Covid-19 and Whistleblowing

With the recent media attention around Personal Protective Equipment (PPE) and staff raising their concerns, what protection do they have under “whistleblowing” legislation?

Over recent weeks, there has been a huge amount of media attention on the issue of Personal Protective Equipment (PPE) and staff raising concerns regarding shortages and unsuitability of PPE. Unsurprisingly, there has been a particular focus on staff working in the healthcare sector caring for and treating patients who have been diagnosed with or identified as potentially having COVID-19.

Under existing employment legislation, it is well established that an individual has the right not to be subjected to a detriment or dismissed on the ground that they have raised concerns that are in the public interest, that is having made a public interest disclosure, often referred to as a protected disclosure or more commonly ‘whistleblowing’. The protection is set out in the Employment Rights Act 1996 and was incorporated into that legislation by the Public Interest Disclosure Act 1998. The protection is not limited to concerns regarding health and safety and applies to disclosures relating to a variety of issues.

The protection applies where an individual discloses information which, in their reasonable belief, tends to show one or more of the following:

- A criminal offence has been, is being, or is likely to be committed.
- That a person has failed, is failing or is likely to fail to comply with a legal obligation.
- That a miscarriage of justice has occurred, is occurring or is likely to occur.
- That the health and safety of any individual has been, is being, or is likely to be endangered.
- That the environment has been, is being or is likely to be damaged.
- That information tending to show any of the above has been, is being, or is likely to be concealed.

The purpose of the legislation was to protect individuals who raise concerns about certain types of wrongdoing, specifically issues that are in the public interest as opposed to concerns or complaints which relate to an individual’s personal circumstances, which should be dealt with in line with grievance procedures.

There is a strict test which Employment Tribunals will consider in cases involving allegations of whistleblowing complaints and whether a specific disclosure qualifies as a public interest disclosure from a legal perspective has to be assessed on a case by case basis. Once the Employment Tribunal has considered whether a particular disclosure qualifies as a public interest disclosure, it will go on to consider whether the treatment about which the individual complains was as a result of that disclosure.

Put simply, the Employment Tribunal will consider whether the treatment of that individual was, in fact, motivated by the whistleblowing perhaps with an intent to punish an individual for raising concerns or to discourage others from doing the same, or another justifiable reason unrelated to the concerns raised. From a practical perspective, employers should not concern themselves with whether or not a particular disclosure is classed as a public interest disclosure – that is a matter for legal argument to be determined by an Employment Tribunal. Instead, employers should focus on responding to any concerns raised in an appropriate way.

Most organisations, especially those in the healthcare sector, will already have a whistleblowing policy and procedure which sets out the process to be followed and employers should refer to that policy when dealing with concerns raised. If an employer does not already have a whistleblowing policy in place, they should seek advice on how best to deal with any concerns raised.

Written by:
Janine Lawton, Employment Solicitor at rradar