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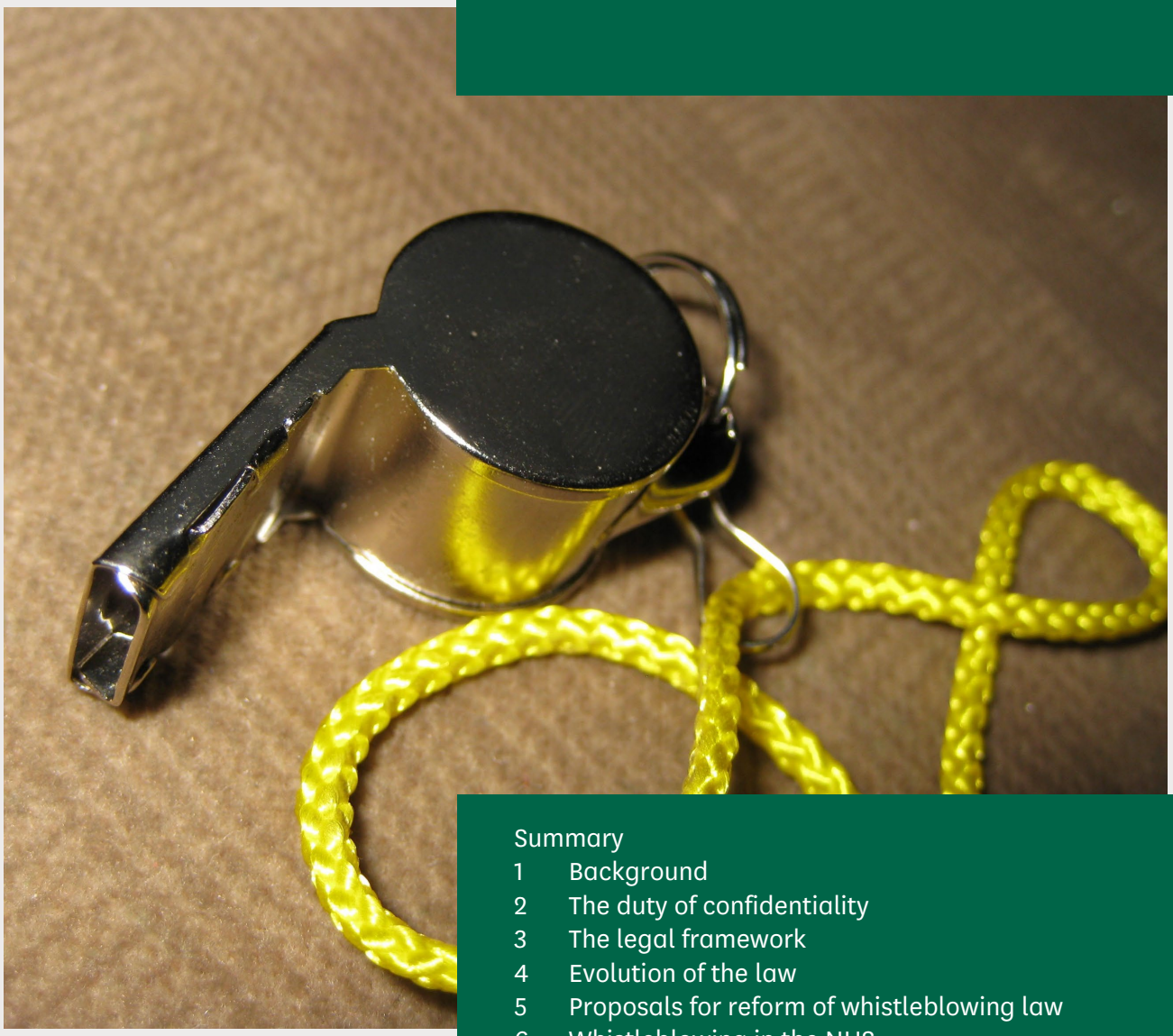
By Patrick Briône

Whistleblowing and gagging clauses



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The Public Interest Disclosure Act 1998 came into force on 2 July 1999. The Act protects workers who disclose information about malpractice at their workplace, or former workplace, provided certain conditions are met. The conditions concern the nature of the information disclosed and the person to whom it is disclosed. If these conditions are met, the Act protects the worker from suffering detriment or dismissal due to having made the disclosure. If the conditions are not met a disclosure may constitute a breach of the worker's duty of confidence to his employer.

Calls for reform

This legal framework has received some criticism in recent years for failing to protect some whistleblowers and there have been a number of calls for reform. Two Private Members' Bills in 2022 – one by Mary Robinson MP (Con) and the other by Baroness Kramer (LibDem) – proposed to entirely replace the current legal framework with a new one based around a new "Office of the Whistleblower", with both civil and criminal penalties for breaches. An unsuccessful amendment to the Economic Crime and Corporate Transparency Bill 2022-23, supported by the Labour Party, also proposed to create an office of the whistleblower. The Government has acknowledged that the law may be in need of reform and on 27 March 2023 launched a Review of the whistleblowing framework to assess evidence on the law's effectiveness and consider possibilities for reform.

Gagging clauses

"Gagging clauses" are clauses in employment contracts or settlement agreements which purport to prohibit workers from disclosing information about their current or former workplaces. A settlement agreement is a contract concluded at the end an employment relationship that seeks to prevent future disputes. Typically, it is accompanied by a payment to the worker. A gagging clause is unenforceable in so far as it purports to preclude a worker from making a protected disclosure.

Following a consultation in 2019 the Government has pledged to reform the law around settlement agreements to make sure workers felt confident in whistleblowing. These reforms are yet to be implemented.

1 Background

Current whistleblowing protections for employees are found in the Employment Rights Act 1996 (ERA), primarily Part IVA, inserted by the Public Interest Disclosure Act 1998 (PIDA). These apply across Great Britain, but not Northern Ireland where employment law is devolved.

