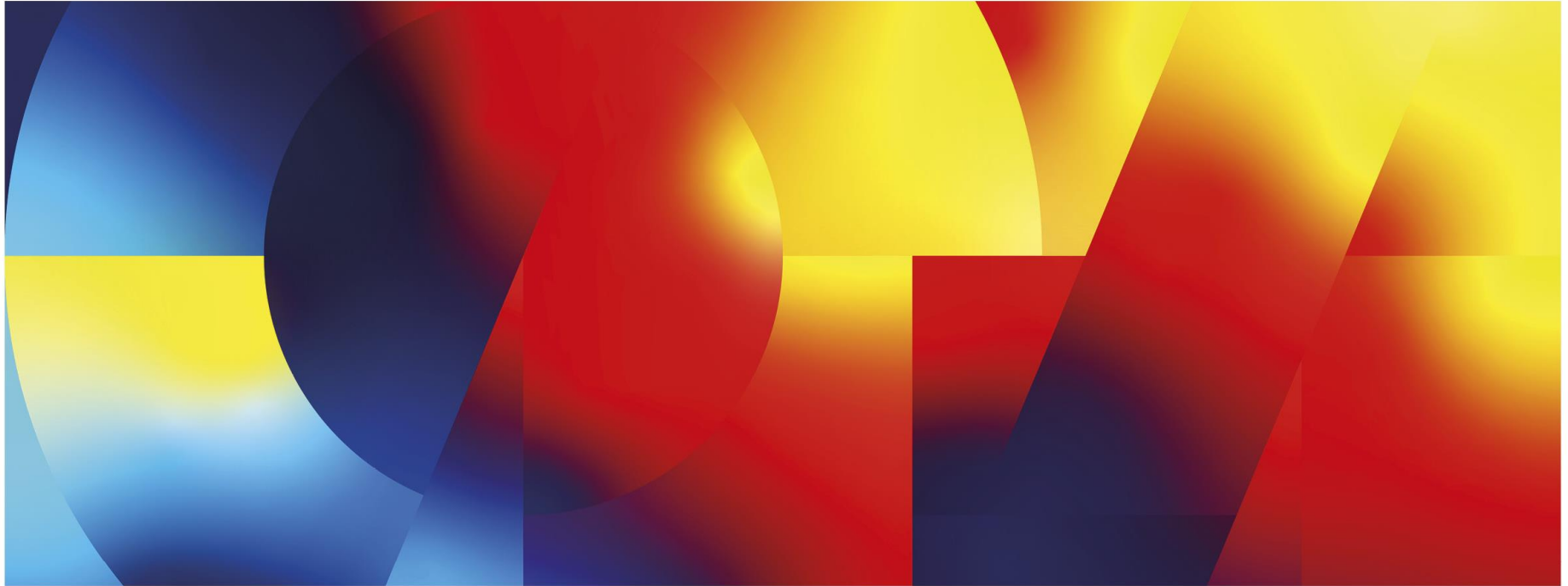


1 February 2022

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# GRIEVANCES AND WHISTLEBLOWING



# CONTENT

- What is a grievance
- What is whistleblowing
- What are the differences?
- How do you manage the cross over?
- Practical Tips

# Grievance & Whistleblowing – HR's role



- To ensure that the relevant policy is followed.
- To support management with the investigation.
- To advise the investigator on questions of law, procedure and process – not decision making.
- To be a line of communication with the aggrieved.
- To ensure consistency of approach.

# What is a grievance?

COMPLAINT



# What is a grievance?

- A complaint about something that is personal to you;
- Can include allegations discrimination; and/or
- A complaint that they have been badly treated because they have ‘blown the whistle’.

# What is whistleblowing?



# What is whistleblowing?

- Can be labelled a concern/complaint/blowing the whistle/protected disclosure.
- It is a concern about wrongdoing of a more general nature which is in the public interest.
- E.g. financial irregularity, health and safety issues, fraud, etc.

# What is Whistleblowing?

## THE TECHNICAL BIT .....

- S43 of the Employment Rights Act 1996
- There are 2 elements ....
  1. Is it a qualifying disclosure?
    - Is it a disclosure of information?
    - Does it relate to one of the six types of “relevant failures”?
    - Does the individual have a reasonable belief that the information tends to show one of the relevant failures?
    - Does the individual have a reasonable belief that the disclosure is in the public interest?
  2. Is it a protected disclosure?
    - Depends on who the disclosure is made to.



