

April 2019

## Protect Briefing: EU Directive on Whistleblowing

On the 16 April 2019 the EU Parliament passed a new, ground-breaking, EU Directive on whistleblowing. This briefing is Protect's analysis of which parts of the Directive the UK Government need to adopt to ensure that our legal protection for whistleblowers does not slip behind the protection offered in Europe.

The legal protection for whistleblowers was introduced by the Public Interest Disclosure Act 1998 (PIDA), now incorporated into the Employment Rights Act 1996, and the following Directive reforms will further strengthen PIDA.

### Background to Protect

Protect legal charity, (formerly *Public Concern at Work*) is the UK's leading authority on whistleblowing. Our Advice Line handles 3,000 whistleblowing cases each year, and in our 25 years' history, we have supported over 40,000 cases, including through intervening in cases of public policy interest as they pass through the legal system. Protect also offers consultancy and support to employers to deliver best whistleblowing practice in the workplace. We use the experiences of the many whistleblowers we have supported to campaign for better legal protection for people who speak up about wrongdoing.

### Areas from the EU Directive the UK Government need to adopt

The existence of PIDA means there is no need for the Government to adopt the Directive in its entirety, but the following areas will strengthen the current legal framework to the benefit of all whistleblowers:

- a) **Broadening the whistleblowing protection to include more people including volunteers, Non-Executive Directors, self-employed contractors and job applicants.**  
Too many people in the workplace who may see wrongdoing are excluded from the protection of the law. Under the EU Directive a much broader range of people will be able to claim protections from detriment or dismissal if they raise concerns. To date PIDA has been expanded piecemeal to include junior doctors (following Chris Day's case) and job applicants in the NHS, and the police.<sup>1</sup> Another key missing group, as they are neither workers nor part of the whistleblowing disclosure, are third party groups such as family members: they often suffer from victimisation (especially if the family member works in the same organisation as the whistleblower). The EU Directive presents an opportunity to adopt a coherent and comprehensive list of those who should be protected.

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<sup>1</sup> [I was left to fight alone for NHS whistleblowing protection' the Guardian, Benedict Cooper, 2<sup>nd</sup> October 2018](#)

### The Claire Gilham Case

Claire Gilham was a District Judge at Warrington Country Court. She raised concerns about systemic failures of judicial administration, following which she experienced bullying and mistreatment for which it appeared she had no adequate legal defence against.

Gilham lost her case at the Court of Appeal on the basis that as an Office Holder (i.e. a judge) she was not a worker and therefore not protected under PIDA. The case will now be heard in the Supreme Court.

We intervened in the case arguing that it was crucial that those individuals at the heart of our justice system are encouraged to responsibly speak up about wrongdoing or malpractice in the knowledge that the law protects them if they suffer mistreatment as a result.

The Government needs to ensure that the widest number of working relationships are included in PIDA's protection to ensure that everyone with concerns about wrongdoing or malpractice feels protected enough to come forward with this information.

Crucially, the directive will also cover job applicants – addressing the difficulties faced when a whistleblower is “blacklisted” and labelled a trouble maker. They may be denied a job opportunity, e.g. at interview or reference stage, because they have raised whistleblowing concerns in a past job role but currently have no remedy.

Currently PIDA only extends this protection to NHS workers but if the Government implements this part of the Directive this will extend to workers in all sectors. If such protection had been in place in the construction industry, then many trade unionists and workers raising safety concerns could have challenged the blacklist maintained by the industry much sooner.<sup>2</sup>

