Protecting whistleblowing research: a step too far?

JASON BRAIER, 42 Bedford Row and SHOSHANA BACALL, Fox & Partners

In Bilsbrough, Southampton Employment Tribunal has ruled that protection for whistleblowers under the ERA extends to those considering making a protected disclosure. Below, we argue this decision is a case of judicial overreach with unintended consequences.

The facts

Mr Bilsbrough worked as a client service executive for Berry Marketing Services, a company that provides clients with software for booking venues for conferences and events around the world. A glitch was identified in the software, enabling third parties to be added to the database and to become privy to certain private data without authorisation.

Mr Bilsbrough raised concerns about this with a company director, a disclosure that the company took seriously. His line manager was vexed that Mr Bilsbrough had failed to raise it first with her and she took him to task for not doing so. Angry at this intervention, Mr Bilsbrough told a colleague, Ms Dobbs, of his intention to take the company down, following which he started to search through Google for data protection principles and how to make a disclosure to the Information Commissioner.

Mr Bilsbrough did not follow through with that disclosure. A few weeks later, he resigned on finding new employment, but then retracted the resignation, a retraction that was accepted. A few weeks later, he was offered a promotion. Ms Dobbs was upset by this reward and that she was not being promoted. Offended at being overlooked, she told Mr Bilsbrough's line manager what he had said and about the searches he had performed. Around two months had passed between the Google searches and Ms Dobbs recounting what had happened. The following day, Mr Bilsbrough was suspended. A day later, an investigation meeting opened with the investigating officer reading a summary that referred to an investigation of claims that Mr Bilsbrough had been researching ways to 'take the company down' by reporting the company for data protection violations. Following a disciplinary procedure, Mr Bilsbrough was dismissed.

The controversial legal conclusion

The employment tribunal found, as a fact, that an effective cause of the decision to suspend Mr Bilsbrough was the research he carried out into how to make a disclosure to the Information Commissioner. Incidentally, an automatic unfair dismissal claim failed given that the tribunal found the principal reason for dismissal was the expressed intention to take the company down rather than the research into protected disclosures.

Having found the research to be an effective cause of the suspension, the tribunal considered whether that act – preliminary to any future disclosure – fell under the protections from detriment under Parts IVA and V of the ERA. The tribunal decided it did. It reached that conclusion by finding the right to freedom of expression under Article 10 ECHR would be breached by the chilling effect of subjecting to detriment/dismissal an employee for researching how to make a protected disclosure. It held that words should be read into s.47B(1) and s.103A ERA to protect against detriment or dismissal, where the reason is that the worker/employee has 'considered' making a protected disclosure.

Comments

We appreciate that *Bilsbrough* highlights a *lacuna* in the protection afforded to those looking to enter the whistleblowing arena. We recognise that there are strong policy-based arguments to campaign for the extension of legislative protection to those who find themselves subjected to detriment for acts done in preparation for making a protected disclosure. To allow employers to act with impunity in anticipation of a disclosure arguably undermines the protective purpose. This is especially so in a world in which technological advances allows closer and quicker scrutiny of

'the tribunal's approach arguably undercuts the highly prescriptive legislative hoops a claimant is required to jump through to be afforded protection under the ERA'

employees' digital footprints in the workplace. However, any such extension needs to be carefully crafted and ought, we think, to be a matter for Parliament to determine rather than judges.

We see a number of problems with the approach taken by the Southampton Employment Tribunal and are concerned by the unintended consequences of the proposed extended construction.

First, the wording lacks definitional certainty. What does 'considered' mean? Does it require the act to achieve a particular preparatory quality before protection applies? What if the individual considers whether or not to make a protected disclosure but decides not to do so, or decides (rightly or wrongly) that the information he would disclose would not be protected? Would researching whether something was a breach of a legal obligation or of health and safety requirements suffice, or does the individual also have to give active consideration to means and methods of disclosure? Would simply checking the company's whistleblowing policy suffice?

Secondly, and relatedly, the tribunal's approach arguably undercuts the highly prescriptive legislative hoops a claimant is required to jump through to be afforded protection under the ERA. ERA s.43B-H provides requirements relating to the subject matter of the disclosure, the content of the disclosure, public interest in the disclosure and the disclosure's recipient. Are those still requirements under the tribunal's extension? If so, how are they to be proved, given their hypothetical nature and given the importance of the precise wording of a disclosure to determination of whether or not it qualifies for protection?

If the tribunal's extension does not require proof that the elements qualifying a disclosure for protection are satisfied, does that allow a second bite of the cherry to a claimant whose disclosure would otherwise not meet the statutory test? Could a claimant fail to show their actual disclosure was protected but succeed by persuading a tribunal that an effective cause of a detriment suffered was that they had performed acts preparatory to making that disclosure? If so, surely that emasculates the careful prescription of the written legislation and offends against the restriction in *Ghaidan* on reading in words 'inconsistent with a fundamental feature' of the legislation in order to reach a construction consistent with HRA protections.