## Martin v London Borough of Southwark (2021), EA-2020-000432-JOJ

- A teacher raised various concerns about working time.
  - “I am looking at our working hours for teachers and seem unable to reconcile them to statutory guidance, and all my conservative calculations, clearly I may be missing something.”
  - “I am concerned we may be in breach of the second part of [*the terms and conditions*]. I have emailed the head about my concerns and the email trail is below.... it is likely that, over the past two years teaching staff of worked in excess of 212 hours over the statutory directed time.”
  - “I hope that this team will ensure that a budget of directed time’ or similar instrument is used going forward so that we are come in compliance with statutory guidance.”
  - “I am writing to you as a teacher in a local authority school, concerning the allocation of directed time for teaching staff in my school... [*and*] the accumulation of excess directed time over and above the statutory ... periods.”
- The Employment Tribunal considered whether these were qualifying disclosures, and decided that...

# Whistleblowing Definition

## Martin v London Borough of Southwark

...none of them were.

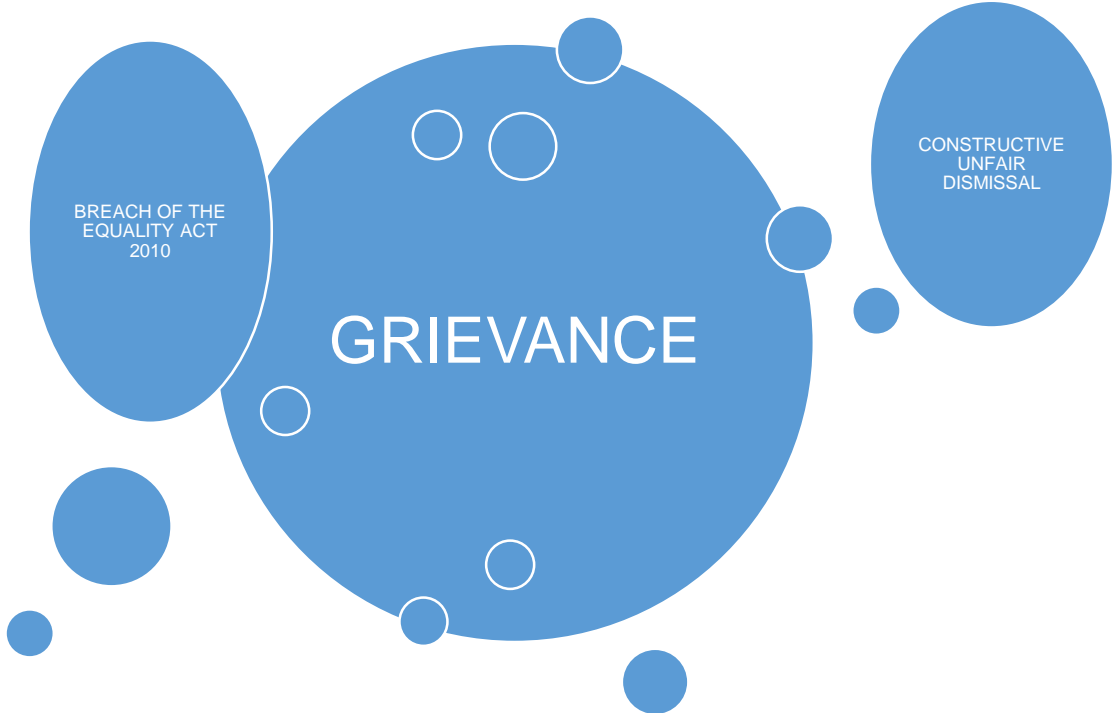
- The Claimant appealed to the Employment Appeal Tribunal (EAT)
- The EAT reaffirmed the test for a 'protected disclosure', Williams v Michelle Brown AM (2019):
  - There must be a disclosure of information.
  - The worker must believe that the disclosure is in the public interest.
  - That belief must be reasonably held.
  - The worker must believe that the disclosure tends to show one of the relevant failures.
  - That belief must also be reasonably held.
- The case was remitted to a new tribunal to reconsider these issues.

