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Feature

Equality Act 2010: what employers need to know

Briefing

Whistleblowing in practice: ten years on

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Equality Act 2010: what employers need to know

As the long-awaited legislation is finally rolled out across the UK, **Åsa Waring** (left) and **Sarah Lister** (right) define its key purposes, the types of discrimination addressed and warn of its implications, setting out a plan of action for employers



THE MUCH-ANTICIPATED EQUALITY ACT 2010 (the 2010 Act) received Royal Assent on 8 April 2010. A main feature of the 2010 Act is to consolidate and harmonise the reams of anti-discrimination legislation that have developed over the past 40 years. The 2010 Act attempts to address inconsistencies in the existing legislation to harmonise protection where possible and create a more streamlined piece of legislation, but it also aims to strengthen the law to reduce disadvantage suffered through discrimination, including socioeconomic disadvantage. The 2010 Act brings together the different strands of discrimination that currently exist into 'protected characteristics': age, marital and civil partnership, maternity, race and ethnicity, gender reassignment, sex and disability, sexual orientation, and religion and belief.

The scope of the 2010 Act ranges from employment measures to the provision of goods and services, discrimination in private members' club rules, and protection for mothers breastfeeding in public. This article will focus on the main substantive employment law changes that are relevant to employers in the private and voluntary sector, rather than the additional obligations introduced in relation to public sector employers.

IMPLEMENTATION

The main provisions relating to the prohibition on discrimination in the workplace are expected to come into force in October 2010, while dual discrimination protection will come

into force in April 2011. Regulations on gender pay transparency reporting will not come into force until April 2013 at the earliest, if at all. At the time of writing, it is not yet clear how the new coalition government will impact on the implementation of the 2010 Act as the two parties disagreed on its remit, but the Conservative Party has indicated that one of the provisions they would seek to repeal is that relating to gender pay reporting (provisions on positive action being another).

HARMONISATION

Harmonisation has been a focus for the 2010 Act, to ensure that definitions of discrimination across the various protected characteristics are in line with one another where there are currently anomalies across the various bodies of legislation. As shown in the key areas set out in this article, this will broaden the circumstances in which discrimination will occur and employers may wish to refresh staff training to stay abreast of these developments. The simplification of some key discrimination concepts may also assist employers in understanding how to avoid potential discrimination in the workplace.

KEY AREAS OF HARMONISATION

Indirect discrimination

The 2010 Act harmonises the different definitions of indirect discrimination, so that all protected characteristics will be subject to the same definition.

In addition, the concept of indirect discrimination has also been extended to

cover disability and gender reassignment, where it previously did not. The exception is in relation to pregnancy and maternity discrimination, which will not have a stand-alone definition and will continue to be dealt with under indirect sex discrimination.

Indirect discrimination will also extend to situations where a person would be deterred from doing something, for example applying for a job, as a result of a policy that puts a particular group of people with a protected characteristic at a disadvantage.

Harassment

The 2010 Act also brings consistency in relation to harassment, introducing protection against persistent harassment by third parties (such as customers or suppliers). Currently, third-party harassment claims can only be brought in relation to sexual and sex-related harassment under the Sex Discrimination Act (SDA) 1975.

In addition, the new universal definition of harassment will make it clear in relation to all forms of discrimination that harassment can occur even where the victim of the harassment does not possess the particular protected characteristic, as long as the unwanted conduct relates to a relevant protected characteristic. See further details under 'Associated and perceived discrimination' on p4.

Instructing and inducing discrimination

Harmonisation has also taken place in relation to the prohibition against instructing

and inducing discrimination, which currently applies in various forms only to certain characteristics. Under the 2010 Act all protected characteristics will receive the same protection, with it being unlawful for a person to instruct, cause or induce another person to discriminate, harass or victimise a third person, or attempt to do so.

Burden of proof

There has been an ironing out of inconsistencies under the 2010 Act in relation to the concept of burden of proof, which has appeared and been applied in various forms under existing legislation. Under the 2010 Act any person who alleges discrimination or victimisation in relation to any of the protected characteristics must first establish sufficient facts, which in the absence of any other explanation, point to a breach. If the claimant can show this, the respondent must then show that no breach had occurred. This 'reverse burden of proof' previously (and somewhat inexplicably) did not apply to race discrimination on grounds of race and nationality, victimisation relating to race discrimination, non-work disability, and sex discrimination claims that relate to the exercise of public functions.

