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Whistleblowing

Inside

Workers who "blow the whistle" on their employers have the right not to be dismissed or otherwise penalised as a result.

The legislation protecting whistleblowers requires the worker to act in the public interest and, in most cases, raise his or her concerns directly with the employer or regulator. Rarely will workers be afforded the protection of legislation where they have made a disclosure directly to the press.

Reasons for whistleblowing protection

The whistleblowing legislation was introduced after a series of high-profile scandals and disasters in the 1980s and 90s. In many cases, staff were aware of serious irregularities within the organisations in which they worked, but for fear of the consequences did not speak out.

The Public Interest Disclosure Act 1998 (PIDA) inserted various new sections into the Employment Rights Act 1996. As the name suggests, the intention of PIDA was to encourage the disclosure of information that is in the public interest such as illegal, dangerous or corrupt practices.

Who is protected?

The whistleblowing legislation protects workers. A worker in this context includes not only employees but also consultants (who undertake to provide work personally), contract workers and agency workers among others.

When is a worker protected under the legislation?

The whistleblowing legislation does not provide general protection for any form of whistleblowing.

In order to attract protection, the worker must make a protected disclosure. In simple terms it can be broken down as follows:

- There must be a disclosure of information.
- The disclosure must relate to certain specified kinds of malpractice.
- The worker must have a reasonable belief that the information tends to show one of the specified kinds of malpractice.
- The worker must have a reasonable belief that the disclosure is in the public interest.
- The disclosure will only amount to a protected disclosure if it is made to the right person in the right circumstances, as specified in the legislation.

Disclosure of information

The disclosure can be oral or in writing or may be an action, such as producing a video showing malpractice. The fact that the person receiving the information already knows about it does not stop it from being a disclosure.

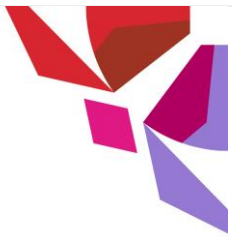
A "disclosure" does not include the whole course of conduct surrounding a disclosure such as the steps taken by the worker to confirm or prove their belief. For example, an employee was not making a "disclosure" when he hacked into a computer system to prove that the concerns, he had raised about security were well-founded.

However, in recent years the courts have been taking a broader approach to the concept of "disclosure". For example, the courts have said that an allegation that the employer is not complying with health and safety requirements could be a disclosure of "information" depending on the context.

Qualifying disclosure

To be a qualifying disclosure, the disclosure made must tend to show one or more of the following kinds of malpractice:

- the commission of a criminal offence
- breach of legal obligations
- a miscarriage of justice



- the endangerment of the health and safety of any individual
- environmental damage
- the deliberate concealment of information relating to any of the above.

The malpractice does not need to be on the part of the employer - it can relate to the actions of third parties. So, for example, an allegation that the employer's outsourced caterers are selling out-of-date food in the staff canteen in breach of health and safety laws could amount to a protected disclosure.

In each case, the disclosure must tend to show that either the relevant failure has taken place, is taking place or is likely to take place in the future. The question in relation to future failures is whether it is "more probable than not" that the malpractice will take place.

Reasonable belief

The worker must have a reasonable belief in the disclosure made. What happens, then, if a worker tells their employer they have seen a colleague stealing money from the employer and it later transpires the colleague was authorised to take the money, so no theft had occurred? There can still be a protected disclosure in these circumstances, provided the worker reasonably believes a criminal offence has taken place. Similarly, there can still be a protected disclosure even if no legal obligation exists or the disclosure is based on incorrect facts.

The question of reasonable belief is not a purely subjective test: there must be identifiable objective grounds to justify the worker's belief in the wrongdoing. An unsubstantiated rumour will not be enough.

Method of disclosure

The identity of the person to whom the disclosure is made and the circumstances in which it is made will determine whether the worker is protected under the legislation. Although the legislation covers disclosures to various persons, most commonly the disclosure is made to the employer and the law is drafted to encourage workers to make the disclosure internally.

If the disclosure is made externally to a regulatory body (e.g. the Financial Conduct Authority or Health and Safety Executive), the worker must also reasonably believe the malpractice falls within the remit of the regulatory body and that the allegations are substantially true.

Where the disclosure is made externally to other third parties such as the media, even more rigorous criteria apply. The worker must not only comply with the requirements set out above but disclosure to the third party must, among other things, be reasonable in all the circumstances and not made by the worker for personal gain.

The "reasonableness" requirement may be difficult to satisfy if the worker has not approached the employer first and given it an opportunity to rectify the problem.

Public interest requirement

Workers making qualifying disclosures must believe that doing so is in the public interest, and that belief must be reasonable in all the circumstances. A worker acting purely in self-interest will not be protected.

However, a worker could still be protected for blowing the whistle about breaches of individual rights, including employment rights, where the disclosure is also in the employee's personal interest. According to case law, whether these sorts of disclosures can also reasonably be believed to be in the public interest will depend upon:

- the numbers in the affected group
- the nature of the interests affected and the extent to which they are affected
- the nature of the alleged malpractice
- the identity of the alleged wrongdoer

No good faith requirement

A disclosure can be made in bad faith and, provided the other conditions are met, still be a qualifying disclosure. The issue of good faith may, however, affect the amount of compensation a worker receives. Damages can be reduced by up to 25% if the disclosure is not made in good faith.

What are workers protected from?

A worker who has made a protected disclosure has the right not to be victimised as a result. This includes post-termination victimisation, such as the refusal to provide a reference. Employees also have the right not to be dismissed as a result of their protected disclosure.

