



# The Work Couch

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

## Season 2

### Episode 3 – Whistleblowing (Part 1): A whistlestop tour of the law, with Victoria Othen

**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 today, 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, which reflects increased efforts to foster "speak-up" cultures.

So today, in part one of our mini-series on whistleblowing, we're going to look at the legal elements of a whistleblowing claim. So, who is protected? How are they protected? What actually counts as a whistleblowing disclosure? And what are the potential remedies available to a whistleblower who brings a claim in the employment tribunal? With over 25 years' experience of handling these kinds of claims in the employment tribunal,

I'm delighted to be joined by Victoria Othen, Consultant Solicitor in RPC's Employment, Engagement and Equality team, who's going to take us on a whistle stop tour of the law on whistleblowing. Hi Victoria, thank you so much for joining us again on the Work Couch.

**Victoria:** Hi Ellie, it's lovely to be back again. Thank you.

**Ellie:** So, it would be great if we could just look at the bare bones of a whistleblowing claim because I think the legal concepts sometimes get lost when this topic crops up. So, what does the term whistleblowing actually mean in the context of employment law?

**Victoria:** Yes, it is really one of those kind of tricky areas, which it's quite difficult to explain in plain terms, but I will do my absolute best to do that. So put it in its simplest terms, blowing the whistle is where someone reports their concerns about their employer's actions or the actions of one or more of its employees that amount to bad practice or some sort of wrongdoing that adversely affects others. It could even be reporting criminal activity. You earlier mentioned the Post Office and Horizon software dispute and that is a particularly far-reaching example of whistleblowing. Other examples where a worker blows the whistle about perhaps a bank's undisclosed conflicts of interest, or it often arises in medical settings - probably one of the most disturbing and tragic cases recently was that of the Lucy Letby case where it was found that senior doctors had raised the alarm about avoidable patient deaths, but their concerns had unfortunately not been listened to. But it really can cover a wide variety of complaints made by employees in many, many different sectors. Most of them, you know, just don't grab the headlines as much as these well-known examples.

**Ellie:** Absolutely. But those examples do bring home, don't they, why we have laws on whistleblowing. And interestingly, [research by Harvard Business Review](#) a few years ago found that a higher number of whistleblowing reports could actually indicate a healthier workplace because it shows people are prepared, they feel brave enough to speak up about wrongdoing.

So should we actually be reframing whistleblowing as something to support rather than avoid?

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<b>Victoria:</b>	Yeah, absolutely. I think traditionally the narrative around whistleblowing has been seeing it as maybe an individual trying to make trouble. But nowadays, and I think really, particularly since the #MeToo movement where people have spoken up to call out sexual misconduct. And as you mentioned in your intro, the growing drive to stamp out toxic workplace practices. We're seeing whistleblowing as a means by which an organisation can ensure a safe, fair and productive working environment. And that's crucial for employees, but also other parties. So, customers, suppliers, or other stakeholders. . It's also about accountability, which consumers and regulators are increasingly demanding across a range of different sectors.
<b>Ellie:</b>	So how long has whistleblowing protection, as we know it, been part of UK employment law?
<b>Victoria:</b>	<p>It's been around for quite some time now. So, the law on protected disclosures, and that's the relevant legal terminology, protected disclosures, that was introduced by the Public Interest Disclosure Act back in 1998. And that inserted specific provisions into the Employment Rights Act from 1996 and that's the Act which sets out the base legislation, which gives rights for things like the right to bring a case of unfair dismissal. And those provisions in the Employment Rights Act, they came about in July 1999, so we're talking 25 years now, which is unbelievable really, a quarter of a century has gone by since then. So, in addition to the legislation, there is <a href="#">government guidance</a> for employers on whistleblowing.</p> <p>And that includes a Code of Practice that sets out best practice in relation to whistleblowing. And more recently in June 2023, ACAS published <a href="#">guidance on whistleblowing at work</a>. It's not legally binding but it can be considered by an employment tribunal as a standard of best practice, a bit like some of the other ACAS guidance can in other jurisdictions and types of claim.</p> <p>There are also potentially changes in the pipeline with the government launching a <a href="#">review</a> last March, March 2023, into how effective the current whistleblowing framework is in terms of facilitating disclosures and protecting workers. We're still awaiting the outcome of that review. It was due at the end of 2023, but in all areas really there certainly seems to be an intention to strengthen the existing framework to encourage and protect those who blow the whistle.</p>
<b>Ellie:</b>	And we'll come on to each component of the legal definition of whistleblowing shortly. Before we do that though, I think this is important to go through, who is actually protected by the law.
<b>Victoria:</b>	Yeah, so whistleblowing protection applies to employees, but also to anyone who does work or provides services in certain circumstances to an employer. So that's going to include other workers who don't meet the legal definition of an employee. It could cover agency workers or freelancers or casual workers.
<b>Ellie:</b>	But not self-employed people?
<b>Victoria:</b>	Well whistleblowing protection doesn't usually extend to those people who are genuinely self-employed and that's set out in the Employment Rights Act. Neither does it normally extend to non-executive directors or to volunteers who have no contract to employment. It doesn't cover solicitors or barristers where the issue in question is covered by legal professional privilege so there are exceptions.
<b>Ellie:</b>	Okay, so assuming a worker has satisfied all the elements required by law to blow the whistle, what protection are we talking about here?
<b>Victoria:</b>	<p>Okay, so we're talking about two main areas and again I'm trying to kind of simplify things and categorise things as much as possible really here. So, if a worker's reports of concerns meets the legal definition and we'll look at that in a moment, there are two main forms of protection. Firstly, employees are protected from dismissal. So, dismissal protection for employees if they blow the whistle or if their dismissal is because they blew the whistle. Dismissal can cover redundancy and the reason as I've just alluded to the reason for that dismissal, or the main reason must be because they have made a protected disclosure. Now what that means is that that will entitle them to bring a claim of automatic unfair dismissal and</p> <p>that's particularly important because in a case of automatic unfair dismissal in this particular case, where whistleblowing is concerned, there's no requirement for the employee to have two years' continuous service. And that's normally required to claim ordinary unfair dismissal. The other factor is that any compensation that's awarded is unlimited. So, this is something we quite regularly see in practice. Employees who are unable to bring claims of ordinary unfair dismissal because they've worked for less than two years, and they may seek to bring a claim relying on whistleblowing as the main or principal reason for dismissal because they don't have that two years' continuous service and, in those cases, they try and seek unlimited compensation.</p>

