



Members' guide

# Whistleblowing



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# Introduction

Whistleblowers play an essential role in exposing corruption, fraud and malpractice and in preventing disasters resulting from negligence or wrongdoing. In blowing the whistle, workers commit a public interest act that requires substantial moral courage.

Many Prospect members work in politically sensitive areas or in workplaces that are particularly safety-critical. Members may also come across issues in other areas, such as fraud, health and safety breaches or environmental issues. In many situations employees can discover, in the course of their work, that there are serious issues of public concern or safety arising from an employer's actions. Employees in such a position are faced with a dilemma as to whether to raise the issue but are often fearful of the consequences.

Prospect representatives can assist members in deciding how and when to blow the whistle and offer valuable advice and support.

The Public Interest Disclosure Act 1998 (PIDA) amended the Employment Rights Act 1996 to provide employment protection to whistleblowers if they make a 'protected disclosure' about any malpractice or wrongdoing in their organisation within limited statutory requirements.

The Act provides statutory protection for workers who are dismissed or subjected to a detriment for whistleblowing at work. This guide looks at the protection offered by the law and also considers procedures which both public and private sector organisations should adopt to ensure that employees can confidently raise issues of public concern.

The law as stated in this guide applies to members in England, Scotland and Wales. The law is somewhat different in Northern Ireland, the Channel Islands and the Isle of Man. Members in these areas should contact their Prospect negotiator for more information.

This guide can only give general information. For detailed advice on these issues, please contact your Prospect representative, full-time officer or call our Member Contact Centre on 0300 600 1878.

# 1. Overview

**1.1** The Public Interest Disclosure Act (PIDA) aims to give protection to employees who ‘blow the whistle’, but it only offers protection in specified circumstances.

**1.2** Not all whistleblowing is protected under the Act. The aim is to protect workers in certain circumstances where the matter relates to an issue of public interest or concern.

**1.3** There are two key stages in determining whether the Act applies. The first relates to the type of information disclosed and the second relates to whom and how the disclosure is made.

**1.4** The Act amends the Employment Rights Act so that it will be an unfair dismissal to dismiss an employee for making a specified disclosure, and it will be unlawful to subject the worker to any other detriment for making such a disclosure.

**1.5** PIDA applies to people raising genuine concerns about crimes, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice, dangers to health and safety or the environment and the cover-up of any of these. It applies whether or not the information is confidential and whether the malpractice occurs in the UK or overseas.

## Individuals covered

**1.6** The definition of ‘worker’ used in the Act is wider than that used in much other employment legislation. It includes not just employees and workers as defined in the Employment Rights Act but also third party contractors, whose work is controlled by the ‘employer’. It also specifically includes Crown employees.

**1.7** The Act covers employees, workers, contractors, trainees, interns, freelancers, agency staff and homeworkers. It does not cover the genuinely self-employed. No qualifying period of employment is required.

## 2. Qualifying disclosures (QD)

**2.1** The first stage is to consider the subject matter of the disclosure. Statutory protection only applies in relation to public interest matters and the range of subjects which are covered is limited.

**2.2** A qualifying disclosure is any disclosure of information which, in the reasonable belief of the worker making it, tends to show that one or more of the following has happened, is happening or is likely to happen:

- a criminal offence
- a failure to comply with a legal obligation
- a miscarriage of justice
- endangerment of health and safety
- damage to the environment
- concealing information about any of the above.

**2.3** It will not be a QD if the whistleblower commits an offence by disclosing or if it concerns information covered by legal professional privilege in legal proceedings. Good faith in making the disclosure is not required, but a tribunal can reduce compensation by up to 25 per cent if it believes the disclosure was made in bad faith.

**2.4** The worker must reasonably believe that the disclosure is in the public interest. This is intended to ensure incidents purely related

to the worker's own contract of employment will not be covered. Case law suggests that if disclosure relates to an employment contract and is against a large or well-known employer who could suffer reputational damage, it may amount to a QD. Always seek advice from a Prospect full-time officer or representative before making a disclosure or if there is uncertainty on this point.

