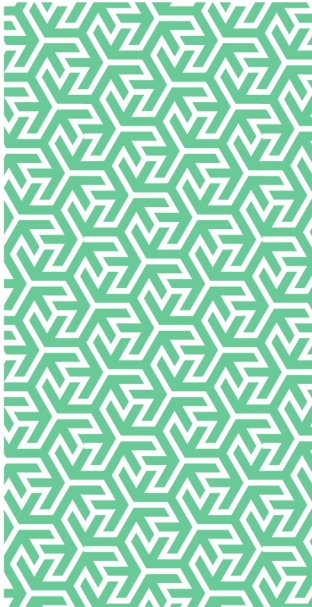


rmp

Risk control
Whistleblowing and
Safeguarding



In partnership with



Whistleblowing and Safeguarding

Introduction

Whistleblowing continues to be a difficult situation for large organisations to respond to effectively. Warnings from employees about criminal actions or failures can be both challenging and complicated, however, ignoring them can result in high profile reputational damage and criminal sanctions. Concerns relating to the health and safety of individuals affected by the actions of an organisation remain a headline grabbing issue in the media.

In October 1999, the Ladbroke Grove train crash occurred just outside London Paddington. A driver drove through a red signal causing the crash. During the investigation, a report was obtained by the Health and Safety Executive from a mess room regarding internal concerns about the duration of driver training and signals passed at danger.

The author of the report, Laurance Holden¹, was a Trade Union Safety Representative who had raised many health and safety concerns over employee and railway safety including signals passed at danger which represented a significant risk to both employees and the public.

He was subjected to victimisation, called before disciplinary hearings for assorted reasons, and his attendance was monitored. His job was made so difficult that he resigned. He then took his case for constructive dismissal to an employment Tribunal and was successful.

The Public Interest Disclosure Act 1998

The Public Interest Disclosure Act 1998² was introduced to insert a range of measures designed to allow whistleblowers to make protected disclosures and provide a mechanism for them to seek redress if they were victimised.

It inserted sections into the Employment Rights Act 1996 that set out an employee should in the first instance raise their concerns with their employer. In situations where this has not been acted upon, the individual can also make their qualifying disclosure to a person other than their employer, such as a regulator. In any case the disclosure must be made in good faith.

Another specific issue considered relates to who constitutes the persons 'employer' and a disclosure can be made to any person who is senior to the person making the disclosure, who expressly or implicitly is authorised by the employer as having management responsibility over the work. A disclosure to a colleague does not qualify.

Permitted Disclosures

Where a disclosure is made, it must be in the reasonable belief of the employee that one or more of the following applies:

- A criminal offence has been, or is about to be committed
- There is a failure to comply with a legal obligation
- A miscarriage of justice may take place
- A person's health and safety is endangered
- The environment will be damaged
- Information about these situations is deliberately suppressed

As you can see, where a person claims their concern relates to statutory duties under health and safety legislation an organisation should carefully investigate as one or more components of the above list are likely to apply.

The Employment Rights Act 1996

The Employment Rights Act 1996³ requires that certain terms and conditions be set out in a written contract of employment or a statement of the main terms and conditions of employment. The contract will contain both contractual and statutory rights protected by law.

In relation to health and safety, Section 44 requires that no employee be subjected to detriment by any act or deliberate failure to act, done by the employer because of a number of actions by an employee which include:

- Carrying out activities in connection with preventing or reducing risks to health and safety at work
- Being a representative on safety matters or a member of a safety committee
- Bringing to the employer's attention by reasonable means or circumstances which would ordinarily be taken to a safety representative
- In situations where the employee believes themselves to be in serious and imminent danger and either refused to return to the workplace or took steps to protect themselves in the workplace

It should be noted that Section 44 (3) does allow the employer to cause detriment to the employee where it can be shown that the act of the employee was so negligent that a reasonable employer would be justified in taking such action.

A dismissal is automatically unfair when the reason given for the dismissal is or includes the fact that the employee made a protected disclosure. In relation to the employee there is no qualifying period or upper age limit for this protection of disclosure.

Safeguarding

In many workplace situations including schools, charities, hospitals, and care homes, there can be situations where employees encounter a safeguarding concern and have a legal responsibility to take action to protect the individual at risk of harm.

Safeguarding involves recognition that a concern exists, reporting the concern using organisation processes, recording the concerns, and referral by a nominated person in the organisation to other agencies.

There are several acts and policies in the UK that relate to safeguarding. These include:

- The Care Act 2014⁴, which sets out a legal framework for how local authorities and other parts of the system should protect adults at risk of abuse or neglect
- The Children Act 1989⁵ (as amended), which is one of the key pieces of legislation regarding safeguarding children
- The Children and Social Work Act 2017⁶, which is another key piece of legislation regarding safeguarding children
- Keeping Children Safe in Education⁷, which is a policy that outlines the legal responsibilities of schools and colleges in England to safeguard and promote the welfare of children and young people
- The Safeguarding Vulnerable Groups Act 2006⁸, which provides a system for employers to assess the appropriateness of individuals, such as employees or volunteers, for working with children or vulnerable adults.

