
Whistleblowing at Work

The Court of Appeal has confirmed that it is easier for claimants to succeed with detriment claims than automatically unfair dismissal claims under whistleblowing legislation.

A "*detriment*" is a disadvantage an employee has suffered because they have "blown the whistle" (for example, being overlooked for a promotion or disciplined).

Whereas a detriment claim will succeed where a protected disclosure has "*more than trivially*" influenced the employer's subjecting a worker to a detriment, an automatically unfair dismissal claim will only succeed where a protected disclosure is the employer's "*reason or principal reason for the dismissal*".

This case highlights the importance of having a whistleblowing policy in place and of providing information and training to managers on how to recognise, and properly deal with, a whistleblowing situation.

This checklist outlines the protection given to whistleblowers at work under UK law.

What protection does the law give to whistleblowers?

There are two levels of protection for whistleblowers:

- **Unfair dismissal.**

Dismissing an employee will be automatically unfair if the reason, or main reason, is that they have made a "*protected disclosure*".

- **Unlawful detriment.**

Workers are protected from being subject to any detriment on the grounds that they have made a "*protected disclosure*".

A detriment includes:

- threats;
- disciplinary action;

- loss of work or pay; or
- damage to career prospects.

The definition of a "*worker*" is wide and includes:

- agency workers;
- freelance workers;
- seconded workers; and
- trainees.

There is no financial cap on compensation in whistleblowing claims, and no requirement for a minimum period of service.

When is a disclosure protected?

The information disclosed must, in the reasonable belief of the worker, tend to show that one of the following has taken place, is taking place or is likely to take place:

- A criminal offence.
- Breach of any legal obligation.
- Miscarriage of justice.
- Danger to the health and safety of an individual.
- Damage to the environment.
- The deliberate concealing of information about any of the above.

Internal disclosures

If the whistleblower is acting in good faith, a disclosure to your business will be a protected disclosure.

External disclosures

- **Responsible third parties.**

If a worker reasonably believes a third party (for example, a client or supplier) is

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responsible for the wrongdoing, they can report it to that third party in good faith, without informing your business.

- **Prescribed persons.**

There are a number of organisations that a worker can make a disclosure to in good faith, provided they believe the information is substantially true and concerns a matter within that person's area of responsibility.

They include:

- HM Revenue & Customs;
- the Office of Fair Trading; and
- the Health and Safety Executive.

- **Legal advisers.**

Workers are entitled to disclose matters to their legal adviser while obtaining advice.

- **Wider disclosure.**

Disclosure to anyone else is only protected if the worker believes the information is substantially true and acts in good faith and not for gain.

Unless the matter is "exceptionally serious", they must have already disclosed it to your business or a prescribed person, or believe that, if they do, evidence would be destroyed or they would suffer reprisals.

Why is protection of whistleblowers important?

Internal risk control

Your business has an interest in uncovering wrongdoing or dangerous practices within your organisation. You are also likely to want to manage what information (if any) is spread to the outside world. Encouraging the reporting of these types of issues through internal channels may help avoid:

- Serious accidents.
- Fraud.
- Regulatory breaches.

Avoiding litigation

Whistleblowing cases can involve significant management time and legal costs, which are not usually recoverable.

Reputational damage and staff morale

An external disclosure of suspected malpractice, especially to the media, can lead to negative publicity for your business and damage staff morale.

Any claim by a whistleblower who believes they have suffered reprisals is likely to have a similar effect.

Avoiding criminal liability

Your business will be guilty of failing to prevent bribery if a person associated with it (for example, an employee) bribes another person with the intention of obtaining or retaining business or a business advantage.

You will have a defence if you can show that you had "adequate procedures" in place to prevent bribery.

The government has published guidance indicating that this would include having effective whistleblowing procedures in place that encourage the reporting of bribery.

Practical steps to reduce business risk

- Implement a whistleblowing policy that enables your staff to confidentially report concerns about:
 - illegal;
 - unethical; or
 - otherwise unacceptable conduct.

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Ensure that it enables the worker to bypass the level of management where the problem exists.

- Publicise the policy internally and train any managers on it. Make it clear that victimisation of a whistleblower will lead to disciplinary action.
- Investigate disclosures promptly, and keep the whistleblower informed of progress where possible. A lack of contact with the whistleblower may lead them to make an external disclosure.
- Do not rely on confidentiality clauses to prevent external disclosures, as they are unenforceable if the disclosure is protected. Taking action against a whistleblower for breach of confidence may amount to an unlawful detriment.

More information

If you have any questions, please visit our website at www.conybeare.com or feel free to contact Steven Conybeare via email steven@conybeare.com or call him on +44 (0) 870 753 0925.

About Conybeare Solicitors

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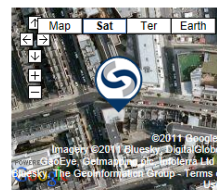
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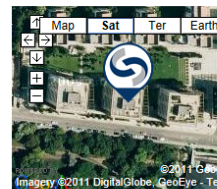
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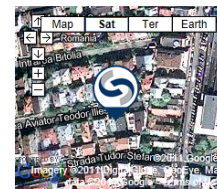
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