DUAL DISCRIMINATION

A fundamental change under the 2010 Act is the new protection against dual discrimination, whereby it will be discriminatory to treat someone less favourably because of a combination of two of the following protected characteristics:

- age;
- disability;
- sex;
- sexual orientation;
- gender reassignment;
- race; or
- religion or belief (note that marriage, civil partnership, pregnancy and maternity are excluded).

The explanatory notes to the 2010 Act provide the following example to demonstrate how the act seeks to recognise that someone may be unable to

bring a claim successfully under existing 'single strand' discrimination:

'A black woman has been passed over for promotion to work on reception because her employer thinks that black women do not perform well in customer service roles. As the employer can point to a white woman of equivalent qualifications and experience who has been appointed to the role in reception, as well as a black man of equivalent qualifications and experience in a similar role, the woman may need to be able to compare her treatment because of race and sex to demonstrate that she has been subjected to less favourable treatment because of her employer's prejudice against black women.'

It is not clear whether dual discrimination will bring about a rise in claims and should be of concern to employers, as there will be many cases where the single strand approach will still protect someone who is discriminated against on the basis of more than one protected characteristic. However, the Government Equalities Office has estimated that 7.5% of discrimination claims will include dual discrimination, with a 10% increase in discrimination cases overall. On this basis, employers will want to ensure that they are alive to situations where dual discrimination may occur.

ASSOCIATED AND PERCEIVED DISCRIMINATION

Direct discrimination

One of the many ways in which the 2010 Act has sought to harmonise discrimination law is to extend the concept of perceived discrimination, which is already covered to some extent under the current Employment Equality (Age) Regulations 2006, to other protected characteristics. The same applies to associative discrimination, currently excluded by the definition of direct discrimination in respect of sex, age, gender reassignment and disability (although the Employment Appeal Tribunal (EAT) has interpreted the Disability Discrimination Act (DDA) 1995 in light of European case law in an attempt to overcome this limitation). Under the 2010 Act the definition of direct discrimination is widened so that it will be unlawful to treat someone less favourably because of a protected characteristic.

This means that it will be unlawful to discriminate against someone as a result of their association with another person who has a protected characteristic, even if they do not have that protected characteristic themselves or if they are mistakenly held to have that protected characteristic. For example, a person could be directly discriminated against because they are a carer of someone who is disabled or because they are wrongly perceived to have a particular religious belief.

There are several exceptions to this form of direct discrimination, with the 2010 Act permitting employers to continue to offer childcare facilities based on the age of a child, where this might otherwise fall under age discrimination. In addition, it will not be possible to bring a claim for associated or perceived discrimination on the basis of marriage or civil partnership, as a complainant must be married or a civil partner themselves to bring a direct discrimination claim.

Harassment

On a similar basis, the current definitions of harassment have been harmonised and extended under the 2010 Act with the effect that they cover associated or perceived discrimination, with harassment defined as conduct related to a relevant protected characteristic. Current definitions of harassment, except in relation to disability and sex, state that harassment must be conduct on grounds of a particular characteristic. Even in the areas of disability and sex, where movement has been made towards recognising perceived or associated discrimination, the statutory definitions have been subject to debate. This has led to disputes over the motivation of the alleged harasser. For example, in *English v Thomas Sanderson Ltd* [2008], a heterosexual employee was subjected to homophobic taunts by colleagues. However, the employer was able to successfully argue at the early stages that their conduct did not constitute harassment as the employee did not possess that protected characteristic. This was eventually overturned by the Court of Appeal. However, the new definition will make it easier for all complainants to show that harassment has taken place, with less emphasis on the motivation of the alleged harasser, as in *English*.

DISABILITY

Disability discrimination has been a key focal point under the 2010 Act, with an amendment to the definition of disability and attempts to mitigate the effects of recent case law in this area, which has made it harder for claimants to show disability discrimination in some cases.

