



Shaun Pinchbeck, LL.B
Head of Employment Law

Member of the Employment
Lawyers Association

Shaun also sat on a working
party advising the Government
on law relating to "working
status"

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www.heptonstalls.co.uk

e-mail: [Shaun Pinchbeck](mailto:Shaun.Pinchbeck@heptonstalls.co.uk)

Head Office address:

7-15 Gladstone Terrace,
Goole,
East Yorkshire,
DN14 5AH
T: 01405 765661
F: 01405 764201

Also at,
Howden,
Pontefract and
Scunthorpe,



Welcome to the latest issue of our free employment law update. In this month's issue we look at:

BLOWING THE WHISTLE There are a number of circumstances in which workers can legitimately blow the whistle on malpractice at work. We provide an overview of the legislation governing this area. [\[more...\]](#)

REPUTATION AT STAKE Employees can be dismissed for doing something that impacts on the reputation of their employer. We look at a case which said that dismissing a chaplain for doing a media interview could not be fair as the company had not even bothered to listen to the interview. [\[more...\]](#)

COLLECTIVE RIGHTS Under European law, employers are required to inform and consult workers in the event of making collective redundancies. We look at a case that said that employers must start the process of consultation as soon as they decide to contemplate collective redundancies. [\[more...\]](#)

IN BRIEF The Government recently published another consultation document on draft regulations to implement the EU Agency Workers Directive into domestic law. [\[more...\]](#)

Heptonstalls LLP's Employment Partner Shaun Pinchbeck has seen a significant increase in employers seeking advice on redundancy situations in the past year:

"My aim is to explore with clients whether there is a way to avoid having to make employees redundant by considering whether there is an alternative such as reduced hours. In the event that there is no realistic alternative, my aim is then to guide clients through the process to try to minimise the consequences to the client and to minimise the risk of claims being brought. If you are in a situation where you are even contemplating the possibility of having to make redundancies, then seeking advice from the outset is something that I would urge employers to do as mistakes made at any stage of the process can prove costly".

Do not hesitate to contact Shaun if you have any queries on 01405 765661 or email shaun.pinchbeck@heptonstalls.co.uk

Heptonstalls have created a very useful summary to guide you through the key points of current employment legislation. This covers key qualifying periods and limits including a schedule of forthcoming changes.

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BLOWING THE WHISTLE

The Public Interest Disclosure Act 1998 introduced special protection for people who “blow the whistle” about malpractice at work. Generally this involves disclosures by workers and employees (or former employees) of wrongdoing such as fraud or malpractice of some sort.

Individuals are protected if they:

- are a worker
- are revealing information of the right type
- reveal it to the right person, and in the right way
- believe that malpractice in the workplace is happening, has happened in the past or will happen in the future

No service qualification is required, so protection applies from day one.

Who can make a protected disclosure?

The Act covers most people at work, including employees, agency workers, homeworkers, apprentices, trainees on vocational schemes, crown servants and the self-employed who work personally on a contract (but not genuinely self-employed professionals such as accountants). Voluntary workers, police officers and members of the armed forces are excluded.

Which disclosures are protected?

The Act only protects certain disclosures, as follows:

- a crime
- the breach of a legal obligation
- a miscarriage of justice
- issues relating to health and safety
- an environmental risk
- an attempt to conceal any of the above

Workers are not protected, however, if:

- they break the law when making a disclosure (for example if the person had signed the Official Secrets Act as part of their employment contract)
- the information is protected under legal professional privilege (for instance, if the information was disclosed in the course of someone asking for legal advice)

To whom should the disclosure be made?

To qualify for protection, workers have to make the disclosure to one of the following:

- Their employer, using the internal procedure if there is one
- A legal advisor

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- A Minister of the Crown
- A prescribed person - that is, an outside body or appropriate regulatory body prescribed by the Secretary of State.

Can disclosure be made to anyone else?

Yes, workers are still protected if they make the disclosure to someone else, as long as they can show that they:

- made the disclosure in good faith
- that they believed the information was substantially true
- that they did not act for personal gain
- that it was reasonable to make the disclosure, given the circumstances

To make a protected disclosure in these circumstances, the worker must either:

- reasonably believe their employer would treat them unfairly if they made the disclosure to them or one of the "prescribed" people
- reasonably believe that a disclosure to their employer would result in the destruction or concealment of information about the wrongdoing
- have previously disclosed the same or very similar information to their employer or a prescribed person

What about "exceptionally serious" breaches?

If a worker believes the breach is "exceptionally serious" they do not have to go through the normal channels and can publicly blow the whistle straight away.

However, it is not enough for something to be an exceptionally serious failure in their opinion alone. It must be a matter of fact - for instance, an exceptionally serious health and safety risk putting workers' lives at risk.

In these circumstances, the above conditions for blowing the whistle do not apply, if the worker:

- has made the disclosure in good faith
- reasonably believed that the information was substantially true
- did not act for personal gain
- acted reasonably taking all the circumstances into account

Can workers complain to a tribunal?

Workers have the right not to be treated badly by their employer and can complain to a tribunal if they feel their employer has penalised them in some way for making a disclosure. Compensation is what is just and equitable in the light of the worker's loss.

If they are dismissed because they blew the whistle, the dismissal would be automatically unfair. Compensation is unlimited.

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REPUTATION AT STAKE

Employees can be dismissed for doing something that impacted on the reputation of their employer. In *Reverend Le Vanttinen -Newton v The Geo Group UK Ltd*, however, the Employment Appeal Tribunal (EAT) said that dismissing a chaplain for doing a media interview could not be fair as the company had not bothered to listen to the interview, nor even read a transcript of it.

