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EMPLOYMENT & INCENTIVES

Guide to managing whistleblowing at work

This guide sets out the key protections provided to whistleblowers under the law, together with some practical tips for managing whistleblowing at work and in Employment Tribunal litigation.

In an environment of increasing focus on culture, good governance and corporate responsibility, whistleblowing plays a vital role in risk management within organisations. A series of high-profile cases, financial services and public sector scandals, including LuxLeaks and the Panama Papers has meant whistleblowing is increasingly prominent in our media. Litigating claims can represent a significant cost for employers. Understanding how to manage whistleblowing reports and Employment Tribunal whistleblowing litigation is increasingly important for employers.

1. Purpose of whistleblowing legislation

Whistleblowing legislation was originally introduced following the realisation that a number of disasters such as the Zeebrugge ferry disaster in 1987, the Clapham rail crash in 1988, and the BCCI collapse in 1992 could have been prevented or their effect reduced if a worker had spoken up and/or their employer had listened to them. The Public Interest Disclosure Act 1998 ("**PIDA**") was brought into force in 1999, inserting new sections into the Employment Rights Act 1996. Workers have no general duty to make disclosures or "blow the whistle", but encouraging whistleblowers to come forward can be in the interests of employers as whistleblowers can assist in uncovering wrongdoing within the organisation.

This can help prevent accidents, financial scandals, criminal offences and regulatory breaches. It can also assist in allowing organisations to deal with issues internally and to manage information disclosed outside the organisation.

2. Whistleblower protections

The law provides two key protections to workers who blow the whistle.

2.1. Automatically unfair dismissal

First, dismissing an employee who has blown the whistle is automatically unfair if the reason or principal reason for the dismissal is that they have made a protected disclosure. Employees bringing such claims do not need the normal two years' service to bring an unfair dismissal claim linked to whistleblowing.

2.2. Unlawful detriment

Second, subjecting a worker to a detriment on the ground that they have made a protected disclosure is unlawful. Detriments include, but are not limited to, pay cuts, limiting career prospects and disciplinary action. This includes detriments occurring after the termination of employment, so employers should proceed cautiously when drafting references.

3. Who is protected?

Employees are protected in relation to dismissal. There is no qualifying length of service for bringing whistleblowing claims. Both employees and workers (including some LLP members) are protected in respect of detriment claims. The Supreme Court has also held that judges are entitled to whistleblowing protection and it is possible that other officeholders, such as non-executive directors, may rely on this decision to claim they are entitled to protection.

4. Qualifying disclosures

4.1. Categories

The information disclosed must, in the worker's reasonable belief, tend to show that one of the following has occurred or is likely to occur: (i) a criminal offence (ii) breach of a legal obligation (iii) a miscarriage of justice (iv) danger to the health and safety of any individual (v) damage to the environment (vi) the deliberate concealment of information about any of the above categories.

4.2. Reasonable belief

So long as the worker subjectively believes, acting reasonably, that the relevant failure has occurred or is likely to occur, they will be protected, even if their belief turns out to be wrong. However, "reasonable belief" is more than unsubstantiated rumour or opinion.

4.3. Information

The disclosure must be of information, not just an allegation or statement of opinion. The worker making the disclosure must convey facts and will be protected even if those facts are already known by the recipient. Disclosures can be in writing (including a grievance letter) or oral. Disclosures can relate to an entity other than the employer (e.g. a client).

5. Protected disclosures – to whom can the disclosure be made?

To be a protected disclosure, the whistleblower must make a qualifying disclosure to an appropriate person or organisation.

5.1. Encouraging disclosures internally

Employers can encourage internal disclosures by having a written whistleblowing policy setting out how to do this. Some employers have anonymous whistleblowing hotlines which enable employees to disclose information anonymously.

5.2. External disclosures

However, in some circumstances, workers are protected if they disclose information externally.

5.2.1. Prescribed persons

Parliament has approved a list of "prescribed persons" to whom a worker can make a disclosure, provided the worker believes the information is substantially true and concerns a matter within that person's area of responsibility. Prescribed persons include (but are not limited to) HMRC, the Health and Safety Executive, the Information Commissioner, the FCA and the PRA. There is no requirement for the employee to make a prior disclosure to the employer.

5.2.2. Third parties

Where the worker reasonably believes a third party (such as a client or supplier) is responsible for the wrongdoing, they can report it to that third party without telling the employer.

5.2.3. Other external sources

Disclosure to other external sources (e.g. the media) is protected only if the worker believes the information is substantially true and the worker does not act for gain. So, workers who receive payment for a story to a newspaper are unlikely to be protected. Unless the matter is "exceptionally serious", they must have already disclosed it to the employer or a prescribed person, or believe that, if they do, evidence would be destroyed, or they would suffer reprisals. Disclosure to that person must also be reasonable. Commercial organisations should not rely on confidential information clauses in employment contracts to prevent the worker from making a disclosure externally. These are void insofar as they seek to prevent a protected disclosure. Seeking to enforce them could amount to an unlawful detriment against the worker.