Definition

The definition of disability has been subject to minor changes under the 2010 Act, although the effect of such changes is not entirely clear. In spite of pressure from numerous lobby groups and recommendations by the Equality and Human Rights Commission (EHRC), the Work and Pensions Committee and the Disability Rights Commission to widen the scope of the definition of disability to apply to a greater range of impairments, any changes have remained limited. The definition of disability has remained essentially the same: a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. However, the definition currently makes reference to an impairment as affecting specific capacities, such as mobility, manual dexterity and physical co-ordination. This requirement is removed in the 2010 Act, though the effect is not likely to be significant.

Discrimination arising from disability

Following *London Borough of Lewisham v Malcolm* [2008], disability-related discrimination has become much harder to demonstrate. Under *Malcolm* it was decided that the comparator for the purposes of disability-related discrimination will be a non-disabled person who is otherwise in the same circumstances as the disabled claimant. Currently, under *Malcolm*, this means that a visually impaired man who is dismissed because he is unable to do as much work as a non-disabled colleague would need to use a comparator who does not have a visual impairment but who, for a reason unrelated to disability is unable to do as much work as other colleagues. The employer is likely to be able to show that the comparator would have been treated in the same way.

The 2010 Act attempts to reverse this position by introducing the concept of discrimination arising from disability. This is where a disabled person is treated

'It will be unlawful to discriminate against someone as a result of their association with another person who has a protected characteristic, even if they do not have that protected characteristic themselves.'

unfavourably because of something arising in consequence of that person's disability, rather than the disability itself. The definition dispenses with the need for a comparator at all. The employer will have a defence if it can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim or if the employer does not know, or could not reasonably be expected to know, that the employee had a disability.

Indirect disability discrimination

The 2010 Act has also extended the concept of indirect disability discrimination to disability. Under the 2010 Act an employer may not apply a policy that puts those who share a protected characteristic at a particular disadvantage. The 2010 Act has defined persons who share a protected characteristic as persons with the same disability.

Many disabilities are difficult to homogenise, with a disability varying from person to person, and so in reality, potential claimants may find it difficult to show that there is a group disadvantage resulting from an employer's policy. It remains to be seen what the impact of the extended protection will be.

Reasonable adjustments

The 2010 Act harmonises the language on reasonable adjustments and consolidates the various provisions. However, the duty to make reasonable adjustments remains essentially the same. The only addition is that an employer will be obliged to provide an auxiliary aid or service where this is necessary to ensure that a disabled person is not at a substantial disadvantage, currently only a requirement in relation to goods and services. Examples of this include the provision of specially adapted furniture for a new employee with restricted movement in their upper limbs or large print application forms for any visually impaired

people applying for a job. The 2010 Act also specifically states that the cost of complying with the 2010 Act, for example in providing such an auxiliary aid or service, may not be passed on to the disabled person.

It is likely that many employers will already make such reasonable adjustments under their existing practices in compliance with DDA 1995, with the 2010 Act serving only to emphasise this duty. As under DDA 1995, an employer will not be expected to make a reasonable adjustment where it cannot reasonably be expected to know that a disabled person has a disability or that a job applicant may have a disability that requires reasonable adjustments to be made.

Pre-employment health enquiries

Under DDA 1995, employers are currently not permitted to use the result of any health or disability enquiries of applicants to discriminate against a disabled applicant. This has been brought into sharper focus under the 2010 Act to provide better protection for disabled job applicants by prohibiting certain pre-employment enquiries. The 2010 Act states that a person must not ask about the health of a job applicant before offering work or, where the person is not in a position to offer the job applicant work, before including the job applicant in a pool of applicants from which the person intends to potentially select the job applicant for work.

Pre-employment health enquiries will be permitted under the 2010 Act where:

- there is a desire to monitor the diversity of job applicants;
- the work requires the job applicant to have a particular disability;
- taking positive action (see p6);
- discovering whether an applicant can participate in an assessment to test their suitability for work;

- making reasonable adjustments to enable a disabled person to participate in the recruitment process; or
- discovering whether a job applicant would be able to undertake a function that is intrinsic to the job, with reasonable adjustments in place as required.