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It's important to add here though, that it doesn't matter if you as the employer don't consider that the disclosure is protected. So that was confirmed by a Court of Appeal case from 2017, which emphasises the importance of the employer carrying out a thorough investigation to assess whether or not the tribunal is likely to deem the disclosures as protected. Secondly, the second type of protection we're concerned with is that workers are also protected from detrimental treatment for making protective disclosures. So, we ask ourselves what is detrimental treatment? Well really, we're talking about kind of any unfavourable treatment so it could include disciplining someone or penalising someone in some way unfairly or it could be terminating a worker's contract because that worker may be unable to bring a claim for unfair dismissal as they're not an employee. So, it's important to remember that this protection, so protection against dismissal and protection against detriments, this protection arises from day one of a person's employment.

And it also applies if they no longer work for the employer about whom they're making the protected disclosure complaint.

**Ellie:** So, you mentioned detrimental treatment there. It'd be useful to hear from you what you see most often in practice, examples of detrimental treatment. What are you seeing most often?

**Victoria:** So, I guess we're talking about situations, the things that I see quite commonly are where there's been a disciplinary case, an employee is disciplined, or there's a performance concern, capability concern, an attendance issue. And it may be that employee does not have sufficient service, it may be that they do, but... there's some dispute about the motivation for that treatment. It arises particularly in cases where employees disagree with the reason for the alleged treatment. So, the warning or whatever. And they often in those circumstances will say, you know, I blew the whistle. I raised such and such a complaint on such and such a date or I made a complaint about, you know, health and safety or whatever it might be.

And then my manager subjected me to this disciplinary process, or my manager made an allegation about my performance. And they will often say, you know, that's just a cover-up for the complaints that I made. So, we see that an awful lot of the time. So those complaints can be made by individual managers, line managers, can be directors, and those complaints are often made about specific people, but they're made to the employment tribunal about the employer who's liable for those actions.

**Ellie:** Okay, so let's look at those elements of the definition that you mentioned. So first of all, what is a protected disclosure?

**Victoria:** Yeah, this particular definition is notoriously complex, so I will again, attempt to do my best to explain that complexity as clearly as I possibly can. There are three main points really to think about. So, there must be a disclosure of information that in a worker's reasonable belief is made in the public interest and that information or disclosure must show a "relevant failure". So, the relevant failure that I'm talking about there, there's a particular section again, section 43B of the Employment Rights Act, and that lists a number of relevant failures. So, it defines what a relevant failure is, and it breaks them down into examples.

The first one is a criminal offence. It can be a failure to comply with any sort of legal obligation. It can be a case where a miscarriage of justice is concerned. There can be a health and safety concern, and that's something that comes up quite a lot. So, something to do with health and safety in the workplace, you know, that there's an endangerment because of health and safety.

