

Whistleblowing: Developments in the Public Interest?

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Importance of effective whistleblower protection

“Whistleblowers, i.e. persons who report (within the organisation concerned or to an outside authority) or disclose (to the public) information on a wrongdoing obtained in a work-related context, help prevent damage and detect threat or harm to the public interest that may otherwise be hidden.

However, they are often discouraged from reporting their concerns for fear of retaliation.”

Explanatory Memorandum to draft EU Directive, 2018

The Law Society

“Using the Public Interest Disclosure Act 1998 to “whistleblow” on an organisation allowing inappropriate behaviour is not ideal. A common misconception about how whistleblowing legislation works in practice is that the law offers protection to whistleblowers. It does not.”

Paragraph 28 of a Written Submission to the Women and Equalities Committee on its inquiry on sexual harassment in the workplace, March 2018

Working relationships Protected?

Employment Rights Act 1996 (ERA 1996) (Part IVA inserted by *Public Interest Disclosure Act 1998*) provides protection to a ‘worker’ rather than an employee

Worker defined under section 230(3) of the ERA 1996 who has entered or works under:

- (a) A contract of employment, or
- (b) Any other contract

Section 43K of the ERA 1996 extends the meaning of worker if section 230 does not apply, but still excludes certain “work-related activities”

Recent case law

- Judges not protected – they are office holders and not workers decided by Court of Appeal in:

Gilham v Ministry of Justice (2017)

- Junior Doctors

Day v Health Education England (2017)

Court of Appeal found that a junior doctor within extended definition of worker (employer Health Education England) although already ‘worker’ as employed by NHS Trust

EU Directive on the protection of persons reporting on breaches of Union Law

Article 2(1) applies protection to workers, the self employed, shareholders, volunteers, unpaid trainees and persons working under supervision of contractors, subcontractors and suppliers. Article 2(2) also applies protection to the recruitment process and other pre-contractual negotiation.

Article 4: All organisations required to establish reporting channels for whistleblowers and for the follow-up of reports.

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

Regulations made 2nd May 2018

Came into force 21 days later

Prohibition of discrimination because of
protected disclosure

Regulation 3:

“An NHS employer must not discriminate against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.”

Tribunal Statistics

Applications to employment tribunals are rising following the decision of the Supreme Court in *UNISON v Lord Chancellor* [2017] UKSC 51 that the Fees Order was unlawful.

On 21st September 2018 Ministry of Justice published tribunal statistics for April to June 2018:

Single claims increased by 165% compared with same quarter in 2017 when fees in force

Refund of Employment Tribunal fees

President of the Employment Tribunals issued a Case Management Order on 18th August 2017 that noted all applications for reimbursement of fees be in accordance with administrative arrangements of Ministry of Justice.

Ministry of Justice and HM Courts & Tribunals Service opened scheme to refund employment tribunal fees on 20th October 2017

After one year after judgment 80% of tribunals refunds unpaid

Non-disclosure agreements

“NDAs are widely used to protect commercial interests, confidentiality, and - in some circumstances - reputation. However, they should not be used to prevent people reporting wrongdoing to the relevant authorities, such as the police or a regulator.”

News release of Solicitors Regulation Authority concerning warning to law firms regarding use of NDAs, March 2018

Contractual duties of confidentiality

Section 43J of the Employment Rights Act 1996

- (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.

Nick Denys, policy adviser at the Law Society, April 2018

“Ultimately, the law can only go so far in creating safe workplaces. Workplace culture, which stems from colleague and management behaviour, is normally the most important factor in creating a good workplace. The best way to avoid an intimidating culture from developing is to put in place appropriate policies so everyone is clear as to what is acceptable, what to do if they are concerned about unacceptable behaviour, and to ensure reporting systems are trusted.”