The Public Interest Disclosure Act 1998 started life as a Private Members' Bill, introduced by Conservative MP Richard Shepherd, on 18 June 1997 and supported by the then Labour Government. This had been the latest in a series of Private Members' Bills during the mid-1990s on this issue.[1]

Mr Shepherd outlined the purpose of the Bill:

> As with its predecessors, the Bill's purpose is to make it more likely that where there is malpractice that threatens the public interest, a worker will raise the concern in a responsible way rather than turn a blind eye.[2]

He then discussed the reasons for its introduction being to encourage workers to raise the alarm about potential scandals and disasters before they happen:

> The clearest illustration of the need for the Bill is to be found in the major disasters and scandals of the last decade. Almost all official inquiries report that workers had seen the dangers, but either had been too scared to sound the alarm, or had raised the matter with the wrong person or in the wrong way. Examples include the rail inspector who, for fear of rocking the boat, did not report loose wiring before the Clapham rail disaster in which 35 people died. There were five warnings that ferries were sailing with their bow doors open before the tragedy at Zeebrugge took 193 lives. At Barlow Clowes and the Bank of Credit and Commerce International and in Maxwell's empire a culture of fear and silence deterred workers from blowing the whistle, costing investors and pensioners billions of pounds. Finally, a Matrix Churchill employee wrote a letter to the Foreign Secretary about munitions equipment for Iraq but it was ignored by civil servants....
>
> The Bill is, as its name implies, a public interest measure. Were it merely an employee rights measure, I doubt that I would be able to inform the committee that its objectives are supported by the Institute of Directors, the Confederation of British Industry and the Committee on Standards in Public Life as well as the Trades Union Congress.[3]

The Bill received Royal Assent on 2 July 1998 and came into force a year later. PIDA amended the Employment Rights Act 1996 to protect individuals from

1 Public Interest Disclosure Bill 1995-96; Whistleblower Protection Bill 1995-96

2 Public Interest Disclosure Bill Deb 11 March 1998

3 As above

suffering dismissal or detriment as a result of having made a "protected disclosure". The concept of "protected disclosure" is set within the context of a general duty of confidentiality between employer and employee, discussed below.

2 The duty of confidentiality

In general, employees are subject to a legal duty of confidentiality prohibiting the disclosure of certain information obtained during their employment. This duty may be an express term of a contract or, if there is no express term, some degree of confidentiality will be implied by common law.[4]

If the information disclosed by a whistleblower is not of a kind protected by whistleblowing law, the employee may be in breach of this duty. In some cases, a breach of this duty might be enough to justify dismissal of the employee. In certain circumstances, such as information about trade secrets, the duty of confidentiality may continue after the employment relationship has ended.[5]

The duty of confidentiality is subject to a common law 'public interest exception', which existed prior to PIDA. This exception, for example, prevented an employer silencing an employee (by obtaining an injunction against him) who sought to disclose information about his employer's regulatory failings.[6]

However, this public interest exception offers only limited protection. It merely provides a defence to legal proceedings an employer might bring against an employee (or former employee) for breach of the duty of confidentiality; it does not protect employees from suffering detriment at work, or dismissal, for having made a disclosure. PIDA was enacted to provide this protection. The following sections explain how these whistleblowing protections under PIDA work.

4 See Practical Law practice note, "Confidentiality during employment and after termination", updated July 2023

5 *Faccenda Chicken v Fowler* [1986] IRLR 69

6 *Re a Company's Application* [1989] IRLR 477

3 The legal framework

Whistleblowing law protects workers who make "protected disclosures" from being subjected to detriment or dismissal by their employers.[7] The protections only apply to:

- certain categories of person
- who disclose information of a certain kind
- in a certain way

Each of these elements is explained below.

3.1 Protected persons

Employment law makes a distinction between different types of employment status. The main ones are "employee" and "worker". Employees have the full range of employment rights; workers have fewer rights although retain many of the most basic entitlements; and self-employed independent contractors, in business on their own account, are largely outside the scope of employment law. For more information on these different statuses and the rights associated with them, see the Library briefing on employment status.[8]

Subject to very limited exceptions, whistleblowing protections apply to all those classed as workers.[9] 'Worker' is defined under section 230(3) of the Employment Rights Act 1996 as either an employee (all employees are automatically also workers, and thus qualify for worker rights); or anyone who personally provides services to another under a contract, where that other person is not their customer or client. This means that whistleblowing law protects those who work under contracts of employment (employees) as well as those who work under contracts that require them to work for someone else but who are not genuinely self-employed (workers).

However, section 43K of the ERA, inserted by PIDA, expands the definition of the term 'worker' beyond that contained in section 230(3) for the purposes defining who can benefit from whistleblowing protections. The extended definition covers persons that, for one reason or another, might not satisfy the tests for worker status. For example, as explained by the whistleblowing

7 Employment Rights Act 1996, section 47B
8 Commons Library research briefing CBP-8045, Employment status
9 Employment Rights Act 1996, section 230(1) and section 43K

charity Protect "This includes certain agency workers, homeworkers, NHS practitioners, nurses and midwives in training, and trainees."[10]

In addition, the Supreme Court ruled in a 2019 case *Gilham v Ministry of Justice* that whistleblowing protections can also extended to office-holders such as judges, who are not usually considered to be workers in other contexts.[11]

Whistleblowing protections do not apply to employment in the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.[12] As originally enacted, PIDA did not apply to police officers. However, the relevant provisions were amended following the Police Reform Act 2002. Police officers received whistleblowing protection from 1 April 2004.[13]

Whistleblowing protections therefore apply to the vast majority of the working population.

3.2 Protected disclosures

The protections in PIDA apply only to "protected disclosures". Section 43A of the Employment Rights Act 1996 defines this as:

> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H

Thus, a protected disclosure is:

- a disclosure of a certain kind of information (a "qualifying disclosure");
- that is disclosed by a worker in a certain way.

