

Reason Shopping and the Undermining of Whistleblower Protections

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Whistleblowing



Detection of wrongdoing

Whistleblowers are regarded as often the most effective means of detecting, identifying, and evidencing wrongdoing across a range of different societal contexts



Sarbanes-Oxley Act

‘a necessary step in restoring investor confidence following high profile failures to implement effective systems of control and accountability.’



Pluralistic Regulatory systems

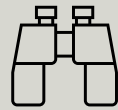
combines various actors, organisations and regulations, i.e. state control, pure self-regulation, and private systems of control

Breaking the Silence



Asymmetry of Knowledge

The regulated know much more about the behaviour intentions and conduct than it is possible for the regulator to know



Increased Expectations

On whistleblowers to perform a regulatory function and to detect, alert to, or prevent organisational wrongdoing



Decentralised Policing

This asymmetry combined with heightened societal expectations provides a large shift towards policing by insiders



Organisational Responsiveness

This shift should ideally be combined with an organizational response to being alerted to wrongdoing to minimize organizational harm



“They are one of the least expensive
and most efficient sources of
feedback about mistakes the firm may
be making”,

An asset to protect the organisation
from others and itself



Kong (appellant) v Gulf International Bank (UK) Ltd

Wrongdoing discovered

Senior auditor of a bank discovers they are misusing forms. Creates AML vulnerabilities and is against regulations.

Internal Retaliation

Despite concerns being valid, head of legal refused to work with auditor citing bullying and a breakdown of relationship

Protected Disclosure

Having raised concerns to managers and no response, informed head of legal of risk and lack of legal compliance.

Loss of position

Due to complaints of poor attitude from head of legal, senior auditor fired for creating hostile environment



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Dismissed for Protected Disclosure?

Wrongdoing

- Bank acting outside of legal compliance
- Clear violation of industry standards
- Reasonable expectation of harm

Internal Report

- Disclosed repeatedly to appropriate management
- Performing function of auditor

Dismissal Resultant of Disclosure

- Head of legal did not like implication they were wrong
- Manufactured reason for dismissal

Official Reasoning....

“...dogmatic in her approach.”

“very forensic”

does not take a
“proportionate approach in her assessment of the risk.”

“behaviours, manner, and approach had resulted in people not wanting to work with her”.



The Appeals

First Tier Tribunal

- Recognised whistleblower status
- Entitled to protections from retaliation
- Head of Legals complaints motivated by disclosure
- "separability principle" – Motive for dismissal not disclosure but perception of 'unacceptable conduct'

Second Tier Tribunal

- Agreed with First Tier Tribunal
- Decision based on, "... unacceptable style of interaction had now manifested itself in an incident that was so serious in its impact on a senior colleague, with no prospect of her changing her ways, that she had to go ..."
- This behaviour was distinct from the disclosure

Court of Appeal

“If it could be, any person who was the subject of, or directly affected by, protected disclosures could rely on being upset in response to justify retaliating against the whistle-blower. That would very substantially undermine the protection offered by the protected interest disclosure provisions of the ERA”.

Held

Concured with judgment of both the first tier and appeals tribunals.

The principle of separability provided the sufficient distance between the disclosure and the actions taken by the managers as to establish no causal link between the two.

Found dismissed unfairly on procedural grounds, but not due to disclosure



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Reason Shopping



Stealth Retaliation

Break Chain of Causation

Disconnect the disclosure from the punishment.

Fabricate Reasons

Poor performance reviews

Unachievable Targets

Undermine professionalism

Character assassination

Fight Appeals

Sending a message to others

If you break ranks – we will come for you



Expansion of the Concept

‘Reason shopping’ masks motivations for whistleblower retaliation, **blaming punitive actions on fabricated or distorted unrelated events.**

Kong extends this to directly related and resultant effects of disclosure, including argument of ‘hurt feelings’

No requirement to demonstrate the behaviours were grossly unacceptable or to establish merit to claims of unacceptable conduct.



Kong Implications



Incentivises Summary Dismissal

Without an investigation, easier to argue belief
in unacceptable behaviour

Greater chance of winning appeal if can
demonstrate belief in poor conduct



The model whistleblower

Question now becomes 'was the conduct
essential', not 'was the conduct manifestly
inappropriate'

Dehumanises whistleblowers and dismisses
stress and burden



Undermines Job of Auditor

Auditors ask difficult questions

They hold people to account and may be
uncomfortable

Chilling effect on willingness to report



What do we Expect of Whistleblowers?



Whistleblower damages – uncapped

Unfair dismissal - £93,878 max

Two-year watermark for unfair
dismissal claims

No reward systems

Dismissing clear retaliation