

## Allan Janes

solicitors

Spring 2010

### whistleblowing – what constitutes a qualifying disclosure?

The Employment Appeal Tribunal (EAT) has ruled (Cavendish Munro Professional Risks Management Ltd. v Geduld) that in order to fall within the statutory definition of a protected disclosure under Section 43 of the Employment Rights Act 1996 (ERA), a disclosure must be an actual disclosure of information as opposed to an allegation or expression of concern.

Mr Geduld became a director, shareholder and employee of Cavendish Munro, a firm of insurance brokers, in March 2007. From early on in his employment there were tensions between him and his two fellow directors and less than a year later Mr Geduld was dismissed. Prior to his dismissal, his solicitor had sent a letter on his behalf to the two other directors.

As he had been employed for less than a year, it was not open to Mr Geduld to bring a claim of unfair dismissal. He claimed, however, that he had been dismissed because of the letter sent by his solicitor, the contents of which amounted to a protected disclosure. An employee can bring a claim of unfair dismissal for having made a protected disclosure irrespective of length of service and there is no upper limit to the amount of compensation that can be awarded.

The Employment Tribunal (ET) upheld Mr Geduld's claim and awarded him £36,300 in compensation.

Cavendish Munro appealed on the ground that the ET had erred in law. Section 43 of the ERA requires a disclosure of information in order to establish the existence of a protected or qualifying disclosure. This is not the same as simply voicing a concern or objection or making an allegation. The company contended that there was nothing in the solicitor's letter that could be said to be a disclosure of information.

Mr Geduld argued that the letter did constitute a protected disclosure. Under the ERA, a disclosure can be stating something of which the recipient is already aware. Referring to a general basis of an allegation can constitute information without the need to refer to specific facts.

The EAT upheld Cavendish Munro's appeal and set aside the ET's judgment. For a protected disclosure to fall within the statutory definition, there must be disclosure of information. In the EAT's view, the letter sent by Mr Geduld's solicitor did not convey information as contemplated by the legislation, let alone make a disclosure. It did not disclose any facts but was merely 'a statement of position quite naturally and properly communicated in the course of negotiations between the parties'.

### EHRC guidance for employers on flexible working

The Equality and Human Rights Commission has published new guidance entitled 'Working Better: A Manager's Guide to Flexible Working'. This aims to help business managers implement innovative working methods that also improve productivity and customer service, save money and enable employees to balance their work and personal lives.

The guidance covers:

- the business benefits that can be achieved from implementing flexible working

practices:

- the key principles for introducing flexibility;
- advice on implementing flexible working;
- the key management skills required;
- case studies of flexible working arrangements in large and small businesses; and
- Q&As on problem solving for challenging situations.

The guidance can be found at:

[www.equalityhumanrights.com/uploaded\\_files/Employers/flexbetterworkingguide.pdf](http://www.equalityhumanrights.com/uploaded_files/Employers/flexbetterworkingguide.pdf).

### guidance on preventing workplace harassment and violence

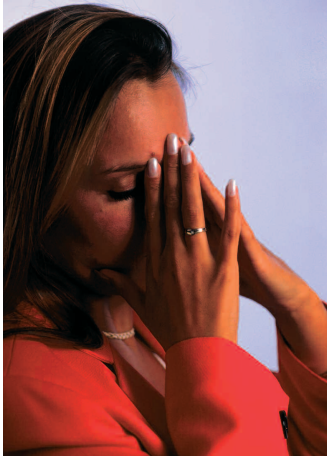
New guidance giving practical advice to businesses and employees on preventing workplace harassment and violence has been published following European level agreement between employer and trade union organisations on the necessity of raising awareness of this issue.

The guidance has been produced after collaboration between the Government and employers, trade unions and other relevant agencies.

As well as raising awareness of the issues, it provides employers, workers and their representatives with ways of identifying, preventing and managing problems of harassment and all forms of violence at work.

The guidance can be found at: [www.workplace-harassment.org.uk](http://www.workplace-harassment.org.uk).

## Increases in compensation for injury to feelings



The Employment Appeal Tribunal (in *Da'Bell v NSPCC*) has ruled that the level of awards made to compensate employees for injury to feelings in discrimination and whistleblowing cases should be

increased to take account of inflation. Such awards are compensatory. They are not intended to punish the employer.

In 2002, the Court of Appeal issued guidance (in *Vento v Chief Constable of West Yorkshire Police*) for use when assessing the compensation payable for injury to feelings in such cases. This identified three bands, depending on the seriousness of the case, and the recommended limits had remained unchanged until the EAT's decision.

The new limits are as follows:

- The top band will now be between £18,000 and £30,000. Awards in this range will be made

in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in exceptional circumstances will a compensation award for injury to feelings exceed £30,000;

- The middle band is now between £6,000 and £18,000. Awards in this range will be made in serious cases but where the action does not merit an award in the top band; and

- For less serious cases, such as where the act of discrimination is an isolated or one-off occurrence, awards of between £500 and £6,000 will be appropriate.

The new guidelines come into effect immediately.

## without prejudice communications can be admissible

The phrase 'without prejudice' is commonly used where parties in a dispute wish to keep communications relating to its settlement from being admissible as evidence should negotiations fail and the matter end up in court. For example, negotiations between an employer and employee seeking to reach a compromise agreement will normally be so labelled.

The principal use of without prejudice communications is to encourage parties to settle their dispute out of court. It provides a useful way for them to discuss the issues and to see if an agreement can be reached. If this does not prove possible and the case proceeds to court, the parties to the dispute will want to know that the earlier without prejudice discussions cannot be relied on as evidence in court. In many cases, without prejudice communications will not be admissible but a recent case has highlighted the need to be careful not to assume that the phrase will provide blanket cover that will always prevent such communications being admissible.

The case in point concerned two companies involved in a dispute over an invoice. They had undertaken extensive without prejudice negotiations prior to agreeing to a settlement in writing.

However, one of the companies subsequently claimed that the other had defaulted on the agreement and the matter went to court. The High Court ruled that whilst without prejudice negotiations that do not lead to agreement will not normally be admissible as evidence in court, where a settlement is reached but there is subsequent litigation, adducing the communications between the parties as evidence in court, as if they had not been made on a without prejudice basis, may be appropriate in order to ascertain the true intentions of the parties concerned.

The judge said that the principle that without prejudice communications aimed at settling a dispute cannot be used in evidence in any subsequent legal proceedings is not an absolute rule but a matter of public policy. Where legal action is taken after a settlement has been reached and it would assist the court in reaching its decision, the court has the discretion to decide whether without prejudice communications should be admissible, depending upon the facts of the individual case.

Without prejudice negotiation is often an effective way of settling employment disputes with individuals. We can assist you in protecting your interests in all such negotiations.

**Allan Janes**  
solicitors

21-23 Easton Street, High Wycombe, Buckinghamshire. HP11 1NT

Tel: (01494) 521301 Fax: (01494) 442315

email:enquiries@allanjan.es.com

**www.allanjan.es.com**