3.3 Qualifying disclosures

Section 43B defines a "qualifying disclosure" as any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made "in the public interest" and tends to show any of the following:

- a criminal offence has been committed, is being committed or is likely to be committed;

10 Protect, "Who is protected by PIDA?", [accessed 25 August 2023]
11 *Gilham v Ministry of Justice* [2019] UKSC 44
12 Employment Rights Act 1996, section 193
13 Police Reform Act 2002, section 37; Employment Rights Act 1996, section 43KA; Police Reform Act 2002 (Commencement No. 9) Order 2004 SI No.1319

- a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
- a miscarriage of justice has occurred, is occurring or is likely to occur;
- the health or safety of any individual has been, is being or is likely to be endangered;
- the environment has been, is being or is likely to be damaged;
- information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.[14]

The definition of "qualifying disclosure" excludes disclosures of information where the person making the disclosure commits an offence by making it, or the disclosure is made in breach of legal professional privilege (ie the confidentiality between a lawyer and her client).[15] The disclosure must be a disclosure of "information", as distinct from allegation or opinion. Tolley's Employment Law Handbook 2012, provides an example of the distinction:

> The distinction is well illustrated by an example given in Mrs Justice Slade's judgment in relation to the state of a hospital. To say "health and safety requirements are not being complied with" is an unprotected allegation. To say "the wards of the hospital have not been cleaned for two weeks and sharps were left lying around" is conveying "information" and is protected.[16]

To count as a qualifying disclosure, the information does not have to be true but the whistleblower must reasonably believe that the information tends to show one or more of the above failings. This means that it must be objectively reasonable for the whistleblower to believe that the information tended to show a relevant failing – the whistleblower's subjective belief is not on its own enough. This test of reasonable belief is made taking into account the whistleblower's personal circumstances; for example, their level of education and experience.[17]

Public interest test

The Enterprise and Regulatory Reform Act 2013 (ERRA 2013) amended the definition of qualifying disclosure. In order to benefit from whistleblower protection a disclosure must "in the reasonable belief of the worker making the disclosure" be "made in the public interest". A review document from the then Department for Business, Innovation and Skills (now mostly the Department for Business and Trade) (March 2012) explains the thinking behind this:

14 Employment Rights Act 1996, section 43B(1)

15 Employment Rights Act 1996, section 43B(3)-(4)

16 Tolley's Employment Law Handbook 2012, p130; example from *Geduld v Cavendish Munro Professional Risks Management Ltd* [2010] ICR 325, para 24

17 *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] I.R.L.R. 4

> It has come to light through case law that employees are able to blow the whistle about breaches to their own personal work contract, which is not what the legislation (Public Interest Disclosure Act (PIDA)) was designed for.[18]

The case law in question resulted from the decision in *Parkins v Sodexho Ltd* [2001].[19] As noted above, a protected disclosure may be of information that tends to show that "a person has failed, is failing or is likely to fail to comply with any legal obligation".[20] In *Parkins v Sodexho* it was held that the relevant legal obligations include contractual obligations. This allowed workers to use PIDA's protections when disclosing breaches of their own employment contract, irrespective of whether the breach raised issues of public interest. Thus, if a worker was dismissed for disclosing a breach of his employment contract, he could claim protection as a whistleblower. Because whistleblowing protections apply to all workers, and compensation is uncapped, *Parkins v Sodexho* allowed workers to sidestep the normal qualifying criteria for bringing unfair dismissal claims, and to avoid the cap on compensation for such claims.

During the Enterprise and Regulatory Reform Bill's committee stage in the Commons, then Parliamentary Under-Secretary of State for Business, Innovation and Skills, Norman Lamb MP (Lib Dem), explained the Government's position on *Parkins v Sodexho,* and the reason for the public interest test:

> To return to my explanation of the purpose of the clause and of why the Government have designed it in such a way, the decision in the case of Parkins v. Sodexho Ltd has resulted in a fundamental change in how the Public Interest Disclosure Act operates and has widened its scope beyond what was originally intended. The ruling in that case stated that there is no reason to distinguish a legal obligation that arises from a contract of employment from any other form of legal obligation. The effect is that individuals make a disclosure about a breach of their employment contract, where this is a matter of purely private rather than public interest, and then claim protection, for example, for unfair dismissal.
>
> [...]
>
> The clause will amend part IVA of the Employment Rights Act 1996 to close the loophole that case law has created. The clause emphasises the need for there to be an issue of public interest involved when an individual is pursuing a public interest disclosure case. The Government support protection for genuine whistleblowers. The clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest.[21]

While this change placed some limits on workers using PIDA to make claims relating to their own contracts, such claims could still be made where the breach of contract affected a sufficient number of other workers in a

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18 Department for Business, Innovation and Skill, Employment Law Review - Annual Update 2012, March 2012, p13

19 *Parkins v Sodexho Ltd* [2001] UKEAT 1239_00_2206

20 Employment Rights Act 1996, section 43B; see above under the heading "protected disclosures"

21 PBC 3 July 2012 c387

significant way, as found by the Court of Appeal in the 2015 case *Chesterton Global Ltd & Anor v Nurmohamed & Anor*. The court ruled that "a relatively small group may be sufficient to satisfy the public interest test" such that disclosure about a breach of contract affecting the earnings of 100 senior managers, including the claimant, could still be protected under PIDA as a disclosure "in the public interest", regardless of the fact that the group in question were all employees of the company.[22]

3.4 The method of disclosure

As noted above, section 43A states that in order to be protected a disclosure must be "made by a worker in accordance with any of sections 43C to 43H". These sections outline the following permitted methods of disclosure:

- disclosure to the worker's employer;
- disclosure to another responsible person, if the worker reasonably believes the information relates to that person's conduct or a matter for which they are responsible (for example, an agency worker might raise a concern with the organisation hiring them);
- disclosure made in the course of obtaining legal advice;
- disclosure to a Minister of the Crown if the worker's employer is appointed by enactment (this protects workers in Government appointed bodies who complain to the sponsoring department, such as a worker in an NHS Trust disclosing to the Department of Health);
- disclosure to prescribed persons (see below);
- disclosure to someone else, that meets the conditions of section 43G (see below);
- disclosure to someone else of an exceptionally serious failure (see below).

A qualifying disclosure by a protected person which is disclosed by any of these methods which automatically count as a protected disclosure and grant the whistleblower the protections under PIDA. More detailed explanations of the last three categories are given below.

