Whistleblowing

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An Insight into Whistleblowing

Whistleblowing is one of those “go to” claims for individuals with questionable employment status (you don’t have to be an employee to bring a whistleblowing claim) or for those employees with less than two years’ service (there is no minimum length of service requirement).

The very un-sexy, proper, term for blowing the whistle is making a “protected disclosure”. The relevant legislation is the Public Interest Disclosure Act 1998 (PIDA). If you care to read it you’ll find that it runs to little more than ten pages and doesn’t contain the word whistleblowing (I admit this isn’t much of a “fun” fact and it’s never come up in any pub quizzes I’ve been to - sorry). We’ll stick with whistle-blower though as it is commonly used and makes this a less arduous to read.

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Whistle-blower's are protected in two key ways, from:

- **Dismissal** – the dismissal of an employee or employee shareholder is automatically unfair if it is because of a protected disclosure; and
- **Being subjected to a detriment** – the wider category of workers are protected from detriment as a result of having made a protected disclosure.

As well as there being no minimum length of service requirement in order to bring a whistleblowing claim, there is also no cap on compensation. This makes it a claim that is quite popular for individuals to attempt to pursue, much to the dismay of the often incredulous employer.

The key elements of a whistleblowing claim are set out below.

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Qualifying disclosure

Information: the worker needs to communicate information to someone in the company which is either new, or can already be known to that person. The information needs to be more than just an allegation and must "convey facts". Although it doesn't have to be in writing, a worker putting a concern in writing will have a stronger case.

Subject matter: the facts conveyed need to, in the reasonable belief of the worker, show that one or more of the following six wrongdoings have taken place, are taking place or are likely to take place:

- Criminal offence
- Breach of any legal obligation – very wide, can include breach of the employee's contract, for example
- Miscarriage of justice
- Danger to the health and safety of any individual
- Damage to the environment
- The deliberate concealing of information about any of the above.

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Public interest: a disclosure of information will only be protected if it is "in the public interest". Note that it can be possible for workers to show that a disclosure concerning a breach of their own employment contract can be in the public interest (for example, if it affects a group of employees).

Reasonable belief: the facts a worker discloses do not actually need to be true or satisfy the legal tests of the 6 wrongdoings set out under "subject matter" above. This is the case provided that the worker held a reasonable belief that the wrongdoing has taken place (or is, or will take place). If it turns out they were wrong, that doesn't matter.

Reasonable belief in public interest: not only does it not matter if the worker turns out to be wrong about their disclosure qualifying under the subject matter test, but if they also reasonably believed it was in the public interest and turn out to be mistaken about that, that doesn't matter either.

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When the disclosure is protected

The worker needs to make their disclosure to the right category of person and meet certain conditions if it is to be protected:

Employer – there is no guidance as to whom within the company a disclosure has to be made. It is always sensible therefore for a company to have a policy in place.

Responsible person – this occurs where, instead of the employer, the worker makes a disclosure to the person who the worker reasonably believes has the legal responsibility for the matter in question. For example, if an employee thought that a client of their employer had breached their legal obligations, instead of telling their employer the employee could make a protected disclosure directly to the client. If the client then asked the employer to get rid of the employee, and the employer did so, the employee could bring a whistleblowing claim against their employer.

Legal adviser – a worker could make a protected disclosure via their solicitor, who in turn could pass this on to the employer.

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Government Minister – if a worker is employed by an individual or body appointed under an enactment (e.g. the NHS) then they can make a protected disclosure to a Minister or member of the Scottish Executive.

Prescribed person – there is a section in the Employment Rights Act 1996 which allows workers to make a protected disclosure to a "prescribed person". There is a list of over 60 organisations and individuals who have been assigned this duty because they have some sort of authority or relationship with the sector in question. For example, the list includes Ofcom, the Bank of England and HMRC.

Disclosures made to a prescribed person will only be protected if the worker reasonably believes that the issue falls within the remit of that person and the information disclosed and any allegation made are substantially true.

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Wider disclosure – there is no list of who this includes but it could extend to, for example, the media. A disclosure made on such a wide basis however is subject to closer scrutiny:

- Belief: the worker must believe the disclosure is substantially true
- Not for gain: there can't be anything in it for the worker
- Previous disclosure: if the worker hasn't already disclosed it to their employer or a prescribed person then that has to be because they thought they would be subjected to a detriment or reasonably believe that evidence will be hidden or destroyed
- Reasonable: it must be reasonable for the worker to make the disclosure.

These conditions will only be slightly relaxed if it concerns "an exceptionally serious" disclosure. In such cases, disclosure to the employer first isn't necessary.

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Detriment and dismissal

Workers are protected from being subjected to a detriment because they have made a protected disclosure. There is no definition of detriment although the Whistleblowing Commission Code of Practice provides some examples:

- Failure to promote
- Denial of training
- Closer monitoring
- Ostracism
- Blocking access to resources
- Unrequested reassignment or relocation
- Demotion
- Suspension
- Disciplinary sanction
- Bullying or harassment
- Victimisation
- Dismissal
- Failure to provide an appropriate reference
- Failure to investigate a subsequent concern

If an employee is dismissed because they made a protected disclosure, they will be able to bring an unfair dismissal claim. In circumstances where all the conditions of a protected disclosure have been met, the employee will be considered as having been automatically unfairly dismissed.

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The Consequences

Whistleblowers attract a great deal of protection from the law: there is no minimum period of service and no cap on compensation. A successful claimant could therefore potentially be very damaging to a company.

The way in which the Tribunal will calculate compensation works in a very similar way to unfair dismissal (see Outtakes of Constructive Dismissal), aside from the cap. In pure detriment cases, or an aspect of a claim which relates to detriment, the Claimant can also obtain an award for injury to feelings. Such an award is calculated on a similar basis as in discrimination claims (see Outtakes of Sex Discrimination).

Enough of the doom on gloom, let's look on the bright side: the Employment Tribunal doesn't deal with an enormous number of whistleblowing claims, in fact they don't even report statistics separately and lump whistleblowing in the "other" category.

If you would like more advice regarding whistleblowing, get in touch for a friendly and informal chat today.

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