Employers are vicariously liable for the actions of their employees and workers, if those actions take place during the course of employment. So, if another worker ostracises a colleague at work because he has "blown the whistle" on him, the employer can be liable for that employee's conduct even

if it did not know it was taking place. The employer has a defence if it took all reasonable steps to prevent the conduct taking place. Workers will also be personally liable for their conduct in victimising a fellow worker.

Claims under the whistleblowing legislation

Whistleblowing claims fall within the remit of the Employment Tribunal (ET). In most cases, the claim must be brought within three months of the act of victimisation complained of or dismissal, as appropriate. In a successful victimisation claim, the ET will award the claimant a compensatory award reflecting any financial losses flowing from the victimisation together with an injury to feelings award.

Although rarely used, an employee bringing a whistleblowing unfair dismissal claim can apply to the ET for an order making their employment continue pending the outcome of the case. This is known as "interim relief". The employee must make the application within seven days of the dismissal and the application will be granted if the ET considers that the claimant has a good prospect of success. If the application is successful, the employee will be entitled to continue to receive their salary.

A whistleblowing dismissal is "automatically unfair" and there is no qualifying period of service required to bring a claim. The tribunal will award a successful claimant a basic award based on the employee's length of service and age, capped at a fixed amount which changes in April each year (see here for the current rate) and a compensatory award. Unlike ordinary unfair dismissal, there is no cap on the compensatory award that can be made in a whistleblowing case.

Workers have always been free to send details of a whistleblowing claim directly to the appropriate regulating body or authority. However, the ET claim form allows the claimant to tick a box indicating whether their claim involves allegations of a protected disclosure and whether they wish the ET to pass on such allegations to the appropriate authorities (set out in a prescribed list).

Dealing with whistleblowing in practice

In some cases, it will be obvious when a worker is making a protected disclosure. In other cases, it will not. The disclosure may be made in an email, in a meeting or buried deep in a grievance. It may relate to matters that have taken place a long time ago. In practice, it will be difficult for an employer to know whether a communication amounts to a protected disclosure.

Where individuals are implicated in the malpractice, the employer should be mindful that retaliation may take place. While dismissal is an obvious way of punishing a whistleblower, other forms of punishment can be more subtle. It can include appraisals or unfair selection for redundancy.

Employers should have the appropriate mechanisms in place to ensure that concerns raised in the workplace are dealt with promptly and appropriately in the circumstances and that those raising concerns do not face retaliation. This may be through the use of the employer's grievance procedures, although increasingly employers are adopting specific whistleblowing or "speaking up" policies.

Adopting a whistleblowing or speaking up policy

It may not always be appropriate to deal with concerns raised about work issues through the employer's grievance procedures. For example, employees may alert their employer to something suspicious that they have witnessed at work that is completely unrelated to them personally. In such circumstances, the employer would want to be able to investigate the allegations and take such steps as it deems appropriate.

Inviting the reporter to a grievance meeting and giving them the right of appeal from any decision made is unlikely to be the best way to resolve the situation. The reporter may be keen to keep their identity secret from those involved, which is more difficult where a formal grievance investigation is underway.

Adopting a whistleblowing policy can overcome these problems and has other advantages for the employer. It may encourage internal disclosures and, if the employer is alerted to any wrongdoing at an early stage, it may have the opportunity to resolve the matter before any serious and potentially public damage occurs.

Points which could be included in a whistleblowing or speaking up policy:

- a clear statement that wrongdoing is taken seriously within the organisation, together with an indication of matters regarded as amounting to malpractice
- an identification of the person(s) to whom disclosures should be made. Such people should have sufficient authority and independence to be able to deal effectively with the matters raised by the disclosure

- a statement of respect for the confidentiality of workers making disclosures, if at all possible
- a clear indication of the penalties for making false or malicious allegations
- the message that it is a serious disciplinary offence to victimise workers for raising legitimate concerns or to deter them from doing so
- the procedures the employer will follow when investigating disclosures, and the steps to be taken in the event of a disclosure being well-founded
- the feedback that will be provided to someone making a report

Terms preventing disclosure void

Any provision in an agreement, whether it is the worker's contract or otherwise, is void insofar as it purports to prevent them from making a protected disclosure. Confidentiality clauses in contracts of employment are therefore subject to the overriding right to make a protected disclosure.

Non-disclosure agreements (NDAs) in settlement agreements and Acas conciliated settlement agreements will also be void to the extent that they purport to preclude the worker from making a protected disclosure.

It is good practice to draft contractual confidentiality clauses and NDAs in settlement agreements in a way that expressly excludes protected disclosures under the whistleblowing legislation.

Whistleblowing in the financial services sector

Certain employers in the financial services sector have to appoint a "whistleblowers' champion" with have responsibility for managing the firm's internal whistleblowing policies and procedures who must report to the board annually about their operation.

Such employers also need to: establish and maintain an independent whistleblowing "channel" to manage all types of whistleblowing disclosures; insert wording into settlement and employment agreements that ensures individuals are not deterred from making a protected disclosure; inform the Financial Conduct Authority (FCA) if they lose an ET against a whistleblower; inform UK staff about the FCA and Prudential Regulation Authority whistleblowing services; and require the firm's appointed representatives and tied agents to tell their UK-based employees about the FCA whistleblowing services.

EU Whistleblowing Directive

A new Directive, designed to achieve a minimum level of common protection for whistleblowers throughout the European Union, was adopted in October 2019 and EU member states have until 17 December 2021 to implement it. As a result of Brexit, the UK is no longer required to implement the Directive, although given the UK already has whistleblowing legislation, only relatively minor amendments would have been needed in any event.

UK law already covers much of the content of the Directive, which only protects persons reporting on breaches of EU law. It would nonetheless have some implications if its measures were to be incorporated into UK law, including requiring organisations with 50 or more employees to establish internal reporting channels and respond to reported concerns within set timescales.

For more information on this subject please contact:

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