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and safety concerns: some
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does and does not provide for
workers**

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WHISTLEBLOWING ABOUT HEALTH AND SAFETY CONCERNS: SOME COMMENTS ABOUT WHAT THE LAW DOES AND DOES NOT PROVIDE FOR WORKERS

Introduction

The Good Law Project recently commissioned a legal opinion from Schona Jolly and Dee Masters of Cloisters chambers about the whistleblowing protections available under the Employment Rights Act 1996 (ERA 1996) where individuals speak up about dangerous working conditions or challenge government decisions relating to the Covid-19 pandemic. The Cloisters opinion:

- a) Highlights the importance of whistleblowing protection.
- b) Provides three illustrative case study examples of the legal protection available to workers that deal respectively with:
 - i) A senior NHS manager who is concerned about the lack of personal protective equipment (PPE).
 - ii) A warehouse worker who is dismissed for posting photographs and comments on social media concerning a lack of ‘*social distancing*’ in the workplace which she considers unsafe.
 - iii) A member of a UK government scientific advisory board who is concerned about the approach adopted towards modelling as part of the fight against Covid-19 on the grounds that she believes it will endanger certain categories of people, such as the elderly or disabled, and that a different form of modelling would have a greater chance of decreasing the death toll by the end of the summer of 2020.
- c) Outlines how the legal protections of whistleblowers are enforced.

The IER believes that the advice contained in the Cloisters opinion merits as wide a circulation as possible given the extent of current concerns about whether

workers are being adequately protected from the risks of Covid-19. This short summary therefore draws out central points from the opinion concerning:

- a) When disclosures on certain health and safety grounds are potentially protected ones;
- b) How such disclosures can be disclosed in a legally protected way;
- c) The enforcement of whistleblower rights.

In addition, our text at times goes beyond the scope of the opinion in highlighting the legal duties that employers possess with regard to the protection of non-employees and detailing other, ‘non-whistleblowing’, rights that workers and safety representatives have to raise health and safety concerns with their employer.

Protected health and safety disclosures

For a disclosure to be protected under Part IVA of the ERA 1996, Section 43B provides that the worker making it must have a *reasonable belief* that:

- a) the disclosure is made in the public interest; and
- b) the disclosed information tends to show one or more of six specified categories of risk. In the context of a concern about the Covid-19 crisis, the following three categories are highlighted as being of potential relevance;
 - i) A person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject;
 - ii) The health and safety of any individual has been, is being, or is likely to be endangered;
 - iii) Information has been concealed or is likely to be deliberately concealed which tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which they

are subject or that the health and safety of any individual has been, is being, or is likely to be endangered.

In what follows we will first revisit the specific scenarios mentioned in the Cloisters legal opinion. The text includes a commentary on the mechanisms for raising health and safety concerns and the efficacy of using the law to achieve the objective of safeguarding workers.

PPE

On PPE, the Cloisters opinion concludes that the NHS manager in the case study was correct to assert a breach of health and safety legislation. In doing so, attention is drawn to both specific statutory provisions on the provision of PPE and more general duties relating to health and safety imposed on employers that could provide the basis for a protected whistleblowing disclosure, both within and outside clinical and care settings.

Regarding the former, it is noted that the conclusion receives support from the following:

- a) A specific duty imposed under Regulation 4 of the Personal Protective Equipment Regulations 1992 on all employers to ensure that suitable PPE is provided to employees who may be exposed to a risk to their health and safety while at work, except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective. It is argued that extensive government guidance to the effect that medical staff across a range of clinical settings should use PPE in order to minimise the risk of contracting Covid-19 from infected patients suggests that the obligation under this regulation arises in clinical settings;
- b) Regulation 7 of the PPE Regulations requires employers to ensure that any PPE provided to employees is maintained, which includes being

replaced and kept in working condition. In relation to this, the Cloisters opinion notes that this obligation arises, following the House of Lords ruling in *Fytche v Wincanton Logistics plc* [2004]UKHL 31, in relation to ‘identified risks’ and argues that the risk of Covid-19 to clinical staff appears to be an ‘identified risk’.

