

Introduction to Whistleblowing

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Agenda

Topic

1. Whistleblowing: What is it? does it matter? Why
2. Whistleblowing in an employment context: What protection is available and how do employees/workers get that protection?
3. Who can be liable?
4. Remedies
5. Policies and reform

What is Whistleblowing?

- Whistleblowing: where a current or former member of staff reports wrongdoing in his or her organisation.
- To be protected the disclosure must be a 'qualifying disclosure' of 'information' made in the manner specified by statute.

Why does it matter?



Why does it matter?

Whistleblowing disclosures have the potential to:

1. damage corporate reputation;
2. absorb a huge amount of management time
involve considerable legal costs and litigation
risk.

Why do they do it?

Do	Don't
To alert others	Risk Exposure
To highlight wrongdoing/ illegality/exploitation	Retaliation
For advantage?	Trust

“Whistleblowing” in the Employment context

Public Interest Disclosure Act 1998 (“**PIDA**”)

- Came into force 2 July 1999.
- Inserts provisions into the Employment Rights Act 1996 [as amended].
- Protects workers and employees.

Two levels of protection

1. Unfair dismissal (s103A ERA):

- It is automatically unfair to dismiss an employee if the reason, or principal reason, is that they have made a protected disclosure.
- There is no qualifying minimum period of service.
- No cap on compensation.

Two levels of protection

2. Unlawful detriment (s47B ERA)

- Available to employees and workers.
- Protection from being subjected to any detriment by his or her employer done on the ground that he or she has made a protected disclosure.

Who is covered?

- Protection for 'workers' (s43K ERA).
- Definition of 'worker' extended beyond s230(3) ERA and includes:
 - Employees
 - Freeland workers
 - Former employees/workers.
 - LLP partners
 - Secondees

But must be related to employment.

What is a ‘Qualifying Disclosure’?

S 43B(1) ERA:

means “any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following...[list of six relevant failures]”

What is a 'Qualifying Disclosure'?

Three elements:

1. Disclosure of Information;
2. Nature of the worker's belief;
3. Subject matter of disclosure.

Qualifying Disclosure: Information

- Disclosure of information (43B ERA):
 1. Needs to be sufficient factual content and specificity;
 2. Words that would otherwise fall short can be boosted by context;
 3. Need not be unknown to the recipient;

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Qualifying Disclosure: Information

- Disclosure of information (43B ERA):
 4. Information can be given verbally or in writing;
 5. Several communications can cumulatively amount to a qualifying disclosure, even if not on their own.

Qualifying Disclosure: Information

- Anticipated disclosure?
- *Bilsbrough v Berry Marketing Services – Southampton ET 1401692/2018*
 1. Do the whistleblowing provisions cover anticipated disclosures?
 2. Yes, said the Tribunal - without the law extending that far, whistleblowers would not be adequately protected.

Qualifying Disclosure: Nature of belief

- Worker must reasonably believe that the information disclose falls under one of the six relevant failures.
- Reasonable belief in the accuracy of the information.
- A belief may be reasonably held and yet be wrong.

Qualifying Disclosure: Nature of belief

- Subjective test but with an objective element.
- What is reasonable will depend on all the circumstances at the time.
- Test for reasonable belief that the disclosure is 'in the public interest' mirrors the above.

Qualifying Disclosure: Relevant Failure

Worker must **reasonably believe** the information they disclose falls under 1 of the 6 relevant failures:

1. A criminal offence;
2. Breach of any legal obligation;
3. Miscarriage of justice;
4. Danger to the health and safety of any individual;
5. Damage to the environment;
6. The deliberate concealing of information about any of the above.

Qualifying Disclosure: Relevant Failure

- In an employment context, "breach of legal obligation (is most likely to be the cited relevant failure category.
- But note that if the disclosure in an employment context relates to danger to the health and safety of any individual or environmental damage then the disclosure does not need to point to any definable legal breach by the employer.

Qualifying Disclosure: Exclusions

- Disclosure of information relating to a relevant failure will not constitute a ‘qualified disclosure’:
- Where the person making the disclosure commits an offence by making it - s43B(3); or
- Legal professional privilege – s43B(4).
- But no exception for disclosures carried out as an integral part of the worker’s work – *Leclerc v Amtac Certification Ltd* (EAT).

