

HR AND EMPLOYMENT LAW IN EDUCATION

Managing whistleblowing

It's important that leaders in your school or trust can recognise disclosures which fall under whistleblowing legislation – and know how to respond. Follow this guidance from employment lawyer **Ian Deakin**.

What is whistleblowing?

'Whistleblowing is the term used when a worker passes on information concerning wrongdoing. In this guidance, we call that "making a disclosure" or "blowing the whistle". The wrongdoing will typically (although not necessarily) be something they have witnessed at work.' ([Whistleblowing: guidance and code of practice for employers](#))

Basically, whistleblowing is a worker saying to their employer that 'something is wrong'.

Why do you need to know about whistleblowing?

- Manage risk and compliance issues internally.
- Ensure quality and system safety.
- Avoid litigation and negative PR.
- Improve staff morale.

Whistleblowing needs to be managed properly and with care. It creates a risk – but it's how you react to it that creates the liability! Don't be afraid of whistleblowing: focus on what you can control – the response.

Risks of getting it wrong

There are serious consequences for not responding appropriately. Risks include:



- the award of 'injury to feelings' compensation to the whistle blower (with no cap on compensation)
- costly and complex litigation
- reputation damage
- being perceived as an organisation who seeks to silence those who speak up.

What does the law say?

The dismissal of an employee/worker is automatically unfair if the reason, or principal reason, for their dismissal/detriment is that they have made a 'protected disclosure' (note that it's any worker e.g. this applies to locums too).

There is no cap on compensation and no requirement for a minimum period of service (e.g. it could be the whistle blower's first day of employment).

To count as whistleblowing, it must be a **qualifying disclosure**. There are three elements to this.

1. **Disclosure of information:** the worker must make a disclosure of information. Merely gathering evidence or threatening to make a disclosure is not sufficient.
2. **Subject matter of disclosure:** the information must relate to one of six types of 'relevant failure' (see [whistleblowing for employees](#) for a list).
3. **Public interest:** the worker must have a reasonable belief that the disclosure is in the 'public interest'.

It must also be a **protected disclosure**. This means it must be made to the employer or to an appropriate authority.

The requirement for the disclosure to be made in good faith was removed in the 2013 amendments to the legislation, meaning good faith is now only relevant to compensation. Malicious complaints are hard to prove, so think very carefully before disciplining staff on this basis. Honest but mistaken belief is recognised in the case law.



Safeguarding reports

Many safeguarding reports could be deemed as whistleblowing. They are usually:

- submitted by an employee
- relate to pupil safety
- reasonably believed
- likely to be viewed as of public interest, as they relate to the safety of children in the school.

This illustrates that whistleblowing is a common event and usually causes neither difficulty nor conflict.

Recognising a disclosure

Managers do not need to become lawyers, but they do need to be aware of the general character of a protected disclosure, so that they recognise that they need to take care, and get advice from HR. Note that:

- an employee's complaint does not become a whistleblowing concern because it is raised through that policy or titled whistleblowing
- it doesn't have to be in writing
- it does not matter if it has been raised before.

A complaint is potentially a protected whistleblowing complaint if four criteria are met.

1. The employee discloses facts.
2. Those facts tend to show (amongst others) a breach of health and safety, a legal duty or a criminal offence.
3. The employee reasonably believes the facts are true.
4. The employee reasonably believes there is a public interest in their disclosure.



Investigating a disclosure

Early action is critical. A delay could mean that:

- wrongdoers cover their tracks
- evidence is lost
- situation is aggravated
- regulatory investigations are impeded
- effective control is lost during first stages of response.

The over-riding aim of all investigations should be fact-finding: to determine what happened, NOT to reach conclusions on liability. Other aims include:

- informing governing body or trustees about the background to a particular issue
- enabling the school or trust to publicly state they have investigated
- to establish what happened
- to comply with regulatory obligations.

Key steps

- Assemble the investigation team and agree structure of the investigation.
- Have robust terms of reference.
- Manage communications, both internally and externally.
- Preserve evidence.
- Interview witnesses (maintain objectivity and balance).
- Prepare for potential investigations by regulators.
- Produce investigation report.
- De-briefing.



Protection for whistle blowers

Whistleblowing in itself isn't a liability or problem. The key risk lies around detriment and dismissal. Be wary of anything that could be perceived as detrimental treatment. For example:

- denial of training opportunities
- being given more onerous or mundane work
- demeaning or humiliating comments being made; discrimination
- withdrawal of benefits
- dismissal.

However, it's important to note that whistleblowing protection does not make the employee immune from other action.

Top tips

- If not listened to internally people will make their voice heard externally...so investigate and respond.
- Review your own policies.
- Train your staff.
- Make it easy to raise concerns.
- Have your internal/external 'go to' investigators and keep delay to a minimum.

Remember: whistleblowing creates the risk – how you react to it creates the liability!

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