The tribunal's answer to that criticism (at para 75 of the judgment) is to rely upon the Secretary of State's power under s.49B ERA to make regulations prohibiting an NHS employer from subjecting a worker to detriment due to a belief that the worker has made a protected disclosure (regulations now in force under the NHSR-PDR). But that is no answer. It is in a separate part of the ERA, it is a provision restricted to NHS workers and, most importantly, it only protects those the employer believes has made a protected disclosure. It does not extend to those who have researched how to make such a disclosure but who have not got around to making it. If anything, this limited power of extension under s.49B reinforces the opposite argument to that for which the tribunal relied on it.

Moreover, the whistleblowing provisions of the ERA were amended substantially after the drafting of the victimisation provisions under the EqA, which protect against subjection to detriment motivated by a belief that the employee may do a protected act. Had Parliament considered there to be a need to replicate s.27 of the EqA to comply with Article 10 ECHR, it would surely have done so then. Notably, in *Fecitt*, Elias LJ – in refusing to read words in to s.47B – considered it 'striking' that the construction called for in respect of whistleblowing protection was afforded to those claiming victimisation under the EqA.

Fecitt provides a prime example of the courts recognising the demarcation between appropriate judicial construction and inappropriate judicial legislation. There, the claimants identified a *lacuna* in the protection in that the statutory provisions did not protect against victimisation by fellow workers for having made a protected disclosure. The Court of Appeal was urged to read words into s.47B to cover that situation but declined to do so. Elias LJ considered that went 'far beyond the legitimate role of the court in construing legislation' and that the proposed reading in of words was 'not … sustainable given the language that Parliament has used'. The *lacuna* was ultimately remedied by amendments made under the ERRA as opposed to judicial legislation.

Thirdly, there are issues with the tribunal's reliance on Article 10 ECHR. The tribunal relied upon *Heinisch*, while recognising (a) that that was a case in which the public interest disclosure had already been made rather than merely being threatened; and (b) that there was no Strasbourg case law supportive of a finding of breach of Article 10 for

'Fecitt provides a prime example of the courts recognising the demarcation between appropriate judicial construction and inappropriate judicial legislation'

subjecting to detriment for researching how to make a public interest disclosure. Not only was *Heinisch* not supportive of the legal finding the tribunal sought to make, but there are aspects of the Strasbourg court's judgment that are ignored by the tribunal but should have given them considerable pause for thought. The judgment in *Heinisch* does not render detriments motivated by any act of whistleblowing to be in breach of Article 10. The judgment goes into some detail on issues relevant to proportionality before a breach is found.

The guidance at para 69 is of particular note given the facts of *Bilsbrough*: 'The motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. For instance, an act motivated by a personal grievance or personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection. It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet means of remedying the wrongdoing was available to him or her.'

That nuance is absent from the words read in to the ERA by the tribunal in *Bilsbrough*. Given the absence of a bad faith defence to a whistleblowing claim under the ERA (save to reducing compensation at the remedy stage), the tribunal's legislative addition would protect those researching a disclosure in circumstances where the Strasbourg court would not have found breach of Article 10 even if the disclosure had been made.

In *Bates van Winkelhof*, Lady Hale recognised the extent of the proportionality inquiry set out in *Heinisch* before asking rhetorically about what impact the higher level of protection under the ERA as against the ECHR had on the s.3 HRA interpretive obligations to read legislation compatibly with ECHR rights 'so far as it is possible to do so'. She described that as a 'difficult question', which 'fortunately' it was unnecessary, in that case, to answer. It is not a question that appears to have crossed the minds of the tribunal in *Bilsbrough*.

Finally, the tribunal's judgment is arguably inconsistent with the Court of Appeal's judgment in *Bolton School*, where the court dismissed as 'highly artificial' the submission that Mr Evans' conduct in entering the school's computer system was in itself a disclosure protected under s.43B ERA.

Conclusion

We recognise the merits of extending protection to those engaging in acts preparatory to making a protected disclosure. However, it is a legislative exercise requiring careful prescription and the sort of policy-based judgments about the boundaries of protection, which it is only appropriate for Parliament to make. It is too contentious for the blunt instrument of judicial activism.

KEY:

Bilsbrough	*Bilsbrough v Berry Marketing Services Ltd* ET/1401692/2018
ERA	Employment Rights Act 1996
ECHR	European Convention on Human Rights
Ghaidan	*Ghaidan v Godin-Mendoza* [2004] 3 WLR 113
HRA	Human Rights Act 1998
NHSR-PDR	Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018 (SI 2018/579)
EqA	Equality Act 2010
Fecitt	*Fecitt v NHS Manchester* [2012] IRLR 64
ERRA	Enterprise and Regulatory Reform Act 2013
Heinisch	*Heinisch v Germany* (2014) 58 EHRR 31
Bates van Winkelhof	*Bates van Winkelhof v Clyde & Co LLP* [2014] 1 WLR 2047
Bolton School	*Bolton School v Evans* [2006] EWCA Civ 1653