

## Protected disclosure

Rights to bring a whistleblowing claim potentially arise when someone suffers a detriment (which might be dismissal or any other detriment) because they made a **protected disclosure**.

A *protected disclosure* involves a worker making:  
(s.43a)

- o a *disclosure of information* (as defined)
- o which is a *qualifying disclosure* (as defined), and
- o is made in one of the protected manners

If a worker succeeds in showing that he has made a protected disclosure, he must still go on to show he was subjected to a detriment (either dismissal or any other detriment) for making that protected disclosure.

## Characteristics of disclosures

Any disclosure of information will potentially act as the foundation for a whistleblowing action. This is very wide.

References: ERA 1996, s 43B(1)

Information in this context means a disclosure of facts; merely voicing a concern or making allegations is not enough.

References: Cavendish Munro Professional Risks Management v Geduld UKEAT/0195/09/DM

Where the person receiving the information is already aware of the facts it contains, it does not prevent the giving of that information from amounting to a 'disclosure' for these purposes.

References: ERA 1996, s 43L(3)

## Qualifying disclosures

Whether or not a disclosure is a *qualifying disclosure* depends upon the subject matter of the allegation in that disclosure. Only disclosures which make certain specific types of allegation can amount to *qualifying disclosures*.

References: ERA 1996, s 43B

## Necessary belief

In order to be a *qualifying disclosure*, it is also necessary that the worker making it reasonably believes that what he is alleging tends to show that one or more of the listed types of wrongdoing has occurred (see below).

The allegation need not actually be true as long as the worker reasonably believes that it tends to show one or more of the listed types of wrongdoing. If it is in fact untrue (and particularly if the person making the allegation knows that), this may lead a tribunal to conclude that the worker making the allegation did **not** reasonably believe that it tended to show relevant wrongdoing. The reasonableness of the belief will depend on the information available to the worker at the time the decision to disclose is made. It is not relevant that the belief would no longer be considered reasonable if considered in the light of factors which become apparent later.

References: Darnton v Univ Surrey [2003] IRLR 133

Babula v Waltham Forest College [2007] IRLR 346

## Relevant types of wrongdoing

To be a qualifying disclosure, the worker must reasonably believe that the information disclosed tends to show:

References: ERA 1996, s 43B(1)

- o that a criminal offence has been committed, is being committed, or is likely to be committed
- o that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject
- o that a miscarriage of justice has occurred, is occurring, or is likely to occur
- o that the health or safety of any individual has been, is being, or is likely to be endangered, or
- o that the environment has been, is being, or is likely to be damaged

The alleged wrongdoer can be any legal person: it can be the employer, a person for whom the employer is responsible, or any other person.

References: ERA 1996, s 43B(1)

Hibbins v Hesters Way Neighbourhood Project [2009] IRLR 198

It will also be sufficient if the disclosure relates to the deliberate concealment of information tending to show any such wrongdoing. In each case, the worker must believe that the relevant wrongdoing either:

References: ERA 1996, s 43B(1)(f)

- o has already occurred, or
- o is occurring at the time of the disclosure, or
- o is **likely** to occur at some point after the disclosure

Where it is alleged that something is likely to occur in the future, the worker must reasonably believe, given the information on which he is relying, that it is more likely than not that the bad consequence will occur. It is not enough to believe that there is a risk or possibility that it will occur.

References: Kraus v Penna [2004] IRLR 260

As regards disclosures concerning criminal offences or legal obligations (subsections 43B(1)(a) and (b)), where a whistleblower believes that a criminal offence has been committed, is being committed or is likely to be committed, or that a person has, is, or is likely in future to fail to comply with a legal obligation, then provided the tribunal is of the view that this belief is objectively reasonable, whistleblowing protection will not be denied because:

References: Babula v Waltham Forest College [2007] IRLR 346

ERA 1996, s 43B(1)(a)-(b)

- o the belief turns out to be wrong, or
- o the information which the whistleblower believed to be true (and may indeed be true) does not in law amount to a criminal offence, or would not in fact involve the breach of any actual legal obligation

### **Failure to comply with legal obligations**

Wrongdoing includes a worker's reasonably belief that a 'person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject'.

References: ERA 1996, s 43B(1)(b)

The concept of 'legal obligation' is so wide that it even covers legal obligations under the worker's own contract of employment.

References: Parkins v Sodexho [2002] IRLR 109

As noted above, provided that a worker has an objectively reasonable belief that someone has failed, is failing, or is likely in future to fail to comply with legal obligation, the fact that he is mistaken, and/or that no such legal obligation in fact exists, does not prevent a whistleblowing claim from being brought.

References: Babula v Waltham Forest College [2007] IRLR 346

Whistleblowing protection will not be lost merely because the employer can show that, for reasons not immediately apparent to the worker, the legal obligation does not in fact apply, or that he has some defence to it.

