

Whistleblowing Law and Practice

John Bowers, Martin Fodder, Jeremy Lewis, Jack Mitchell

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Book review by Roderick Ramage and Sally Ramage

It can safely be taken as a given that this book provides all the law and guidance that the employment law practitioner is ever likely to need.

Of particular interest to this reviewer is the depth to which the authors, in what is essentially a practitioners' textbook, describe the underlying principles of whistleblowing; discuss the shortcomings of the law and, without actually speculating themselves, lead the reader to speculate how the aims of the legislation might be achieved.

The fundamental flaw in the Public Interest Disclosure Act 1998 is that it was drawn to provide a defence for employees, who risk dismissal or some other detriment as a result of blowing the whistle.¹ The, probably inevitable, consequence, is that employers, instead of dealing with the subject matter of the disclosure, turn their forensic attention to the whistle-blower, with a view to discrediting him or her, for example, by demonstrating that the disclosure was made for a reason other than the public interest, or to suppressing the disclosure by financial inducements.

The recent spate of revelations about NHS gagging clauses in compromise agreements with whistle-blowers is a clear illustration that the Act, far from facilitating the making

¹ The Public Disclosure Act 1998 protects individuals who make certain disclosures of information in the public interest. It protects them from victimisation. It protects workers who are employees and also protects persons who '(a) work or worked for a person in circumstances in which (i) he is or was introduced or supplied to do that work by a third person, and (ii) the term on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked by the third person or by both of them'.

of public interest disclosures, has resulted in a regime, in which disclosures are suppressed and would-be whistle-blowers are enriched financially.

The disparity between the aims of the legislation and its implementation is illustrated by the authors' analysis of the Court of Appeal's decision in *Fecitt v NHS Manchester*² in chapter 7, titled, *The Right Not to Suffer Detriment*.³ Three nurses, including Mrs Fecitt, at a walk-in centre made protected disclosures about a colleague at the centre, who made false statements about his experience and qualifications. Other staff at the walk-in centre thought that the three were conducting a witch hunt and subjected them to isolation, insults, abuse on the Internet social website at www.Facebook.com; and made threatening telephone calls to him. The walk-in centre became dysfunctional, and therefore NHS Manchester transferred the three to other employment.

The three nurses then made complaints to an Employment Tribunal under the Employment Rights Act 1996 s47B, that they had suffered detriments as a result of making protected disclosures. The Court of Appeal held that the three had not been victimised by NHS Manchester; that the legislation did not make it unlawful for other employees to victimise whistle-blowers and that NHS Manchester was not vicariously liable for the conduct of the other employees. The result of this decision is to strengthen the employer's armoury of defences and limit the protection given to employees.

Chapter 15, titled, *Obligations to Blow the Whistle*, shows that *Bell v Lever Brothers*³ is not as restrictive today as formerly and that there are circumstances in which directors and senior employees, may, in the absence of express contractual obligations⁴ have implied duties to report the wrongdoing of others and themselves. This chapter concludes with a discussion of the extent to which employers can or ought to establish whistleblowing policies, with a view to clarifying employees' duties and their rights. The briefing paper by Public Concern at Work to the Health Select Committee in July 2011 reported that the most significant factor leading to the failure of employees to report concerns, was the perception that nothing would be done, underlining the fact that, as this reviewer sees it, under the present legislation as applied by the courts, the

² [2011] EWCA Civ 119.

³ [1932] AC 161.

⁴ See the 'own up and sneak' clause in Kelly's Legal Precedents 20th Edition para 10, 310.

defence of employers trumps the public interest matters about which whistle-blowers express concerns.

The Minister of Health's announcement on 14 March 2013 that NHS employees would have new legal rights allowing them to speak out about public interest concerns without being bound by confidentiality clauses, may lead to a change in attitude and practice in the NHS. However the wider issues highlighted by *Fecitt*, if they are to be resolved, will need further legislation and indeed the government has just announced such changes to the legislation by way of a 'public interest test'.

Currently, a worker has whistle blowing protection where he makes a disclosure about a breach of his own employment contract. This was not the intention of the legislation.⁵

New 'public interest' test and abolished 'in good faith' disclosure

The public interest test⁶ is intended to close this loophole. The UK government's planned significant changes to whistle blowing laws by introducing a 'public interest' test will shortly come into force. For disclosures that are made from 25 June 2013: a new requirement for disclosures to be made 'in the public interest' applies; the requirement for a disclosure to be made *in good faith* is abolished⁷ and instead, there is to be a new power for tribunals to reduce compensation if a disclosure is not made in good faith; the definition of a 'worker' now extends to cover certain NHS contractors.

The definition of 'worker' to be extended

There will be further consideration later in 2013 on extending the definition of a 'worker' to cover job applicants. In summer 2013, personal liability for employees who victimise whistleblowers and vicarious liability for their employer will be introduced, addressing *Fecitt*.

⁵ Currently, an employer cannot be vicariously liable for acts of victimisation carried out by its employees (*Fecitt*). The change brings whistle-blowing protection in line with discrimination law. There is no confirmed implementation date.

⁶ Currently, a worker has whistle blowing protection where he makes a disclosure about a breach of his own employment contract. This was not the intention of the legislation. The 'public interest' test is intended to close this loophole. Under the new test, the worker must have "a reasonable belief" that the disclosure is made in the public interest. This is still partly subjective. It is not necessary for there actually to be a public interest, it is sufficient that the worker has a reasonable belief that this is the case. The loophole has not been closed completely. Whistleblowing protection can still apply where a worker discloses breaches of his own contract if there is a public interest in the disclosure, as in relation to serious breaches by public sector or large private sector employers.

⁷ The removal of the 'in good faith' requirement has caused some concern for employers. It shifts the emphasis to the type of information being disclosed, not the motivation. Good faith will instead come into play at the remedy stage. Compensation may be reduced by up to 25% if the employer can demonstrate that the disclosure was not made in good faith.

In conclusion, *Whistleblowing Law and Practice* by Bowers, Fodder, Lewis and Mitchell is an important book which helps the lawyer to see how the new, much needed legislation fits with what went before. It will therefore assist in drafting the necessary new whistleblowing policies.