The rise in cynical claims from staff over unfair dismissal for whistleblowing is driving companies into the courts.

WHEN THE WHISTLE BLOWS
Last year, investment bank Nomura received unwanted publicity when two former employees took the bank to employment tribunals. Their allegation was that Nomura had dismissed them after they had made what the law calls “protected disclosures”, more commonly referred to as blowing the whistle.

Since 1998’s Public Interest Disclosure Act (PiDA), whistleblowers have protection under English law. Employees who are victimised or dismissed because they raise genuine concerns about negligence, breach of contract, danger to health, crime, safety or the environment are protected by the law and can use tribunals to seek uncapped compensation. For high-flying employees of a bank such as Nomura, compensation can stretch to six-figure sums, many times the maximum award from an unfair-dismissal-claim. With whistleblowing claims up eight fold last year compared to the 15 made in 2000, the suspicion now is that some disgruntled ex-employees are abusing the whistleblowing laws.

Taking a stand
In Nomura’s case, it was bond salesmen Simon Hussey and Piero Burragato who brought two separate claims, each alleging that they had been made scapegoats for blowing the whistle. In this instance, the bank decided to take a stand – and won. “We would never fight a claim if we thought we had done something wrong,” says Stephen Sidebottom, Head of Human Resources at Nomura. “When the PiDA became law, everyone was aware of the theoretical possibility of someone abusing it, but in practice we hadn’t really seen that until the last two years.”

Hussey’s claim was rejected by the London Central Employment Tribunal. Burragato claimed he was given a ‘derisory’ bonus in 2006, and so was forced to resign. He alleged that this was because he had made protected disclosures. Once again, the tribunal disagreed.

“We have clearly seen a rise in whistleblowing claims being brought by disgruntled former highly paid employees in the last two years. The claims are about personal gain rather than public interest,” confirms Richard Brown, a Partner at Osborne Clarke, who represented Nomura in both cases. “We are finding that some employees are using this legislation as a sword rather than a shield. Some of the uses the Act is being put to are not in the public interest.”

Unlimited compensation
One reason that these claims have mushroomed in the City is that for white male employees – the majority of City workers – who want to try to claim a large settlement, there are effectively only two routes that allow uncapped compensation claims. One is age discrimination, for which they need to show comparators and firm evidence. The other is whistleblowing, which might allow them, in the words of Rachel McClusky, an employment solicitor at Nomura, to “rewrite history to find grounds to challenge the dismissal and increase the compensation that they seek”. Straight forward unfair-dismissal claims are currently capped at £3,000, but if the ex-employee can reinterpret an incident at work as their attempt to blow the whistle, and link it to their case, there is no maximum legal compensation.

Another problem is that the PiDA defines whistleblowing broadly. Any remark made about the employer’s alleged failure to comply with any legal or contractual obligation can be argued as a protected disclosure. “FSA [Financial Services Authority] regulations are drawn so widely that any complaint over normal internal commercial disputes, where there is a private but not a public interest, can with hindsight be interpreted as whistleblowing,” explains David Cubitt, a Partner specialising in employment law at Osborne Clarke. “If you’re dealing with someone who has been made redundant and been earning bonuses of half a million pounds, it’s not unusual for them to want to find a way to scale up any claim.”

“In the cases we fought, we had people who were underperforming, who we thought had been fairly paid,” says Sidebottom. “If you don’t fight this in a tribunal when you are right, you’ve lost. You need to show you’re courageous, so people don’t assume you will settle.”

The price of fighting the case on its merit needs to be carefully assessed. Preparing for a
How to Avoid Abusive Whistleblowing

While it is impossible to stop all cynical ex-employees alleging they were victimised for blowing the whistle, there are ways to reduce the risk and make any abusive claims less likely to succeed.

- Ensure transparency in the bonus process. To be able to tie bonuses clearly to performance means that underperformers cannot allege they were victimised.
- Have a whistleblowing policy in place, and make sure there is awareness among managers and employees alike of its existence and details.
- Make sure managers know how to investigate whistleblowing disclosures that are made in good faith, and are aware of how to record and escalate them if necessary.
- Train managers to spot statements that can retrospectively be recast as a protected disclosure – even when the statements are not explicitly whistleblowing at the time – and take the appropriate action if they think it is in their interest to do so.

Companies faced with unmerited claims should consider fighting them. If they do not, more and more cases will emerge.

Tribunal, searching for evidence, building the case and distracting staff and managers from their jobs means that even winning a case can cost a six-figure sum. Also, there is likely to be unwelcome publicity, as all tribunals can be reported in the press. “You need to factor this into the cost-benefit analysis,” explains Sidebottom.

However, the rewards of winning are substantial – not least in discouraging others from taking a similar route. McClusky reports that the positive publicity around Nomura’s tribunal wins have encouraged other firms to make contact with her, interested in sharing best practice.

On the campaign trail
Having seen a big rise in these claims, Osborne Clarke’s employment practice is campaigning to change the law around whistleblowing – in effect, to restrict protection to disclosures made in the public interest. Until the law is changed, trying to eliminate the risk that someone will make a whistleblowing claim is almost impossible, but Cubitt recommends that employers focus their attention on those who offer most risk.

“There are only a small number of people in your organisation – the underperformers – from whom there is a danger of this type of claim,” he says. “So properly document the conditions of their employment and the rewards you are giving them. If and when they raise a grievance, identify the risk, record the process and follow procedure.”

Despite the problems that the PIDA has caused, Sidebottom is still one of its biggest fans. “It’s a well-conceived law about protecting the public. If that purpose is lost because some people are abusing the legislation it will be very damaging,” Sidebottom says. “We think this is important and valuable legislation, and we support it. We want people to tell us these things. We just don’t want them to make them up.”

As for Nomura, the bank has had a whistleblowing policy in place for many years. Employees are encouraged to voice their concerns using an anonymous helpline, and managers are trained to take those concerns seriously to help prevent future cynical claims.

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