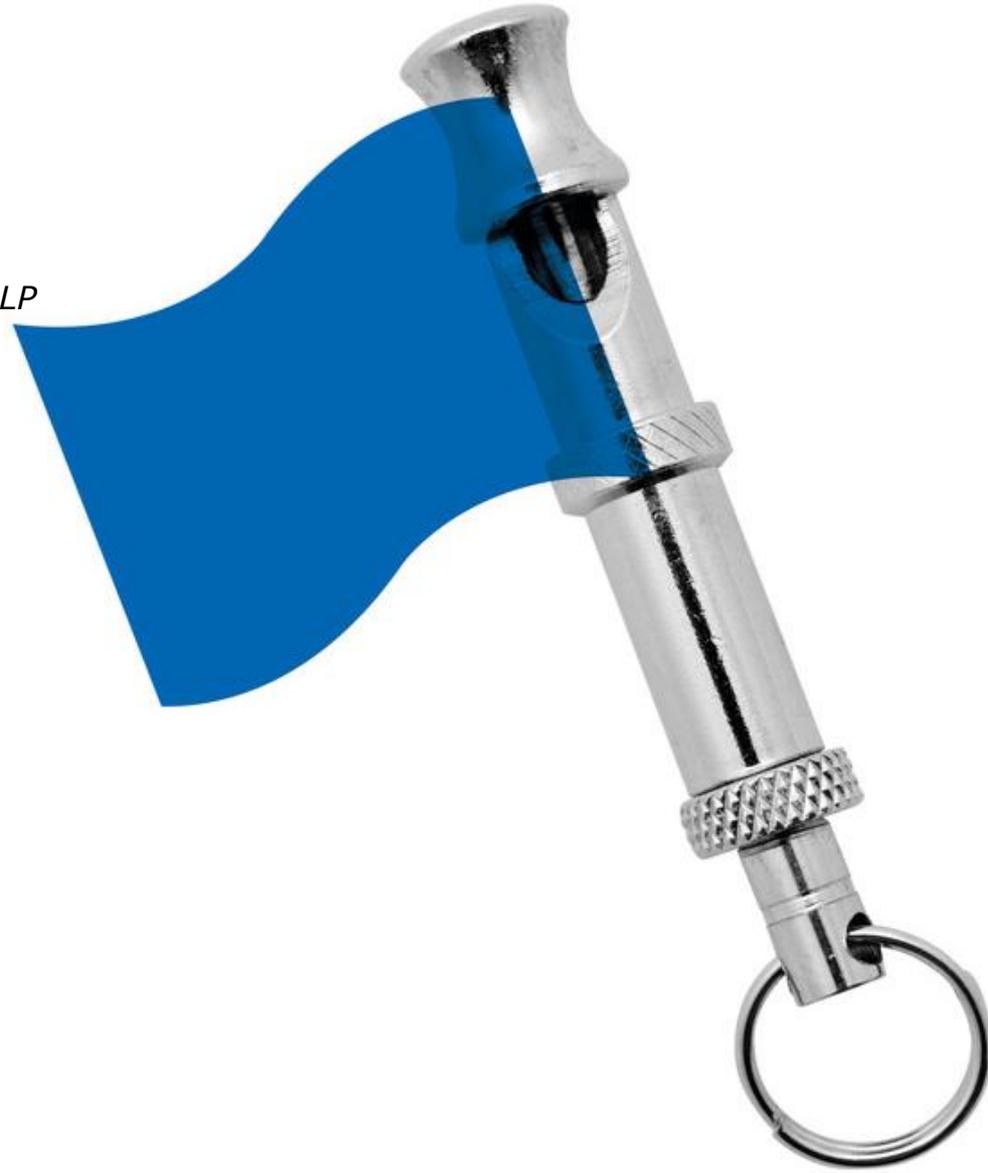


Whistleblowing: Legal and Regulatory Framework

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Legal framework

Background

PIDA 1998

- Protection for workers if they have made a **protected** disclosure
- Employees protected from **dismissal** if protected disclosure is reason or principal reason for dismissal
- Workers protected from being subjected to **detriment** on ground of having made protected disclosure
- No cap on compensation or qualifying service requirement



Public Interest Disclosure Act 1998

1998 CHAPTER 23

An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.
[2nd July 1998]

Who is protected?

