GUIDANCE NOTE

Public Interest Disclosure (Whistleblowing)

Legal Protection for Whistleblowers

There is no general legal duty on workers to disclose or report wrongdoing on the part of their employer. However, the law protects workers who report malpractices on the part of their employers or third parties against dismissal or victimisation for doing so.

The protection for whistleblowers was introduced by the Public Interest Disclosure Act 1998 which came into force in July 1999. The Act followed a series of disasters and financial scandals in the 1980s and 1990s. The various enquiries revealed that staff had been aware of the risks to health and safety or of financial damage, but had either been too frightened to raise their concerns or had done so in the wrong way or with the wrong person.

Following the advent of the Act many organisations have adopted whistleblowing policies in order to encourage internal disclosure and the remedying of malpractices within their business.

Unfair Dismissal

The dismissal of an employee will be automatically unfair if the reason or principal reason for their dismissal (including constructive dismissal or selection for redundancy) is that they have made a protected disclosure. There is no qualifying period of service. Nor is there any upper limit on compensation. Because of this whistleblowing claims are sometimes made for tactical reasons.

Victimisation

It is unlawful for an employer to subject a worker to a detriment on the grounds that they have made a protected disclosure.

The concept of worker is broad and, in addition to employees, includes agency workers, freelance workers, home workers, secondees and trainees.

Detriment includes threats, disciplinary action, loss of or stoppages of pay, refusal of promotion, damage to career prospects. It also covers detriments imposed after the termination of employment, e.g. refusal to supply a reference.

Under current law an employer is not vicariously liable for reprisals imposed on a whistleblower by colleagues or third parties. Nevertheless a failure to protect the worker from reprisals may itself amount to a detriment by the employer. Further, the Government proposes to amend the

law through the Enterprise and Regulatory Reform Bill to impose vicarious liability on employers for victimisation carried out by fellow workers.

What is a Protected Disclosure?

The worker must make a disclosure of information. The information disclosed must, in the reasonable belief of the worker, tend to 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.

"Reasonable belief" means that the worker does not have to prove that the facts or allegations disclosed are true or that the facts fall into one of the categories of wrongdoing listed in the legislation. There is a protected disclosure if the worker reasonably but mistakenly believes there was a specified malpractice (although there must be more than unsubstantiated rumours and more than a mere expression of opinion by the worker).

The alleged malpractice or wrongdoing can be past, present, prospective or merely alleged. It may concern the conduct of an employer, an employee or a third party.

Under current law, "breach of a legal obligation" is very broad. Case law has established that it includes an employer's (alleged) breach of the employee's own employment contract. Despite its title, the Act does not expressly require that the disclosure should be in the public interest. It is debateable whether the Act was intended to cover a breach of the employee's own contract. The Government regards the case law as a loophole in the Act and has proposed to close this loophole by amending the legislation (through the Enterprise and Regulatory Reform Bill) to provide that a qualifying disclosure must, in the reasonable belief of the worker, be made in the public interest.

The legislation encourages internal disclosure to the employer as the primary method of whistleblowing. For disclosure to an employer to be protected, it must be made in good faith. It may be made in the form of a grievance submitted by the employee.

"Good faith" means acting with honest motives. Case law has established that a disclosure is unlikely to be in good faith if it was for an ulterior motive unrelated to the statutory objectives of

the legislation, i.e. it was not directed to remedying the wrongs or malpractice disclosed. This seems to involve an element of public interest being required, i.e. the disclosure is not made in good faith where the predominant purpose is the employee's own personal interest.

The Government is proposing to remove the "good faith" requirement for a disclosure to be protected. However "good faith" will not be removed entirely from whistleblowing claims. Under the proposed amendment a Tribunal will have the power to reduce compensation by up to 25% if the disclosure was not made in good faith. Moreover, as explained above, the amendment to the legislation will require that a disclosure must be in the public interest.

External disclosures are protected in some circumstances:

- To responsible third parties: where the worker reasonably believes the third party e.g., customer or supplier, is responsible for the wrongdoing, they can report it in good faith to the third party without telling the employer.