Disclosure to prescribed persons

Section 43F protects disclosures made to a person prescribed by an order made by the Secretary of State. The prescribed persons are set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549) as

[22] *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2015] UKEAT/0335/14/DM

amended.[23] These are generally bodies responsible for the regulation of various activities such as the Financial Conduct Authority, the Civil Aviation Authority, the Care Quality Commission, the Environment Agency and so on. The Government maintains an up to date list of prescribed people and bodies.[24]

In order for the disclosure to be protected, the worker must reasonably believe that the information disclosed relates to a matter for which the prescribed person is responsible (for example, disclosure to the Environment Agency about acts which have an effect on the environment). The worker must also believe that the information disclosed is substantially true. The prescribed persons, and the areas for which they are responsible, are set out in a table in the Schedule to the Order. This takes the following format:

Persons and descriptions of persons	Descriptions of matters
Environment Agency	Acts or omissions which have an actual or potential effect on the environment or the management or regulation of the environment, including those relating to pollution, abstraction of water, flooding, the flow in rivers, inland fisheries and migratory salmon or trout.

So, for example, a disclosure by a worker to a body in the first column will be protected if the worker reasonably believes the information relates to a matter in the corresponding part of the second column.

Disclosure to Members of Parliament

In addition to the prescribed persons that regulate specific areas, since 2014 Members of Parliament have been considered prescribed persons. Protected disclosures to an MP can be made in relation to any matter for which any other prescribed person is responsible. This change was introduced by the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014 (SI 2014/596).

The rationale for this change given by the Government was that MPs are "often well placed to make representations on behalf of whistleblowers, including to the regulatory agencies of the kind that already feature in the 1999 Order".[25] The amendment was introduced following a Ten Minute Rule Bill presented by Conservative MP David Davis on 19 November 2013 on the same issue.[26]

Being a prescribed person does not grant MPs any additional legal powers or responsibilities in respect of the information disclosed to them. Rather it offers protection to the person making the disclosure under PIDA. It is up to each individual MP to decide what to do with such information, subject to

23 By The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2010

24 GOV.UK, Whistleblowing: list of prescribed people and bodies, updated 19 July 2023

25 Explanatory Memorandum to the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014, No. 596

26 Public Interest Disclosure (Amendment) Bill 2013-14

usual legal and parliamentary rules around data protection and parliamentary privilege.[27]

MPs are exempt from the requirement to submit reports on disclosures received each year which apply to most other prescribed persons under the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017.[28]

Disclosure that meets the conditions of section 43G

Section 43G provides conditions for "disclosure in other cases". It protects disclosure to persons other than those detailed above, provided certain criteria are met. It could be used, for example, to protect disclosure to the press. In order to benefit from this protection one of the following must apply:

- the worker reasonably believes he will be subjected to detriment if he discloses to his employer;
- where there is no relevant prescribed person, the worker reasonably believes that evidence will be concealed or destroyed if he discloses to his employer; or
- the worker has already disclosed substantially the same information to either his employer or a prescribed person.[29]

If one of the above applies, then disclosure by the worker may be eligible for protection under the section, provided all three of the following conditions are also met:

- the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true;
- the worker does not make the disclosure for purposes of personal gain;
- in all the circumstances of the case, it is reasonable for the worker to make the disclosure.[30]

As to the last requirement, whether or not the disclosure was reasonable would be a matter of judgment for an employment tribunal, although the section identifies a number of factors that the tribunal must have regard to.

In addition to the identity of the recipient, the tribunal must take into account the seriousness of the relevant failure, whether the failure is continuing or likely to occur and whether the worker had previously attempted to disclose to his employer or a prescribed person and if so how he went about doing so.[31]

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27 See also Erskine May, para 21.19 Matters awaiting judicial decision and matters under investigation

28 Regulation 2, Prescribed Persons (Reports on Disclosures of Information) Regulations 2017

29 Employment Rights Act 1996, section 43G(2)

30 Employment Rights Act 1996, section 43G(1)

31 See section 43G(3)

While section 43G can provide protection against disclosure to the press in some cases, the whistleblowing charity Protect notes that disclosures made on social media are less likely to meet these tests, saying:

> whistleblowing on social media rarely overcomes the hurdles set by the Public Interest Disclosure Act 1998 – hence why social media whistleblowers often struggle to bring successful whistleblowing claims in the employment tribunal.[32]

Originally, disclosure under section 43G would only be protected if the worker made the disclosure "in good faith" (the disclosure would not qualify where the predominant purpose of making it was for some ulterior motive such as blackmail).[33] However, this requirement was repealed by the Enterprise and Regulatory Reform Act 2013 (see below under "Recent changes to the law"). It was replaced by a power for a tribunal to reduce any award it makes to a worker by up to 25% where the disclosure is not made in good faith, along with the requirement that qualifying disclosures must be "in the public interest".[34]

Disclosure of an exceptionally serious failure

Section 43H protects disclosures of "exceptionally serious" failures. It is similar to section 43G in also requiring the worker to reasonably believe the information is true, not make it for personal gain, and includes the same test of being reasonable "in all the circumstances". However, unlike 43G, there is no requirement for the worker to have first contemplated or attempted disclosing the failure to his employer or a prescribed person.

The rationale behind this protection appears to be that, where a matter is exceptionally serious, it is in the public interest that its disclosure should not be delayed. The gist of the provision was summed up by Ian McCartney MP during the committee stage of the Public Interest Disclosure Bill:

> The Government firmly believe that where exceptionally serious matters are at stake, workers should not be deterred from raising them. It is important that they should do so, and that they should not be put off by concerns that a tribunal might hold that they should have delayed their disclosure or made it in some other way.
>
> That does not mean that people should be protected when they act wholly unreasonably: for example, by going straight to the press when there would clearly have been some other less damaging way to resolve matters.[35]

32 Protect, "Are you sure you want to post this? Whistleblowers online", 18 July 2023

33 *Street v Derbyshire Unemployed Workers Centre* [2004] EWCA Civ 964

34 Employment Rights Act 1996, sections 49(6A) and 43B(1)

35 Public Interest Disclosure Bill Standing Committee D 11 March 1998

3.5 Protections granted and making a claim

If a worker is dismissed or subjected to detriment by their employer for having made a protected disclosure, that worker may enforce their rights by presenting a complaint to an employment tribunal.[36] The claim must be brought within three months of the act (or failure to act) complained of.[37] Where an employee is dismissed for having made a protected disclosure, the employee will be regarded as having been unfairly dismissed.[38]

