Types of whistleblowing claim

There are two types of whistleblowing claim:

- o unfair dismissal claims by employees where it is alleged that the reason or principal reason for dismissal is that the employee made a protected disclosure. Only employees may bring such claims. Employees complaining about dismissal for whistleblowing may **not** claim under the section 47B workers' detriment provisions. Employees dismissed for whistleblowing reasons will be automatically unfairly dismissed
  References: ERA 1996, ss 47B(2), 103A
- o claims by workers that they have been subjected to any detriment by any act or omission by their employer on the ground that they made a protected disclosure. Dismissal is a detriment but only workers who are not employees may claim about dismissal on whistleblowing grounds under these provisions. Unlike employees, workers cannot get an order for reinstatement or re-engagement References: ERA 1996, s 47B(1)

Unfair dismissal

Once an employee has shown that he made a protected disclosure he must show that the making of the protected disclosure was the reason (or, if more than one, the principal reason) for dismissal. This will be a matter of fact in every case for the tribunal to decide.
References: ERA 1996, s 103A

Once that has been shown, the dismissal will be automatically unfair , and all the unfair dismissal remedies become available, with special rules for compensation.

No qualifying period of employment is needed to bring an unfair dismissal whistleblowing claim.
References: ERA 1996, s 108(3)(ff)

Detriment

The worker must show:

- o that he made a protected disclosure and
- o that (subsequently) he suffered less favourable treatment amounting to a detriment caused by an act, or deliberate failure to act, of the employer

Once the worker has done that, the employer must show:
References: Fecitt v NHS Manchester [2011] IRLR 111

- o the ground on which the act, or deliberate failure to act, which caused the detriment was done
  References: ERA 1996, s 48(2)
- o that the protected act played no more than a trivial part in the application of the detriment

Detriment

Being caused distress is not enough to amount to detriment. The test for a detriment is that a reasonable worker would or might take the view that the act or omission had in some way disadvantaged him in the circumstances in which he had to work from then onwards. This requires a comparison with the treatment of an actual comparator or a hypothetical comparator, in the same way as with direct discrimination cases. That comparator would be someone who did not make the protected disclosure, but is in other respects not materially different from the complainant.

References: De Souza v The AA [1986] IRLR 103

An unjustified sense of grievance cannot amount to 'detriment'. On the other hand, it is not necessary to demonstrate some physical or economic consequence for there to be a detriment.
References: Shamoon v RUC [2003] IRLR 285

Linking detriment to an act or omission

Having established that he suffered a detriment, the worker must then identify a specific act or omission and show that by 'doing' that act or omission the employer 'subjected' him to that detriment.
References: Harrow LB v Knight [2003] IRLR 140

There is no statutory provision under which individual employees are personally liable for victimising whistle-blowers, and therefore an employer has no vicariously liability for such victimisation because, as the House of Lords in *Majrowski* made clear, an employer can be vicariously liable only for the legal wrongs of its employees.
References: NHS Manchester v Fecitt [2012] IRLR 64

Majrowski v Guy's and St Thomas's NHS Trust [2006] IRLR 695, HL

Linking the act or omission to the protected disclosure

The burden of proof is on the employer: under the statute, it is for the employer to show the ground on which any act or omission was done.
References: ERA 1996, s 48(2)

The causation test in cases of victimisation for whistleblowing is whether the protected disclosure materially influences the employer's treatment of the whistleblower (in the sense of being more than a trivial influence). The 'in no sense whatsoever' test set out in *Igen* as applying in cases of discrimination is not strictly applicable since it has an EU context (and the whistleblowing legislation is purely domestic), but the same underlying principle that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions, is equally applicable.
References: NHS Manchester v Fecitt [2012] IRLR 64

Igen v Wong [2005] IRLR 258

Note the following regarding causation:

- showing that 'but for' the disclosure the act or omission would not have occurred is not the correct test
- in order for the employer to be liable, it is **not** necessary that he *intended* to treat the complainant less favourably than an actual or hypothetical comparator; it need only be the case that he did
- it is irrelevant what the purpose or objective was of the employer's act or omission: for the employer to be liable, it need only be the case that it was caused or influenced by the fact that the protected disclosure had been made