Employees have a responsibility to make others aware of their concerns so that a decision can be taken to involve other agencies where appropriate. If they are concerned that the issue has not been addressed, then they are entitled to whistle-blow.

Raising a Concern

Many organisations have a whistle-blower or safeguarding policy which sets out the process an individual should follow to raise their concerns.

The policy should also include an authorisation to raise the concern with someone else other than the employer, such as a health and safety representative. In that situation the

Employment Rights Act recognises that this can be treated as if it had been made to the employer.

The Safety Committee and Safety Representatives Regulations 1977⁹ and the Health and Safety (Consultation with Employees) Regulations 1996¹⁰ allow for employees to be represented by a Trade Union Appointed Safety Representative and non-union elected Representative of Safety, respectively.

As these functions are fulfilled by employees of the organisation, created by legislation, care must be taken to ensure that the organisation is not breaching its statutory duties regarding these regulations.

In the case mentioned previously, there was a continued refusal by the company to recognise the Trade Union Safety Representative's rights under law. Mr Holden requested, and was entitled to have access to, statutory documentation such as risk assessments. This denial was a breach of the Safety Representatives and Safety Committee Regulations 1977. His sharing of information with the regulator was also protected under the same regulations.

Disclosure or Grievance

Sometimes an employee believes they are whistleblowing when, in fact, their complaint or concern is a personal grievance¹¹. An individual making a disclosure under an organisation's whistleblowing policy should believe that they are acting in the public interest.

A personal grievance or complaint is not usually covered by whistleblowing protections. So, it is essential that any policy, procedures, and other communications produced by the organisation make this clear.

Investigation

An organisation can choose to use a telephone hotline to allow employees to raise their concerns and this may be provided by an external organisation. Maintaining a register of calls and action log is essential to ensure good governance of the process.

Various actions may be taken to respond to a concern including appointing an independent manager to investigate, recommendation that a referral for internal audit is made, or referral to an appropriate external agency.

Retaliation

A typical outcome for someone raising their concerns by whistleblowing can be:

- Verbal abuse

- Victimisation
- Pressure to leave the organisation

In many situations the person raising the concern becomes the focus rather than the details of the actual concern they raised. The fact that they have 'informed' on their colleagues or others within their organisation can be seen as a negative thing by colleagues and often leads to the team or the organisation ostracising them.

If someone does leave, their main option is to take their case to an Employment Tribunal claiming constructive dismissal.

Employment Tribunals

An Employment Tribunal¹² hears many diverse types of cases including discrimination cases. The tribunal is also the place an organisation may seek to appeal against an Improvement or Prohibition Notice served by the Health and Safety Executive.

The panel consists of a legally qualified chair, with one representative appointed by the Confederation of British Industry (CBI), and one person appointed by the Trade Union Congress (TUC). A majority verdict is enough for a claimant to be successful.

In relation to protected disclosure claims, a tribunal can award an unlimited amount, and require the reinstatement of the employee.

Managing the Risks

The risks from failing to manage a legitimate whistleblowing or safeguarding concern can be significant. A robust policy and clearly documented process are essential in protecting the reputation of the organisation and addressing issues raised.

It is essential that:

- Whistleblowing policies and procedures are understood by employees and managers
- Safeguarding policies and procedures are understood by employees and managers
- Managers are familiar with the statutory duties applicable to Trade Union Safety Representatives and Representatives of Safety
- The process for raising a concern is clear
- Organisations guard against retribution and retaliation towards whistle-blowers
- Feedback is provided to those who raise concerns about the progress and outcome of an investigation

- The investigation is carried out by someone independent of the organisation when it is appropriate to do so

If the organisation fails to act on the concerns raised, then a valuable opportunity is missed that could prevent both harm to individuals and the organisation itself.

References

1. [Mr Laurance Holden v Connex South Eastern Ltd, Case Number: 2301550/2000. 15th November 2001](#)
2. [Public Interest Disclosure Act 1998](#)
3. [Employment Rights Act 1996](#)
4. [Care Act 2014](#)
5. [Children Act 1989](#)
6. [Children and Social Work Act 2017](#)
7. [Keeping children safe in education, Department for Education](#)
8. [Safeguarding Vulnerable Groups Act 2006](#)
9. [The Safety Representatives and Safety Committees Regulations 1977](#)
10. [The Health and Safety \(Consultation with Employees\) Regulations 1996](#)
11. [Department for Business Innovation & Skills: March 2015 Whistleblowing: Guidance for Employers and Code of Practice.](#)
12. [Employment Tribunals, HM Courts & Tribunal Service](#)

Further information

For access to further RMP Resources you may find helpful in reducing your organisation's cost of risk, please access the RMP Resources or RMP Articles pages on our website. To join the debate follow us on our LinkedIn page.

Get in touch

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