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Parliamentary Briefing for Rt Hon Norman Lamb MP's backbench debate to be held on 3 July 2019

That this House calls for a fundamental review of whistleblowing regulation to provide proper protection for a broader range of people.

Introduction

Protect (formerly Public Concern at Work) is the UK's leading whistleblowing charity, providing free confidential legal advice to around 3000 callers a year on how to raise concerns about workplace wrongdoing. We have 25 years' expertise on whistleblowing and were instrumental in the introduction of the Public Interest Disclosure Act ("PIDA") 1998 (now incorporated in the Employment Rights Act (ERA) 1996). We also work with employers to develop and benchmark best practice in whistleblowing policies and processes.

Our understanding of the difficulties faced by workers raising concerns, and our knowledge of the challenges facing businesses, lead us to support this call for a fundamental review of the law. PIDA is now 20 years old and needs to reflect the changing workplace. Piecemeal changes to the law have led to inconsistencies and loopholes, for instance NHS students and job applicants are now protected by PIDA while other industries have been left out of these reforms.

For many years, the UK has led the way in providing workplace protection for whistleblowers. However, new laws – for example in Ireland and Australia, together with the introduction of a new EU Whistleblowing Directive to be transposed across Europe by 2021 - mean there is a danger that workers' rights in the UK will fall behind.

What needs to change

Currently PIDA provides two basic protections for whistleblowers, making it unlawful for an employee or worker to suffer detriment on the grounds that they have made a "protected disclosure" (Section 47B ERA), and unlawful to dismiss an employee for the reason or principal reason that they have made a disclosure (Section 103A ERA). Unlawful dismissal rights apply from day one in employment: it is automatically unfair to dismiss for a whistleblowing reason. However, we know from callers to Protect's advice line, the law doesn't stop detriment happening - it can only provide a remedy in tribunal after the event. Too few employees and workers are aware of their whistleblowing rights, and the difficulties of bringing employment tribunal claims (particularly for those without legal advice) are well documented. Whistleblowers' protection could be improved by strengthening obligations on employers, as well as expanding the scope of the current law.

We would like to see the law reformed and strengthened in the following key areas:

a) Who is covered by protection
b) Standards for employers and regulators
c) Legal threats to whistleblowers and the need for a public interest defence
d) Non disclosure agreements

a) Key whistleblowers are excluded from PIDA

There is a wide definition of "worker" for whistleblowing under Section 43K of ERA. While this is broader than other definitions of workers in employment law, nevertheless this area of law is

complex and too many groups are excluded.

For example, **volunteers, trustees and non-executive directors** are excluded, yet they may be the first to know about wrongdoing in their charity or business. **Foster carers** have neither whistleblowing nor many other basic employment rights. Yet they should be able to raise concerns about wrongdoing with their local authority (who places children with them and pays them) without fear of victimisation (for example the removal of a child in their care). **Priests** and ministers of religion and **office holders and public appointees** are also excluded from protection.

Protect recently intervened in the case of junior doctor, Chris Day, and in the case of Gilham v Ministry of Justice on behalf of a district judge (see box below) – both of whom were told they were not covered by whistleblowing protection.

The law is being reformed piecemeal through court cases, rather than through Parliament, leaving the onus on individuals to pursue their claims, often at great personal cost.

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.

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 has now been heard at the Supreme Court (June 4-5) and we await the judgment.

Protect 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.

Protection from detriment and dismissal should also be extended to those mistaken for whistleblowers. Equality law prevents discrimination of those who are mistakenly perceived to have a protected characteristic, so protection should be extended to who are mistaken for whistleblower and suffer as a result. **Job applicants** (other than in the NHS) are similarly not protected and fear that raising a concern may affect their ability to secure future employment. If an employer declined to appoint a candidate on the basis that they had blown the whistle in previous employment, the candidate would not be able to bring a claim. This gap in the law can cause serious damage to an individual's career prospects, finances and mental health. Job applicants are however protected from less favourable treatment under the Equality Act or because of trade union membership.

Examples of best practice from around the world

In Ireland a wider group of people can claim whistleblowing protection including family members. In Serbia the broad scope of protection includes volunteers, the self-employed and those associated with the whistleblower (such as family members). The categories covered by the EU Whistleblowing Directive include job applicants (during the recruitment process), shareholders, non-executive directives, volunteers, trainees , contractors and suppliers.

b) Imposing standards on employers and regulators

PIDA is silent on the standards expected from employers which limits its effectiveness in preventing victimisation against whistleblowers. There is no obligation (outside of certain regulated sectors such as health and financial services) for employers to have a whistleblowing policy, much less that they should put in place effective arrangements to deal confidentially with concerns, train staff or prevent victimisation of those who raise concerns.

