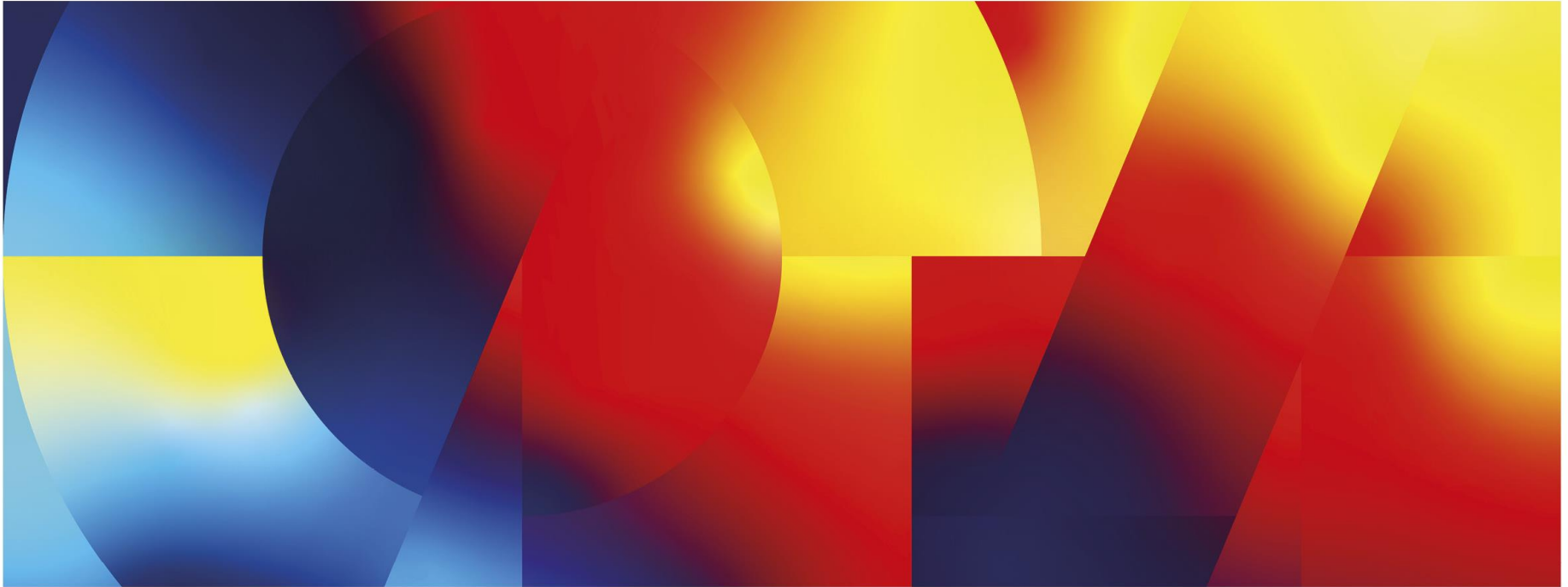


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Hollie Ball and Claire Turner

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hadaway

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?

- The ACAS code defines grievances as “...concerns, problems or complaints that employees raise with their employers.”
- Limited to employees and not ex-employees or job applicants (but check your policies and consider dealing with it where discrimination is alleged.
- Can include allegations of discrimination



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.

