



The Work Couch

NAVIGATING TODAY'S TRICKY PEOPLE CHALLENGES TO
CREATE TOMORROW'S SUSTAINABLE WORKPLACES

Season 2

Episode 8 – Whistleblowing (Part 3): 5 key challenges for employers in 2024, with Sybille Raphael

-
- Ellie:** Hi and welcome to the Work Couch Podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law, with the emphasis firmly on people. My name is Ellie Gelder. I'm a senior editor in the Employment Equality and Engagement team here at RPC, and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. We hope by the end of the podcast you'll feel better prepared to respond to these people challenges in a practical, commercial and inclusive way. And to make sure you don't miss any of our fortnightly episodes, please do hit the like and follow button and share with a colleague.
- With whistleblowing cases regularly dominating the headlines, most recently the Post Office and Horizon scandal where a whistleblower's evidence was crucial to the sub-postmaster's claims, we are seeing what many would describe as a welcome shift in how employers should approach workers' concerns about wrongdoing in the workplace, reflecting increased efforts to foster speak-up cultures. So today, in the third part of our mini-series on whistleblowing,
- we're going to run through five key challenges for employers when it comes to whistleblowing in 2024 and beyond. And joining me today to share her expertise on this topic, I am thrilled to welcome back Sybille Raphael, Legal Director at Whistleblowing Charity Protect. Hi, Sybille, thank you so much for joining us again today. It's wonderful to speak to you again on this hugely topical and complex area of employment law.
-
- Sybille:** Hi, Ellie. Thanks for having me again. It's lovely to be here.
-
- Ellie:** So, Sybille, for those listeners who may not have heard our previous episode, can you just remind us about the work that Protect does?
-
- Sybille:** We're a charity that was founded in 1993 to campaign for the UK to adopt a law protecting whistleblowers, which it did in 1998.
- But we stayed around because nobody quite knew how this new law would work. So, we've set up this free legal advice line where we advise whistleblowers on how to raise their concern in the most effective and in the safest possible way. And what they can do if things go wrong. To date, we've individually advised more than 50,000 whistleblowers. We had a very busy year last year. In February this year, we reported that calls to advice line were up 23% a year, and that now translates to roughly 3,000 calls per year. We're unusual because we self-fund, and we fund our advice line by training and consultancies that we sell to businesses. And so along our policy and campaign works, this gives us a real 360 view of whistleblowing, and I always say I have the best job in the world because I do a bit of everything.
-
- Ellie:** Absolutely. And it's fantastic to get that holistic view and that insight from you, Sybille. And as I said, we are going to highlight five key challenges for employers when it comes to whistleblowing this year. But before we do that, it would be really helpful if you could shed any light on whether the UK law on whistleblowing is likely to change anytime soon, given that the legislation is now 25 years old.
-

Sybille: Well, we very much hope so because we are at risk of being left in the dust behind our European neighbours. The EU adopted a whistleblowing directive that actually goes further than our current UK law. The government promised they were going to review the whistleblowing framework and they said they were going to publish their findings this month, so watch this space. And there's lots of ways that we can improve the current law. At Protect we have a very long draft whistleblowing bill of our own with lots of good ideas on how to make it work better for whistleblowers, better for businesses and better for society as a whole. What's wrong? Well, the law has not kept up with the world of work really, so for instance it doesn't cover job applicants or trustees and obviously you know part of the trustee's role is to report wrongdoing so it's totally wrong that they're not protected when they do so. Also, fundamentally the law is very limited. It doesn't say you have to investigate; you have a duty to investigate whistleblowing concerns. It only just says "Hey if you worker blows a whistle and then something bad happens to you, you can go to the employment tribunal and maybe get some money for it". That's very, very limited.

The protection, it's not even a protection, the sort of remedy, only kicks in when something has gone wrong. And it places the burden of having the law respected on the most vulnerable person, the victim of the bad treatment, the whistleblower who's been badly treated because they've blown the whistle. And it only offers tribunal proceedings as a solution.