There is no upper limit on the amount of financial compensation obtainable in whistleblowing-based unfair dismissal claims and such protections are available from day one of employment, compared with the two year qualifying period to gain normal protections against unfair dismissal.[39]

The Enterprise and Regulatory Reform Act 2013 amended the Employment Rights Act 1996 to also make an employer vicariously liable if a worker is subjected to detriment by a co-worker for making a protected disclosure. This means that employers can also be liable if they fail to take reasonable steps to prevent other employees from victimising a whistleblower.[40]

Further information

For more information on employment tribunals and how workers can bring claims, see the Library's article on Making a claim to an employment tribunal.

Anyone considering bringing an employment tribunal claim may wish to seek independent legal advice – see the Library's briefing paper Legal advice and help in employment matters for relevant sources of advice.

36 Employment Rights Act 1996, section 48(1A)
37 Employment Rights Act 1996, section 48(3)
38 Employment Rights Act 1996, section 103A
39 Employment Rights Act 1996, sections 124(1A) and 108(3)(ff)
40 See *Abertawe Bro Morgannwg University Health Board v Ferguson*, UKEAT/0044/13

4 Evolution of the law

4.1 The Enterprise and Regulatory Reform Act 2013

The Enterprise and Regulatory Reform Act 2013 made three key changes to whistleblowing law:

- amended the definition of "qualifying disclosure" to introduce a public interest test;
- removed the requirement that certain disclosures be made in good faith, replacing this with a power to reduce compensation where disclosure is not made in good faith;
- introduced vicarious liability for employers if a worker is subjected to detriment by a co-worker for making a protected disclosure.

The Act also brought certain healthcare professionals into the scope of PIDA who had originally been excluded from protection due to their contractual arrangements.

The provisions came into force on 25 June 2013.[41]

4.2 Small Business, Enterprise and Employment Act 2015

The Small Business, Enterprise and Employment Act 2015 made two further changes, implemented by subsequent regulations. The 2015 Act:

- Gave powers to the Secretary of State to make regulations prohibiting an NHS employer from discriminating against a job applicant because it appears to the employer that the applicant has made a protected disclosure.[42] Such regulations were subsequently made as the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018.

41 BIS, Enterprise and Regulatory Reform Bill receives Royal Assent, 25 April 2013 (accessed 30 April 2013)

42 Small Business, Enterprise and Employment Act 2015, Section 149

- Gave powers to the Secretary of State to make regulations requiring a prescribed person "to produce an annual report on disclosures of information made to the person by workers".[43] Such regulations were subsequently made as the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 and the reporting requirements apply to all prescribed persons except for MPs, ministers and some auditors of smaller authorities.

[43] Small Business, Enterprise and Employment Act 2015, Section 148

5 Proposals for reform of whistleblowing law

5.1 Francis Review

In June 2014 Sir Robert Francis QC was appointed to lead a review of whistleblowing in the NHS. His review, Freedom to Speak Up, published in February 2015, described the legal framework established by PIDA as "limited in its effectiveness", adding:

> At best the legislation provides a series of remedies after detriment, including loss of employment, has been suffered. Even these are hard to achieve, and too often by the time a remedy is obtained it is too late to be meaningful.[44]

Given his report was commissioned to look specifically at whistleblowing in the NHS, he concluded that "it would not be appropriate to make recommendations for amendment which might impact on other sectors".[45] However, he did recommend the extension of protection to job seekers in the NHS, which was implemented by the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018 as discussed above.

5.2 Private Members' Bills

Two Private Members Bills were introduced in 2022 that proposed to reform whistleblowing law.

Whistleblowing Bill 2021-22

One was the Whistleblowing Bill 2021-22, a Private Member's Bill introduced by chair of the APPG for whistleblowing Mary Robinson MP (Con) in April 2022, to "establish an independent Office of the Whistleblower" and create a completely new legal framework for whistleblowing law to entirely replace that established by PIDA. When introducing the Bill, Mary Robinson discussed why she felt it was needed, saying:

> According to the whistleblowing charity Protect, just 4% of employment cases are successful, and PIDA, our world-leading legislation, is now seen as a discredited and distrusted law that has failed to protect whistleblowers or the

[44] Sir Robert Francis QC, Freedom to speak up (PDF), February 2015 p9
[45] Sir Robert Francis QC, Freedom to speak up (PDF), February 2015 p22

> public against wrongdoing and harm. Where we once led the way, we now lag behind.[46]

She argued that her Bill would address these problems through the new office of the whistleblower, saying:

> The Whistleblowing Bill will set up an independent office of the whistleblower to make whistleblowing work properly and safely for everyone. It will champion whistleblowers and whistleblowing. It will be a central point where the would-be whistleblower could come for information and support. It will have support and advice services for regulators, organisations and the public. It will set standards and report back to the Government. It will ensure that those who inflict or suffer detriment will be properly compensated or properly held to account. It will have real teeth with the ability to issue redress orders, fines and penalties. For the worst offenders, there will be prison sentences.The Bill did not receive a second reading.[47]

The Bill did not receive a second reading and fell at the prorogation of the 2021-22 session.

Protection for Whistleblowing Bill [HL] 2022-23

The second Bill was the Protection for Whistleblowing Bill [HL] 2022-23 introduced by Baroness Kramer (LibDem) in the House of Lords on 13 June 2022. The text of this Bill was published and would, similarly to Mary Robinson's Bill, entirely replace the PIDA framework with a new legal approach based around an office of the whistleblower with powers to impose civil penalties. The Bill would also make intentionally or recklessly subjecting a whistleblower to a detriment a criminal offence subject to potential fines or imprisonment. The Bill has not received a second reading.

