

COVID-19 and whistleblowing – A double whammy for a positive speak up, listen up culture?

Over the past few years many UK businesses have invested time and money in creating a culture which encourages individuals to speak up and responds positively to their concerns. This is a requirement for some regulated and publicly listed businesses, whilst for others there has been increasing recognition that good governance is both a top down and bottom up phenomenon and that a speak up, listen up culture should be encouraged. COVID-19 presents challenges for this business culture, and in this piece we examine two specific aspects of this – the impact of remote working, and the likely rise of both health and safety concerns and ‘tactical’ complaints.

Why is a speak up, listen up culture business critical?

Studies have shown that a strong speak up, listen up culture actively contributes to a healthier and more responsive business, and ultimately can ensure that business critical issues are escalated and dealt with. In the current environment, promulgating this culture at the grass roots level is more important than ever. Increased remote working makes wrongdoing less visible and detectable, and is likely to result in misconduct occurring in new and novel ways. In addition, at a time when health and safety is paramount, listening to employees’ concerns gives employers an opportunity to make changes that benefit the entire workforce.

Conversely, there can be severe penalties for businesses that suppress whistleblowing. Failure to detect underlying issues within the business can give rise to huge liabilities both reputationally and financially. Such issues may remain hidden until it is too late to avert a business crisis if whistleblowing is suppressed. In addition, whistleblowers have extensive legal protection from detrimental treatment or dismissal on the basis of their whistleblowing, including uncapped

Key considerations

- Remind employees of the whistleblowing policy and encourage them to “stay alert” where they are working remotely.
- Ensure the Board is seen to lead a positive speak up, listen up culture in the current environment.
- Encourage managers to create a psychologically safe environment for employees where they feel they can challenge decisions, raise concerns, and admit to mistakes without being punished.
- React promptly to investigate any concerns raised by employees in accordance with any whistleblowing policy, adhering to the principles of the speak up, listen up culture.
- Avoid unreasonable or tactical complaints by consulting with employees about any changes, and ensuring the reasons for any potentially detrimental treatment or any dismissals are robust and justified by the facts.

compensation. In unfair dismissal cases, a former employee can make an application for 'interim relief' which, where successful, forces the employer to continue to pay the individual (on full pay and benefits) pending final determination of their claim. Where an individual alleges they have been subjected to detriment, they can bring claims against named individuals in addition to claims against their employer. This significantly raises the stakes for senior managers, who can find themselves personally liable for retaliatory treatment against a whistleblower.

Any litigation ultimately plays out in the public domain and may include an examination of the business practices which gave rise to the whistleblowing in the first place. Employers that implement unsafe or illegal practices, and then punish those who speak out, are likely to be heavily criticised internally, in the press and on social media. Those in the regulated sector may also face regulatory scrutiny and even sanctions.

Can a speak-up, listen up culture thrive remotely?

It seems likely that many employees will continue to work from home if not full-time, at least for part of the time, for the foreseeable future. This poses particular challenges in terms of promoting and preserving a speak up, listen up culture. In particular, the primary means of ensuring speaking up occurs, the employee/manager relationship, is facing unprecedented strain due to the reduction of spontaneous interaction and the lack of emotional connectivity.

Whilst the fact that employees do not have to interact with their colleagues face-to-face may embolden some to raise concerns about the actions of others, the lack of connectivity means it is more likely that employees feel awkward raising concerns remotely. In addition, it is likely some individuals will be feeling vulnerable and have concerns about their job security, so they may wish to avoid any risk of being considered a 'troublemaker'.

All of this means that it is crucial for employers to encourage their employees to "stay alert" where they are working remotely. Internal messaging around whistleblowing is incredibly important, to bolster the idea that employees will not be penalised for raising concerns, and that in fact this is welcomed.

Practical steps to foster a remote speak up, listen up culture

Direction from the top

A speak up, listen up culture should be a Board issue. The Board should ensure it is seen to lead this culture in the current environment and ask for frequent reports of any whistleblowing complaints. The Board may also consider appointing one of their members as a whistleblowers' champion (a requirement for some regulated businesses), to ensure the integrity, independence and effectiveness of the business response to whistleblowers.

An environment of psychological safety

Soft skills training should be used to increase managers' ability to create a psychologically safe environment for employees. This should equip managers to instil confidence in employees that they can challenge decisions, raise concerns, and admit to mistakes without being punished. Managers should aim to have a virtual "open door" and recognise that they may need to make more deliberate efforts to maintain communication than they would have in the office. This could include creating time and space for discussions which are not directly related to work, and facilitating and encouraging conversations between team members who may not have direct day to day interactions. This also encourages innovation and improves employee well-being, so can have a broader positive impact on the business overall.

Identification and escalation

The whistleblowing policy should be readily accessible to employees, and businesses should consider communications to remind employees of it in the remote environment. Consider also introducing an anonymous online reporting tool or telephone hotline, if such mechanisms are not in place already (which may be a regulatory requirement for some businesses). Managers may also benefit from training on policies to enable them to confidently respond to concerns employees raise with them directly. They need to be able to recognise a whistleblowing complaint and understand that any concerns (whether raised verbally or in writing) need to be treated seriously and passed on to HR or the company's whistleblowing officer.