- b) **A requirement on all organisations with more than 50 employees to introduce internal channels and procedures for whistleblowing**, including protecting their confidentiality and providing feedback. There is currently no obligation on organisations (outside of regulated sectors such as Financial Services or the NHS) to have any whistleblowing arrangements. This simple change would make it easier for workers across the UK to find a route to speak up and stop harm sooner, whatever sector they work in. This change would underpin the current philosophy behind PIDA that employers are best placed to deal with whistleblowing but too often too many employers do not have the correct infrastructure in place. The Directive offers a way of holding employers to account in this area, as well as enshrining key parts of recognised best practice that have been worked for decades.
- c) **New standards for regulators.** Regulators are vital to the whistleblowing system as they are, in most cases, the external route whistleblowers turn to when attempts to raise their concerns with their employer fails. Our experience through the Advice Line is that many whistleblowers are left frustrated by the inconsistency of approach by regulators to their concerns. The Directive represents a clear chance for the Government to put forward a sensible standard approach across the board. The Directive requires member states to have regulatory bodies who engage with whistleblowers in the industry, sector or profession they regulate. These standards should include how these regulators receive whistleblowing disclosures, maintain confidentiality, provide feedback and follow up on any disclosures made.
- d) **New provisions to protect whistleblowers from liability.** Whistleblowers do not only face victimisation in the workplace but sometimes legal threats outside the protection offered by

<sup>2</sup> 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-blacklistbuilding-firms-secret-information-on-workers>

### Greg Pytel and Ofgem Case

Greg Pytel was an economist for the energy regulator Ofgem. He raised concerns about the way Ofgem were overseeing the roll of the £10.9bn smart meter program. When these concerns were not addressed internally he was threatened with criminal prosecution under the Section 105 of the Utilities Act 2000 if he raised his concerns externally to Ofgem. This act was designed to safeguard commercially sensitive information damaging energy markets but is so restrictively drafted that it criminalised whistleblowing from staff within Ofgem. A breach carries a fine or jail term of 2 years. Pytel and another whistleblower were both threatened with prosecution.

Section 105 of the Utilities Act 2000 is not an isolated case, the Law Commission ([see Chapter 4 Protection of Official Data Report](#)) judges there are 100's of offences designed to protect both commercial and government information but there is no public interest defence or whistleblowing exceptions to the offence. This is an unexploded bomb sitting under whistleblowing that can be diffused if the Government enacts this section of the Directive.

Under the EU Directive, there will be a defence for whistleblowers for incurring civil liability of any kind, provided that they had reasonable grounds for whistleblowing. People will be able to blow the whistle without fear that their employer will pursue them for a legal action that sits outside of the workplace and therefore beyond the protection offered by PIDA.

PIDA through employment law. This can come in the form of breach of confidence, defamation, data protection or copyright law. These laws are often designed to protect commercial information or sensitive information for legitimate business reasons or the interests of the general public, but there is also a danger that such offences can be misused.

- e) **Introduction of legal aid for Whistleblowers.** Currently there is no legal aid for whistleblowers seeking to bring employment claims (except when discrimination matters are also engaged), and the Government should follow the Directive and extend legal aid to whistleblowing. Without legal aid there is an access to justice issue for whistleblowers where a large proportion of whistleblowers lack legal representation. Our research has shown that 41% of claimants were litigants in person.<sup>3</sup> As a result claimants are often at a significant disadvantage 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.<sup>4</sup> With the stress and strain of taking a claim under employment increased by worries over a lack of representation there is a danger that a lack of access to legal representation means a whistleblower is not in a position to able to escalate their concern to external bodies like the regulator, the media or an MP. This undermines the whole public policy purpose of PIDA which is to reassure whistleblowers so they feel they can raise their concerns. Therefore, legal aid for whistleblowers is a public interest issues rather than one based on individual rights.

### **Conclusion**

The Government has committed to build on workers' rights after the UK's exit from the EU<sup>5</sup> and to give Parliament a say on whether the UK should align with future EU employment law changes. If we remain in EU, the Directive must be implemented by May 2021. If we leave, the EU

<sup>3</sup> P.g.26 Whistleblowing: Time for a Change, 5 year Review, Protect Review, 2016.

<sup>4</sup> Ibid

<sup>5</sup> Protecting and Enhancing Worker Rights after the UK Withdrawal from the European Union – BEIS 6.3.19

Whistleblowing Directive may prove to be the first test as to whether the UK keeps up with the EU's levels of protection, or allows its workers to fall behind.

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