- c) Breach of the Personal Protective Equipment Regulations 1992 may amount to a criminal offence under the Health and Safety at Work Act 1974.
- d) Employers are required to provide PPE to employees where it is not possible to adequately control the exposure of workers to substances hazardous to health under Regulation 7 of the Control of Substances Hazardous to Health Regulations 2002. It is argued that Covid-19 constitutes a ‘substance’ for this purpose and attention is drawn to the fact that the Health and Safety Executive has published a document, ‘Pandemic Flu – Workplace Guidance’ which confirms that pandemic influenza viruses fall within the scope of these regulations.

The more general duties of employers that are further regarded as supporting the conclusion that the manager in scenario 1 was right to assert a breach of health and safety legislation are:

- a) The duty imposed on every employer to ensure, so far as reasonably practicable, the health, safety and welfare of all employees under Section 2(1) of the Health and Safety at Work Act 1974 and the more specific one under Section 2(2)(a) to provide safety systems of work that are, so far as reasonably practicable, safe and without risks to health.
- b) The obligation on all employers under Regulation 3(1)(a) of the Management of Health and Safety at Work Regulations 1999 to make a suitable and sufficient assessment of the health and safety risks to which employees are exposed while at work for the purposes of identifying the

measures the employer needs to take to comply with health and safety provisions. There is also a further obligation under these Regulations to implement preventive and protective measures on the basis of the principles set out in Schedule 1, which includes providing work equipment where a risk cannot be avoided or combated at source;

- c) The duty imposed on employers under Regulation 5(1) of the same Regulations to give effect to such health and safety arrangements as are appropriate, having regard to the nature of the employer's activities and the size of their undertaking, for the effective planning, organisation, control, monitoring and review of preventive and protect[ive] measures.
- d) An implied duty in all contracts of employment that employers take reasonable care and reasonable steps to ensure the safety of their employees whilst at work.

The analysis offered in relation to the first case study scenario provides a valuable reminder that employers possess specific duties in relation to the provision and maintenance of PPE under the PPE Regulations 1992, the COSHH Regulations 2002 and the Management of Health and Safety at Work Regulations 1999. In doing so, it makes clear the relevance of these to the protection of employees from the risks associated with Covid-19. Additionally, the Cloisters opinion highlights how the management of these risks and the protection of employees from them, also falls within the scope of the more general health and safety obligations imposed on employers under:

- a) Section 2 of the Health and Safety at Work Act 1974.
- b) Regulations 3 and 5 of Management of Health and Safety at Work Regulations 1999.
- c) The duty of care that is implied in all contracts of employment.

It should be noted, however, that these provisions relating to the protection of employees exist alongside others falling outside the scope of the Cloisters

opinion that extend the obligations of employers to the health and safety protection of non-employees. These include:

- a) A duty under Section 3(1) of the Health and Safety at Work Act of employers to conduct their undertakings in such a way ‘as to ensure, so far as reasonably practicable, that persons not in their employment who may be affected thereby are not thereby exposed to risks to their health and safety’.
- b) The application of the duty of an employer to conduct a suitable and sufficient risk assessment under the Management of Health and Safety at Work Regulations to ‘the risks to the health and safety of persons not in his employment arising out of, or in connection with, the conduct by him of his undertaking’.

Breach of social distancing

The Cloisters opinion states a breach of UK government guidance on social distancing does not constitute breach of a legal obligation.¹ However, it is also argued that a failure to ensure social distancing, where this is feasible, would likely amount to a breach of an employer’s legal duty to take reasonable steps to protect the health and safety of employees. In addition, it is observed that the disclosure concerned would likely be a concern about the health and safety of individuals within the meaning of Section 43B(1)(d) ERA 1996 by tending to show the ‘health or safety of any individual has been, is being or is likely to be endangered’.