I'm sure we all know if we've been near an employment tribunal that it's really not a great solution. It doesn't provide any kind of shield or of real protection. It's also notoriously complex and time consuming to go to tribunal with a whistleblowing claim. Access to justice is really very, very difficult for whistleblowers. And generally, the law has not kept up with the growing importance of speaking up at work and acting on wrongdoing at work.

Ellie: Okay, so something to keep a close eye on this year. And of course, if we have a new government, there are likely to be changes, as Labour has indicated, if it gets into power, which we'll discuss later in this podcast. For now, though, let's look at our first key challenge for employers, which we touched on in our last episode. And that's how whistleblowing feeds into a business's ESG obligations.

Sybille: Absolutely, and maybe I can start by telling you Desiree's story. So, Desiree Fixler was recruited by DWS, the investment branch of Deutsche Bank, as the head of sustainability. She went to the board pretty soon after she was appointed because she realized that DWS had no evidence to back its external statements on their ESG credentials. Actually, they had no ESG tracking systems or capabilities. But the board, instead of agreeing to help her solve this and put the relevant structures in place, decided that it was easier to shoot the messenger and dismissed her not long afterwards. DWS issued a statement in Bloomberg implying that she had left because she was not a good sustainability officer. Desiree replied in Wall Street Journal accusing DWS of greenwashing and that of course alerted the regulators in the US and in Europe who launched investigations who found out that indeed DWS was greenwashing and sanctioned DWS which was fined for \$19million and ultimately DWS chief executive had to resign because of that. So, this example of greenwashing had huge financial consequences, not to mention reputational consequences. And that's something that we see across the board on ESG-related matters. It matters to your customers, it matters of course to your staff, to your prospective employees.

It matters to your investors, it matters to your regulator, it matters to your stakeholders, it also matters to the concerned citizen. They all expect transparency and good practice. And the key way to ensure that and to demonstrate that is to prove that your staff is empowered to speak up. Whistleblowing is a key ingredient to any ESG obligation, to any ESG system really.

Ellie: So, tell us about how that could play out in practice.

Sybille: We think on the Protect Advice Line that green washing, social washing or purpose washing is going to be the next big thing in whistleblowing. As I mentioned in the last podcast, 10 years ago on the advice line, all we heard about was financial misconduct and patient safety. Whistleblowing was just that. And in the last 10 years, we've seen a huge rise in discrimination, bullying, harassment concerns, whistleblowing has become that. And we firmly believe that greenwashing, social washing, that's good, purpose washing, that's going to be the new wave. And of course, getting it wrong can have huge financial consequences, huge reputational consequences. If your staff finds out that actually you do not have the ESG tracking systems or the ESG capabilities to back your external statement on your ESG credentials. Well, potentially it's going to alert your regulator, it's going to alert your customers, it's going to alert the wider world and that can result in huge financial and reputational damage to yourself. It can result in regulatory fines, of course, but also in very potentially very damaging results in terms of sales and reputation. So, whistleblowing is absolutely key to allow you to detect those risks early and to address them early.

Ellie: And moving on to our second key challenge, and that relates to one of the hottest topics on everyone's minds right now, AI. So, I'd be really interested in your views on whether AI is gonna help or hinder whistleblowing at work.