YES

Employees,
contractors, agency
staff, home workers,
police officers, NHS
practitioners, LLP
members

NO

Job applicants,
volunteers, interns,
self-employed,
intelligence services,
armed forces and
more...

Recent changes

Enterprise and Regulatory Reform Act 2013

For qualifying disclosures made on or after 25/6/13:

- disclosure not protected unless worker reasonably believes made “**in the public interest**”
- no need for disclosure to be made in **good faith**, but lack of good faith can lead to compensation reduction of up to 25%

From 25/6/13 employers can be **vicariously liable** for whistleblowing victimisation by workers/agents, as well as workers/agents being found personally liable

Qualifying disclosures

If made on or after 25 June 2013...

Any **disclosure of information** which...

in **reasonable belief** of worker making the disclosure..

is made in the **public interest**...

and tends to show one or more of the following...

Qualifying disclosures

Criminal
offence

Failure to
comply with
legal obligation

Miscarriage of
justice

Endangering
someone's
health and
safety

Damage to
environment

Covering up
wrongdoing in
any of these
categories

In the public interest?

Chesterton Global v Nurmohamed, EAT, 2015

- N dismissed as Director of Mayfair branch of estate agents
- Alleged he had made 3 protected disclosures (2 to his Area Director; 1 to HR Director) stating:
 - employer deliberately mis-stating £2-3m costs and liabilities in its accounts;
 - affected commission of 100 senior managers, including himself
- Did these disclosures qualify for PIDA protection, or were they purely of a personal nature?



In the public interest?

Chesterton Global v Nurmohamed, EAT, 2015

- EAT – Agreed with ET’s conclusion that it was N’s reasonable belief that his disclosures were in interest of other 100 managers and this was sufficient group to amount to being a matter in the public interest
- Test is not whether disclosure is of real interest to the public, but:
 - worker must genuinely (subjectively) believe disclosure is in the public interest, and
 - must be objectively reasonable, judged from worker’s perspective, to hold that belief
 - a relatively small group can be sufficient to satisfy “public interest” test
- Appeal due to be heard by Court of Appeal in October 2016

Protected disclosures

A qualifying disclosure becomes **protected** when it meets prescribed conditions

- Disclosure to employer/responsible persons/legal advisers
- Disclosure to “prescribed persons” (i.e. regulators/MPs)
- Wider disclosures, e.g. to media

PCAW research based on tribunal judgments 2011-13

- 91% whistleblowers first raised their concern with employer (line or senior manager)
- just 2% first raised concern with regulator