References: Bolton School v Evans [2006] IRLR 500

### Exceptions

In two sets of circumstances, a disclosure will never amount to a qualifying disclosure, even if the other criteria are satisfied:

References: ERA 1996, s 43B(3)-(4)

- o if the person making the disclosure commits an offence by making it, or
- o if the person making the disclosure was himself given the information in the course of obtaining legal advice, and the information is subject to legal professional privilege

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Harvey CIII[6]-[13] -- Qualifying disclosure

### When qualifying disclosures are protected

A qualifying disclosure is not necessarily a protected disclosure. It will only be a protected disclosure depending on the circumstances and manner in which it is made. A qualifying disclosure will be protected:

References: ERA 1996, s 43A

- o where the disclosure is made in good faith to the worker's employer  
References: ERA 1996, s 43C(1)(a)
- o where the disclosure is:  
References: ERA 1996, s 43C(1)(b)
  - made in good faith
  - concerns wrongdoing which relates solely or mainly to the conduct of a person other than the employer, or some matter for which a person other than the employer has legal responsibility, and
  - is made to that person
- o where a worker follows a procedure, authorised by the employer, under which he makes a disclosure to a third party  
References: ERA 1996, s 43C(2)
- o disclosures made in the course of obtaining legal advice  
References: ERA 1996, s 43D
- o where the worker's employer is an individual appointed by a Minister of the Crown, or a body comprising any such individuals, and the disclosure it is made in good faith to a Minister of the Crown  
References: ERA 1996, s 43E
- o where a worker makes a qualifying disclosure relating to exceptionally serious wrongdoing:  
References: ERA 1996, ss 43H, 43L(2)
  - which is made in good faith, and
  - which he reasonably believes is substantially true, and
  - where he does not make the disclosure because he wants to make personal gain (any reward payable by or under any enactment is disregarded), and
  - where in all the circumstances of the case, it is reasonable for him to make the disclosure (having particular regard to the identity of the person to whom the disclosure is made)

- o where a worker makes a qualifying disclosure:  
References: ERA 1996, ss 43G, 43L(2)
  - which is made in good faith, and
  - which he reasonably believes is substantially true, and
  - where he does not make the disclosure because he wants to make personal gain (any reward payable by or under any enactment is disregarded), and:
    - reasonably believes that he would be subjected to a detriment by his employer if he made a disclosure to his employer or to a relevant regulatory authority ('prescribed person'), or
    - (where there is no prescribed person) reasonably believes that it is likely that evidence will be concealed or destroyed if he makes the disclosure to his employer, or
    - has previously made an earlier disclosure of substantially the same information either to his employer or to the relevant prescribed person
  - and, in all the circumstances of the case, it is reasonable for him to make the disclosure, having particular regard to:
    - the identity of the person to whom the disclosure is made, and
    - the seriousness of the relevant failure, and
    - whether the relevant failure is continuing or likely to recur, and
    - whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person, and
    - any action which the employer or the prescribed person has already taken or might reasonably be expected to have taken in response to the earlier disclosure (in cases where the worker has previously made an earlier disclosure of substantially the same information to his employer, or to the relevant prescribed person), and
    - whether in making the previous disclosure to the employer the worker complied with any procedure authorised by the employer (in cases where the worker has previously made an earlier disclosure of substantially the same information to his employer)
  
- o where the worker:  
References: ERA 1996, s 43F
  - reasonably believes the disclosure is substantially true
  - makes the disclosure in good faith to a relevant regulatory authority ('prescribed person'), and
  - reasonably believes that the wrongdoing is of a type for which that prescribed person is responsible

The prescribed persons are listed in the Public Interest Disclosure (Prescribed Persons) Order 1999, which also describes the matters for which they are responsible. The list has been amended from time to time by a series of subsequent statutory instruments, the three most recent of which are:

References: Public Interest Disclosure (Prescribed Persons) Order 1999, SI 1999/1549

- o SI 2009/2457, which added two further prescribed persons with effect from 1 October 2009  
References: Amendment Order 2009, SI 2009/2457
- o 2010/7, which amended the entry in relation to the Pensions Regulator with effect from 1 October 2012 (to take account of disclosures relating to the automatic enrolment regime)

- o References: Amendment Order 2010, SI 2010/7  
SI 2012/462 which added the Office of Qualifications and Examinations Regulation ('Ofqual') as a prescribed person to whom whistleblowers have been able to make protected disclosures since 22 March 2012  
References: Amendment Order 2012, SI 2012/462

The current list includes bodies such as:

- o **the Commissioners of Customs and Excise** for matters relating to VAT, excise duties, the import and export of prohibited or restricted goods, etc
- o **the Environment Agency** for matters affecting the environment, including pollution, abstraction of water, flooding etc
- o **the Financial Services Authority** for matters relating to investment business, insurance business, the operation of banks and building societies etc

BIS has published a list of all prescribed persons, including full contact details for each.

References: BIS list of prescribed people and bodies