Linklaters

Guide to managing whistleblowing at work

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

In an environment of increasing focus on good governance and corporate responsibility, it is recognised that whistleblowing plays a vital role in risk management within organisations.

Approximately 1,400 whistleblowing claims were made in 2016 and a number of high profile cases have attracted negative media attention. Moreover, since compensation is uncapped, it can be high. Understanding how to manage whistleblowing and Employment Tribunal whistleblowing claims is therefore increasingly important for employers.

1. Purpose of whistleblowing legislation

Whistleblowing legislation was originally introduced in 1998 following the realisation that a number of disasters could have been prevented or their effect reduced if a worker had spoken up and/or their employer had listened to them (eg the Clapham rail crash in 1988, and the BCCI collapse 1992 in which staff were afraid to speak up). The Public Interest Disclosure Act 1998 ("PIDA") was brought into force on 2 July 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 since 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 what information is 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. Moreover, the cap on unfair dismissal compensation is lifted in whistleblowing claims, meaning that compensation can be high, especially if the individual encounters difficulties in finding a new job because of the dismissal.

2.2. Unlawful detriment

Secondly, subjecting a worker to a detriment on the ground that he has made a protected disclosure is unlawful. Detriments include, but are not limited, to pay cuts, limiting career prospects and disciplinary action. They include detriments occurring after the termination of employment *(Woodward v Abbey National Plc (2006))*, so employers should proceed cautiously in relation to e.g. references.

3. Who is protected?

Employees are protected in relation to dismissal. Both employees and workers (including some LLP members) are protected in respect of detriment claims. There is no qualifying length of service for bringing whistleblowing claims.

4. Qualifying disclosures

4.1. Categories

Six categories of disclosure are qualifying disclosures. 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 regarding 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 *(Babula v Waltham Forest College (2007))*. However, "reasonable belief" is more than unsubstantiated rumour or opinion.

4.3. Information

The disclosure must be of information, rather than an allegation or statement of opinion. The worker making the disclosure must convey facts, although he will be protected even if those facts are already known by the recipient.

Disclosures can be in writing (eg grievance/ solicitor's letter), oral (eg during appraisal/ discussion), or via media eg video. Disclosures can relate to an entity other than the employer (eg 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

In most cases, disclosures should be made to the employer. Employers can encourage this by having a written whistleblowing policy setting out how to do this. Some employers have anonymous whistleblowing hotlines which enable employees to disclose information without providing their names.

5.2. External disclosures

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

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. They include (but are not limited to) HMRC, the Health and Safety Executive and the Office of Fair Trading. There is no requirement for the employee to alert 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 (eg media)

Disclosure to other external sources (eg 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 not 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.

An example is *Goode v Marks and Spencer plc (2010)* – the employee's disclosure was not protected because it had not been disclosed in substantially the same form to the employer before employee went to The Times newspaper. However, exceptionally serious information can be disclosed externally first – an example is *Collins v The National Trust (2006)* where the worker was protected when he disclosed information related to asbestos concerns.

Commercial organisations should not rely on confidential information clauses in employment contracts to prevent the worker from making a disclosure externally. These are unenforceable if the worker makes a protected disclosure and 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 (section 10) to refer claim to 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?

Originally, PIDA set out a requirement that the disclosure had to be made in good faith for the worker to be protected. However, although PIDA's long title was An Act to protect individuals who make certain disclosures of information in the public interest, there was no requirement within the legislation for the disclosure to be made in the public interest.

In June 2013, two key changes occurred in relation to the whistleblower's reason and motivation in making a disclosure:

6.1. Removal of "good faith" requirement

First, whistleblower protection was expanded to those who make disclosures in bad faith (eg because their disclosures are motivated primarily by money or spite, rather than a desire to put right a wrong). However, if an Employment Tribunal upholds an employer's argument that a disclosure was made in bad faith, it has power to reduce compensation by up to 25%.

Case law suggests that disclosures made predominantly for personal interest or with malice are not in good faith – eg *Bachnak v Emerging Markets Partnership Europe (2006)*.

6.2. Introduction of "public interest" requirement

Secondly, since June 2013 there has been a requirement that the disclosure must, in the reasonable belief of the worker, be made in the "public interest". Prior to June 2013, it was possible for an employee to bring a whistleblowing claim on the basis that his disclosure was that his own contract of employment had been or was going to be breached, pursuant to *Parkins v Sodexho (2002)*. Some employees appeared to use this tactically when they considered themselves to be at risk of dismissal since it raised the risks of an unfair dismissal claim considerably for the employer if the dismissal was linked to whistleblowing due to the potential reputational damage and uncapped compensation.