The explanatory notes provide the following example of an acceptable pre-employment health enquiry:

'In an application process for a job which required the manual lifting and handling of heavy items, an employer may ask a job applicant questions which help him establish whether the applicant can do this job (subject to any reasonable adjustments). However, any other more general questions about the applicant's health would not be permitted.'

An employer who makes pre-health enquiries that are not permitted will potentially be liable for a claim of disability discrimination if it relies on that information and it leads to an inference of discrimination. The burden of proof will then shift to the employer to show that no discrimination took place. In addition, the EHRC has power to enforce this provision and may, for example, conduct an investigation if it suspected that an employer is consistently making pre-employment health enquiries.

Associative disability discrimination

As set out above, associative disability discrimination is now expressly set out in the 2010 Act.

POSITIVE ACTION

The existing ability of employers to take positive action in relation to under-represented groups, with regard to targeting training and encouraging applications from these groups, has been extended under the 2010 Act to recruitment and promotion. When selecting candidates for promotion or in recruitment, in certain circumstances an employer will be allowed under the 2010 Act to take a person's protected characteristic into consideration.

The 2010 Act places several limitations on when this may take place. First, the more favourable treatment must be aimed at those

individuals whose protected characteristic means that they are disadvantaged or under-represented. In addition, such positive action is only permitted where:

- i) the individual in question is as qualified as other candidates;
- ii) the employer does not have a policy of such positive action (it can therefore only be on a case-by-case basis); and
- iii) the more favourable treatment must also be objectively justified, that is a proportionate means of addressing the disadvantage or under-representation of person(s) with the protected characteristic.

There is no obligation under the 2010 Act for employers to take positive action. While many employers will undoubtedly want to do so, they may be daunted by the boundaries set out in the 2010 Act, particularly the uncertainty surrounding the meaning of 'as qualified as', the only guidance being that it is not limited to academic qualifications. It remains to be seen whether the new coalition government will seek to amend or exclude the provisions on positive action altogether as the Conservatives indicated during the passage of the Equality Bill through Parliament.

EQUAL PAY

It is of no surprise that the 2010 Act has included numerous provisions relating to equal pay. Equal pay has been something of a hot topic in recent years, with the EHRC's 'Inquiry into Sex Discrimination in the

Finance Sector' in March 2009 indicating an economy-wide gender pay gap average of 28%, rising to as much as 55% less annual average gross salary for women in the financial sector in comparison to their male colleagues. The ten-fold rise in equal pay claims in the tribunals, which in March 2009 accounted for a third of all tribunal cases in Great Britain, also indicated that this is an area where more action is necessary to achieve greater equality in pay.

The 2010 Act has attempted to tackle the issue by:

- i) restricting the way in which secrecy clauses in relation to pay can operate, making it easier for employees to establish if there is a pay differential by permitting more discussion between employees; and
- ii) permitting regulations in relation to gender pay reporting to be introduced, which would potentially require all private sector employers with over 250 employees to report on discrepancies in pay.

Finally, the type of comparator that may be used by claimants in bringing equal pay claims will be widened to allow hypothetical comparators to be used in certain circumstances, making it easier for some claimants to establish an equal pay claim where previously this has not been permitted.

Pay secrecy clauses

Under the 2010 Act, pay secrecy clauses in bonus schemes and employment contracts

ACTION POINTS

- Plan training for employees and managers to refresh their understanding of discrimination rights and responsibilities, as well as to understand the new areas introduced under the Equality Act 2010.
- Review policies and procedures to incorporate perceived and associated discrimination and harassment. This may include updating flexible working policies to take account of carers of disabled people.
- Review policies and practices to incorporate new obligations to provide an auxiliary aid or service to a disabled person.
- Reconsider the use of any pre-employment health enquiries.
- Consider using positive action in recruitment and promotions.
- Review the use of pay secrecy clauses in bonus terms and employment contracts.
- For employers with over 250 employees, consider how pay reporting might be achieved.
- For employers who rely on genuine occupational qualifications, ensure that policies and practices will meet the new single occupational requirement.

will be unenforceable in relation to the sharing of information between employees for the purpose of finding out whether, or to what extent, there is a connection between pay and having (or not having) a protected characteristic. Such discussions will also be regarded as a protected act and subject to protection from victimisation.