Qualifying Disclosure: Public Interest

- Worker must also have **reasonable belief** that the disclosure of information is made in the public interest (43B(1) ERA)
- What is in the public interest?

Qualifying Disclosure: Public Interest

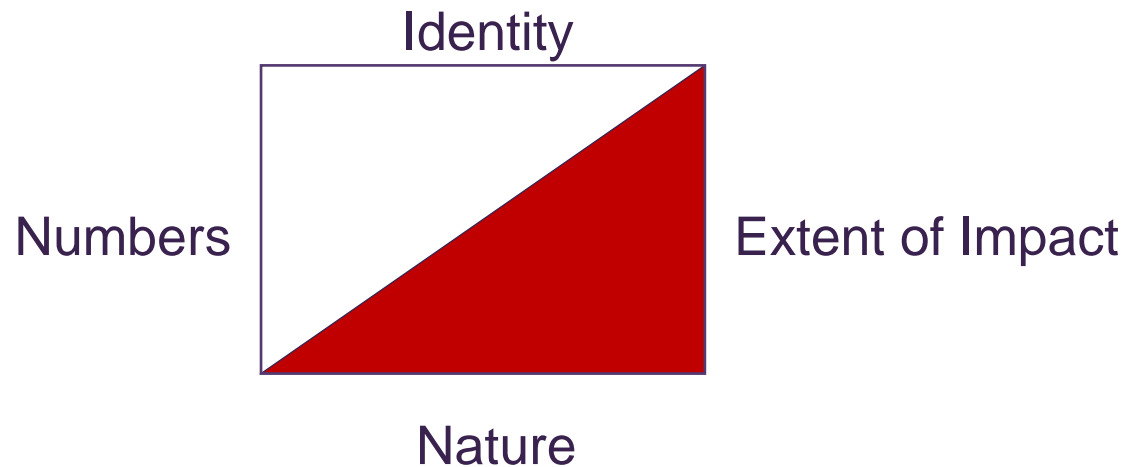
Chesterton Global v Nurmohamed CA July 2017:

- Does not matter that the whistleblower was mostly motivated by concern about his own position.
- 'the public' can refer to a subset of the general public, even one composed solely of employees of the same employer.
- CA refused to draw a 'bright line'.

Qualifying Disclosure: Public Interest

CA *Chesterton* guidance

- “a multi-factoral approach or a fudge?”



Method of Disclosure

Seven categories (43C – 43H ERA):

1. Employer;
2. The person believed to be responsible for the relevant failure;
3. Legal adviser;
4. Minister of the Crown;
5. Prescribed person

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Method of Disclosure

Seven categories (43C – 43H ERA):

Wider disclosure

6. External disclosure; or

7. Disclosure of exceptionally serious failures.

Method of Disclosure

Save for disclosure to legal advisor must:

- Reasonably believes the information disclosed is substantially true;
- Not for personal gain;

Method of Disclosure

For wider disclosure must also:

- Previously been disclosed to E'er or prescribed person except where reasonably believes it does so
 - evidence likely to be destroyed; or
 - they will suffer a detriment
(unless the matter is “exceptionally serious”)
- Reasonable in all the circumstances.

Causation

- There must be a causal link between the protected disclosure and the dismissal or detriment.
- The standard of proof differs depending on whether the claim is one of unfair dismissal or one of detriment.

Causation

- Dismissal: the reason or principal reason - *Bolton School v Evans* 2007 ICR 641, CA, *Kong v Gulf International Bank* [2022] EWCA Civ 941.
- Detriment: Materially influences the employer's treatment - *Fecitt and ors v NHS Manchester (Public Concern at Work intervening)* 2012 ICR 372, CA.

Erroneous belief of decision-maker

- Whether a dismissal is automatically unfair under section 103A, 2 questions must be answered:
 1. Was the making of the disclosure the reason (or principal reason) for the dismissal?
 2. Was the disclosure in question a protected disclosure within the meaning of the ERA?
- It is irrelevant that the employer genuinely believed employee's disclosure did not amount to a protected disclosure - *Beatt v Croydon Health Services NHS Trust* [2017] IRLR 748.

