

How to spot a whistleblower



Employees do not need any minimum qualifying service to bring a whistleblowing claim, whether based on 'detriment' during employment or unfair dismissal where their employment is terminated on the back of them having 'blown the whistle'.

Protection against dismissal applies to employees and employee shareholders. Protection against detriment applies to employees, employee shareholders and workers.

It is often the case that employees raise concerns during their employment, whether as part of a formal grievance or otherwise. Compensation in whistleblowing cases is unlimited and claims are time consuming and expensive, so it is crucial that managers are trained to respond appropriately to the concerns raised. It may be that this is done as part of your grievance procedure or you may have a separate whistleblowing procedure where this applies. We set out below some guidance to set you on the right path.

What is the employee complaining about?

In order to be protected under whistleblowing legislation, the worker must make a protected disclosure. This means that the worker must reasonably believe that the information disclosed tends to show (not actually does show) that one of the following has occurred, is occurring or is likely to occur:

- A criminal offence;
- Breach of any legal obligation;
- 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.

Until 25 June 2013, in order to be a protected disclosure, the worker had to make the disclosure in good faith. At that time, a disclosure motivated by malice or personal gain would not qualify for protection. However, this requirement has now been removed and so a disclosure in bad faith will still be

protected. It will though be taken into account when deciding the amount of any compensation payable to the worker.

If a worker makes a protected disclosure, the law protects them from suffering detrimental treatment at work as a result. Detrimental treatment includes threats, disciplinary action and loss of pay. If you dismiss an employee for making a protected disclosure, this is automatically unfair. The same applies for selection for redundancy.

You should bear in mind that previous case law has shown that an allegation by an employee that an employer has breached their employment contract can fall under the category of 'breach of any legal obligation' and therefore be deemed a protected disclosure. For example, the employee may allege that the employer has failed to provide a safe place of work if they are left alone and unsupervised (*Parkins v Sodhexo* [2002] IRLR 109). The impact on employers arising from this decision is that employees who are at risk of dismissal may make tactical disclosures and attempt to rely on these in bringing an unfair dismissal claim in future. This makes safeguarding against these claims even more important.

Who has the worker complained to?

A worker should be encouraged to make the disclosure internally. You should ensure that your staff feel they are able to raise concerns to you without reprisal and after all, it is to your advantage to be made aware of any dangerous or illegal activity that may be going on within your organisation.

In order to facilitate this and maximise your control over complaints, it is best practice to have a whistleblowing policy in place. This would set out the protection given under the legislation and the procedure staff should follow to confidentially report their complaints. The policy could also set out what will not be tolerated (i.e. an employee making false accusations).

A protected disclosure can be made to a third party who the

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worker reasonably believes is responsible for the conduct that is the subject matter of the disclosure, or to a 'prescribed person', which includes (amongst others) HMRC, the Health and Safety Executive, the Office of Fair Trading and Members of Parliament.

It is possible that an individual will make a disclosure to a wider audience, for example the press. An external disclosure is damaging both to your organisation and staff morale. This disclosure will only be protected under whistleblowing law if it has already been disclosed to the employer or a 'prescribed person', or the individual believes that by making the disclosure, evidence would be destroyed or they would suffer. In addition, the worker must not be acting for gain and must also believe the information is substantially true. It follows that if good internal procedures are in place within your organisation which is then ignored by "an employee", they would find it difficult to justify a wider disclosure and may mean they find themselves unprotected from a subsequent dismissal.

How can I maximise my protection from whistleblowing claims?

You should ensure that your management team is adequately trained in the whistleblowing policy including its principles and procedures. You should make it clear that victimisation of a whistleblower will not be tolerated and will lead to disciplinary action for the perpetrator. You should also keep the whistleblower updated with the progress of your investigation and take steps to ensure they feel their concerns are being dealt with seriously and discreetly, where necessary.

If you would like any further information about our specialist employment law and HR services, please contact a member of the team.

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Kevin is experienced in all aspects of employment law, both claimant and respondent, from drafting contracts and procedures, through to providing representation before tribunals in cases involving multiple claimants, and advising on dismissal and re-engagement procedures in relation to contract variations for 500 plus employees. He has worked across the public and private sectors, for high street practices, local authorities and RSLs. This diverse range of experience has given him a very good understanding of the different pressures and considerations that apply when providing advice to individuals, businesses and public bodies. Kevin is admired for his pragmatic approach to most problems, and for finding solutions which minimise both cost and risk to clients.

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