Responsiveness

Having a speak up culture is ineffective, and ultimately undermined, if there is no corresponding listen up response. The reaction of an organisation when an employee does speak up is key to determining whether that employee, and their colleagues, will feel safe to do so again. It is therefore crucial that any concerns raised by an employee are acknowledged, that the basis for them is fully understood, and that the individual feels protected, valued, and listened to.

Prompt and thorough investigation

The business should react promptly to investigate any concerns in accordance with its whistleblowing policy. Remote investigations pose their own challenges, as it is more difficult to engage and reassure the participants. The guidance provided to investigators should be reviewed and adapted with this in mind. Download our publication on [key considerations for conducting remote investigations](#).

Communication of outcomes

Once a whistleblowing complaint has been investigated, employers should consider whether it is appropriate to share the investigation findings with the whistleblower, and make them aware of any recommendations that will be implemented. This is best practice where possible, but it may be inappropriate to share some or all of the outcomes in certain circumstances, such as where there have been disciplinary proceedings against another member of staff. In a remote environment, clear communication and setting expectations in relation to this is even more important.

Navigating an increase in complaints

We are already starting to see a significant increase in whistleblowing complaints. The whistleblowing charity Protect has reported that within a few weeks of the introduction of the government's furlough scheme, they received an increase in calls from individuals who were concerned their employer was fraudulently abusing the scheme. In addition, as employees start to return to work, there will inevitably be a heightened consciousness of health and safety amongst the workforce. This alone is likely to cause a rise in whistleblowing complaints about the adequacy of the health and safety measures employers have implemented.

Many complaints about health and safety may be fuelled by employees' anxiety, and may relate to matters that are outside of the employer's control, or that managers may consider unreasonable. This is likely to test managers' acceptance that whistleblowing complaints are a positive part of the business' culture.

In addition, as employers make difficult decisions in relation to cost reduction, restructuring and redundancies, we are likely to see a rise in 'tactical' whistleblowing. This is where an employee raises concerns with the intention of claiming whistleblower protection in an Employment Tribunal and alleging that any subsequent dismissal or detriment (which can include a demotion or reduction of pay or hours) is linked to that whistleblowing.

Dealing with unreasonable or tactical claims

The legal protection under employment legislation for whistleblowers is broad. The content of the individual's concern does not have to be proven to be factual, and the concern does not have to be raised in good faith. There is simply a requirement that the individual had a reasonable belief that the matter was in the public interest. As a result, the Employment Tribunal tends to focus on the issue of causation when deciding whistleblowing cases, meaning whether the employee's complaint was actually the reason for, or had a material influence on, their subsequent treatment.

With this in mind, the first step employers can take in relation to such unreasonable or tactical complaints is preventative; ensuring that the reasons for any potentially detrimental treatment or any dismissals are robust and justified by the facts. This limits the Employment Tribunal's ability to fill a vacuum with alternative motivations based on the alleged whistleblowing.

At the same time, employers should anticipate issues that employees are likely to be anxious about and address these directly and openly to avoid employees feeling the need to 'blow the whistle'. Businesses should aim to be as open and transparent with employees as possible, and consult with them about any measures or changes where appropriate, especially in relation to any health and safety measures or proposed redundancies or restructurings. Businesses should consider setting out how employees can raise questions informally, and then aim to respond to these promptly and thoroughly. Where employees feel they have been treated with respect and kept in the loop, they are less likely to feel insecure and/or try to protect their position through tactical complaints.

Where complaints do arise, it is crucial that they are all handled in accordance with the company's whistleblowing procedures, and that the principles of the speak up, listen up culture are adhered to. There is a danger that management and HR will fail to proactively engage with a complaint where they are dubious about the content or have suspicions about the whistleblower's motives. This will not only damage the company's position if the matter becomes litigious, but could also undermine the organisation's attempts to foster a psychologically safe environment. In regulated sectors, such scepticism could also prove damaging to relationships with the company's regulators.

Finally, consider the evidence trail. A clear contemporaneous paper-trail of the reasonable justifications for an employee's treatment will assist with evidencing the causation and motivation behind such decisions, and this should be encouraged. However, whistleblowing investigations, particularly when conducted remotely, are likely to generate a large volume of emails and written messages, all of which may ultimately need to be provided to the employee either through a Data Subject Access Request or the disclosure process during an Employment Tribunal claim. All the individuals involved in such an investigation should be reminded of this fact, and informed that all forms of instant messaging (including WhatsApp) will be caught. The application of legal privilege should also be considered carefully.

Speak up, listen up in the "new normal"

The pandemic has inevitably presented new challenges and tested us as individuals and the systems that our businesses have in place. This is undeniably a difficult time for a healthy speak up listen up culture to be maintained. It requires particular attention and effort across the business.

In assisting your business to rebound and remodel during this crisis, the importance of creating an environment where staff members feel listened to should not be underestimated. Each organisation will have its own procedures and approaches to whistleblowing – we would be interested to hear from you. Please do contact us if you would be interested in sharing the approach your organisation is taking to whistleblowing during the pandemic.



Catherine Taylor
Partner, Employment
T +44 20 7067 3588
E catherine.taylor@cms-cmno.com



Molly Grace
Associate, Employment
T +44 20 7367 3335
E molly.grace@cms-cmno.com