

WHISTLEBLOWING: CHC CYMRU

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Agenda

- Whistleblowing: an important protection
- Who is protected?
- What is a “qualifying disclosure”?
- What is a “protected disclosure”?
- Remedies
- Tips and tricks
- Case study
- Q&A

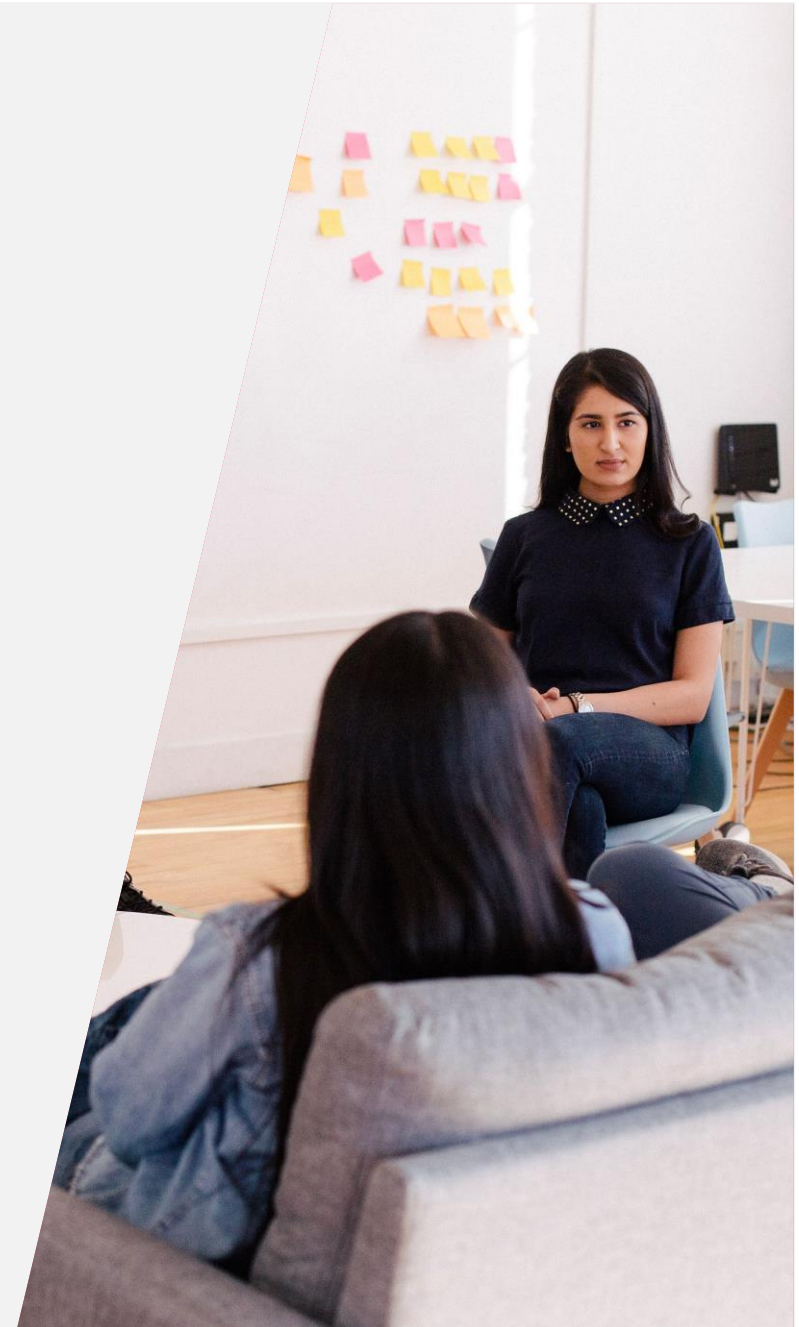
Whistleblowing: An important protection

- Introduced July 1999 by the Public Interest Disclosure Act 1998 (PIDA) - inserted sections into the Employment Rights Act 1996 (ERA)
- No requirement for a minimum period of service
- Unlimited compensation
- Both workers and employees protected
- PIDA created to respond to disasters and public inquiries during 1980's – 1990's
 - Piper Alpha explosion
 - Maxwell pension scandal
 - Alder Hey Hospital body parts scandal



Who is protected?