Another example is where the environment has been or may be damaged or is likely to be damaged. And then finally, we're talking about cover up points really. So, there's an allegation that information or any of the information from the preceding examples I've just given, there's going to be a deliberate concealment of that. So, you're talking about cases where, you know, there may have been a criminal offence committed and then there's a deliberate attempt to conceal that by an employee. So those are the key elements really. You've got information, it's got to be in the worker's reasonable belief, made in the public interest and there's got to be a relevant failure concerned.

**Ellie:** I just want to go back to that phrase that it must be made "in the public interest". Can you tell us a bit more about what that means in practice?

**Victoria:** Yeah, so to put it really simply, I guess the best way of defining it is it has to affect other people. So that could be the general public or customers, or it could mean other workers. As a general rule of thumb, the more serious the issue, the more likely it is to be deemed to be in the public interest, especially if something's been done deliberately or a large number of people are potentially affected or perhaps it involves a big or a famous or an influential employer. If the issue is personal though, if it's only personal to the whistleblower, so for example, they've made a complaint in a grievance that just affects them about their treatment, it's far less likely to be in the public interest because it would be difficult in those circumstances to demonstrate any public interest in those circumstances.

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<b>Ellie:</b>	And how would an individual normally make a protected disclosure? Are there certain people they have to make it to?
<b>Victoria:</b>	<p>Yeah, there are. So again, a protected disclosure, it must be made to one of the following parties. So first of all, the employer, the whistleblower's employer or a legal advisor. Another person who's responsible for the wrongdoing or in more unusual cases, there's a list of prescribed persons or bodies. We're talking here about certain regulators or auditors. And in other situations, there are other non-prescribed persons so if it relates to an exceptionally serious failure, it can be the police or the media. In general terms though those cases are quite rare. Usually, we're talking about the employer in the first instance.</p> <p>So, I guess again a good rule of thumb to think about is, if a whistleblowing allegation is not made to an employer there are other examples and that's the point at which you would look more closely at the legislation or take legal advice.</p>
<b>Ellie:</b>	Okay, so let's say your organisation has received a claim by a worker for whistleblowing. If that claim is successful, what remedies could the Employment Tribunal order?
<b>Victoria:</b>	<p>So, they're similar to what we find in, for example, discrimination claims. So, a tribunal can make what's called a declaration and may make an award of compensation to a claimant if it considers that it's just and equitable, so fair in all the circumstances. Now, I mentioned earlier in the case of a dismissal for making a protected disclosure, so an automatically unfair dismissal, there's no limit on the compensation awarded. Having said that, compensation can be reduced by up to 25% where a tribunal finds that the protected disclosure was not made in good faith. What we mean by that really well, an example of when that might arise might be where there's evidence or findings that</p> <p>a disclosure has been protected and that detrimental treatment or dismissal has occurred because of that disclosure but there's some sort of element of that disclosure was malicious or there's evidence about the whistleblower's motivations for making that allegation.</p>
<b>Ellie:</b>	And in addition to potentially costly remedies at tribunal that you just outlined, there are also other costs to the employer to bear in mind here.
<b>Victoria:</b>	Yes, there are. So, we're talking about really the time and the cost of defending these claims and they really, really can be quite considerable. So, some whistleblowing claims often involve large amounts of evidence and information, especially where they relate to several years of employment and involve numerous witnesses. So, this can make litigation complex and stressful and time-consuming and a successful claim can also adversely impact your reputation or an employer's reputation. So, we're thinking about, you know, how customers and investors perceive a brand, not to mention employee morale and, you know, an ability to attract and retain the best talent. So, where they carry a risk of, you know, reputational damage, one has to think really seriously about how to deal with claims of that type.
<b>Ellie:</b>	<p>Absolutely, a lot to consider there. But thank you so much, Victoria, for that whistle stop tour of the law. A very tricky aspect of employment law, but brilliantly explained. Thank you.</p> <p>And I think today's episode sets us up perfectly for part two of this mini-series later in the year. We'll hear from Sybille Raphael, who's legal director at whistleblowing charity Protect. And we'll also talk to our own Patrick Brodie, partner and head of RPC's Employment Engagement &amp; Equality Team. So now that we've looked at the law, we'll take a deep dive into the realities of whistleblowing, how employers should respond to protected disclosures, and what changes are on the horizon.</p>

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**Ellie:**

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](http://www.rpc.co.uk/theworkcouch). Or if you have questions for me or Victoria, or perhaps you've got suggestions of topics you'd like us to cover in a future episode, please get in touch by emailing us at [theworkcouch@rpc.co.uk](mailto:theworkcouch@rpc.co.uk). We'd love to hear from you.

Thank you all for listening and we hope you'll join us again in two weeks.



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