5.3. Disclosures by the Employment Tribunal to regulators

Claimants can tick a box in their ET1 Claim Form to refer a claim to the relevant regulator for investigation. The Employment Tribunal will pass on a copy of the ET1 (or parts of it) to the relevant regulator and will then inform both the claimant and the respondent to whom the form has been sent.

6. Must the disclosure be made for the right reason?

6.1. Originally, PIDA set out a requirement that the disclosure had to be made in good faith. Subsequently two key changes were made in relation to the whistleblower's motivation in making a disclosure:

6.11. The "good faith" requirement was removed. However, if an Employment Tribunal upholds that a disclosure was made in bad faith, it has power to reduce compensation by up to 25%.

6.12. Introduction of "public interest" requirement. "Public interest" is not defined, but case law indicates that the interests served by the disclosure do not have to extend outside the workplace to satisfy the public interest requirement. The Court found that four considerations are relevant:

- The number of people affected by the disclosure.
- The nature of the interests affected.
- The extent to which those interests are affected.
- The identity of the alleged wrongdoer.

On this basis, anything which affects a class of people could potentially be caught, so employers should take a cautious approach. Remuneration issues in plcs/financial institutions, especially where these have serious implications and impact large numbers of people may well be matters of "public interest". Moreover, issues such as discrimination or equal pay issues at work could arguably have a public interest element. However, claimants will find it harder to demonstrate that there is a matter of public interest where there is evidence they have raised concerns purely out of self-interest.

7. Causation and taking action against a whistleblower for a separate reason

7.1. Causation

Many whistleblowing claims fail because the worker is unable to establish a causal link between their detriment/dismissal and their whistleblowing. Causation is often a key issue in whistleblowing claims so witness evidence is often critical.

7.2. Taking action for a separate reason

In some cases, the detriment or dismissal can be separable from the protected disclosure. For example, if an employee goes further than making a disclosure and acts in a way that amounts to gross misconduct in order to prove their point, their conduct is unlikely to be protected. However, employers who wish to take action for a separate reason should proceed cautiously where a worker has made a protected disclosure, and create a clear paper trail to evidence their reasoning.

8. Liability

8.1. Vicarious liability

Employers are liable for detriments perpetrated by their employees or workers against a whistleblower. The detriment will be treated as if it had been carried out by the employer, unless the employer can show it took all reasonable steps to prevent the detrimental treatment. Having an appropriate whistleblowing policy and providing training to support this will therefore be very important.

8.2. Personal liability

Claimants can pursue individual co-workers personally for detriment where, in the course of their employment, the co-worker victimises them for whistleblowing. Liability against the co-worker extends to losses flowing from any decision they made to dismiss the claimant.

9. Remedies

9.1. Interim relief

Interim relief is available for employees who are "likely" to succeed in unfair dismissal cases linked to whistleblowing. Employment Tribunals can make an order for the continuation of employment pending the final determination of the case. Applications are rare, in part because they must be made within seven days of the termination date, but can be expensive, particularly if a claim proceeds to an appeal.

9.2. Compensation

Compensation for whistleblowing is not subject to an upper limit. Since whistleblowing cases can be reputationally damaging for employees in addition to employers, there is a risk that an Employment Tribunal will make an award for career-long loss arising from a dismissal. If a whistleblowing claim is a risk in a dismissal situation, employers should follow the ACAS Code, otherwise the compensation award could be increased by up to 25%.

9.3. Injury to feelings

Injury to feelings awards can be awarded in detriment cases (but not in dismissal cases). Injury to feelings compensation is an award of between £1,200 – £458,700 (with exceptional cases capable of exceeding this amount).

9.4. Other remedies

The tribunal can make reinstatement or re-engagement orders, in the same way as for other unfair dismissal claims. Such orders are rare. Likewise, aggravated/exemplary damages can be awarded but are rare.

10. Other sources of guidance/ requirements

10.1. Bribery Act 2010

Under the Bribery Act 2010 a company can be criminally liable for failing to prevent bribery by its employees (sections 7–8). The organisation has a defence if it can show that they had in place adequate procedures designed to prevent bribery. Guidance from the Ministry of Justice indicates that this includes having effective whistleblowing procedures that encourage the reporting of bribery.

10.2 Criminal Finances Act 2017

Under sections 45 and 46 of the Criminal Finances Act 2017, a company can be criminally liable for failing to prevent the facilitation of tax evasion offences by its associated persons. It is a defence for a company to show that it had reasonable prevention procedures in place. Such procedures are likely to include clear reporting procedures for whistleblowing of suspected facilitation of tax evasion offences as well as protection for whistleblowers.