Reporting requirements

The 2010 Act includes the potential for regulations to be introduced that would oblige private and voluntary sector employers with 250 or more employees, to report publicly on an annual basis on the difference in pay between male and female employees. Employers who do not comply could face criminal and civil sanctions, including a fine of up to £5,000. The aim is that such reporting will be made on a voluntary basis and that regulations will only be introduced if sufficient progress is not made. For further details of the gender reporting provisions and what employers can do to prepare, please see the article 'Money talks: a new era of transparency beckons in pay and remuneration' in *IHL* 174 (p16). The Conservatives have strongly opposed the gender reporting provisions stating that employers should only be obliged to report if they have lost an equal pay claim in the tribunal. In contrast, the Liberal Democrats stated in their manifesto that all employers with more than 100 employees would be subject to equal pay audits. It remains to be seen whether and how these provisions will be brought into force by the new coalition government.

Hypothetical comparators

Historically, anyone bringing an equal pay claim was limited to using a real comparator of the opposite sex who does equal work. Unlike other areas of anti-discrimination law, where hypothetical comparators are permitted, judges have been unwilling to consider hypothetical comparators in equal pay claims due to concerns that this would require an unacceptable degree of speculation as to what characteristics the comparator would have.

The 2010 Act recognises that this has prevented many equal claims from going forward and while it will not introduce hypothetical comparators into equal pay claims as such, it will permit a claim for sex discrimination (where hypothetical comparators are allowed) being brought

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in relation to contractual pay (currently, contractual pay discrimination can only be brought under the Equal Pay Act 1970, not SDA 1975).

GENUINE OCCUPATIONAL REQUIREMENTS

There are some areas of work where discrimination in favour of a particular protected characteristic is permitted on the recruitment, transfer, training, dismissal or promotion of certain roles, with different tests applying, depending on the strand of discrimination law. For example, in race, ethnic or national origin, religion or belief, sexual orientation or age, an employer must show a 'genuine and determining occupational requirement' (GOR), and show that it is proportionate to apply this requirement. Alternatively, in relation to sex, gender reassignment, race and nationality, the need to discriminate would have to fall into one of several defined 'genuine occupational qualifications' (GOQ).

Under the 2010 Act, this distinction between GORs and GOQs has been removed so there is now a single 'occupational requirement', which applies to all of the protected characteristics. Under this an employer must simply show that the requirement to discriminate is a 'proportionate means of achieving a legitimate aim'. Given the similarity of the existing GOR test with the new test under the 2010 Act, it is likely that occupational requirement policies and practices made in accordance with the GOR test will still meet the new occupational requirement. However, employers with employees who fall under the current GOQs may wish to ensure that their policies and practices in this area will meet the new test.

TERRITORIAL SCOPE

Unlike the existing discrimination legislations, the 2010 Act does not specify its territorial scope and it is likely that this will mean that some employees currently covered by discrimination law will potentially be excluded from the 2010 Act's protection. Currently, discrimination legislation applies

to 'employment at an establishment in Great Britain'. This includes those who work for a business with a base in Great Britain, but who may not work wholly in Great Britain, or at all, if they were resident in Great Britain when they applied for employment or at any time during the employment. This captures many workers based overseas, but the 2010 Act's silence on territorial jurisdiction will leave it to tribunals to determine whether the employment has a sufficiently strong connection with Great Britain in the same way that they are currently obliged to do under the Employment Rights Act 1996. The test laid down by the House of Lords in *Serco Ltd v Lawson* [2006] will therefore be relevant, as will subsequent case law modifying the principle in *Lawson* where EU rights are concerned.

CONCLUSION

The 2010 Act provides some welcome clarity to, and consolidation of, the existing discrimination laws. In many respects the protection for employees against discrimination will be strengthened and it will perhaps be even more imperative for employers to ensure that they have up-to-date employment policies in place, that managers are properly trained on their equality obligations and that there are effective procedures in place to deal with complaints. This will help employers avoid claims and may provide a defence where claims do arise.