5.3 Westminster Hall debate on Whistleblowing awareness week

On 23 March 2023 there was a Westminster Hall debate opened by Mary Robinson MP on whistleblowing awareness week. During the debate, Mary Robinson again argued in favour of the creation of an office of the whistleblower, as had been proposed in her unsuccessful Private Member's Bill the previous year.[48]

Shadow Minister for Business and Consumers, Seema Malhotra MP, reiterated the Labour Party's support for the creation of an office of the whistleblower, which they had supported via an unsuccessful amendment to the Economic Crime and Corporate Transparency Bill 2022-23. She explained the potential

46 HC Deb 26 April 2022, c598
47 HC Deb 26 April 2022, c600
48 HC Deb 23 March 2023 c169WH

benefits of an office of the whistleblower in protecting workers and incentivising disclosures:

> The office would protect whistleblowers from detriment, ensure that disclosures by whistleblowers are investigated, and escalate information and evidence of wrongdoing outside of its remit to another appropriate authority. The objectives of the office would be to encourage and support people to make whistleblowing reports, to provide an independent, confidential and safe environment for making and receiving whistleblowing information, to provide information and advice on whistleblowing, and to act on evidence of detriment. As the hon. Member for Cheadle raised on Report, there is evidence that an office of whistleblowers incentivises and increases disclosures.[49]

She also noted that the Government had indicated they supported such a measure in principle, saying:

> during the passage of the Economic Crime and Corporate Transparency Bill through the Commons the Security Minister said he agreed with the need for an office of the whistleblower[50]

Responding for the Government, Parliamentary Under-Secretary of State for Business and Trade, Kevin Hollinrake, acknowledged that the legislation was not "where it needs to be today" and said that a Government review would soon be announced.[51] On the proposal to transfer oversight of this area to a new office of the whistleblower, he said there were arguments on both sides that needed to be looked at:

> What I regard as the key point in my hon. Friend's contribution today is the proposal for an office of the whistleblower. I quite understand that the intent is to provide one central place for whistleblowing and to make sure that we have best practice across the piece. Such an office would provide consistency in standards for regulatory investigations triggered by whistleblowing information. I am also interested in the issues that dealing with whistleblowing disclosures might raise for the prescribed persons, and vice versa.
>
> I know there are concerns, not just in Government but in wider circles, about how such an office would interact with the role of regulators, who are experts, of course. It is important that we look at the arguments for and against the proposed office, and I am keen to look at international examples.[52]

5.4 Review of the whistleblowing framework

On 27 March 2023 the Government announced a review of the whistleblowing framework in Great Britain, to examine how effective the framework established by PIDA has been at meeting its original objectives. The review is being led by the Department for Business and Trade and is expected to be

49 HC Deb 23 March 2023 c181WH
50 HC Deb 23 March 2023 c182WH
51 HC Deb 23 March 2023 c184WH
52 HC Deb 23 March 2023 c186WH

concluded in Autumn 2023. According to the terms of reference, the core research questions for the review are:

- how has the whistleblowing framework facilitated disclosures?
- how has the whistleblowing framework protected workers?
- is whistleblowing information available and accessible for workers, employers, prescribed persons and others?
- what have been the wider benefits and impacts of the whistleblowing framework, on employers, prescribed persons and others?
- what does best practice look like in responding to disclosures?[53]

Commentary

Whistleblowing charity Protect, commenting on the launch of the review, noting that "though tardy, the review could be seen as well timed" given that most EU countries "have now passed laws implementing the EU's Whistleblowing Directive that go further than the UK in many respects". Protect have called for a number of reforms to the legal framework, including:

- Placing a legal duty on organisations to establish functioning whistleblowing arrangements as well as a legal duty to "prevent whistleblower victimisation"
- Expanding the definition of "worker" protected by the law "to include non-executive directors, charity trustees, self-employed contractors, job applicants and others"
- Simplifying the legal tests whistleblowers must meet to gain protection, shifting the burden of proof to employers and making it automatically unfair to dismiss whistleblowers if the disclosure "was a material (not the main) factor in the dismissal".[54]

[53] Department for Business & Trade, Review of the whistleblowing framework: terms of reference, 27 March 2023

[54] Protect, "Protect's View of the Whistleblowing Review", 24 May 2023

6 Whistleblowing in the NHS

NHS workers can get advice on whistleblowing from the freephone Speak Up Direct Helpline on 08000 724 725 or Speak Up website. They can also speak to their organisation's Freedom to Speak up Guardian.

Employment law and policy (of which whistleblowing law and policy is a part), and health policy, are devolved matters in Northern Ireland. In Scotland and Wales employment law is not devolved, but health policy is. Decisions about implementation of whistleblowing policies in the NHS in each part of the United Kingdom are therefore a matter for each of the devolved governments.

6.1 NHS workers and whistleblowing law

NHS workers are protected from unfair dismissal and detriment in employment after whistleblowing by the Employment Rights Act 1996 (ERA), as amended by the Public Interest Disclosure Act 1998 (PIDA).

PIDA covers temporary staff, including some agency and self-employed staff and students on work experience placements. PIDA does not cover volunteers, but it is regarded as good practice for NHS organisations to include volunteers and all students on placements in their own whistleblowing policies.[55]

Whistleblowing protection was extended to NHS job seekers by the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018.[56]

To qualify for protection, workers must meet the requirements set out in the ERA relating to the type of information shared and the method of disclosure (see section 3 of this briefing).

In the NHS, disclosures can be made internally to the employer, to a prescribed body, or to a minister at the Department of Health and Social Care. Prescribed persons include:

- Care Quality Commission
- Healthwatch England

55 DHSC, Handbook to the NHS Constitution for England, updated 17 August 2023

56 The Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018

- National Guardian's Office
- NHS England
- Professional regulators such as the General Medical Council and the Nursing and Midwifery Council.[57]

6.2 NHS whistleblowing policy and guidance

NHS inquiries

Whistleblowers have played a key role in exposing failings in the NHS and recommendations from the resulting inquiries have shaped national policy on whistleblowing and wider issues, such as professional regulation.