**2.5** It is the 'reasonable belief' of the person making the disclosure which is important. For example, the employee does not have to prove a criminal offence occurred, only that they had reasonable grounds for believing it had. It will be for employment tribunals to establish in each case whether the worker's belief was reasonable or not.

**2.6** The circumstances relating to the complaint can be related to anywhere in the world so, for example a worker in the UK could make a disclosure about environmental effects in another country.

**2.7** Prospect members have raised whistleblowing cases in a number of situations, including concerns over disclosure of personal data of members of the public, health and safety breaches, financial irregularities and impropriety in awarding contracts. These were all accepted as qualifying disclosures.

# 3. Protected disclosures

**3.1** The next stage under the Act is to whom and how the disclosure can be made. The Act lists ways of making the disclosure which can gain protection. The aim is to encourage employees to use the appropriate channel by firstly raising matters with the employer and only going to outside sources when absolutely necessary.

**3.2** There is no strict requirement that the disclosure must be made in good faith. Instead tribunals can reduce compensation by up to 25 per cent if they find the disclosure was not in good faith.

**3.3** In order to be protected, the disclosure may be made to:

- the worker's employer, or another person responsible for the wrongdoing (internal disclosures)
- a legal adviser, in the course of obtaining legal advice
- a Minister of the Crown (for Crown employees (regulatory disclosures))
- a prescribed person as set out in an order by the Secretary of State, eg Health and Safety Executive for health and safety issues; HM Revenue and Customs for taxation (regulatory disclosures) or
- in certain limited circumstances, a third party unconnected to the employment (external disclosures).

## Internal disclosures

**3.4** In the normal course of events, a worker should have the confidence to disclose their concerns to their employer and know there will be no adverse repercussions for raising those issues. Employers should have clear, internal procedures for raising issues to reduce the risk of serious concerns being mishandled. They should also be encouraged to have a whistleblowing policy in place.

**3.5** To make an internal disclosure:

- inform your line manager immediately if you believe any of the specified actions happened, are happening or are likely to happen
- in a serious case, where the allegation may involve a line manager, raise the matter with a more senior manager
- use the employer's whistleblowing policy to make a relevant disclosure.

## Legal advice disclosures

**3.6** Disclosure to a legal adviser in the course of getting legal advice is covered. But you should note that this does not necessarily cover disclosure to a union representative.

**3.7** You can seek advice from your Prospect representatives but the disclosure itself

needs to be through one of the protected categories.

## Regulatory disclosures

**3.8** If you do not think an internal disclosure is appropriate, the most effective and secure method of external disclosure is to a prescribed person. These include: the Health and Safety Executive, Environment Agency, Care Quality Commission, Food Standards Agency, Independent Police Complaints Commission and local authorities. You can find a list of prescribed people and bodies at <http://bit.ly/whistleblowing-prescribed-list>. The police and trade unions are excluded from the list of prescribed organisations.

**3.9** Regulatory disclosures will only be protected where the whistleblower meets the tests for internal disclosures and reasonably believes the information and any allegations in it are substantially true and relevant to that regulator.

## External disclosures

**3.10** Disclosure to the police, media, MPs, consumers and non-prescribed regulators can be protected if, in addition to the tests for regulatory disclosures, the whistleblower reasonably believes the information is true and they are not doing it for personal gain.

They must also meet the following conditions:

- the whistleblower reasonably believed he/she would be victimised if the matter was raised internally, or with a prescribed regulator
- there was no prescribed regulator and he/she reasonably believed the evidence was likely to be concealed or destroyed
- the concern had already been raised with the employer or a prescribed regulator.

## Reasonable disclosure

**3.11** Additionally, a tribunal must be satisfied that a particular disclosure was reasonable. It will consider all the circumstances, including:

- the identity of the person to whom it was made
- the seriousness of the concern
- whether the risk or danger remains, and
- whether the disclosure breached a duty of confidence which the employer owed to a third party.

**3.12** Where a concern is raised with a prescribed regulator, the tribunal will consider the reasonableness of their response. If the concern was raised with the employer, the tribunal will consider whether any whistleblowing procedure was, or should have been, used.

