

Whistleblowing Guidance

Employment legislation gives employees special protection for whistleblowing, i.e. making a protected disclosure. Such employees are protected from being dismissed for whistleblowing or being subjected to a detriment and this applies irrespective of the employee's service. In fact, the whistleblowing protection is wider in scope than just being limited to employees.

Who do the whistleblowing provisions apply to?

The legislation relating to whistleblowing is contained in the Public Interest Disclosure Act 1998, the Employment Rights Act 1996 and the Enterprise and Regulatory Reform Act 2013. It provides that those protected by the legislation include not only employees but workers, i.e. home workers, [apprentices](#), [agency workers](#), and persons carrying out work for the company personally as opposed to self-employed workers who have their own business.

When does whistleblowing protection apply?

The first question is whether the disclosure of information is one that qualifies the employee for protection ('a qualifying disclosure').



Qualification will take place when:

- a) the worker discloses information which they reasonably believe is in the public interest and indicates:
 - ⦿ That a criminal offence has been committed; and/or
 - ⦿ That a legal obligation has been breached; and/or
 - ⦿ That there has been a miscarriage of justice; and/or

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- ⦿ That there has been a danger to someone's health and safety; and/or
- ⦿ That the environment has been damaged; and/or
- ⦿ That any of the above have been deliberately concealed

And

- b)** the worker has a reasonable belief that the information they are disclosing shows that this has or is happening or will happen in the future.

Because of the public interest element most individual grievances or contractual matters are unlikely to fall into the above categories and workers should be encouraged to use the appropriate procedures for personal complaints.

As long as the worker has a reasonable belief that the information disclosed indicates one of the above has occurred, this is sufficient for the disclosure to be a qualifying disclosure, even if in fact the information does no such thing.

Secondly, if the disclosure amounts to a qualifying disclosure, to achieve whistleblowing protection, the worker must make the disclosure to specified people or bodies, ('a protected disclosure'). These are as follows:

- ⦿ The employer or another person that the employer has authorised to receive the information. This could be, for example, a confidential hotline
- ⦿ The responsible person, i.e. where the information relates to the conduct or legal duties of someone other than the employer, to that other person
- ⦿ Legal advisers where the disclosure is made in the course of obtaining legal advice
- ⦿ Prescribed persons. These are persons or bodies prescribed in law to receive certain information, for example, Commissioners of HM Revenue and Customs for information about income tax and the Environment Agency for information about actual or potential risks to the environment
- ⦿ A government minister where the worker is employed by a body or individual appointed under an enactment, statute or statutory instrument

Wider Audience Disclosure

Disclosure made to a wider audience than those listed above may also benefit from protection but only if:

- ⦿ The worker reasonably believed that the information disclosed was true; and
- ⦿ The disclosure was not made for personal gain; and

In addition to this either:

- ⦿ The worker had previously disclosed the information to the employer or to the prescribed body; or
- ⦿ The worker reasonably believed at the time of the disclosure that they would be subjected to a detriment by the employer if they gave the information to the company or one of the prescribed bodies; or
- ⦿ Where there is no prescribed person, the worker reasonably believed that the employer would conceal or destroy relevant evidence if the disclosure was made to the employer

If the above conditions are satisfied, disclosure to the wider audience will only afford the worker protection if in all the circumstances of the case it was

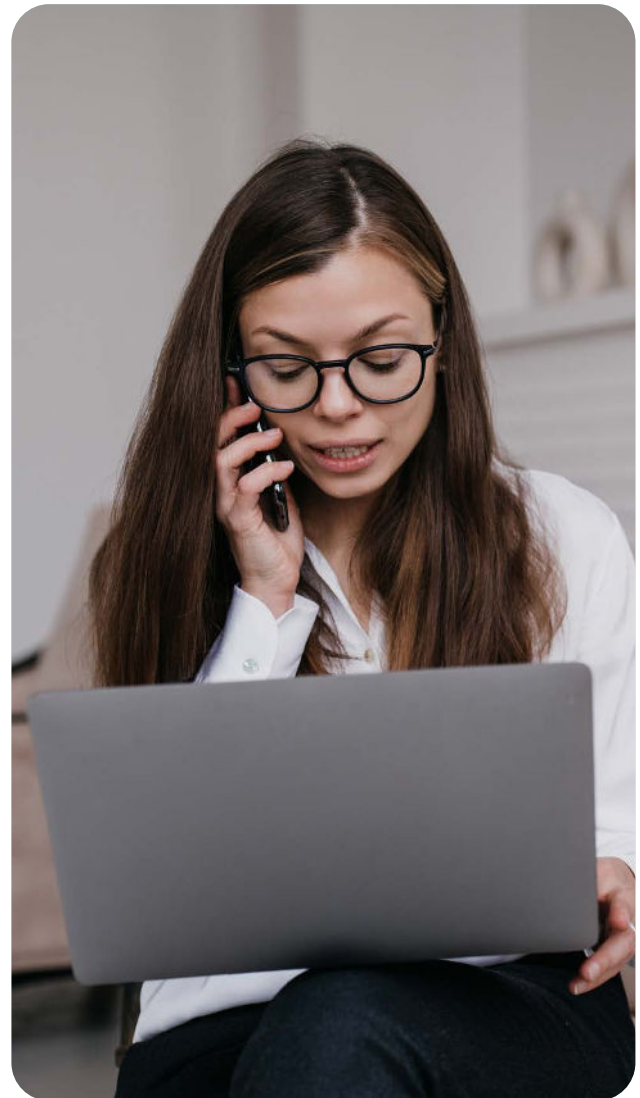
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reasonable for the employee to make the disclosure. Circumstances that may be considered include:

- ⦿ The identity of the person to whom the disclosure was made
- ⦿ The seriousness of wrongdoing disclosed
- ⦿ Whether the matter disclosed is continuing or likely to occur in future
- ⦿ Whether the disclosure of information breached a duty of confidentiality between the employer and a third party
- ⦿ Where the disclosure has already been made to the employer or a third party, what, if any, action was taken by the employer or third party on receipt of the information and/or whether the worker complied with any whistleblowing procedure of the employer when reporting the wrongdoing; and
- ⦿ Any relevant circumstances of the whistleblower

Procedures

It is not possible to side step the right to make a protected disclosure and employers should note that any clauses in an employee or worker's contract, or in a settlement agreement, that seek to prevent a protected disclosure will be void. Therefore, to limit the effect of a disclosure, an employer would be well placed to have a whistleblowing procedure that encourages workers to raise concerns internally rather than outside of the organisation. The procedure should emphasise the fact that complaints will be taken seriously and that those making disclosures will be protected from being treated less favourably by the employer and by colleagues for making such a complaint. Having such a policy is likely to prevent any disclosures to a wider audience from being protected.



Short Serving Employees

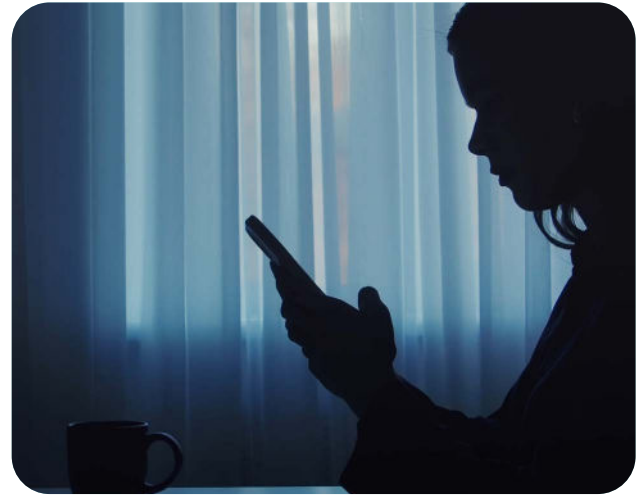
As there is no service qualification to bring a claim of whistleblowing, employers should be aware that if they dismiss an employee prior to them acquiring the requisite service to bring an ordinary, unfair dismissal claim it is not unknown for whistleblowing to be cited as the alleged cause of their dismissal. For this reason, it is important that employers follow proper procedures for monitoring new employees and that dismissals are handled in accordance with good practice generally. A careful record of the reasons for the dismissal together with appropriate evidence will be a key factor in defending such claims.

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The Protection

It is unlawful to dismiss an employee or select them for redundancy because they have made a protected disclosure. In addition, it is unlawful to subject an employee or worker to a detriment because they have made such a disclosure.

Colleagues who subject a worker to a detriment for making a whistleblower's complaint will be personally liable for their own actions, as of 25 June 2013 and their employer will also be vicariously liable unless it can demonstrate that it has taken such steps to prevent the action complained of. The protection applies even after the termination of employment so would include the situation where an ex-employee is given a bad reference because they have made a protected disclosure.



In both detriment and also dismissal cases there is no limit on the amount of compensation that the Tribunal can award in such circumstances and may include an injury to feelings award.



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