What happened?

Reverend Le Vanttinen-Newton, a chaplain for the Geo Group which operated a detention centre on behalf of the Home Office, gave a short radio interview which was broadcast on 29 July 2007. He did not get anyone's permission before giving the interview, contrary to a rule in his code of conduct, but told his manager on 19 July about it.

Following a disciplinary hearing, he was dismissed for gross misconduct on 20 November 2007, on the ground that he might have brought the company into disrepute and that, in turn, might impact on its relationship with the Home Office.

Reverend Le Vanttinen-Newton claimed unfair dismissal, pointing out that no one in the company had listened to or read his interview and that he had given media interviews before to the "secular" as opposed to the "religious" media without being sanctioned.

Although the tribunal was critical of the way in which the company had handled the matter, it said that it was entitled to take a strict view of talking to the media without authority. It accepted that the decision was harsh, but was unable to say that his dismissal was outside the range of reasonable responses in the circumstances. It further found that if his dismissal had been unfair, it would have found that he was 85 per cent responsible for it.

The EAT agreed that Reverend Le Vanttinen-Newton had been aware of the consequences of breaching the rule. It also found that the tribunal was entitled to decide that, although the chaplain had made a distinction in his own mind between different elements of the media, he was not entitled to subdivide them into different types and seek to attribute different possible disciplinary sanctions to each of them. And although he had told his line manager about the interview before it was broadcast (indicating that he did not think that the company would object to it), that did not excuse him.

However, the EAT then turned its attention to the dismissal letter. It said that there was a big difference between something having "potential" and something being "likely" to occur. As no one at the company had bothered to hear or read a transcript of the interview, the EAT was not clear how the chaplain's actions could even have the potential to bring the company into disrepute. As this was an essential element of the letter, the EAT was not convinced that the company would have decided to dismiss Reverend Le Vanttinen-Newton had it heard the interview.

However, it saw no reason to depart from the tribunal's finding that Reverend Le Vanttinen-Newton should be held 85 per cent responsible for his dismissal.

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COLLECTIVE RIGHTS

Under European law, employers are required to inform and consult workers (or their representatives) in the event of making collective redundancies. In *Akavan Erityisalojen Keskusliitto AEK ry and ors v Fujitsu Siemens Computers Oy* the European Court of Justice (ECJ) held that employers must start the process of consultation as soon as they have taken " a strategic or commercial decision compelling them to contemplate or to plan for collective redundancies".

What happened?

The Fujitsu Siemens Computers Group (FSC), a subsidiary of Fujitsu Siemens Computers (Holding) BV (the parent company) operated a production plant at a site in Kilo, Finland. At a meeting on 14 December 1999 the board of directors supported a proposal to sell off the Kilo factory and consultations then took place with the workforce from 20 December until the end of January 2000. On 1 February the board decided to terminate operations in Finland and on 8 February 2000, FSC began to make most of the workforce redundant.

The employees then claimed that the decision to close the Kilo factory had, in fact, been taken on 14 December before consultation with the workforce began, contrary to the 1975 Collective Redundancies Directive. FSC argued that the decision had not been made until 1 February 2000, after the consultations had ended. It said that up to that point, possible alternatives were still being considered, such as scaling down production, or going into partnership with another undertaking.

The ECJ said that the general obligation to hold consultations under article 2 of the directive arose when an employer was contemplating or drawing up a plan for collective redundancies.

The reference in articles 3 and 4 to "projected collective redundancies" meant that the actual factor triggering the obligation was an "intention" to make collective redundancies. That intention arose as soon as the employer took a strategic or commercial decision compelling them to contemplate or to plan for collective redundancies.

The obligation to consult was not, however, dependent on the employer being able to supply all the information required under the directive to the workers' representatives at the start of the process. In other words, employers could (and indeed must) add to any information supplied in the course of the consultation process. This would also allow the workers' representatives to participate as fully and effectively as possible.

Under Article 2(4), the ECJ said that the subsidiary company was responsible for complying with the regulations, even if it was the parent company that took the decision to make the redundancies, and even if the subsidiary "may not have been immediately and properly informed of that decision" by the parent company. However, the obligation to hold consultations only fell on the subsidiary once it been identified by the parent company.

The ECJ also said that where there is a group of undertakings, the consultation procedure must be concluded by the subsidiary before it terminates the contracts of employees who are to be made redundant. [[Back to contents](#)]

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IN BRIEF

The Government has recently published another consultation document on draft regulations to implement the EU Agency Workers Directive into domestic law. This follows on from the consultation conducted by the Department for Business Innovation and Skills earlier in the year.

In it, the Government says it intends to proceed on the basis of the CBI-TUC agreement of May 2008, providing agency workers with a right to equal treatment after 12 calendar weeks in a given job (whether the person works part time or full time).

It has now revealed in this document that the regulations will not come into force until 1 October 2011 in recognition of the fact that "implementation of the Directive will entail some potentially significant changes in practice for hirers and agencies, who will need time to prepare".

The publication contains a brief synopsis of responses to the previous consultation on the issues it discussed. The Government is now seeking views on:

- its proposed response to issues arising from the previous consultation
- whether the draft regulations effectively reflect its policy intentions as set out in this consultation
- whether the details of the proposals, as reflected in the draft regulations, give rise to any particular issues of concern
- what practical advice users would welcome in the guidance which will accompany the regulations.

The consultation closes on 11 December.

For further information, go to:

www.berr.gov.uk/files/file53058.pdf

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