## Exceptionally serious matters

**3.13** There is a final category dealing with very serious matters. Cases which do not fall under the strict provisions above may still receive protection if the matter is of an exceptionally serious nature. The employee must be able to show that:

- they reasonably believe the information disclosed is true
- they are not making the disclosure for personal gain
- it is reasonable to make the disclosure, in all the circumstances.

**3.14** In deciding if the disclosure is reasonable in the circumstances, a tribunal must have particular regard to the identity of the person to whom the disclosure is made.

**3.15** Potential whistleblowers should seek advice before making an external disclosure so that they do not lose the protection of the Act.

## Confidentiality clauses

**3.16** Gagging clauses in employment contracts and severance agreements are unenforceable if they conflict with the Act's protection. Always seek advice from a Prospect full-time officer or representative if there is uncertainty on this point.

## Secrecy offences

**3.17** Where the disclosure is found to breach the Official Secrets Act or another secrecy offence, the whistleblower loses the protection of the Act if:

- he/she has been convicted of the offence, or
- a tribunal is satisfied to a high standard of proof that he/she committed the offence.

# 4. Detriment and dismissal

**4.1** If a worker has made a disclosure which meets the conditions of being both a qualifying and protected disclosure, it will be unlawful for the employer to dismiss them or subject them to any other detriment for doing so.

## Detriment

**4.2** An employer must not subject a worker to any detriment because they have made a protected disclosure.

**4.3** The right not to suffer a detriment applies to all workers and can include atypical workers such as freelancers, consultants and interns.

**4.4** A detriment can include harassment, failure to promote or dismissal.

## Dismissal

**4.5** It will automatically be an unfair dismissal if the reason, or if there is more than one, the principal reason is that the employee made a protected disclosure.

**4.6** There is no qualifying length of service for bringing a claim for unfair dismissal for whistleblowing.

**4.7** In redundancy situations, it will also automatically be an unfair dismissal if the principal reason for the claimant being selected for redundancy is that they made a protected disclosure.

## Establishing the reason

**4.8** In all cases the worker must be able to show there is a causal link between the disclosure and the action taken against them.

# 5. Employment tribunals

**5.1** Complaints of unlawful detriment and unfair dismissal on grounds of whistleblowing can be brought to an employment tribunal.

**5.2** The time limit for commencing a claim is three months from the date of the act, or failure to act, the detriment or from the effective date of termination. The time limit can only be extended in very exceptional cases so seek advice from your Prospect representative as soon as possible.

**5.3** It is mandatory to present a claim to ACAS for Early Conciliation (EC) before making the claim to the ET. This must be done before the usual three-month time limit expires. Once the EC application is submitted, it has the effect of 'stopping the clock' for the tribunal claim. The rules are complicated so always contact your Prospect negotiator for advice as soon as possible.

## Interim relief

**5.4** In whistleblowing dismissals, a tribunal can make an interim order for the dismissal not to take effect until it has heard the full case. This is known as interim relief and claims for this must be made within seven days of the last day of employment.

**5.5** This would involve an expedited hearing before a tribunal, where the tribunal has to

determine if the employee is likely to succeed in their claim. If so, the tribunal can order continuation of the contract of employment up until the full hearing. Interim relief is not available where the claim is that the employee was unfairly selected for redundancy.

## Compensation

**5.6** Compensation for unfair dismissal in whistleblowing cases is not subject to a statutory upper limit (unlike other cases of unfair dismissal).

**5.7** In cases of unlawful detriment, the claimant can claim for compensation for injury to feelings in addition to any actual financial loss.

## Prospect legal advice and assistance

**5.8** Members should contact their Prospect representative or full-time officer for detailed advice if they are considering bringing a claim to a tribunal.

**5.9** Workplace and other legal assistance is offered at the discretion of the union and is decided on the facts and merits of each case. For full details, please see our guide to legal advice: <http://bit.ly/prospect-legal-guide>

# 6. Whistleblowing policies

**6.1** All workplaces should ensure they have a whistleblowing policy in place to give concerned workers the confidence to make a disclosure, know that the matter is taken seriously and that they will not be victimised or harassed as a result of making a disclosure. Prospect officers and reps should seek to negotiate a whistleblowing policy and ensure that trade union representatives have a role in the process.

