



Kong v Gulf International Bank (UK) and Whistleblowers

The Court of Appeal has confirmed that the conduct of a whistleblower in making protected disclosures in an automatic unfair dismissal claim is separable from the fact of making a protected disclosure. This case has made clear that whistleblowers do not have blanket protection against dismissal when they are acting unreasonably just because they have blown the whistle, and places importance on how a protected disclosure is made.

However, in turn, this is not a green light for employers to dismiss employee's who have made protected disclosures, even where they are of the view that the employee is acting unreasonably. The Court of Appeal's view was that there were likely to be few cases where employers will be able to rely on upset or inherent criticism caused by whistleblowing as a separate and distinct reason for treatment, and so employers should tread carefully if considering this path.

We always recommend taking advice when considering dismissing an employee who has made a protected disclosure, but what is now clear is that the key questions will be on the manner of how the protected disclosure is made and what is in the mind of the decision makers specifically.

To dismiss a whistleblower employers should:

- provide a detailed explanation as to the reason for the dismissal;
- demonstrate the dismissal is not because they have made a protected disclosure and;
- demonstrate what motivated the decision maker(s) to dismiss the individual.

Background

Ms Kong, Head of Financial Audit for Gulf International Bank, made protected disclosures in the course of her employment. Specifically, she complained to the Head of Legal about various concerns including whether a document the Head of Legal had put forward for a certain product was suitable. These complaints were held to be protected disclosures under UK whistleblowing legislation. The Head of Legal considered that Kong had questioned her integrity and complained about this.

Kong was subsequently dismissed by separate decision makers (who she had not made the protected disclosures to), because of her conduct in making the disclosures, specifically because she had called into question the professional competence and legal awareness of the Head of Legal.

Kong won her claim of “ordinary” unfair dismissal in the Employment Tribunal, but her claim for automatic unfair dismissal was refused on the grounds that she was dismissed not because of her protected disclosures, but because of her conduct in raising those concerns and in questioning her colleague’s professional and legal competence and the subsequent breakdown of that relationship. The EAT agreed and dismissed her appeal, holding that her conduct was properly separable from the disclosures themselves. It was key that they found the primary reason for her dismissal in the minds of the decision makers was not the whistleblowing itself, but her ‘unreasonable’ behaviour in questioning her colleague’s competence. This is despite the Tribunal itself finding that Kong’s behaviour was, in fact, broadly reasonable. Kong’s detriment claim would have succeeded if it was brought in time, as the Tribunal found that she had been subjected to detriments by the Head of Legal (not the decision makers in her dismissal).

Decision

The Court of Appeal dismissed the appeal and held that;

- An employer can take action against a worker who makes a protected disclosure in what is regarded as an unreasonable or unacceptable manner, or who acts in an unacceptable way in relation to a protected disclosure.
- Just because the disclosure is the context for the conduct which results in dismissal, does not automatically mean the disclosure is the reason for the dismissal itself.
- Tribunals needed to explore each case on its own facts to ascertain the real reason for the dismissal in the mind of the decision maker – this is the critical question.
- There was no inconsistency in the tribunal's conclusions about separability in relation to the detriment claim on the one hand and the unfair dismissal claim on the other. This was because the decision-makers in the two (distinct) claims were different (the Head of Legal, who objected to the substance of the disclosure about her own competence, and the dismissal decision makers who were concerned about the way the concerns were raised).
- There is no objective standard against which behaviour must be assessed to determine whether the separability principle applies in a particular case, nor any question of requiring behaviour to reach a particular threshold of seriousness before that behaviour or conduct can be distinguished as separable from the making of the protected disclosure itself. This will be decided on the facts.