- Employees
- Workers
 - Extended definition of workers (homeworkers, certain NHS workers, junior doctors, agency workers, student nurses and midwives)
 - Judges
- Job applicants, volunteers, NEDs and genuinely self-employed **UNLIKELY** to be protected by whistleblowing regime

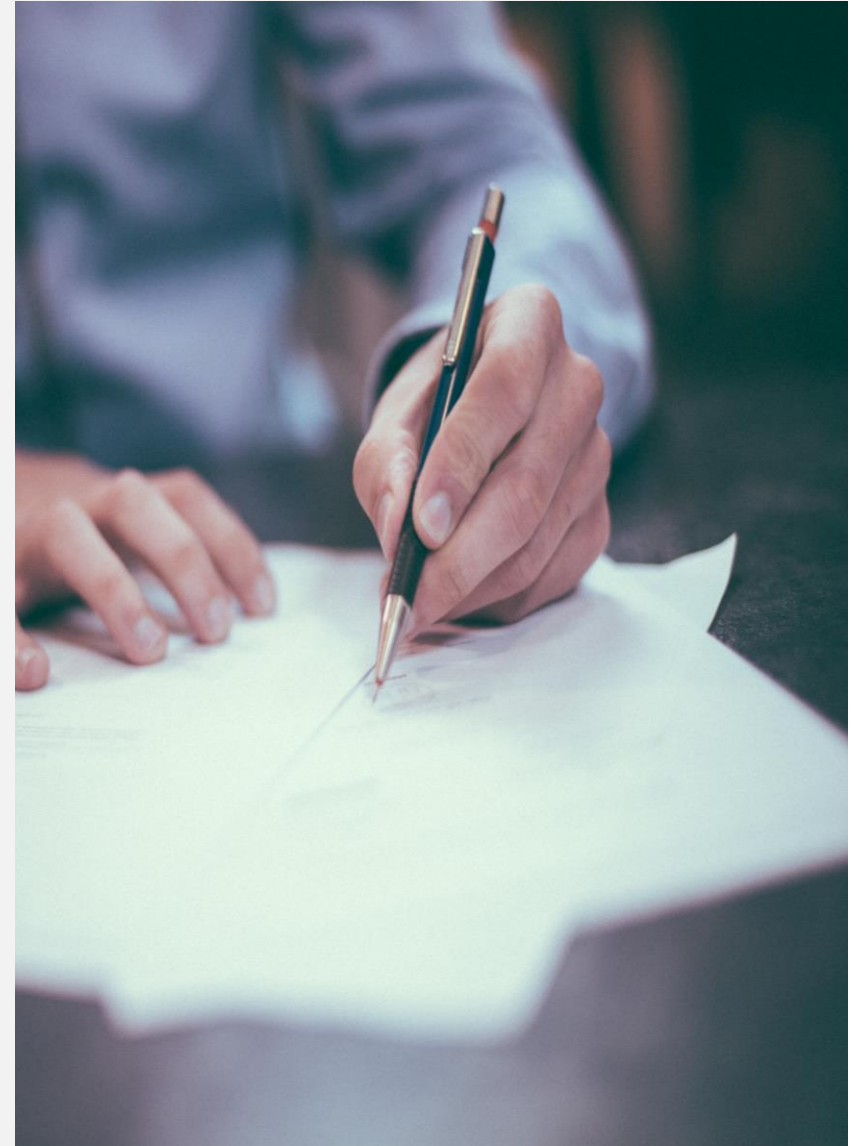


Qualifying disclosures

- Disclosure of information
- Must have a **reasonable belief** that one or more of the following has occurred, is occurring or is likely to occur:
 - A criminal offence
 - Breach of a legal obligation
 - A miscarriage of justice
 - Danger to the health and safety of any individual
 - Damage to the environment
 - A deliberate concealment of any of the above

Qualifying disclosures

- The disclosure must convey facts – may still be qualifying disclosure if facts already known to recipient
- Can be verbal / written / via a recording
- Must be disclosure of information, rather than an allegation or statement of opinion (although often intertwined)
- Good faith requirement removed but can affect compensation
- Subject matter of the disclosure must relate to one of the six types of 'relevant failure'
- Reasonable belief – does not matter if belief turns out to be wrong