## The policy

**6.2** A whistleblowing policy should make it clear that:

- the organisation takes malpractice seriously and give examples of the types of concerns so that people can distinguish a whistleblowing concern from a grievance
- workers have the option to raise concerns outside line management
- workers can access confidential advice from an independent body
- confidentiality will be respected when requested by a worker
- when and how concerns may properly be raised outside the organisation (ie with a regulator)
- it is a disciplinary matter to victimise a bona fide whistleblower and to maliciously make a false allegation

- workers should be encouraged to seek advice from their Prospect representative.

## Good practice

**6.3** All organisations and companies should:

- ensure workers are aware of, and trust, whistleblowing avenues – involvement with Prospect should create additional confidence
- make provision for realistic advice about what the whistleblowing process means for openness, confidentiality and anonymity
- continually review how the procedures work in practice
- regularly communicate to workers the avenues open to them.

**6.4** Employers should be encouraged to consider the benefits of a whistleblowing policy and make it clear through the management line and across the organisation that it is safe and acceptable to raise concerns about malpractice. It is worth checking that board members and senior managers designated to handle whistleblowing issues have received appropriate training.

**6.5** Where a worker raises a concern, every effort should be made, with Prospect support where appropriate, to ensure that

the employer responds (and can show it has responded) to the message – rather than shooting the messenger. This way, an effective whistleblowing policy will improve the likelihood that public interests will be protected.

**6.6** Employers who use contractors should be encouraged to ensure those who work for contractors have access to a whistleblowing policy.

**6.7** If the employer is a public body with at least one board member who is a ministerial appointee, the whistleblowing policy should authorise and facilitate whistleblowing direct to the sponsoring department.

**6.8** Disclosure to a prescribed regulator is protected (whether the concern has been raised internally or not). Employers should be encouraged to acknowledge that reporting concerns to a prescribed regulator is acceptable.

**6.9** Employers should also be aware that any attempt to suppress evidence of malpractice is particularly inadvisable since:

- a reasonable suspicion of a 'cover-up' is itself a basis for protected disclosure
- a disclosure to the media is more likely to be protected, and
- there is less scope for keeping matters private with a gagging clause (**see paragraph 3.16**).

# 7. Points to bear in mind

**7.1** Workers thinking about making a disclosure should bear the following points in mind:

- initial disclosure should usually be to the employer
- if the concern has to be pursued further, disclosure to a prescribed person or external body may be appropriate as the worker's protection may be jeopardised if the concern becomes a dispute between the worker and the employer
- it is not advisable to blow the whistle anonymously because tribunals must be satisfied that the worker was victimised by the employer for blowing the whistle
- if the worker fears being victimised or a cover-up, disclosures to ministers and to prescribed regulators should be considered first before wider disclosure
- if the worker has a large number of concerns, this may be an indication there is more to the case than whistleblowing
- seek advice from your Prospect representative on how to make a disclosure.

**7.2** In the case of external disclosure, the following applies:

- disclosure to a prescribed body is likely to be more readily protected
- where the public interest will be equally protected by disclosures to two bodies, the disclosure which causes less damage to the employer is more likely to be protected.

**7.3** Disclosure to the media is always a serious matter which can have far-reaching consequences. It is essential to seek advice from Prospect as to whether the disclosure is likely to be protected and the timing and content of any disclosure.

# 8. Resources and contacts

## Prospect

- [www.prospect.org.uk](http://www.prospect.org.uk)
- Prospect guide to legal advice  
<http://bit.ly/prospect-legal-guide>

## Protect

- [www.protect-advice.org.uk](http://www.protect-advice.org.uk)

## General information

- <https://www.gov.uk/whistleblowing>

## Blowing the whistle to a prescribed person

- <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies>

## ACAS

- <https://webarchive.nationalarchives.gov.uk/20210104111253/https://archive.acas.org.uk/index.aspx?articleid=1919>

## Civil service management code

- <http://bit.ly/civil-service-code>



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PRO-20-12/MAR20/PDF

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