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English v Thomas Sanderson Ltd [2008]
EWCA Civ 1421

London Borough of Lewisham v Malcolm
[2008] UKHL 43

Serco Ltd v Lawson [2006] UKHL 3

Whistleblowing in practice: ten years on



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FOLLOWING INCIDENTS SUCH AS THE Clapham rail crash, the Zeebrugge ferry disaster and the scandals at the Bank of Credit and Commerce International (BCCI) and Baring Asset Management, it became clear that staff had been aware of the risks but had been too worried about what might happen to them to raise their concerns.

PUBLIC INTEREST DISCLOSURE ACT (PIDA) 1998

PIDA 1998 came into force on 2 July 1999, with the aim of targeting the above issues and of protecting individuals who make certain disclosures of information in the public interest (ie individuals who 'blow the whistle'). PIDA 1998 inserted new ss43A-43L and s103A into the Employment Rights Act (ERA) 1996. These sections offer ostensible protection (from detriment and/or dismissal) for workers who report malpractices by their employers (or third parties).

The dismissal of an employee will be automatically unfair if the reason or principal reason for their dismissal is that they have made a protected disclosure. The protection, however, extends beyond employees to workers, protecting them from being subjected to any detriment on the grounds that they have made a protected disclosure.

There are no minimum service requirements to bring a claim for whistleblowing and compensation is uncapped. There is also the possibility of claiming interim relief. This has made whistleblowing claims attractive fodder for claimants.

To qualify for whistleblower protection a worker must make a 'qualifying protected disclosure', ie the disclosure has to be of a certain type, made in a certain way and, importantly, most disclosures must be made in good faith.

HAS THERE BEEN A QUALIFYING PROTECTED DISCLOSURE?

Disclosure of information

Disclosure is a very broad term. A disclosure can be made orally and/or in writing. That said, a disclosure must be more than simply a statement of position. It must convey facts, even if those facts are already known to the recipient. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2009] the Employment Appeal

Tribunal (EAT) held that a solicitor's letter setting out Mr Geduld's objections to the way he had been treated by his employer did not amount to a protected disclosure, but was simply a statement of the employee's position designed to bring about a settlement. The EAT has also recently found, in *Goode v Marks and Spencer plc* [2010], that the expression of an opinion about an employer's proposal to change a discretionary redundancy scheme did not amount to a qualifying protected disclosure. *Cavendish* and *Goode* should provide some reassurance for employers that not just any statement can form the basis for a whistleblowing claim.

Timing of the disclosure

It was previously assumed that disclosures needed to be made during the course of employment. However, it was held in *Woodward v Abbey National plc* [2006] that a worker who is subjected to a detriment by their former employer after the termination of employment (provided that the disclosure was made when they were still a worker) can bring a claim for detriment under the legislation. An example of such a detriment would be an employer providing a bad reference as a result of disclosures made by the worker during employment. In *Woodward*, it was acknowledged that some benefits accrue during the period of employment and some after, but there is no rational ground for distinguishing one from the other where they arise equally from the employee's employment.

The EAT went further in the recent *BP plc v Elstone & anor* [2010]. In that case, the EAT allowed a worker (Mr Elstone) to pursue a whistleblowing case against his employer (BP), based on a qualifying protected disclosure that he made while working for a previous employer. The EAT accepted that a disclosure will not be protected unless it is made by a worker, ie an individual must be employed or engaged at the time of making a disclosure. However, the EAT acknowledged that the legislation does not specify that the employer at the time of the disclosure and the employer against whom the claim is made have to be the same.

Mr Elstone was summarily dismissed by Petrotechnics Ltd, a company that oversaw and evaluated safety processes for BP plc. The reason for dismissal was

'There are no minimum service requirements to bring a claim for whistleblowing and compensation is uncapped, making it attractive for claimants.'

that Mr Elstone had informed senior BP employees about his safety concerns and Petrotechnics viewed this as disclosure of confidential information in breach of Mr Elstone's contract of employment. Following his dismissal, Mr Elstone began to work as a consultant for BP. However, when he raised the possibility of further consultancy, BP refused. This was because Petrotechnics had informed BP that Mr Elstone had been dismissed for disclosing confidential information. Mr Elstone brought a tribunal claim against BP alleging that it had subjected him to a detriment on the basis that he had made a qualifying protected disclosure. At a pre-hearing review (affirmed by the EAT), it was held that, given Mr Elstone was a worker both at the time of the disclosure and at the time of the detriment, his whistleblowing claim against BP could proceed.

