

January 2019

Protect's response to the Law Commission's consultation Employment Law Hearing Structures

This short consultation response from the whistleblowing charity Protect (formerly Public Concern at Work) will answer questions Question 2, 21, 22, and 42 as they relate to the impact on whistleblowers.

Background

1. By way of background Protect is the UK leading authority on whistleblowing, we run a free confidential advice line for workers who have witnessed wrongdoing, malpractice or a health and safety risk but are unsure how to raise their concerns. The Advice Line takes 2500 cases a year and these experiences have informed the way we approach lobbying and campaigning for better legal protection for whistleblowers.
2. We were instrumental in campaigning for and the drafting of the legal protection for whistleblowers the Public Interest Disclosure Act 1998 (PIDA) which sets a framework of employment rights for whistleblowers within the larger Employment Rights Act 1998.

Time limits

'Question 2. Should there be any extension of the primary time limit for making a complaint to employment tribunals, either generally or in specific types of case? If so, should the amended time limit be six months or some other period?'

3. We agree that the current time limit of three months for employment tribunal claims is far too short. We also agree with the Commission's overall point that delays in hearing dates combined with the increased complexity of employment law means the Employment Tribunal is no longer the speedy informal tribunal system that justifies such short time limits.
4. A large proportion of whistleblowers lack legal representation, our research has shown that 41% of claimants were litigants in person.¹ As a result claimants are often at a significant disadvantage with such a short time limit as the lack of legal representation has a real impact with 53% of claimants with legal advice losing their case while 68% lose as litigants in person.² Combined with such low awareness when it comes to knowledge of their legal rights as whistleblowers (63% of UK workers either are unaware there is a law protecting whistleblowers or incorrectly believe there is no legal protection) shows that whistleblowers are often at a real disadvantage.³
5. We have noticed that in the report's discussion and proposals around increasing time limits the 7 day time limit on interim relief (a sort of reinstatement order) has been forgotten. As background this is a power for the tribunal to award reinstatement, but the claimant needs to put their claim in within 7 days of dismissal. This is a very stressful process, doubly so without the assistance of a lawyer. A combination of both the incredibly short timeframe and the lack of legal advice means this is a rarely utilised remedy. Our suggestion is that this

¹ P.g.26 *Whistleblowing: Time for a Change*, 5 year Review, Protect Review, 2016.

² Ibid

³ Protect and YouGov survey 2011-2018: <https://www.protect-advice.org.uk/attitudes-to-whistleblowing/>

time limit is also extended to one month. This would balance the rights of the whistleblower to have a fair amount of time to get the claim in, and legal certainty for the employer.

6. The legal landscape on time limits is a complex one making this a legally technical area of the law. Given that the original ethos of the tribunal was for it to be an informal system compared to the civil court structure and given that many claimants are litigants in person, we ask that the extension of time limits be universally applied. With this in mind we think it is important to avoid a situation different time limits apply to different employment rights.

'Question 21. We provisionally propose that employment tribunals expressly be given jurisdiction to determine breach of contract claims relating to workers, where such jurisdiction is currently given to tribunals in respect of employees by the Extension or Jurisdiction Order. Do consultees agree?'

7. We agree with this proposal as it will make the process of bringing a claim more straight forward; rather than a litigant in person trying to navigate which forum is best to bring their claim there will be a single destination.

'Question 22. If employment tribunals' jurisdiction to determine breach of contract claims relating to employees is extended in any of the ways we have canvassed in consultation questions 10 to 20, should tribunals also have such jurisdiction in relation to workers?'

8. We believe any changes proposed to the Employment Tribunal structure that affect whistleblowers should apply to both employees and workers as the protection offered by PIDA applies to both groups.

Question 42. Should the £65,300 cap applying to employment tribunal claims brought under the Blacklists Regulations be increased so that it is the same as the cap on compensatory awards for ordinary unfair dismissal claims, as amended from time to time? Are consultees aware of any cases affected by the £65,300 cap on compensation which have had to be brought in the civil courts?'