This position has now been changed, essentially reversing the position set out in Sodexho. "Public interest" is not defined, but, in *Chesterton Global and Verman v Nurmohamed (2017)* the Court of Appeal decided 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. It is possible that "everyday" employment disputes over contractual terms could have a public interest element eg remuneration issues in plcs/financial institutions, especially where these have serious implications and impact large numbers of people. Moreover, issues such as discrimination or equal pay issues at work could arguably have a public interest element.

> "The motivation of the employee for blowing the whistle is now irrelevant, so it doesn't matter if an employee blows the whistle because they don't like their employer, if that disclosure is in the public interest it will still be a protected interest."
>
> **Nicola Rabson**, Linklaters Employment Partner, speaking on Radio 4's Today programme in June 2013

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

7.1. Causation

Causation is often a key issue in whistleblowing claims. Many whistleblowing claims fail because the worker is unable to establish a causal link between their detriment/dismissal and their whistleblowing. Because causation is often a key issue in whistleblowing claims, witness evidence is often critical – whether the Employment Tribunal believes a manager's evidence as to why a worker was treated in a certain way can be determinative.

7.2. Taking action for a separate reason

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 the employer's reasoning.

If an employee goes further than making a disclosure and conducts gross misconduct in doing so in order to prove their point, their conduct is unlikely to be protected by PIDA. For example, in *Bolton School v Evans (2006)*, the worker's conduct was not protected when he sought to prove his disclosure that the company's IT system was not secure by hacking into the system. However, employers should proceed cautiously, since an Employment Tribunal may not accept an employer's assertion that a dismissal was separate from a protected disclosure.

8. Vicarious and personal liability

8.1. Vicarious liability

In June 2013, the Enterprise Regulatory and Reform Act introduced the concept of vicarious liability into whistleblowing law. It imposes vicarious liability on an employer for detriments, on grounds that a worker made a protected disclosure, by other workers on that first worker.

This reverses a loophole in the original drafting of the whistleblowing legislation, and brings vicarious liability for whistleblowing into line with the position regarding discrimination under the Equality Act 2010.

The employer will have a defence if 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 individuals personally for liability arising from whistleblowing detriments. Pursuing such a strategy is often tactical. In *International Petroleum Limited and others v Mr Alexander Osipov (2017)* and others, the Employment Appeal Tribunal confirmed that a dismissal can constitute a detriment and be pursued against an individual (in this case two non-executive directors who were carrying out management functions) alongside a whistleblowing unfair dismissal claim against the employer. The tribunal awarded the claimant employee £1,754,000 in compensation for which the employer and the two non-executives were jointly and severally liable.

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. Interim relief is rarely granted, possibly because applications must be made within seven days of the termination date. However, it is important for employers to be mindful of the risk since it can be expensive, particularly if a claim proceeds to an appeal.

Employment Tribunals hold interim relief hearings very quickly and are required to give employers only seven days notice of a hearing. Such hearings are rarely postponed, so quick preparation is critical.

9.2. Compensation

Compensation for whistleblowing is uncapped. It is primarily based on loss and is what is "just and equitable" in the circumstances. 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. For example, in *Lingard v HM Prison Service (2005)*, the claimant was awarded £477,600, including £228,000 future loss of earnings for "career long loss". In *Watkinson v Royal Cornwall NHS Trust (2011)*, the claimant was awarded £1.2m including £569,158 future loss of earnings to retirement, and £348,382 for pension loss.

If a whistleblowing claim is a risk in a dismissal situation, employers should follow the ACAS Code, otherwise uncapped compensation 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 assessed according to the guidelines in *Vento v Chief Constable of West Yorkshire Police (2003)* (which have been revised upwards to reflect inflation). The current Vento guidelines (as adjusted in 2010) set out three compensation bands according to the severity of the case:

(i) £600 – £6,000

(ii) £6,000 – £18,000

(iii) £18,000 – £30,000

The Presidents of the Employment Tribunals in England, Wales and Scotland launched a consultation in July 2017 to revise these bands upwards with a proposed new maximum figure of £42,000.

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 (usually in the range of £5,000 – £7,000).