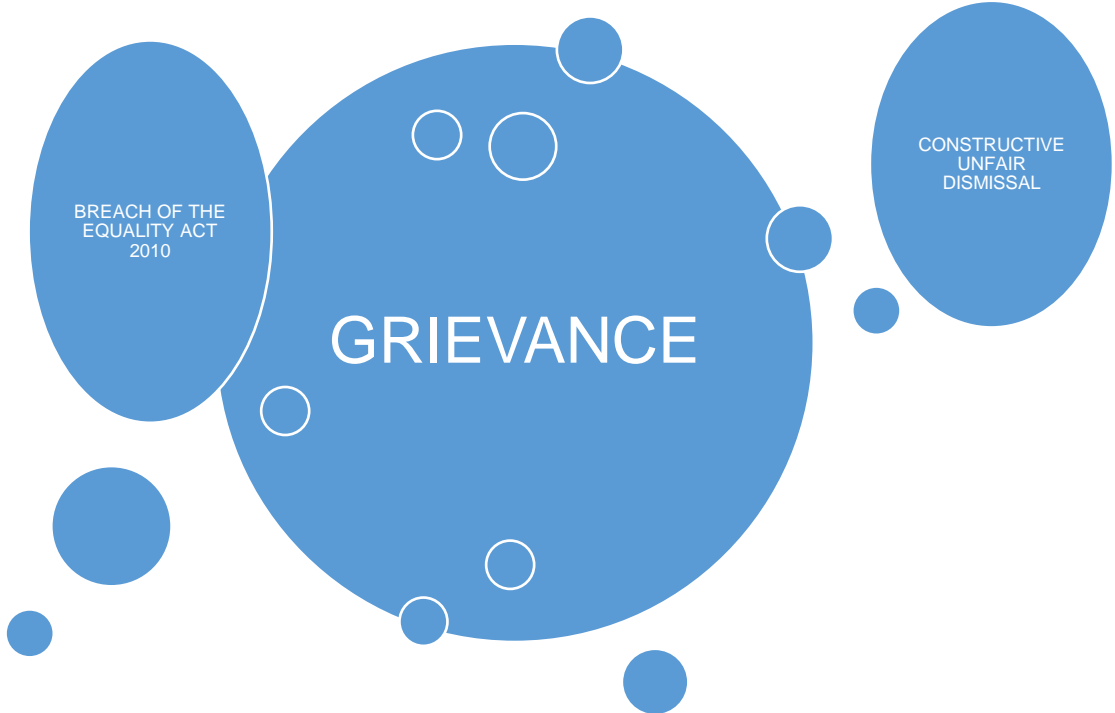
- The Claimant appealed to the Employment Appeal Tribunal (EAT)
- The EAT reaffirmed the test for a 'protected disclosure', Williams v Michelle Brown AM (2019):
 - There must be a disclosure of information.
 - The worker must believe that the disclosure is in the public interest.
 - That belief must 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

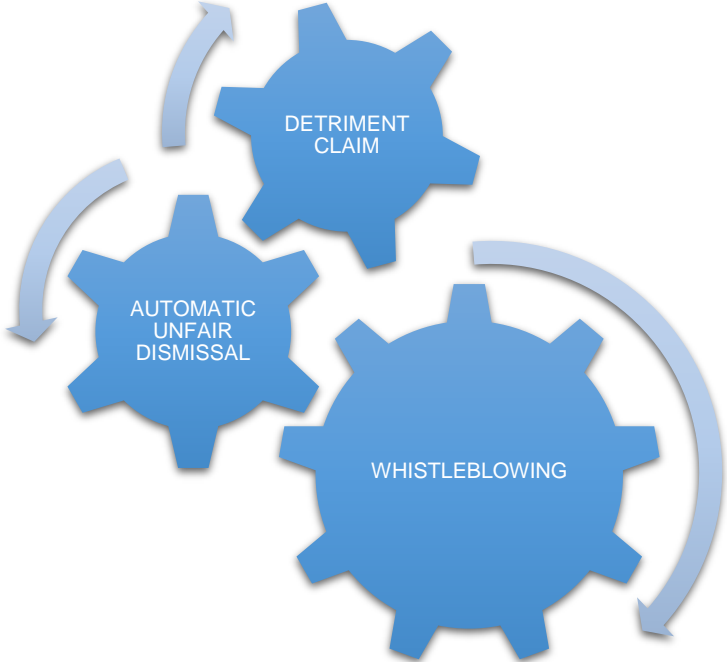
Policies and Procedures – the differences/similarities....

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

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.

- **Marriott v Scarborough Borough Council ET/1800295/2016**
 - Employee subjected to detriment when his confidentiality as a whistleblower was not respected (in accordance with the whistleblowing policy)
 - Another member of staff involved in the investigation had alerted another member of staff to the fact that “trouble was being caused by Mr Marriott.

- **Jesudason v Alder Hey Children’s NHS Foundation Trust [2020] EWCA Civ 73**
 - Consultant paediatric surgeon made protected disclosures to a number of parties including the media about malpractice.
 - Responding to the media the NHS Trust stated that it had falsely stated the complaints were completely without foundation – impacting reputation.
 - Failed to acknowledge the independent report which made recommendations for improvements
 - Held – detriment not on grounds of protected disclosure. Employer motivated by intention to minimise harm from adverse and misleading information in the public domain.

Whistleblowing – detriment examples

- Failure to promote or demotion
- Denial of training
- Closer monitoring
- Blocking access to resources
- Suspension
- Disciplinary sanction
- Bullying or harassment or victimisation
- Ostracism
- Failure to investigate a subsequent concern

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 – dealing with grievances and whistleblowing

- Policies and Procedures and visibility
- Culture – creating a safe environment to raise concerns
- Contact – are employees aware who they should go to?
- Management agenda – concerns raised being treated seriously?
- Training – for those handling grievances and whistleblowing
- Investigation
- Timescales
- Communication
- Confidentiality – breach?
- GDPR
- Settlement agreement – carve out

Questions and answers

Thank you

 Ward Hadaway  @WardHadaway
wardhadaway.com