Whistleblowing protection covers only the disclosure, and not any other conduct by the worker, even if it is connected in some way to the disclosure. There is no protection for the actions of workers which are directed to establishing or confirming whether or not wrongdoing has occurred. For example, a worker would not be protected if he broke into his employer's filing cabinet in the hope of finding papers which would demonstrate some relevant wrongdoing, whether he finds anything or not.
References: Bolton School v Evans [2007] IRLR 140

Bolton School v Evans [2006] IRLR 500

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Harvey DII[11]-[110] -- Whistleblowing

Time limits for unfair dismissal

Whistleblowing unfair dismissal claims by employees are brought in exactly the same way as any other unfair dismissal claim, and the normal three-month unfair dismissal time limit applies, as do the principles upon which that time limit may be extended.

Time limits for detriment

Whistleblowing detriment claims by workers are brought in the tribunal in the same way as any other claim.
References: ERA 1996, s 48(1A)

Whistleblowing detriment claims must generally be presented within three months of the act complained of, but time can be extended for a number of reasons (see below).
References: ERA 1996, s 48(3)(a)

Omissions

Where detriment arises through an omission to act:
References: ERA 1996, s 48(4)

- a deliberate omission is treated as having been done when the relevant person decided on it, so the time limit will run for three months from that decision
- in the absence of other evidence, a person is taken to have decided on an omission:
    - when he does an act inconsistent with doing the omitted act, failing which
    - at the end of the period within which he might reasonably have been expected to do the omitted act

For instance, if an employer awards all employees a bonus apart from the claimant who made a protected disclosure, time will run from the moment the employer decided who he was going to give bonuses to (the first act inconsistent with giving the claimant a bonus).

Continuing acts

Acts do not always take place at discrete points in time. Acts extending over a period are treated as having been done at the end of that period, so any claim must be brought within three months of the end of the period. This idea of 'continuing acts' operates exactly the same way as it does in discrimination law.
References: ERA 1996, s 48(4)(a)

Series of acts/omissions

Where the act or omission is part of a series of similar acts or omissions, the three month limit runs from the last of them.
References: ERA 1996, s 48(3)(a)

A tribunal should hear evidence to determine whether acts or omissions form part of such a series, not rely on submissions alone. This might be done at a pre-hearing review if that would save costs, but if not such time points should instead be decided at the end of the main hearing, taking into account all the evidence.
References: Arthur v London Eastern Railway [2007] IRLR 58

Extending time

The tribunal has a jurisdiction to extend time by such further period as it considers reasonable where it is satisfied that it was not reasonably practicable for the claim to be presented within three months. This is the same test for time extension as applies with unfair dismissal.

References: ERA 1996, s 48(3)(b)

Disclosure of whistleblowing claims to regulators

Since 6 April 2010, where a claimant brings a claim in the employment tribunal:
References: ET Rules, Rules 2(3), 2(4)

- o that alleges that they have made a protected disclosure
  References: ERA 1996, s 43A
- o and the claimant has consented (a box is provided in the ET1 claim form for the claimant to indicate consent)

then the tribunal secretary may (if they consider it appropriate) send a copy of the claim, or the relevant part of it, to a regulator, as listed in the Annex to the ET Rules.
References: ET Rules, Annex -- List of Regulators

This process is to enable the regulator to take any steps that they consider appropriate in relation to the disclosure, because the employment tribunal itself will only deal with the employment issues, and the substance of the disclosure might otherwise be overlooked.

Contractual duties of confidentiality and whistleblowing claims

The whistleblowing provisions of the ERA 1996 represent an exception to an employee's normal duty of confidentiality. Any provision in an agreement is void in so far as it purports to prevent a worker making a protected disclosure. This includes any agreement whereby the worker agrees not to take proceedings against the employer under the Employment Rights Act 1996 or for breach of contract.
References: ERA 1996, s 43J