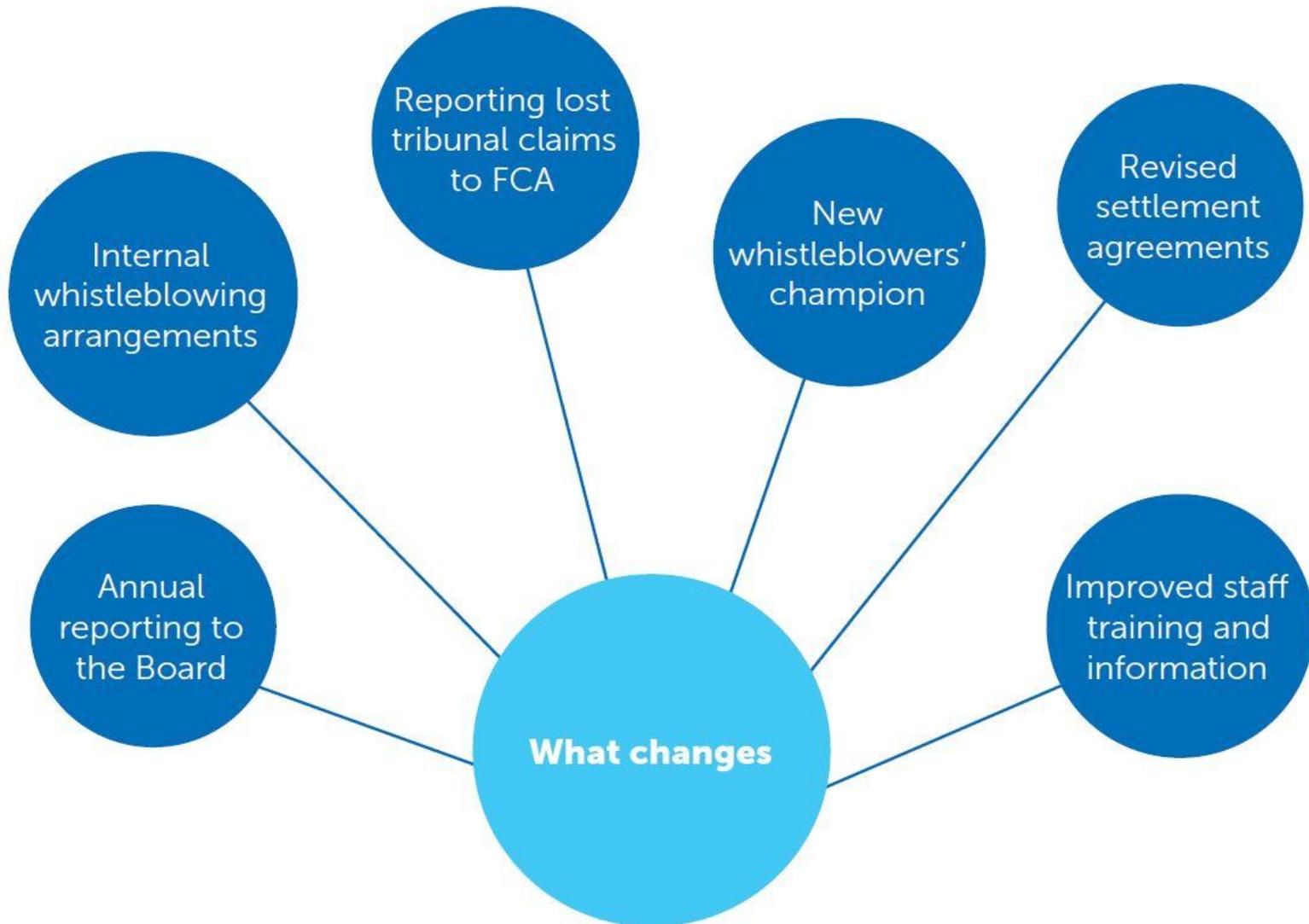
Regulatory framework

Background

Policy Statement PS15/24

- 2013 Parliamentary Commission on Banking Standards recommended that banks:
 - put in place mechanisms to allow employees to raise concerns internally
 - appoint senior person to take responsibility for effectiveness of whistleblowing arrangements
- February 2015 PRA/FCA issued consultation paper (CP15/04)
- October 2015 PRA/FCA issued policy statement (PS15/24) with final rules
- Effective from 7 September 2016 (although whistleblowers' champion must be in place by 7 March 2016)

Whistleblowing and PS15/24



Scope of the rules

Who is affected?

- UK deposit-takers with assets of £250m+ including banks, building societies, credit unions
- PRA-designated investment firms
- Insurance and reinsurance firms within the scope of Solvency II and the Society of Lloyd's and managing agents

Who is not affected?

- UK deposit-takers with assets of less than £250m
- UK branches of overseas banks
- Other FCA-regulated firms such as stockbrokers, mortgage brokers, insurance brokers, investment firms and consumer credit firms

Whistleblowers' Champion

Who should WC be?

- Senior Manager or Director subject to SMR/SIMR
- Expectation that WC will be non-executive director, although no requirement to appoint one if none exists
- Should have level of authority and independence and access to information and resources (including independent legal advice & training)
- May be based overseas provided can perform function effectively

What are WC's responsibilities?