Inquiries in the 1990s and early 2000s, including into cardiac services at Bristol Royal Infirmary and the acts of Ayling, Neale, Kerr and Haslam ('the three inquiries'), noted the impact of organisational culture, power imbalances between professions and a lack of formal procedure for raising concerns. The report of the inquiry into Harold Shipman, whilst avoiding the term 'whistleblower', emphasised the power of the individual to raise concerns.[58]

Sir Robert Francis QC's reports on the failings at Mid Staffordshire NHS Foundation Trust between 2005 and 2009 said a culture of bullying and fear had led to reluctance among staff to voice concerns. Francis' recommendations stressed the need for cultural change over reinforcing protection for whistleblowers after making disclosures.[59]

In 2023, the Government announced a statutory inquiry into the murder and attempted murder of babies at the Countess of Chester Hospital.[60] The inquiry will look at the wider circumstances surrounding the events including concerns that NHS managers attempted to silence whistleblowers.[61]

Freedom to speak up

In 2014, Sir Robert Francis QC led an independent review looking at how NHS staff could be supported to raise their concerns to make sure people receive safe care. The report, Freedom to speak up, was published in February 2015.

57 Gov.uk, Whistleblowing: list of prescribed people and bodies, (Accessed 6 September 2023)

58 R Mannion and others, Understanding the knowledge gaps in whistleblowing and speaking up in health care: narrative reviews of the research literature and formal inquiries, a legal analysis and stakeholder interviews [online via NIHR Journals Library], Health Services and Delivery Research, Vol 6 Issue 30, August 2018, Chapter 4

59 As above

60 HC Deb 4 September 2023, c35

61 BBC News, "Lucy Letby: NHS managers must be held to account, doctor says", 22 August 2023

It described the legal framework established by PIDA as "limited in its effectiveness", adding:

> At best the legislation provides a series of remedies after detriment, including loss of employment, has been suffered. Even these are hard to achieve, and too often by the time a remedy is obtained it is too late to be meaningful.[62]

The report made 20 recommendations including amendments to the ERA and introduction of a national officer.

Following a consultation, the Government published Learning not blaming in July 2015, setting out more detail on how it would meet the Francis report's recommendations. The publication also responded to a report by the Public Administration Select Committee on Investigating clinical incidents in the NHS and Dr Bill Kirkup's report on the Morecambe Bay investigation.

Learning not blaming included commitments to creating a new role of the Independent National Whistleblowing Officer and appointing Freedom to Speak Up Guardians in all NHS Trusts.[63] As well as leading and training the local guardians, the national office reviews organisations where there is an indication that there are barriers to speaking up and reports annually on the disclosures it receives in line with the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017.[64]

In 2016, NHS England and NHS Improvement[65] published a single national integrated whistleblowing policy that all NHS trusts were expected to adopt.[66] A revised policy, the Freedom to speak up policy for the NHS, was published in June 2022. All NHS trusts are expected to update their local policy to reflect the updated policy by the end of January 2024.[67]

Regulation of senior NHS managers

In 2019, the Kark review of the fit and proper persons test (FPPT) recommended setting up an organisation with the power to disbar senior managers.[68] The FPPT requires all health and adult social care providers registered with the CQC to ensure board directors, board members and individuals that carry out equivalent functions are 'fit and proper' for their

62 Sir Robert Francis QC, Freedom to Speak Up, February 2015, p9
63 DHSC, Learning not blaming: response to 3 reports on patient safety, 16 July 2015, pp 23-33
64 Regulation 3, The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 SI 2017/507
65 NHS Improvement has since been abolished and its functions transferred to NHS England
66 NHS England and NHS Improvement, Freedom to speak up: Raising concerns (whistleblowing) policy for the NHS, 1 April 2016
67 NHS England, The national speak up policy, 23 June 2022
68 Tom Kark QC and Jane Russell, A review of the fit and proper person test (PDF), February 2019, para 13.5.1

roles.[69] The review found the test does not perform its function and or stop unfit post holders from moving around the system.[70]

In August 2023, NHS England published a Fit and Proper Person Test Framework for board members in response to the review.

The Letby case has reignited questions about the role of senior NHS managers in responding to whistleblowing concerns and consequences for those who fail to act. In a statement on the forthcoming inquiry, Secretary of State, Steve Barclay, said that at the time of the Kark review the Government believed action on the review's other recommendations would mitigate the need for a disbarring power. However, he has now asked his department and NHS England to revisit this possibility. [71]

Wes Streeting, shadow health and social care secretary, has written to the NHS Confederation and NHS Providers to say Labour would introduce a regulatory system for NHS managers and to ask for their views on how this could be delivered.[72]

69 Regulation 5, The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

70 Tom Kark QC and Jane Russell, A review of the fit and proper person test (PDF), February 2019, para 1.1

71 HC Deb 4 September 2023, c35

72 Health Service Journal, "Labour commits to regulating NHS managers", 12 September 2023

7 Gagging clauses

A "gagging clause" is a confidentiality clause in a contract, typically a type of contract known as a "settlement agreement" (prior to 2013, these were known as a "compromise agreements").[73] A settlement agreement is a contract concluded at the end an employment relationship that seeks to prevent future disputes, usually accompanied by a payment to the worker, who waives their entitlement to pursue any legal claims they may have against the employer. A gagging clause is unenforceable in so far as it tries to prevent a worker from making a protected disclosure.

7.1 Gagging clauses and the law

Section 43J of the Employment Rights Act 1996 provides that gagging clauses are unenforceable in so far as they purport to preclude the making of a protected disclosure:

> Contractual duties of confidentiality
>
> (1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.
>
> (2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

This raises the question: what happens if a worker breaches a gagging clause yet has been paid a sum of money in support of the settlement agreement? Given that the clause is void, the worker would not be breaching any valid clause of the settlement agreement by making a protected disclosure. Some commentators have argued that this means the former employer may not be able to recover any damages for breach of contract.[74]

7.2 Solicitors Regulation Authority warning notice

In March 2018 the Solicitors Regulation Authority (SRA) issued a warning notice on the use of non disclosure agreements (NDAs) to solicitors, setting

[73] See Enterprise and Regulatory Reform Act 2013, s. 23

[74] See: James Laddie QC, 'Gagging Clauses For Whistleblowers: Worth The Paper They're Written On?', Inforrm Blog', 26 February 2013 (accessed 15 April 2013)

out concerns about the way NDAs were used and reminding solicitors of their professional obligations:

> This warning notice and the SRA's Standards and Regulations, do not prohibit the use of NDAs. However, we are concerned to ensure that NDAs are not used to prevent reporting to us, other regulators and law enforcement agencies or making disclosures which are protected by law. We are also concerned to ensure that those we regulate do not take unfair advantage of the other party when dealing with NDAs.[75]

The SRA reminded members of their Code of Conduct and noted that solicitors that used NDAs improperly would be at risk of disciplinary action. The SRA also set out more detailed guidance on what they considered to be examples of such improper use of NDAs, such as seeking to:

- use an NDA as a means of preventing, or seeking to impede or deter, a person from:
  - co-operating with a criminal investigation or prosecution
  - reporting an offence to a law enforcement agency
  - reporting misconduct, or a serious breach of our regulatory requirements to us, or making an equivalent report to any other body responsible for supervising or regulating the matters in question
  - making a protected disclosure under the Public Interest Disclosure Act 1998.
- use an NDA to influence the substance of such a report, disclosure or co-operation
- use an NDA to prevent any disclosure required by law
- use an NDA to prevent proper disclosure about the agreement or circumstances surrounding the agreement to professional advisers, such as legal or tax advisors and/or medical professionals and counsellors, who are bound by a duty of confidentiality
- include or propose clauses known to be unenforceable[76]

7.3 Committee reports on NDAs

The Women and Equalities Committee have published two reports in recent years on the use of non-disclosure agreements. The first report, published in July 2018, considered the use of NDAs in sexual harassment cases.[77] The

[75] Solicitors Regulation Authority, Warning notice: Use of non disclosure agreements (NDAs), updated 12 November 2020

[76] As above

[77] Women and Equalities Committee, Sexual harassment in the workplace, 18 July 2018, HC 725 2017-19

second report, published in June 2019, considered discrimination cases.[78] Both reports considered issues surrounding the law on whistleblowing, although the recommendations also covered much broader issues.

The reports concluded that while section 43J of ERA does ensure that NDAs cannot prevent people from making protected disclosures, the question of what constitutes a protected disclosure is not sufficiently clear. The 2018 report called for the list of prescribed persons to be widened to include bodies such as the police and the Equality and Human Rights Commission – the latter of which was added by the Government in 2019.[79] The 2019 report also called for broader reform to simplify and clarify the provisions of the Act.

The Government broadly accepted the conclusions of these reports. In 2019 the Equality and Human Rights Commission was added to the list of prescribed persons as recommended by the 2018 report. The Government's response to the 2019 report was based around the consultation and proposals outlined in the next section below.

7.4 Consultation on confidentiality clauses

On 4 March 2019, the Government launched a consultation on reforming the law on confidentiality clauses. The Government sought feedback on several proposals:

- Legislating so that no provision in an employment contract or settlement agreement can prevent someone from making any kind of disclosure to the police, in order to report a suspected crime.
- Legislating so that the limitations within confidentiality clauses are clear in the written statement of employment particulars, ensuring the worker understands the disclosure permissions.
- Whether a specific set of words should be used in a confidentiality clause to ensure them disclosure limitations are properly highlighted, can be easily understood by an individual and prevent exploitation.
- Extending Section 203(3) of the Employment Rights Act 1996 to ensure that the independent legal advice a worker signing a settlement agreement receives covers the nature and limitations of any confidentiality clauses.
- Considering enforcement measures for confidentiality clauses that do not comply with legal requirements.[80]

78 Women and Equalities Committee, The use of non-disclosure agreements in discrimination cases, 5 June 2019, HC 1720 2017-19

79 Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2019

80 Department for Business, Energy & Industrial Strategy, Confidentiality Clauses: Response to the Government consultation on proposals to prevent misuse in situations of workplace harassment or discrimination (PDF), July 2019, p7

The consultation closed on 29 April 2019 and the Government response was published in July 2019. In their response, the Government noted there had been overall support for the intentions set out in the consultation and pledged to take five key pieces of action:

- Legislate to ensure that a confidentiality clause cannot prevent an individual disclosing to the police, regulated health and care professionals or legal professionals;
- Legislate so that the limitations of a confidentiality clause are clear to those signing them;
- Legislate to improve independent legal advice available to an individual when signing a settlement agreement;
- Produce guidance on drafting requirements for confidentiality clauses; and,
- Introduce new enforcement measures for confidentiality clauses that do not comply with legal requirements.[81]

Legislation is yet to be introduced to enact these commitments. However, then Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy, Paul Scully, reiterated the Government's commitment to these policies in response to an oral question on 7 June 2022 from Conservative MP Maria Miller.[82]

81 Department for Business, Energy & Industrial Strategy, Confidentiality Clauses: Response to the Government consultation on proposals to prevent misuse in situations of workplace harassment or discrimination (PDF), July 2019, pp4-5

82 HC Deb 7 June 2022, c665

8 Support and advice

The Library publication Legal advice and help in employment matters can be used to direct people towards appropriate sources of professional legal advice relevant to whistleblowing law. In particular two organisations are well placed to provide free support and advice – Protect and Acas.

8.1 Protect

Protect (formerly known as Public Concern at Work) is a charity established in October 1993 which offers legal advice about whistleblowing.[83] Protect has guidance on whistleblowing law for both workers and employers.

Protect also operates a confidential advice line, supervised by lawyers and providing free advice on whistleblowing law and how best to raise whistleblowing concerns. The advice line can be reached on 020 3117 2520 or by completing the online form.[84]

8.2 Acas

The Advisory, Conciliation and Arbitration Service (Acas) has a series of guidance pages on whistleblowing at work, including guidance for workers on how to make a whistleblowing disclosure and for employers on responding to a whistleblowing disclosure and having a whistleblowing policy.

Acas also operates a confidential helpline of free advice on all aspects of employment law, including whistleblowing. This can be reached on 0300 123 1100.

83 See Protect website (accessed 29 August 2023)

84 Protect, Contact our advice line (accessed 29 August 2023)

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