To this we would add that social distancing could also become an express contractual term either as a result of a collective agreement or unilateral

¹ See e.g the guidance to employers and businesses published on 07 April 2020 by the Department for Business, Energy & Industrial Strategy at <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19>

imposition by management. However, even if there is a breach of an express or implied term, it should be remembered that seeking an injunction is both costly and complicated and should not be contemplated by individual workers. For their part, unions would be unlikely to fund such an action and would want to ensure that rectification occurred swiftly as a result of representations or industrial action as a last resort. For those who suffer actual harm, the common law remedy of damages is available but this is likely to involve a long, stressful and expensive process. [We discuss the remedies available to whistleblowers below].

The Cloisters opinion further draws attention to the fact that the legal situations in Scotland and Wales differ in that ‘some legislative provision exists in respect of social distancing within certain businesses as well as government guidance to the effect that it is prohibited’. Attention in this regard is drawn to Regulation 4(1)(a) of The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 and Regulation 6(1)(a) of The Health Protection (Coronavirus Restrictions) Wales Regulations 2020, both of which require the categories of business concerned during the emergency period to:

- (a) take all reasonable measures to ensure that a distance of two metres is maintained between any persons on the premises (except between two members of the same household, or a carer and the person assisted by the carer);
- (b) take all reasonable measures to ensure that it only admits people to its premises in sufficiently small numbers to make it possible to maintain that distance;
- (c) take all reasonable measures to ensure that a distance of two metres is maintained between any person waiting to enter its premises (except

between two members of the same household, or a carer and the person assisted by the carer).

Government scientific adviser

The Cloisters opinion expresses uncertainty as to whether the scientific adviser in the third case study could demonstrate that she was a ‘worker’ and hence be protected by Part IVA ERA 1996. In addition, it argues that the adviser may confront ‘particular problems’ in trying to show that she reasonably believed that ‘the UK government had failed, is failing or is likely to fail to comply’ with one of the previously mentioned legal obligations. However, in relation to the positive obligation the UK government has under the Human Rights Act 1998 to take reasonable steps to protect the right to life and to do so in a non-discriminatory way’, a more positive conclusion is reached. Thus, it is argued that a ‘disclosure of information (as opposed to a mere allegation)’ which articulated concerns that ‘Covid-19 does threaten the right to life of many thousands of individuals, that vulnerable categories of people are especially threatened and she is concerned that the measures being discussed do not sufficiently protect those groups’, may well be sufficient to gain protection.

Other sources of disclosure protection

The Cloisters opinion also draws attention to how the provisions offering protection to whistleblowers exist alongside other measures which seek to protect workers who raise health and safety complaints and place a positive obligation on them to raise health and safety concerns. The provisions concerned are:

- a) Sections 44 and 100 of the ERA 1996 that render it unlawful to dismiss or impose a detriment on an employee who brought to ‘his employer’s attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to

health or safety’ in a workplace where either (a) there was an absence of a safety representative or committee or (b) it was not reasonably practicable for the employee to raise the matter by those means.

- b) The duty imposed on employees under Regulation 14(2) of the Management of Health and Safety at Work Regulations to inform their employer of certain dangers and shortcomings in protection arrangements for health and safety.

The protections afforded under Sections 44 and 100 of the ERA 1996 also apply where:

‘(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee’.

It should be noted that in order to exercise the rights contained in Sections 44 and 100 ERA 1996 an individual must be an employee and submit a claim within three months of the detriment/dismissal being suffered, unless it was not reasonably practicable to do so. In the current climate it will take some time to get an employment tribunal decision but, if the complaint is successful,

unlimited compensation is available.² It almost goes without saying that members should inform their local union representative about alleged breaches of the law and seek advice. Specialist legal advice is particularly important if employees allege that they took steps to protect themselves or others from serious and imminent danger. Not only will tribunals judge the appropriateness of the steps taken in all the circumstances ‘including, in particular, his knowledge and the facilities and advice available to him at the time’, but the employer might also argue that no detriment was suffered because the employee was negligent in taking the steps and a reasonable employer would have handed out the same treatment!