- Oversight of firm's transition to new whistleblowing arrangements
- Responsible for ensuring/overseeing integrity, independence and effectiveness of policies & procedures on whistleblowing (including policies/procedures to protect whistleblowers)
- Oversight of preparation of annual report
- Need not have day-to-day operational role handling disclosures

Internal Arrangements

Firms must establish, implement & maintain appropriate and effective arrangements for disclosure of “reportable concerns” by “whistleblowers”:

- Allow for disclosure through range of methods
- Ability to handle anonymous whistleblowers and whistleblowers requesting confidentiality
- Effective assessment and escalation including to FCA/PRA
- Ensure that whistleblowers are not victimised
- Provision of feedback (where feasible)
- Record keeping
- Procedures kept up to date and made accessible
- Provision of training

Definitions

Reportable Concerns

"A concern held by any person in relation to the activities of a firm, including:

- (a) anything that would be the subject matter of a protected disclosure, including breaches of the rules*
- (b) a breach of the firm's policies and procedures*
- (c) behaviour that harms or is likely to harm the reputation or financial well-being of the firm"*

Whistleblower

"Any person that has disclosed, or intends to disclose, a reportable concern:

- (a) to a firm*
- (b) to the FCA/PRA*
- (c) in accordance with Part 4A (Protected Disclosures) of the Employment Rights Act 1996"*

Reporting

Firms must:

- prepare annual report to the board on operation and effectiveness of whistleblowing systems and controls
 - must maintain confidentiality of whistleblowers
 - must be made available to FCA/PRA on request
 - no requirement to make report public
- promptly report to FCA if firm loses whistleblowing case
 - disincentive to contest whistleblowing claims?
 - leverage for claimants?
- communicate to all UK-based employees that they can make disclosures to PRA/FCA and the methods for doing so

Training

Firms should provide training to:

–UK-based employees on:

- fact the firm takes disclosures of reportable concerns seriously
- means of reporting reportable concerns
- examples of events that might prompt reporting & actions firms may take after receiving reportable concern
- sources of external support

–Managers of UK-based employees on how to:

- recognise disclosures of reportable concerns
- protect whistleblowers and preserve confidentiality
- provide feedback
- treat those accused of wrongdoing fairly

–Employees responsible for arrangements on how to:

- protect whistleblowers' confidentiality
- assess significance of information disclosed
- assist WC when requested

Other points

- Outsourcing of arrangements to third parties
- Appointed representatives and tied agents
- Fitness and propriety

“The FCA would regard as a serious matter any evidence that a firm had acted to the detriment of a whistleblower. Such evidence could call into question the fitness and propriety of the firm or relevant members of staff ...”

– Settlement agreements

- must include wording that the agreement does not prevent worker from making protected disclosure
- firms must not include warranties requiring workers to disclose that they have made protected disclosure or that they know of no information which could form the basis of a protected disclosure

Wording for settlement agreements

"For the avoidance of doubt, nothing precludes [name of worker] from making a "protected disclosure" within the meaning of Part 4A (Protected Disclosures) of the Employment Rights Act 1996. This includes protected disclosures made about matters previously disclosed to another recipient"

Whistleblowing Policy

What to include in your whistleblowing policy?

- Government guidance for employers sets out tips on policy content and how disclosures should be dealt with
- Whistleblowing Commission Code of Practice

WHISTLEBLOWING

Guidance for Employers and
Code of Practice

MARCH 2015

What to include in your whistleblowing policy?

- Firm takes making of reportable concerns seriously
- Firm encourages workers to “speak up” and evidence/proof is not required for them to do so
- Explanation of what whistleblowing is and what is a protected disclosure/reportable concern with examples
- Role of Whistleblowing Champion
- Set out list of persons/bodies with whom workers can raise concerns, e.g.
 - line manager
 - more senior managers
 - internal audit?
 - the Whistleblowing Champion?
 - whistleblowing hotline?
 - the PRA/FCA (or other regulators)
- Worker’s identity will be kept confidential if he/she requests (so far as practicable/unless required by law)
- On making disclosure, worker will be told how matter will be dealt with and anticipated timescales
- Where appropriate, employee will receive feedback and be informed of outcome
- Victimisation of whistleblowers will not be tolerated and that anyone victimising a whistleblower will face disciplinary action
- Whistleblowers should make report if they believe they are being victimised
- How disclosures made anonymously will be dealt with
- Workers making malicious allegations may be subject to disciplinary action
- Information about external sources of support (e.g. Public Concern At Work helpline)
- Scope/application of policy and that it is not contractual
- When other policies should be used (e.g. grievance procedure or anti-bullying/harassment policy)

Any Questions?



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