The decision highlights a loophole in relation to job applicants. Unlike anti-discrimination legislation, an applicant is not protected by the whistleblowing provisions, so an applicant who is denied employment because they have 'blown the whistle' while with a former employer will not have a claim.

Nature of the disclosure

A qualifying protected disclosure is one that, in the reasonable belief of the worker making it, tends to show one of the following types of malpractice (by the employer or a third party) has taken place or is likely to take place:

- 1) criminal offences;
- 2) breach of any legal obligation;
- 3) miscarriages of justice;
- 4) danger to the health and safety of an individual;
- 5) damage to the environment; and/or
- 6) the deliberate concealing of information about any of the above.

There is no express requirement that qualifying protected disclosures are made in the public interest. For example 'breach of a legal obligation' is very broad and, according

'Would-be claimants are spurred on by the potential unlimited compensation and the hope that employers will not wish for such allegations to be aired in an employment tribunal, and will thus settle claims out of court.'

to *Parkins v Sodexho Ltd* [2002], includes a breach of a worker's own contract of employment (including implied terms, such as breach of trust and confidence). *Parkins* caused widespread concern to employers as it significantly widened the remit of the malpractices that were thought to form the basis of a qualifying protected disclosure.

Further, a worker does not have to prove that the facts or allegations that form the basis for disclosure are true, or that they are capable of amounting to one of the six listed categories of wrongdoing. As long as a worker subjectively believes that the failure has occurred or is likely to occur (and such belief is objectively reasonable), it doesn't matter if the worker turns out to be wrong or if the disclosure doesn't actually fall within one of the categories.

Good faith requirement

Qualifying protected disclosures must generally be made in good faith. A disclosure made for predominantly personal (rather than public) interest may fail this test. However, the burden of showing bad faith will be on the employer.

'Good faith' does not mean truth, but it has been described as 'acting with honest motives'. Where the predominant purpose of the disclosure is not righting the wrongs alleged, it is unlikely that the disclosure will have been made in good faith. However, there are often mixed motives at play and an ulterior motive may only negate good faith if it is the predominant motive.

Reason for dismissal

Even if an employee makes a qualifying protected disclosure, they will not be entitled to protection from the legislation if that disclosure is not the reason or principal reason for the dismissal (or detriment). Undoubtedly, it could prove difficult for

an employer to fairly dismiss an employee who has made a qualifying protected disclosure. It is therefore essential that the employer can demonstrate that there was a reason other than the qualifying protected disclosure for its treatment of the employee (see 'Right not to be dismissed' on p34).

Appropriate person to disclose to

A worker must make the disclosure to the appropriate person. Normally, this will be the employer, but the legislation does provide for disclosure, in certain circumstances, to responsible third parties, industry regulators, legal advisers, government ministers and even wider disclosure (eg to the media or police) where the disclosure is 'exceptionally serious'. Varying conditions apply to the disclosure depending on the person that it is made to and, notably, more stringent conditions apply where wider disclosure is made.

PROTECTION

Once it has been established that a qualifying protected disclosure has been made, PIDA 1998 creates two levels of protection for whistleblowers. These are set out below.

Right not to be subjected to a detriment

Workers have the right not to be subjected to a detriment on the grounds that they have made a qualifying protected disclosure. Whether a detriment is 'on the grounds of' a qualifying protected disclosure involves an analysis of the mental processes of the employer. It is insufficient to show that 'but for' the disclosure, the employer's act or omission would not have taken place. There must be a causative link between the qualifying protected disclosure having been made and the employer's conduct. The detriment must be more than just related to the disclosure.

