

Disclosures: the employment law framework

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What will we cover?

- Discrimination
- Whistleblowing
- Grievance and disciplinary issues
- Constructive dismissal
- Social media and freedom of expression
- Members' roles

Equality Act 2010

- Protected characteristics
 - Age
 - Disability
 - Gender reassignment
 - Marriage and civil partnership
 - Pregnancy and maternity
 - Race
 - Religion or belief
 - Sex
 - Sexual orientation

Equality Act 2010

- Employer liable for employees' actions done in course of employment, unless employer took all reasonable steps taken to prevent them
- Direct discrimination
- Indirect discrimination:
 - Provision, criteria or practice which puts protected group at a disadvantage, which cannot be justified
- Disability: reasonable adjustments

Harassment and victimisation

- Harassment
 - unwanted conduct related to a protected characteristic which has purpose or effect of violating person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment
- Victimisation
 - Subjecting someone to a detriment because they have done a 'protected act': making a claim of discrimination, helping someone else to make a claim

Disclosures: whistleblowing

- [Employment Rights Act 1996](#) protections against dismissal and detriment apply where the following tests satisfied:
 - **Have they made a qualifying disclosure?** There are a number of requirements for a qualifying disclosure
 - **Disclosure of information.** The worker must make a disclosure of information. Merely gathering evidence or threatening to make a disclosure is not sufficient

Qualifying disclosures

- **Subject matter of disclosure.** The information must relate to one of six listed types of failure
 1. criminal offence
 2. failure to comply with any legal obligation
 3. miscarriage of justice
 4. that the health or safety of any individual has been, is being or is likely to be endangered
 5. the environment has been, is being or is likely to be damaged
 6. that information tending to show any matter above is being or is likely to be deliberately concealed

Qualifying disclosures

- **Reasonable belief.** The worker must have a reasonable belief that the information tends to show one of the relevant failures
- **In the public interest.** The worker must have a reasonable belief that the disclosure is in the public interest (Government [guidance](#) states “Personal grievances (for example bullying, harassment, discrimination) are not covered by whistleblowing law, unless your particular case is in the public interest.”)

Disclosures: who to?

- Who must the disclosure be made to?
 - The worker's employer
 - The person responsible for the failure (e.g. a client, where an audit shows malpractice by client)
 - Legal advisers (could include a trade union lawyer)
 - Government Ministers
 - Prescribed persons e.g. Equality Human Rights Commission

Disclosures: whistleblowing

- Wider disclosure e.g. trade union official or non-prescribed regulator:
 - Must reasonable believe information/allegation is substantially true
 - Not for personal gain
 - Previous disclosure to employer or prescribed person, or reasonable belief they will be subject to detriment or dismissal if do so
 - Reasonable belief that disclosure to employer will be concealed or destroyed
 - Reasonable in all the circumstances of the case

Disclosures

- Policies (not just whistleblowing) should encourage a 'speak up' culture
- Strong argument that whistleblowing policies should not be limited to the six statutory areas e.g. criminal offence, law being broken, health and safety likely or has been endangered,
- Highlight statutory protections (including against victimisation) and sources of support

Grievance and disciplinary policies

- Grievances more suitable for situations affecting the complainant personally
- Does it raise behaviour that warrants disciplinary action?
- [Acas Code of Practice on Disciplinary and Grievance Procedures](#)
- [Acas Guide to Discipline and Grievances at Work](#)

Investigations

- Maintain appropriate records – also helps instil confidence in use of policies
- Highlight what steps might be taken where a disclosure/grievance is made
- Deal with disclosures/grievances promptly
- Is it necessary to suspend/move an accused party?

Disclosures: confidentiality

- Maintain confidentiality for as long as possible
- What if you might need to disclose the discloser's identity e.g. in disciplinary proceedings?
 - Assess the reason for the requested confidentiality/remaining anonymous e.g. fear of reprisal
 - Balance that against the accused employee's need to know and to be able to challenge evidence, with a view to an employer being able to defend a claim of e.g. unfair dismissal

Hearings/grievance meetings

- Right to be accompanied
- Impartiality of those conducting the hearing
- Employee should be given reasonable opportunity to present their position and evidence, including where relevant witnesses
- Adjourn before decision reached
- Further investigation required?

Appeals

- Same general principles apply as for first stage hearing
- Impartiality: those not previously involved and more senior should hear the appeal
- Pay particular attention to any new evidence
- If previous decision unsound: overturn
- Uphold if not

Constructive (unfair) dismissal

- Contractual claim and in some cases statutory under Employment Rights Act 1996
- Repudiatory breach by the employer
 - Covers express and implied terms, including implied term of trust and confidence
 - Actual or anticipated and ‘last straw’ doctrine
 - Could include failure to deal with a disclosure
- Employee ‘accepts’ the breach and ‘resigns’

Social media

- Conduct issues
- Discrimination? Direct
- Harassment? conduct that causes violation of dignity, creates an intimidating, hostile, degrading, humiliating or offensive environment
- Is it done in the course of employment/connected with it?

Protected religion and belief

- Is it an expression of a protected religion or belief under the Equality Act 2010
 - Must be worthy of respect in a democratic society, not be incompatible with human dignity and not in conflict with the fundamental rights of others
- Tribunals must interpret legislation consistent with rights under the European Convention of Human Rights
- Article 9 protects freedom of thought, conscience and religion, including the right to manifest beliefs in practice
- Article 10 protects freedom of expression

Protected religion and belief

- For belief, manifestation may be restricted where it is necessary in a democratic society, in the interests of public safety, for the protection of public order, health or morals or for the protection of rights and freedoms of others
- Similar restriction for freedom of expression
- Potential conflict with those expressing views in relation to others with opposing views and other protected characteristics
- The way a belief is manifested is an underlying factor

Themes

- Expressing beliefs on social media: does it go beyond the bounds of acceptability on social media / have a real impact on their work?
- Tolerance/respect
- Policies can seek to reasonably prevent imposition of views in the workplace
- A considered 'case by case' approach
- Managing potential conflicts: compromise/pragmatism

Further information

<https://www.local.gov.uk/our-support/workforce-and-hr-support/employment-relations>

<https://www.local.gov.uk/our-support/workforce-and-hr-support/employment-relations/advisory-bulletins-employment-law-updates>