Sybille: That's another difficult question. I very much have in my eyes the image of Jo Hamilton in the ITV series panicked in front of the computer and doubting herself in the Post Office scandal. How do you spot the wrongdoing? How do you identify that actually the problem is not with you, but it's with a computer bug, it's with a software when you're not a software engineer. So spotting, identifying the wrongdoing is much harder because of AI, and may indeed be impossible because of AI. And identifying who's responsible for wrongdoing is another really tricky question. We also fear that AI could potentially be used to monitor or to analyse whistleblowing or speaking up data and could potentially lead to blacklisting of vocal employees who are used to raise things, which we think would be obviously catastrophic. But AI also presents us with opportunities and actually it may be easier for good organisations to put systems in place to protect the confidentiality of whistleblowers better. For instance, in the olden days if you really wanted to raise something anonymously well the only way you could do it was to send an anonymous letter. Now it's much easier you can potentially create an anonymous Gmail address and send it to a friend's computer and a lot of organisations use external reporting platforms that at least say that they are totally anonymous. So, it may be a bit too early now to tell you with any kind of precision how AI is going to impact whistleblowing, but at the very least I think we should all be aware that it will have some impact. And so, we think that organisations should tell their staff, "look, we want you to be aware of that". One of the tragedies of the post-Horizon scandals that we know that actually there was bugs in the Horizon system that were known from the very start. And maybe that was not surprising because it was a new system and new systems usually have bugs. We also know that tragically the Post Office decided to prosecute the postmasters also from the very early start, despite the fact that maybe bugs should have been suspected or bugs were known to happen on the system. So, we think organisations need very much to be alive to the risks that AI presents and be open with the staff about that.

Ellie: Absolutely. So, the third challenge on our whistleblowing list for 2024 and beyond is looking at the reasons why some people are more likely to speak up than others, just to help ensure that everyone is protected from victimisation for blowing the whistle.

Sybille: Yes, and is there a link, for instance, between whistleblowing and autism? Professor Lewis of Middlesex University and Helen Evans, an autistic whistleblower previously at Oxfam, hypothesized that the characteristics commonly associated with autism might mean that those on the autistic spectrum are more likely to whistleblow than their neurotypical counterparts and they're calling for more research to look into the subject. Typically, two of the key strengths associated with autism are a strong sense of right and wrong and hyperfocus. And indeed, at Protect, a notable number of callers to our advice line identify as being on the autistic spectrum. And some have told us that they value rules maybe more than their neurotypical colleagues and that they feel uncomfortable when rules are broken, maybe more than their neurotypical colleagues. and they're less susceptible to organisational pressure to stay silent, maybe because they have more challenges in interpreting the social norms. So, this could make a worker both more likely to identify and more likely to call out misconduct than their neurotypical peers. And we are wondering whether autistic people may be more represented amongst whistleblowers than the general population and we definitely think that more research is needed. In particular, because this has significant implications for how we support whistleblowers as a society. Why? Well, neurodivergent whistleblowers often face additional challenges. For instance, one of our callers with autism told us that his concerns were misinterpreted, dismissed and pathologized as symptoms of stress or mental illness. We also think that there may be an increased risk that autistic whistleblowers unintentionally commit misconduct by trying to find supporting evidence to their concerns because of their need to prove the wrongdoing that they perceive. Autism is also associated with repetitive behaviours which could cause issues for any potential whistleblower who may become penalized for the way they raise their concern, which some may view as inappropriate behaviour. And last but not least, autistic whistleblowers may also decide against raising their concerns at all for fear of exacerbating pre-existing discrimination. So more generally, if you take whistleblowing seriously, you know, you want to know who in your organisation is speaking up. And crucial, who is not speaking up and obviously, you also want to know who you are listening up to and who you are ignoring. You need to look at demographics. You need to look at location, at functions, at seniority. And you need to target support where it's needed.

Ellie: I think that's such an interesting example of how and why it's so important to look at who is speaking up and who isn't and the reasons why that might be. The fourth challenge on our list is the increased scrutiny from regulators into toxic workplace cultures and non-financial misconduct. Plus, there is the new positive duty on

all employers to take reasonable steps to prevent sexual harassment of their employees in the course of their employment, which is due to come into force in October 2024. The Labour Party has also said that if it gets into power, it will change the law so that women who are bullied or sexually harassed at work will be afforded new protections as whistleblowers. So, Sybille, whistleblowing is going to be central, isn't it, to stamping out toxic behaviours such as bullying and sexual harassment.