10. Other sources of guidance/requirements

Aside from employment law, other sources of guidance/requirements in relation to whistleblowing are as follows:

10.1. Bribery Act 2010

The Bribery Act 2010, introduced a new offence where a commercial organisation fails to prevent bribery by its employees (section 7). 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 dated 30 March 2011 indicates that this includes having effective whistleblowing procedures that encourage the reporting of bribery.

10.2. FCA/PRA Whistleblowing rules

Since 7 March 2016, certain FCA/PRA regulated firms have been required to appoint 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.

In addition, since 7 September 2016, new rules on whistleblowing have applied to certain regulated firms. The rules are designed to encourage whistleblowers to come forward, by setting out positive obligations for how firms should deal with "reportable concerns" (which is a wider category than "protected disclosures"). 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

We can tailor whistleblowing training to suit our clients' needs. We have a number of packages suited to financial services clients as well as e-learning training.

10.3. Listed Companies

For listed companies, it is part of the obligations under the UK Corporate Governance Code to maintain a sound system of internal control. Whistleblowing arrangements form part of the system of internal control. Further information is available in the Financial Reporting Council's guidance on Risk Management, Internal Control, and Related Financial and Business Reporting (section 4).

11. Further developments

11.1. Government guidance and non-statutory Code of Practice

In 2014 the Government reported on its findings following a consultation into the framework of whistleblowing laws. Its response was relatively light-touch and resulted in the publication of guidance in March 2015 and a non-statutory Code of Practice. This sets out best practice an recommends that employers make staff aware of the relevant whistleblowing policy, train staff on how to make and deal with disclosures and develop a culture where staff feel safe to make disclosures.

11.2. Regulators to report annually on whistleblowing

In April 2017, regulations were brought into force requiring regulators and other prescribed bodies to which workers can make protected disclosures, to produce an annual report on the whistleblowing disclosures made to them. Although the identities of workers and employers will not be disclosed, the statistical information will give interested parties an insight into the types of issues raised in various sectors and how these are dealt with.

11.3. Other reports

Whistleblowing has continued to be high on the public agenda. In 2016 two comprehensive reports advocating speak-up arrangements were published: Protecting whistleblowers in the UK: A new Blueprint, published by the Blueprint for Free Speech, and the Economic and Social Research Council's report into effective speak-up arrangements for whistle-blowers.

11.4. Whistleblower protection

Whistleblowing is often an area which is excluded when the burden of employment laws on companies is reduced. Notably:

- the cap on unfair dismissal does not apply when the dismissal is linked to whistleblowing
- the confidential status afforded to pre-termination negotiations regarding settlement, which came into force in July 2013, does not apply when the individual has a whistleblowing claim

12. Practical tips for employers to manage whistleblowing at work

12.1. Policy, training and culture

> Implement a whistleblowing policy setting out clearly that disclosures should be made internally and providing details of how this should be done.
> 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 but makes it less likely that a claim will result since it is less likely they can be dismissed or subject to a detriment if their identity is concealed. However, note that this may make disclosures more difficult to investigate thoroughly.

12.2. Employment contracts

> Include clauses in employment contracts requiring employees to disclose the wrongdoing of others within the organisation.
> Do not rely on confidential information clauses in employment contracts to prevent the worker from making a disclosure externally. These are unenforceable if the worker makes a protected disclosure and seeking to enforce them could amount to an unlawful detriment against the worker.

12.3. 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 he discloses 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 he reasonably believed it to be correct when making the disclosure.

12.4. 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. 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 eg unfavourable references.

12.5. Employment Tribunal whistleblowing claims

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

12.6. 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 the Bribery Act 2010, the FCA/PRA guidance and the Corporate Governance Code, where applicable to your organisation.

Key contacts

Nicola Rabson
Partner
London
Tel: +44 20 7456 5284
nicola.rabson@linklaters.com

Jean Lovett
Partner
London
Tel: +44 20 7456 3698
jean.lovett@linklaters.com

Jillian Naylor
Partner
London
Tel: +44 20 7456 5486
jillian.naylor@linklaters.com

Emma Gray
Managing Associate
London
Tel: +44 20 7456 4425
emma.gray@linklaters.com

Gemma Parker
Senior PSL
London
Tel: +44 20 7456 5720
gemma.parker@linklaters.com

For further information, please get in touch with your usual contact in the Employment and Incentives Team at Linklaters.

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