Protecting whistleblowers: A comparative view from the UK

By Sheryn Omeri

For practitioners of employment and discrimination law in England, which includes the law pertaining to whistleblowing, it was extremely disturbing to read, last year, of the cancellation of the contract of psychologist, Paul Stevenson, after he had spoken to the *Guardian* about his experiences when working within Australia's offshore immigration detention centres at Nauru and Manus Island. Even more disturbing was learning that pursuant to s 42 of the *Australian Border Force Act 2015*, Stevenson could have been imprisoned for up to two years for having disclosed apparently any information he had obtained in his capacity as an Immigration and Border Protection worker. It appeared that Stevenson would not necessarily have been protected by the provisions of the Federal *Public Interest Disclosures Act 2013* because his disclosures were made to the press in circumstances where they may have concerned the acts of officials of foreign (i.e. non-Australian) governments and/or Stevenson may not have first made an internal disclosure to his employer. If he had done the latter, it is not clear whether it could be said that any investigation which had been carried out in response was inadequate.

It was encouraging to read, in June 2017, of the announcement of Federal Minister for Revenue and Financial Services, Kelly O'Dwyer, that the Turnbull government wishes to introduce measures to tighten legislation to give compensation and protection to whistleblowers. It was also encouraging to see the publication, even more recently, of the September 2017 Report on Whistleblower Protections of the Parliamentary Joint Committee on Corporations and Financial Services.

The focus however, of both the Minister and the Joint Committee was (perhaps unsurprisingly, given their portfolios) on protecting those who blow the whistle in respect of malpractice in the financial services industry. In reality however, properly drafted whistleblowing legislation has the potential to have a much wider protective effect.

Although *some* consideration was given by the Joint Committee to the protections afforded to whistleblowers in England; in my view, this was somewhat cursory and greater consideration is merited. In England, the rights of whistleblowers are protected by provisions of the same legislation that provide for other causes of action which may be pursued by employees or workers such as unlawful deduction from wages and unfair dismissal; that is, the *Employment Rights Act 1996* ('the ERA', as it is fondly known). In contrast, the Joint Committee appears to recommend that whistleblower legislation remains largely separate from employment-specific legislation. In addition, despite recognising the fragmented nature of whistleblowing legislation in Australia, the Joint Committee nonetheless recommends separate legislation in respect of whistleblowing in the public and private sectors. This adds or maintains an unnecessary layer of complication in a context which will always be inherently, factually and legally complex and which will therefore benefit from as much simplification as possible.

In the English context, the provisions concerning whistleblowing are set out from s 43A of the ERA. In order to benefit from the statutory protection (or compensation in the event of a violation of such protection), employees and workers must satisfy a number of threshold requirements, which enable their disclosures to qualify for protection. The first such set of requirements is enumerated in s 43B, namely that an employee or worker makes disclosures of information which in his or her reasonable belief are in the public interest and which tend to show:

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject (including an obligation imposed by contract);

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of any individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged; or

(f) that the information tending to show any such matter has been or is likely to be deliberately concealed.

Importantly in the case of people like Stevenson, or indeed, those who blow the whistle on malpractice in the financial services industry which has occurred overseas, the ERA specifically states that it is immaterial whether the relevant failure occurs or would occur in the UK or elsewhere and whether the law applying to it is the law of the UK or of any other country or territory.

In 2015, the protection afforded by the whistleblowing provisions of the ERA was broadened through the insertion of an extended definition of the term 'worker' which, in the context of whistleblowing only, now covers agency workers; those who provide services to the National Health Service under a variety of different contractual arrangements which do not fit comfortably within the

more traditional concept of an employment or worker relationship, as well as to those undertaking work experience pursuant to a training program.

It is interesting to note that the Joint Committee, in recommendations 6.1 and 6.2, seeks to broaden protection through extension to former public officials and contractors of the Australian Public Service as well as former staff, contractors and volunteers in the private sector.

In the English context, qualifying disclosures will be protected if they are made to a person's employer. In such cases, the employee or worker need only have a reasonable belief that the information he or she has disclosed 'tends to show' one of the above-mentioned states of affairs. The employee or worker does not need to have sufficient evidence to demonstrate that a criminal offence has in fact been committed for example. Provided the employee's belief in the information tending to show this was objectively reasonable, he or she will be protected even if he or she turns out to be wrong. An employee or worker will also be protected if he or she makes a disclosure to a prescribed person such as the Information Commissioner, if the employee or worker reasonably believes that the relevant failure falls within the remit of that prescribed person. Where an employee or worker makes a disclosure to someone other than his or her employer, a slightly higher state of belief is required; that is, the employee or worker must reasonably believe that the information he or she discloses and any allegation contained in it are substantially true, rather than just that they tend to show one of the above-mentioned states of affairs.