10.3 Economic Crime and Corporate Transparency Act 2023

Under the Economic Crime and Corporate Transparency Act 2023, it will be possible for a company to be held criminally liable for failing to prevent fraud by its associated persons. It will be a defence for a company to show that it had reasonable fraud prevention procedures in place.

10.4. FCA/PRA

Both the Financial Conduct Authority and the Prudential Regulation Authority require firms to implement and maintain appropriate and effective whistleblowing arrangements as part of an effective risk management system. This includes the appointment of a whistleblower's champion who has responsibility for ensuring and overseeing the integrity, independence and effectiveness of the organisation's policies and procedures on whistleblowing. Firms are also required to put whistleblowing policies and procedures in place which include measures for:

- Escalating reportable concerns, including to the FCA/PRA.
- Ensuring that whistleblowers do not suffer victimisation from others at the firm.
- Providing feedback to a whistleblower.
- Maintaining records of reportable concerns and the firm's treatment of these reports including the outcome.
- Expressly setting out in any settlement agreements with workers that they may make protected disclosures.
- Providing training on whistleblowing, including how to raise a concern, what action may be taken, and sources of external support.

10.5. Listed companies

For listed companies, it is part of the obligations under the UK Corporate Governance Code 2018 (Provision 6) that the workforce is able to raise concerns in confidence (and anonymously if they wish). The board should ensure that arrangements are in place for the proportionate and independent investigation of such matters and for follow-up action.

10.6. Private companies

For large private companies, Principle 6 of the Wates Corporate Governance Principles for Large Private Companies 2018 states that there should be clear procedures for raising concerns, which should be reviewed regularly to ensure that they are effective.

10.7 EU law

Member states of the EU were required to transpose the EU Whistleblowing Directive into national law by December 2021. The Directive applies to persons reporting breaches of EU law. It remains to be seen whether the Directive will influence future reform of whistleblowing protections in the UK. However, it will be relevant to multi-jurisdictional employers with global whistleblowing policies.

11. Practical tips for employers to manage whistleblowing at work

11.1. Policy, training and culture

> Implement a whistleblowing policy providing details of how internal disclosures should be made.

> To limit the risk of vicarious liability, publicise the whistleblowing policy and provide whistleblowing training to employees, especially those at managerial level.

> Consider appointing a dedicated whistleblowing officer – this should be someone regarded as approachable by employees.

> Good risk management should include supervision, team working and fostering an open working culture. Actively encourage early reporting of concerns.

> Larger organisations could consider implementing an anonymous whistleblowing hotline. This encourages disclosure of potentially important information and makes it less likely that a whistleblower will be dismissed or subject to a detriment if their identity is concealed. However, this may also make disclosures more difficult to investigate thoroughly.

11.2. Investigations

> Investigate thoroughly the concerns and, where possible, keep the whistleblower informed about the progress of the investigation.

> Consider if any new practices can be put in place to deal with the concerns raised by the whistleblower.

> Note that the worker will be protected even if they disclose facts which are already known to the recipient of the information, or if the worker's belief subsequently turns out to be wrong following an investigation, but they reasonably believed it to be correct when making the disclosure.

11.3. Taking action

> Before taking any action against a worker, identify whether there is a risk of a whistleblowing claim, as this may raise the risk significantly. Beware of potential whistleblowing claims in the context of other employment disputes and seek legal advice if you are in any doubt as to whether whistleblowing may be an issue.

> If a whistleblower is to be dismissed for another reason (eg gross misconduct) proceed cautiously and create a clear paper trail evidencing the reason for dismissal. Be mindful of the risk that an Employment Tribunal may find that the real or principal reason for dismissal was the protected disclosure.

> If a whistleblowing claim is a risk in a dismissal situation, follow the ACAS Code, otherwise uncapped compensation could be increased by up to 25%.

> Note that an employer can be found to have subjected a worker to an unlawful detriment even after employment has terminated so be mindful of how you handle reference requests.

11.4. Employment Tribunal whistleblowing claims

If interim relief is sought, employers should prepare quickly since Employment Tribunals will list hearings promptly.

> As causation is often a key issue in whistleblowing claims, witness evidence is often critical. Note that preparation time for a Tribunal Hearing will be significant for those involved. All witnesses will need to attend at least part of the Tribunal Hearing. Check early on that your witnesses can attend the listed Hearing dates and block the dates out of their diaries.

> Consider seeking to settle a whistleblowing claim by confidential ACAS conciliation or mediation where sensitive or confidential information is involved since Employment Tribunal claims are generally held in public.

11.5. Other practical issues

> Consider whether the employer has any obligation to inform the police or any regulatory body of the information disclosed.

> Bear in mind the requirements of relevant legislation, the FCA/PRA guidance and the Corporate Governance Code, where applicable to your organisation.

Linklaters Employment and Incentives team offers training and seminars tailored to client needs. Please get in touch with your usual contact or a member of our team to learn more about how we can help you.

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