- To prescribed persons: a disclosure may be made in good faith to a prescribed person, provided the worker believes the information is substantially true and concerns a matter within the prescribed person's area of responsibility. Prescribed persons include HMRC, the Health and Safety Executive, the Office of Fair Trading, the Financial Services Authority and Ofcom. Again there is no requirement to inform the employer.

- To Government ministers: workers employed by a person or body appointed under statute can report matters in good faith to the relevant minister.

- Legal advisers: workers can disclose matters to their legal adviser in the course of 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, not for gain, and the disclosure to that person is reasonable. Unless the matter is exceptionally serious, they must have already disclosed it to the employer or a prescribed person or believe that, if they do, evidence would be destroyed or they would suffer reprisals. This means that disclosure to the media will only be protected in limited circumstances. The individual must be acting in good faith and must have made a previous disclosure to the employer (except in an exceptionally serious case) and the disclosure to the media must be reasonable.

Case law has established that a disclosure made after the termination of employment is likely to be protected provided there is some connection between the disclosure and the previous employment, e.g., it relates to matters which were discovered by the employee during the employment.

Whistleblowing Policies

The legislation imposes no obligation on employers to encourage whistleblowing or to implement a whistleblowing policy. It simply forbids employers from dismissing or victimising whistleblowers.

Nevertheless there are a number of reasons why it is good practice to adopt a written policy on whistleblowing:

- Compliance and internal control: encouraging a culture where concerns are reported internally makes it easier for management to address those concerns and avoid more serious regulatory breaches or reputational damage.

- Avoiding external disclosures: an effective policy will encourage and facilitate early internal whistleblowing, making it less likely that a worker will report their concerns externally to the press or other third parties.

- Minimising litigation risk: by helping to protect whistleblowers and by sending a clear message to staff and management about the importance of whistleblowing, a policy will minimise the risk of whistleblowers being dismissed or victimised which could lead to claims under the whistleblowing legislation.

- Avoiding criminal liability for bribery: under the Bribery Act 2012 an organisation which fails to prevent bribery by a person associated with it will be guilty of a criminal offence. It is a defence if the organisation has in place adequate procedures designed to prevent bribery. The Government's guidance stresses that it is important for organisations to have in place effective whistleblowing policies and procedures which encourage employees to report bribery.

Some of the points which an effective whistleblowing policy should cover include:

- Convey the seriousness and importance that the employer attaches to identifying and rectifying wrongdoing.

- Encourage workers to raise concerns internally and give them the confidence to do so.

- Remind workers of the standards of behaviour expected of them.

- Ensure workers know whom to approach with a concern and enable them to bypass the person or level of management to whom the concern relates.

- Outline the procedures for investigating disclosures and what steps might be taken if wrongdoing is uncovered.

- Make it clear what will happen to those who victimise whistleblowers and those who abuse the system by making malicious allegations.

- Provide access to further sources of advice and guidance on whistleblowing.

Whistleblowing and Confidentiality

Most employment contracts and staff handbooks contain confidentiality clauses. Even in the absence of express contractual obligations, employees have implied duties of confidentiality. However the Employment Rights Act makes contractual terms void insofar as they otherwise preclude the making of a protected disclosure. This means that where a disclosure of information to a third party qualifies as a protected disclosure, the employee cannot be in breach of any express or implied contractual duties.

Even if the disclosure does not qualify as a protected disclosure under the legislation, the employee may nevertheless have a defence to any alleged breach of confidence if disclosure of the information is sufficiently in the public interest.

Confidentiality clauses are also normally included in compromise agreements and other severance agreements. Again however such a term is not effective to preclude an ex-employee from being able to make a protected disclosure. As explained earlier in this note a disclosure made after the termination of employment can be a protected disclosure, so, if all the necessary conditions are fulfilled, the ex-employee will not be in breach of the terms of the compromise agreement.

The comments in this guidance note are of a general nature only. Full advice should be sought on any specific problems or issues

ASHTON BOND GIGG
March 2013