In detriment cases, the employee or worker must show that they have made a

FIVE KEY REQUIREMENTS FOR A WHISTLEBLOWING CLAIM

- 1) Did the worker make a disclosure?
- 2) Was the individual a worker?
- 3) Did the worker reasonably believe that the disclosure showed one of the specified types of malpractice?
- 4) Was the disclosure made to the correct person and were the requisite tests satisfied, eg was the disclosure made in good faith?
- 5) Did the worker suffer a detriment or was the employee dismissed on the grounds of the disclosure?

qualifying protected disclosure and that there has been detrimental treatment. However, the employer has the burden of proving the reason for the treatment. If an employer cannot prove an admissible reason for the treatment then the tribunal is likely to conclude that it is because of the qualifying protected disclosure.

A claim for a detriment must be presented to the tribunal within three months of the act or the failure to act to which the complaint relates, or where the complaint relates to a series of acts or failures, within three months of the last of them.

Right not to be dismissed

Employees will have a claim for automatic unfair dismissal under s103A of ERA 1996 if the reason or principal reason for the dismissal is that they have made a qualifying protected disclosure. Again, the tribunal should consider the decision-making processes of the employer or relevant manager. If multiple disclosures are made, the tribunal should consider whether, cumulatively, they were the principal reason for dismissal (*El-Megrisi v Azad University (IR) in Oxford* [2009]).

As stated above, there are no minimum service requirements and there is no upper limit on compensation.

The employee must bring the claim within three months of the effective date of termination. In dismissal cases, an employee must demonstrate that they have made a qualifying protected disclosure and that they have been dismissed (or are otherwise entitled to bring an unfair dismissal claim).

But who has the burden of proving the reason for dismissal?

Where an employee has one year's service

In *Kuzel v Roche Products Ltd* [2008], the court held that the general provisions of s98(1) of ERA 1996 apply to claims for automatic unfair dismissal by reason of whistleblowing. These provisions require the employer to show that the reason or principal reason for the dismissal was a potentially fair one. The employee can put forward an alternative reason, such as the making of a qualifying protected disclosure, provided there is some evidence to support it, but that does not mean that the burden of proof lies with the employee.

If the employer fails to establish a potentially fair reason for dismissal and the employee has raised a *prima facie* case that the reason is the qualifying protected disclosure, the tribunal is entitled to infer that the qualifying protected disclosure is the true reason for the dismissal. However, it then remains open for the employer to convince the tribunal otherwise. This means that the employer can still beat the claim for automatic unfair dismissal. The dismissal may, of course, be held to be an ordinary unfair dismissal (but will then be subject to the cap on compensation).

Where the employee has less than one year's service

Where an employee has insufficient service to claim ordinary unfair dismissal, the burden of proof that the dismissal is for an 'inadmissible reason' lies with the employee.

WHISTLEBLOWING IN THE CURRENT ECONOMIC CLIMATE

It is well known that whistleblowing claims are used by employees to get round the cap on compensation for ordinary unfair dismissal and the normal one year service requirement. In recent years, there has also been an increase in the

use of whistleblowing claims as a tool by workers in the City to obtain increases in the amounts of their bonuses. Banks are reporting that an increasing amount of workers are alleging that they have raised concerns regarding compliance with the Financial Service Authority (FSA) requirements and, as a result of raising those concerns, that they have received lower bonuses and thus suffered a detriment. The fact that FSA regulations are extremely far-reaching leaves banks particularly exposed, however, other employers are likely to experience similar issues.

Whistleblowing claims are expensive both to bring and defend. However, would-be claimants are spurred on by the potential unlimited compensation and the hope that employers will not wish for such allegations to be aired in an employment tribunal, and will thus settle claims out of court. This may be even more likely in light of the new power of tribunals to pass whistleblowing claims to regulators. Employers can reduce the risk of claims by having clear processes and policies in place, not only in relation to whistleblowing, but also in relation to remuneration, conduct and capability. It will be far harder for workers to allege that they have been subjected to a detriment if an employer has treated them in accordance with its own procedures.

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Kuzel v Roche Products Ltd [2008] EWCA Civ 380

Parkins v Sodexho Ltd [2002] IRLR 109 (EAT)

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