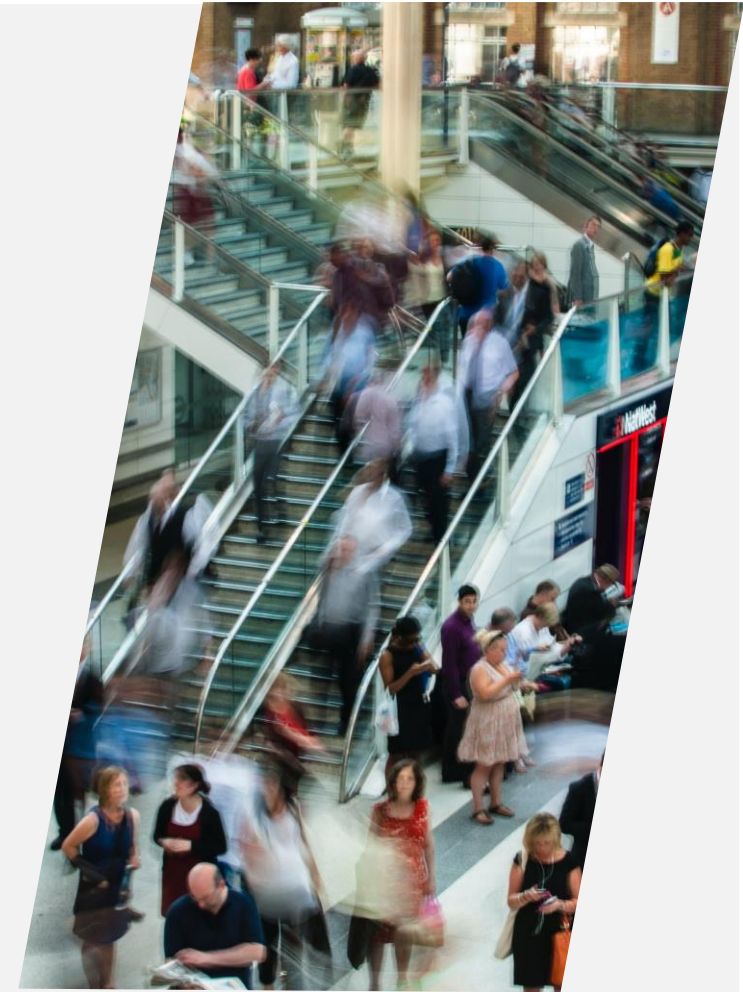


Qualifying disclosures – public interest

- Disclosure can only be a “qualifying disclosure” if worker reasonably believes that the disclosure is “in the public interest”
- “Public interest” element required since 25 June 2013
- Motive for amendment – tackling the Parkins v Sodexho problem (employees complaining about a breach of own employment contract)
- Question: Can disclosure breach of own contract or matter in which worker has personal interest ever be in public interest? Answer: Yes – consider
 - Numbers in the group whose interests the disclosure serves – higher number increases likelihood of features which will engage public interest
 - How important the interest is – the more trivial the wrongdoing the less likely it will be in the public interest
 - Whether the wrongdoing is deliberate or inadvertent
 - Identity of the wrongdoer – larger or more prominent wrongdoers may find their activities engage the public interest

Qualifying disclosures – public interest

- Chesterton Global v Nurmohamed (2017)
 - Estate agent and director of Mayfair office
 - Disclosures made that profitability of Mayfair office was being artificially suppressed (to the tune of £2-£3m) to reduce the level of commission payable to staff
 - This affected the earnings of over 100 senior managers at Chesterton, including Mr Nurmohamed
 - Mr Nurmohamed eventually dismissed. He claimed he had suffered various detriments and that his dismissal was automatically unfair
 - ET: 100 senior managers may constitute a sufficient group of the public for it to be a matter of public interest
 - EAT: Did the worker believe that the disclosure was in the public interest and was that belief objectively reasonable?
 - Chesterton appeal to the Court of Appeal – argued that in order for a disclosure to be in the public interest, disclosure must serve persons outside the workplace – mere multiplicity of workers sharing the same interest is not enough
 - Court of Appeal did not agree



Qualifying disclosures – public interest

- Court of Appeal:
- Still very fact specific, CoA confirmed
 - Two-stage test required, whether worker (subjectively) believed at the time that the disclosure was in the public interest and if so, whether that belief was reasonable.
 - Belief in the public interest need not be the predominant motive
 - No “absolute rules” about what it is reasonable to view as being “in the public interest”
- Even where the disclosure relates to a breach of the worker’s own contract (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as the personal interest of the worker.
- Public interest is a broad and fluid concept
- Still need sufficient public interest factors to be present – not just about the numbers

When is a qualifying disclosure “protected”?