# Grievance & Whistleblowing – Policies and Procedures

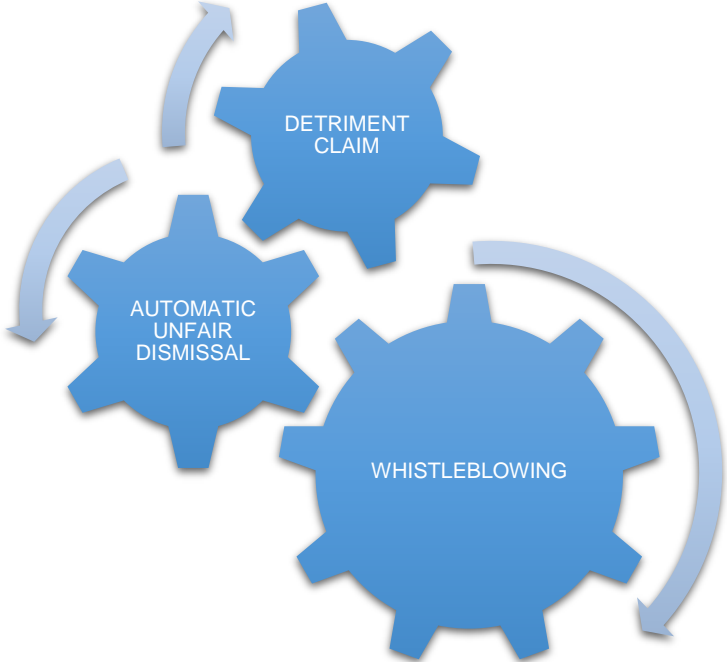
## Policies and Procedures – the differences/similarities....

- Benefit of confidentiality.
- Route for raising concerns.
- Right to be accompanied.
- Investigative process – who investigates?
- ACAS Code of Practice on Disciplinary and Grievance Procedures. Grievance defined as “concerns, problems or complaints that employees raise with their employers”.

# Grievance v Whistleblowing – the differences in protection



# Grievance v Whistleblowing – the differences in protection



# Causation Whistleblowing– automatically unfair dismissal

## Bolton School v Evans [2006] EWHC (Civ) 1653

- Automatically unfairly dismissed if the reason or principal reason for the dismissal is that they have made a protected disclosure (section 103 ERA 1996)
- Employee told his employer that the IT system was not secure.
- Went on to hack into the system to prove the point.
- Court of Appeal held that the hacking was separate to the disclosure and was not protected.



# Causation Whistleblowing – automatically unfair dismissal

## Unfair dismissal cases

- What facts/beliefs caused the decision maker to dismiss.
- It doesn't matter if the decision maker did not genuinely believe that the disclosure was protected.
- Commonly called the “reason why” test.

# Causation Whistleblowing – detriment cases

## Detriment Cases

- Right not to be subjected to a detriment on the grounds that they have made a protected disclosure (section 47B(1) ERA 1996)
- Involves the analysis of the mental processes (conscious or unconscious) of the employer acting as it did.
- It is not a “but for” test.
- Must be a causative link i.e. that the protected disclosure did not “materially influence” the detrimental treatment complained of.



- **NHS Manchester v Fecitt and others [2012] IRLR 64 (Court of Appeal)**
  - 3 nurses made a protected disclosure about their concerns about the truth of a colleagues' qualifications.
  - Management investigated and decided no action needed to be taken
  - The whistle-blowers were dissatisfied and took their concerns further
  - An unpleasant atmosphere ensued and divisions occurred. Threats were made.
  - The whistle-blowers raised grievances investigated externally. One complaint was upheld.
  - Relationships deteriorated. Removed one claimant from her managerial responsibilities and redeployed her and her colleague. The third stopped receiving bank shifts.
  - Complained to an Employment Tribunal they had been subjected to a detriment.
  - Employment Tribunal accepted NHS Manchester's argument that their actions were the only "feasible" way of resolving the dysfunctional state of the walk-in centre.

## Fecitt - Court of Appeal

- NHS Manchester could be criticised for not protecting the Claimants better but its failure to act was not a deliberate omission and was not because the Claimants had made a protected disclosure.
- NHS Manchester had acted genuinely in redeploying the two Claimants and had discharged the burden of proof that the disclosures played no part.
- The third Claimant was described as a trouble maker but there was evidence of other reasons for not providing her with further shifts.
- Therefore agreed with the ET – the protected disclosures did not materially influence the decisions.

# Grievance v Whistleblowing – managing the crossover



# Grievance v Whistleblowing – managing the crossover

## What should you do?

- Can you separate out the issues?
- consultation, communication and agreement are key to minimise risk.

# Practical Tips – creating an safe environment to speak up

- Does your organisation promote the freedom to speak up?
- How?
- Who is responsible/accountable in the organisation?
- Do you know what your staff think? Do they feel safe?
- Is it clear who they should speak to if they have concerns?
- Are the Policies and Procedures visible?

# Practical Tips – creating a safe environment to speak up

- Have those responsible for the policies and procedures been adequately trained?
- Who is investigating the concerns? Are they the right person?
- Timescales.
- Communication, Communication, Communication.
- Confidentiality.
- GDPR.

# Questions and answers

**Thank you**

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