9. We believe there is a strong case for the cap to be removed entirely so that the compensation for the blacklisting mirrors the way PIDA operates, and so there is continuity between the two. This is important as PIDA reflects the fact that some whistleblowers do not work again, and there is an obvious parallel with the blacklisting regulations. In the construction industry for 16 years a blacklist operated in the sector denying many workers from working in the industry (either because they were active trade unionists or had raised health and safety concerns).⁴ There are many instances where those on the list either struggled to find work or where left permanently unemployed.⁵
10. There is also a public interest link between the blacklisting regulations and whistleblowing in that many of the blacklisted construction workers were excluded because they were raising concerns about issues in their workplace. Whether that was as committed trade unionists or because there was some health risk to members of public or fellow workers the public interest aims in the creation of legal rights for blacklisted workers and whistleblowers are clear.

The case for a whistleblowing tribunal

This section puts forward an important issue that is outside the questions asked in the consultation.

11. The experience of whistleblowers going through the employment tribunal is often difficult. PIDA claims are unique in employment law as the tribunal will deal with the employment

⁴ 'On the blacklist: how did the UK's top building firms get secret information on their workers?', the Guardian, 27th February 2015, by Dave Smith and Phil Chamberlain, <https://www.theguardian.com/uk-news/2015/feb/27/on-the-blacklist-building-firms-secret-information-on-workers>

⁵ Construction workers win payouts for 'blacklisting', BBC Website, 9th May 2015, <https://www.bbc.co.uk/news/business-36242312>

relationship but will have little interaction with the wrongdoing, malpractice or safety risk witnessed by the whistleblower. Whistleblowers can feel frustrated that the public interest element of their case is not addressed by the tribunal, which is not part of their expertise.

12. There is often a risk that the tribunal process may prevent or delay public interest concerns being raised. On one level this may come about because the stress and strain of navigating the tribunal process means that escalating the public interest issue gets lost along the way. Legal representation could assist in alleviating this pressure, freeing the whistleblower to raise the concern themselves, or doing it on their behalf. As we have highlighted the majority of whistleblowers in tribunal lack legal representation, the onus will be on the whistleblower to escalate their concern.
13. Another issue is the closed nature of the employment tribunal as compared to normal rules of open justice operated in the civil courts. Only in the event that a tribunal judgement is delivered will there be a public record that can be accessed, there is no way of examining the claimant's tribunal form (ET1), the respondents defence against the claim (ET3) or any other relevant court documents. This is a real problem for whistleblowing claims in that there is a risk that unraised or unresolved public interest concerns may be lurking in the claims themselves, with no one able to examine this information. The scale of the problem can be seen from Government statics from 2018. The latest figures show 57% of PIDA claims are either withdrawn or settled meaning there is no public record of the concerns raised.⁶
14. The tribunal has only a limited referral process where a whistleblower taking a claim through the tribunal can indicate on the ET1 form that they are happy for their ET1 to be forwarded to a regulatory body. The thinking here is that even in the claim process unresolved concerns could still be escalated to a regulator. But this process requires the claimant to be aware of this in the form, and requires the whistleblower to push the issue for the concerns to be sent to a regulator. A public awareness campaign on this referral box, separately or as part of the Government commitment to raise awareness around discrimination law should be considered.⁷
15. One alternative solution could be to create either a legal fund for whistleblowers or to extend legal aid to include whistleblowing claims, this would alleviate the pressure on whistleblowers. Increased legal representation will not necessarily overcome the closed nature of the employment tribunal, or the limited referrals powers the tribunal has.
16. Given PIDA's unique policy aims there is a compelling case for the creation of an independent whistleblowing or public interest tribunal. An independent tribunal system would be able to:
 - Make recommendations for organisations on how they should improve their whistleblowing policies and arrangements
 - Make direct referrals to regulators or other authorities
 - Have specialist tribunal judges

⁶ [Tribunals and gender recognition certificate statistics quarterly: July to September 2018](#)

⁷ [Protect Briefing note on the Department of Business Innovation and Skills consultation: Employment tribunal claims and the Public Interest Disclosure Act \(PIDA\)](#)