes all the more important. Even where allegations of wrongdoing or malpractice may be unfounded, it is important to conduct a full investigation and to ensure that whistleblowers know that their complaint is being taken seriously, so that they do not feel compelled to contact the regulator themselves, and will hopefully think twice about filing a complaint that will then get into the hands of the regulator.

The difficulty for employers will be in balancing the wish to reject plainly spurious complaints against the risk of opening the floodgates of regulatory investigation. As many employers will know to their cost, once the regulator begins looking into an

organisation's affairs, this risks the door being opened to further investigations. Unfortunately, employees will also know this and may well use these new measures to their advantage.

#### CONCLUSION

The ease with which employees making whistleblowing claims will be able to refer the detail of those allegations to regulators will surely increase the workload of regulators. However, the extent to which that additional workload will lead to real improvements in regulatory oversight is debateable, particularly if regulators find themselves swamped with imprecise details of supposed breaches by employers. What is clear is that, for regulated employers, the risk entailed by whistleblowing claims now has a further dimension and one that might cause employers to settle claims early to avoid the spectre of an investigation by a regulator.

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