Sybille: Absolutely. Why? Well, because, you know, it's not great to rely on the victim to take the matter in their hands. You're actually placing the burden on the most vulnerable shoulders here and that's really not good enough. You may remember the scandal around sexual harassment within the surgeon's community and one of the tragedies of that is that, you know, that these incidents of sexual harassment were witnessed by others, but no one, blew the whistle about it. We believe, and certainly regulators believe, that it's not enough to be bystanders, we actually need upstanders in all organisations, and that's the best way to effectively deter the wrongdoing from happening in the first place. You know, the bad apple won't be able to be the bad apple because they'll be far too scared that they'll be found out, because there will be not just bystanders, but upstanders. So, we need to empower workers to be upstanders and to protect them, because as we've discussed in the previous podcast, it's not easy to challenge behaviour. It's not easy to raise concerns generally. It's not easy to be a troublemaker, and you're often seen as a troublemaker when you blow the whistle. So yes, whistleblowing is absolutely key to this new proactive obligations that are put on employers.

Ellie: Finally, then, so the fifth key challenge is actually more of a watch this space. And that's the Economic Crime and Corporate Transparency Act, 2023 which is the first UK anti-SLAPS law, which received royal assent on the 26th of October 2023. So, it's a law that aims to stop the use of strategic lawsuits against public participation, AKS SLAPPs from silencing speech that aims to combat economic crime. So, Sybille, a good step in the right direction for supporting those who call out wrongdoing. However, there is a but isn't there?

Sybille: Yes, it was undoubtedly a landmark moment, but it's limited to those speaking out on economic crime, so it's an important step towards stamping SLAPPs, but it falls short of providing universal protection from SLAPPs and it does not go as far as we wish it would. Just to give you an example of why it relates to whistleblowers, just as much as it relates to journalists, well, let's imagine you work in a factory, and you see that from your factory goes toxic waste that is then that then end up in your local river. Let's imagine that you try to raise it with your employer and your employer just ignores you for lots of reasons. So, you decide to take the matter further and go to your MP because it really impacts your local community and/or you go to your local newspaper to say look this is happening it needs to be stopped. It may well be that your employer will come after you with a breach of confidentiality claim and a defamation claim. Your employer will not just come after the newspaper but will come after you, the whistleblower. These claims are very expensive to defend and just the threat of this very expensive litigation is often enough to silence the whistleblower, to silence also the local newspaper, who just doesn't want the bother of having to deal with this, even if they're confident that they will ultimately win whatever legal case is put, just the time, the resources, the cost or so, because defamation laws are very expensive, are just too big. And so, these SLAPPs are very effective at silencing whistleblowers. So, the Economic Crime Bill and indeed the Private Members' Bill that's just been debated in Parliament, introduce a mechanism to ensure that such claims are dismissed in the early process and the Private Members' Bill is looking at extending this protection beyond economic crime. So, you know, watch this space if it becomes law.

Ellie: Well, Sybille, thank you so much for joining us again and for flagging those really important challenges for employers to tackle this year. The direction of travel certainly appears to be moving towards a culture of supporting whistleblowers and increasingly valuing the role that they can play in helping businesses comply with their legal obligations, their ESG obligations, which in turn can pay dividends to a business's reputation and brand perception. So, thank you again.

Sybille: Thank you for having me.

Ellie:

Well, that concludes our mini-series on whistleblowing. We hope you've enjoyed our deep dive into this topic. If you would like to revisit anything we discussed today, you can access transcripts of every episode of the Work Couch podcast by going to our website. www.rpc.co.uk/theworkcouch. Or if you have any questions for me or Sybille or perhaps suggestions of topics, you'd like us to cover in a future episode of The Work Couch, please do get in touch. You can email us at theworkcouch@rpc.co.uk. Thank you all for listening and we hope you'll join us again in two weeks.



RPC is a modern, progressive and commercially focused City law firm. We are based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.