Crucially in many cases, the ERA allows employees and workers to make disclosures to the press where they believe that the information is substantially true, they do not make the disclosure for purposes of personal gain and in circumstances where any of the following matters prevail: (i) they think they will be subjected to a detriment by their employer; (ii) their employer is likely to conceal or destroy evidence of the subject matter of their disclosure; or (iii) they have already made a disclosure of the same information to their employer.

Provided these conditions are met, the employee or worker will be protected from being dismissed and also from being subjected to any detriment short of dismissal. The concept of a detriment which falls short of dismissal has been given a wide meaning by the courts. In relation to remedies, whistleblowing claims are treated like discrimination claims and tribunals are empowered to make (uncapped) awards for compensation which reflect any detriment to which the employee or worker has suffered (including dismissal and inability to find alternative work) and damages for injury to feelings, which are not available in the case of other common claims such as unfair dismissal.

Complaints of whistleblowing are heard in the Employment Tribunal, which was established in order to provide a speedy and more cost-effective resolution for employment-related complaints than the ordinary courts. As whistleblowing claims tend to be fact-sensitive, they are required to be determined by a full bench, comprising an employment judge and two lay wing members, one with a management background and the other with a more employee-focussed (typically union) background, as in the case of discrimination claims (and unlike in the case of contractual claims or claims for unfair dismissal).

"I'm sensing confidence, boldness, and moral sensibility. You're not not going to turn out to be a whistleblower, are you?"

Aaron Bacall / Cartoonstock

It is important to note that s 43B(3) of the ERA confirms that a disclosure of information is not a qualifying disclosure if the person making it commits an offence by doing so. Given that s 42 of the *Australian Border Force Act 2015* renders the disclosure of any information obtained in one's capacity as a Border Protection worker an offence, even a wholesale duplication of the provisions of the ERA may not have been of direct assistance to someone in Stevenson's position. I say 'direct' assistance, because indirectly, the enactment of whistleblowing protections in England and Wales (and their extension to non-traditional workers) has a normative effect which has encouraged a widespread societal respect for whistleblowers and a recognition of the important role they may play in the fields of human rights violations and regulation of the financial services sector, among many others. In such circumstances, legislative provisions like s 42 of the *Australian Border Force Act 2015* may be less likely to be enacted in the first place, given the primacy accorded to the role of the whistleblower.

For those who may be concerned about an increase in protection for whistleblowers (perhaps particularly in the private sector) leading to an opening of the proverbial floodgates, this has not been borne out in the English context. Employment tribunals are faithful to the terms of the legislation which require evidence of a disclosure of information; that is, a conveying of facts which is more than a communication of one's position in negotiations, an allegation or an opinion: *Cavendish Munro Professional Risks Ltd v Geduld* [2010] ICR 325.

In addition, most employees who bring claims for whistleblowing that are ultimately unsuccessful find themselves in such position because there is insufficient evidence of causation, that is, material from which the Employment Tribunal can infer that the employer dismissed the worker because (or at least principally because) he or she had made a protected disclosure. In this regard, the Court of Appeal has been clear that, given the terms of the relevant statutory provisions, it is perfectly lawful for an employer to dismiss a worker for the manner in which he or she makes a protected disclosure or for conduct relating to the making of the protected disclosure rather than the fact of the making of the disclosure. In *Evans v Bolton School* [2007] ICR 641, a high school IT teacher was dismissed for hacking into the school's IT system in order to prove how easy it was to do so about which he subsequently made a protected disclosure. The Court of Appeal held that the word 'disclosure' was not a term of art and was to be given its ordinary meaning which does not extend to the whole course of a worker's conduct and did not, in that case, extend to the employee's conduct in hacking into the school's computer network. This was upheld by the Employment Appeal Tribunal in the more recent case (in which I acted for the employer) of *Barton v Royal Borough of Greenwich* UKEAT/0041/14/DXA.

As a result, when it comes to the drafting of fresh legislation aimed at enhancing the protection available for whistleblowers in Australia in both the public and private sectors, the Turnbull Government might consider that the corresponding English law and jurisprudence on the subject provide at least a helpful starting point.