Knowledge of the decision maker

Dismissal & tainted information

Royal Mail Ltd v Jhuti [2019] UKSC 55

- An employer is liable for the reasons of any manipulator in the "hierarchy of responsibility above the employee" even where that reason is hidden from the decision-maker(s).
- The improper actions or motive of a line manager will therefore be attributed to the employer.

Knowledge of the decision maker

Detriment

Unlike the position in relation to unfair dismissal claims against the employer, a person who subjects a whistleblower to a detriment must personally be motivated by the protected disclosure for a detriment claim to succeed (*Malik v Cenkos Securities Plc* [2018] UKEAT).

Detriment by co-workers & employer vicarious liability

- Whistleblowers have the right not to be subjected to a detriment (47B ERA)
 1. by any act/deliberate failure to act;
 2. on the ground that worker made a protected disclosure (47B ERA);
 3. the act (or omission) of the employer in failing to prevent reprisals by colleagues, or failing to address a grievance about reprisals, may itself amount to a detriment (*Abertawe Bro Morgannwg University Health Board v Ferguson*, UKEAT/0044/13).

Detriment by co-workers & employer vicarious liability

Since 2013:

- Employer can be vicariously liable for detriment caused by its workers (subject to a statutory reasonable steps defence s47B(1D) ERA);
- Workers can be personally liable for causing detriment (unless able to rely on a statement by the E'er that they would not be contravening the ERA in undertaking the act & it was reasonable to rely on the statement s47B(1E) ERA.

Dismissal consequent on detriment

- There is no obstacle to an employee recovering compensation for dismissal consequent on detriment via a claim under s47B(1A) with the employer being vicariously liable for actions of a wrong-doer co-worker (subject to any reasonable steps defence) - Court of Appeal in *Royal Mail v Jhuti & Timis and Sage v Osipov and ors* [2018] EWCA Civ 2321.

Dismissal consequent on detriment

- An individual's personal liability for detriment which they cause to a whistleblower colleague does not cease with that colleague's dismissal (or termination, in the case of a non-employee whistleblower) - *Timis and Sage v Osipov and ors.*

Unfair dismissal claim -v- dismissal consequent on detriment claim

Advantages/disadvantages for claimants of detriment claims (s47B) over unfair dismissal claims (s103A):

Advantages:

- Availability of injury to feelings awards.
- Significantly lower causation threshold test (materially influences rather than principal reason).
- Potential recovery of damages from co-worker.

Disadvantages:

- Remedies of reinstatement/re-engagement not available.
- Basic award damages not available.
- Reasonable steps defence for employer

Good faith

- Since 2013, the disclosure does not need to be made in good faith. Motive irrelevant for protection.
- But bad faith can affect level of compensation
Decrease of up to 25%.

Time limits

- Unfair dismissal – within 3 months of the EDT (s111(2) ERA)
- Detriment - before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar or failures, the last of them" (s48(3)(a), ERA).
- A deliberate failure to act is treated as done when it was decided on.

Remedies

- Claim in the Employment Tribunal .
- Dismissal:
 1. Interim Relief;
 2. No qualification period;
 3. Automatically unfair dismissal;
 4. No cap on compensation.
- Detriment:
 1. Damages/injury to feelings.

Whistleblowing policies

- Should have one:
 - Internal control;
 - Early warning system;
 - Reduce litigation risk.
- Establishing a statutory defence:
 - Compliance:
 - Public bodies;
 - Listed companies/Governance codes;
 - Financial services;
 - US companies.

Good practice

- Have a whistleblowing governance framework with a 'hotline'.
- Communicate the framework – and at the least the policy and 'hotline'.
- Training.
- Investigate.
- Tracking and reporting.

Prescribed persons reporting duties

- Prescribed persons required by law to report annually on disclosures of information received from workers.
- Includes summary of the action taken.

European reform

- EU Directive to be implemented by Member States by 17 Dec 2021 (17 Dec 2023 for some private employers). But many have yet to do so.
- Sets minimum standards guaranteeing protection for whistleblowers who report breaches of a wide range of **EU laws**.
- UK law widely already compliant (save internal reporting channels requirements & possible wider public disclosure).



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