The new UK Corporate Governance Code rightly gives workforce concerns a high profile. Whistleblowing protection should not be seen simply in terms of workers' rights but as essential to good governance and to protect businesses from crime, fraud and other wrongdoing. Many good employers already understand the contribution of whistleblowers, but too many others have nothing in place. Protect would like to see employers placed under greater obligations to have effective whistleblowing arrangements in place and effective sanctions where they fail. Not only will this make it easier for whistleblowers to raise their concerns with their employers, but it may in turn reduce the burden on regulators.

When a whistleblower decides to take a matter to a "prescribed person" [1], there is no consistency in the regulators' approach. The new duty on prescribed persons to report annually is welcome, but this alone is not likely to drive up standards. Protect recently brought together 20 regulators and enforcement bodies in a roundtable as part of our "Better Regulators Campaign". We found a diversity in how different prescribed persons receive, manage and respond to whistleblowers and their concerns. Few regulators put in place guidance for the entities that they regulate and few see themselves as having a role in following up organisations who victimise whistleblowers.

Examples of best practice from around the world:
In the EU Whistleblowing Directive employers with 50 or more employees will be obliged to introduce internal channels and procedures for whistleblowing, including protecting the whistleblower's confidentiality and providing feedback. In Australia, there are new laws requiring private companies to have whistleblowing arrangements in place and imposing fines on companies where they are found to have breached their duties to protect whistleblowers from vicitimisation.

c) Legal threats to whistleblowers and a public interest defence

Protect advises callers on a number of laws that make it an offence to disclose certain information. Such laws contain no public interest defence exceptions for whistleblowing or PIDA protection if a disclosure is made.[2] As a result, there is a danger that such laws can be used in the workplace as a means of suppressing concerns, pursuing or threatening whistleblowers that they may face criminal

OFGEM whistleblower – Greg Pytel – has been told that he is unable to challenge the victimising behaviour of his employer in the Employment Tribunal after he raised public interest concerns about the implementation of smart meters. He is now having to take his case to the Court of Appeal, at his own expense.

Current legislation makes it a criminal offence (Section 105 of the Utilities Act 2000) to disclose information about the utilities sector by those working for the regulator. The offence is so widely drawn that it prevents a whistleblower from enforcing their legal rights, through the Public Interest Disclosure Act (PIDA), against victimisation or dismissal for raising concerns.

[1] https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2/whistleblowing-list-of-prescribed-people-and-bodies
[2] There are potentially hundreds of similar offences identified Annex C of the Law Commission's report *Protection of Official Data.*

charges. Protect would like to see the introduction in the UK of a public interest defence to whistleblowing.

> *Examples of best practice from around the world*
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> *The EU Whistleblowing Directive states that whistleblowers who follow appropriate routes to making disclosures should "not be considered to have breached any restriction on disclosures imposed by contract or by any legislative regulatory or administrative provision and [should not] incur liability of any kind in respect of such disclosure". This introduces 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 come after them for breach of confidence, defamation, data protection and copyright breaches among others. In Ireland the law offers whistleblowers immunity from civil liability.*

d) Non disclosure agreements (NDAs)

Recent media discussion and the reports on harassment and discrimination from the Women and Equalities Committee have revealed a lack of clarity about what issues may be disclosed under NDAs. Under Section 43J of the ERA, whistleblowing concerns cannot be gagged: the legislation allows individuals to raise public interest concerns outside the employment relationship where they would be protected under PIDA. However, there is a perception among whistleblowers that NDAs prevent them talking to anyone – including a prescribed person – about their concerns, which makes it easier for wrongdoing to be covered up.

There are many reasons why NDAs prevent whistleblowers speaking up:

- Low awareness among workers of their rights: a YouGov survey in 2018 found 63% of respondents were either unaware or believed there was no legal protection for whistleblowing.
- The unclear wording of Section 43J and the opaque wording in the settlement agreements.
- Lack of legal advice for whistleblowers – there is no legal aid available for employment law (except where discrimination claims are included).
- The difficulties of knowing whether their case engages the "public interest". To fall within the protection of PIDA, the individual raising a concern must have a reasonable belief that the employer is breaching a legal obligation and that the disclosure is in the public interest. The tests for the public interest look at the number of people affected, the identity of the wrongdoer, the nature of the interests affected and whether the wrongdoing is deliberate. With little case law on this area, individuals will be reluctant to risk their employer pursuing them through the courts if they speak up.

Protect supports the recommendations of the Women and Equalities Committee that the government consider changes to NDAs, in particular that they look at the interaction between the Equality Act and PIDA and consider whether the public interest test is effective. We also support the call to ensure that all settlement agreements contain clear, plain English explanations of their effect and their limits, for example in relation to whistleblowing.

Conclusion

A review of the 20 year-old PIDA welcome and necessary to ensure that UK remains the best place in the world to do business. Piecemeal reforms, often as a result of individuals bringing claims, have extended the scope of who is now protected but there remain gaps and inconsistencies. The Government recently committed to ensure that workers' rights keep pace with those in the EU, whatever the Brexit outcome. This an opportunity for a reiteration of the commitment to ensure worker protection does not fall behind.

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