# WHISTLEBLOWING: MEANING OF "PUBLIC INTEREST" TEST

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**Labor, Employment and Workplace Safety Alert**

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## WHAT HAPPENED?

The UK's whistleblowing legislation protects employees from being subjected to any detriment or dismissal that arises as a result of that employee making a "qualifying disclosure" of information to his employer. To qualify, the disclosure must relate to one of six categories of wrongdoing, which include criminal offences, breach of a legal obligation and damage to the environment. The making of such disclosures is commonly referred to as "whistleblowing". However, changes to the legislation in 2013 mean that a whistleblower will only be protected if, in his or her reasonable belief, the relevant disclosure is "in the public interest".

In the recent case of *Chesterton Global Ltd v Nurmohamed*, the Employment Appeal Tribunal ("**EAT**") has, for the first time, considered the meaning and scope of the public interest test. The EAT upheld an employment tribunal's decision that the disclosure need not be of interest to the public as a whole to satisfy the test. In a whistleblowing scenario, the tribunal considered it inevitable that only a section of the public will ever be affected by any given disclosure and so applied a more restrictive interpretation of the test than that which applies in other areas of the law, such as defamation.

In this case, an employee made several complaints of alleged manipulation of company accounts which resulted in lower commission payments for around 100 senior managers of the company, including himself. Although the tribunal accepted that the whistleblower was primarily concerned with his own position, the potentially adverse effect of the accounting policies on the commission payments of 100 other employees was considered by the tribunal to be a sufficiently sized group to satisfy the public interest test. The whisleblower's claim for automatically unfair dismissal therefore succeeded.

## WHAT DOES THIS MEAN?

The words "in the public interest" were introduced to prevent an employee from relying on a breach of his own employment contract to claim the protection afforded to whistleblowers, in circumstances where the breach is of a personal nature and there are no wider implications. This was the state of the law following a number of cases in which such circumstances were held to fall within the whistleblowing legislation, thereby widening its scope beyond what legislators had originally intended - the legislation which introduced whistleblowing protection in the UK was even called the "Public Interest Disclosure Act".

Rather than limiting the application of the legislation to situations where the public as a whole has an interest in the disclosure, the EAT has taken a more restrictive approach and ruled that individuals may be protected

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providing that the relevant disclosure serves the interests of a wider group. However it is not clear how many people will need to be interested in the disclosure for it to be considered in the public interest, and this case would suggest that a relatively small group of people is sufficient to satisfy the test.

## WHAT SHOULD WE DO?

Given the relative ease with which the public interest test was met in this case, employers should be wary of relying on this test to deny protection to a potential whistleblower. The tribunal focused on whether the employee was entirely self-interested or able to demonstrate wider intentions. If a similar approach is adopted in future, it is possible that the public interest test could be satisfied by considerably smaller groups than the 100 employees involved in this case. Employers would be prudent to carefully consider the potential impact of an employee's disclosure and who might be affected by it before taking any action against the whistleblower. Employers must also assess whether the employee has a "reasonable belief" that his disclosure is in the interest of the public. If so, the employee will be protected by the whistleblowing legislation even where the actual public interest test is not satisfied.

# KEY CONTACTS



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