- For a qualifying disclosure to be a “protected” disclosure it **must** be made to specific categories of people
 - The worker's employer (section 43C(1)(a), ERA 1996)
 - The person responsible [*in the worker's reasonable belief*] for the relevant failure (section 43C(1)(b), ERA 1996)
 - Legal advisers (section 43D, ERA 1996)
 - Government Ministers (section 43E, ERA 1996)
 - A person prescribed by an order made by the Secretary of State (section 43F, ERA 1996) [*where worker reasonably believes the default falls within the remit of the prescribed person and that the information disclosed is substantially true*]
 - A person who is not covered by the list above, provided certain conditions are met (section 43G, ERA 1996), with the conditions being varied in exceptionally serious cases (section 43H, ERA 1996) (“Wider disclosure”)
- Disclosure to people / groups outside of the above risk the disclosure losing the status of a “protected” disclosure



Wider disclosure

- Possible for wider disclosure to be “protected” (such as the police and even media) but subject to rigorous conditions
 - Reasonable belief that the information is true
 - Not be made for purposes of personal gain
 - Worker must have previously disclosed to employer or prescribed person OR reasonably believe they will be subjected to detriment were they to disclose OR reasonably believe material evidence would be concealed or destroyed if disclosure made
 - Must be reasonable for them to make the disclosure
- Some of these conditions (previous disclosure) are relaxed if the wrongdoing is of “an exceptionally serious nature”

Remedies

- Automatic unfair dismissal claim
 - If employee is dismissed
 - Reason (or principal reason) for dismissal is a “protected disclosure” – must be a causal link between whistleblowing and dismissal
 - No upper limit on compensation but **cannot** include “injury to feelings” award
- Detriment claim
 - Workers (and employees) have the right not to be subjected to any detriment on the ground that they have made a “protected disclosure”
 - Protected disclosure must have played more than a trivial part in the reason for the treatment
 - Worker can bring detriment claim based on termination of contract
 - Compensation assessed on similar basis to discrimination claim – may include award for “injury to feelings”



Tips and tricks

- Promote policies internally
- Appoint a whistleblowing officer
- Consider whether to use an external helpline
- Actively encourage early reporting of concerns
- Create a culture of openness
- Investigate disclosures thoroughly



Tips and tricks

- Keep worker informed of investigation where possible
- Seek employee's consent to share disclosure with investigating team
- Consider whether a grievance may also amount to a protected disclosure
- Detriment claims may be brought after the worker has left – take care with references
- Are requests for further information needed?



Qualifying disclosures

- Which of these (if any) could lead to qualifying disclosures being made:
 - “This place is an accident waiting to happen, I have seen electrical wiring left exposed in the hallway.”
 - “My landlord has no regard for health and safety.”
 - “The properties have been infested with vermin for four weeks and nothing is being done about it.”
 - “I think they’re oblivious to safety checks.”
 - They provide properties which are wholly inadequate for families today.”
 - “You have failed to repair the lift at the flats where I live for 4 weeks... that is a breach of my rights as a disabled tenant.”

Case Study – Sunrise News

Any Questions?

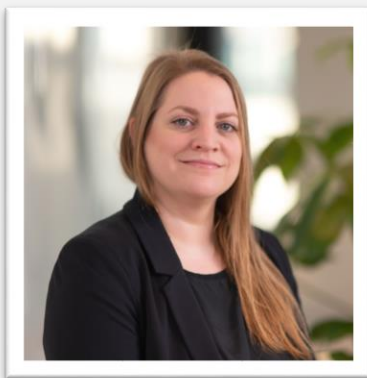


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