The ERA 1996 protections apply to safety representatives appointed by recognised trade unions under the Safety Representatives and Safety Committees Regulations 1977, as well as representatives of employee safety appointed under the Health and Safety (Consultation with Employees) Regulations, in relation to their function of making representations to an employer. In the case of the former category, the protections presumably also apply to disclosures made when exercising their function to represent employees in consultations at the workplace with inspectors of the Health and Safety Executive and of any other enforcing authority. With the exception of those relating to time off, which are actioned through Employment Tribunal complaints to an Employment Tribunal, the provisions of these two sets of regulations can only be enforced by local authority or HSE inspectors.

More generally, the Health and Safety Executive on its website states that: ‘If you see something in a workplace that you think is breaking health and safety law and is likely to cause serious harm, you can report it’ and provides a form to

² On the availability of interim relief and re-employment see the discussion below about remedies in whistleblowing cases.

be used for this purpose.³ It also provides on the website another form that can be used by union-appointed safety representatives to contact HSE ‘about something that has either caused, or has the potential to cause significant harm’ if they have tried to resolve the issue using their powers under the Safety Representatives and Safety Committees Regulations 1977.⁴

Invoking the whistleblowing provisions: some pros and cons

A feature of Part IVA ERA 1996 is that it gives rights to workers rather than employees, which means a wider range of people have access to the law. Thus, the following are included: certain agency workers; certain workers who would not otherwise be covered because they are not obliged to carry out all of their duties personally; NHS practitioners such as GPs, certain dentists, pharmacists and opticians; and certain trainees. In relation to agency workers, the EAT has accepted that both the supplier and end user could be the employer. Protection has also been afforded to an equity member of a law firm, to a person whose services were supplied by a consultancy and to someone engaged through a series of contractual agreements. Indeed, the whistleblower could be a worker of any employer at the time of making the protected disclosure and not just the employer who caused the detriment. Importantly, employers may have whistleblowing procedures that can be invoked by non-workers, for example, customers or even members of the public. Such extended rights are not uncommon in the public sector or large private sector bodies and are often the result of pressures from

³ See

https://webcommunities.hse.gov.uk/connect.ti/concC:\ProgramMX\SU_Scripts\BGInfo.exe C:\ProgramMX\SU_Scripts\bginfo.bgi /timer:0 /AcceptEULAernsform/answerQuestionnaire?qid=594147

⁴ See <https://extranet.hse.gov.uk/lfserver/external/turepl>

trade unions. As in other areas, collectively agreed arrangements can give workers rights that go well beyond the statutory minima.

Whether a worker is covered by Part IVA ERA 1996 or has access to an employer's whistleblowing procedure, the first place to raise a concern about health and safety matters is with the person designated by the employer as a recipient. This is likely to be a line manager or someone more senior if the worker feels the line manager's behaviour is responsible for the situation. Before contacting the designated recipient informally or formally, union members might choose to raise the issue with a union official. Not only will this give the individual the opportunity to receive advice but the union might be aware of similar allegations and may be willing to take up the matter as a collective grievance. This is clearly advantageous to the individual who will no longer be in the firing line if the employer reacts badly to the issue being raised. However, disclosing information about suspected wrongdoing to a union will not be protected under the ERA 1996 unless this is in the course of obtaining legal advice. Thus, workers should always assert that they are seeking legal advice about a situation rather than disclosing information. In practice, where unions are present at the workplace employers will encourage staff to seek their advice about health and safety matters and one obvious reason for doing so is to facilitate speedy rectification of the situation and another is to avoid the embarrassment of disclosures about hazards being made externally.

If a worker feels that their concerns have not been dealt with adequately within the organisation, the ERA 1996 protects them if they contact a person prescribed in the Regulations issued under the legislation. However, the matter must fall within the remit of the prescribed person and the worker must reasonably believe that the information and any allegation contained in it are substantially true. Some obvious prescribed persons in relation to health and safety matters will be the

Health and Safety Executive, specific industry regulators, local authorities, MPs and the police.

Employers see public disclosures of information about health and safety defects as the nuclear option and, unsurprisingly, workers have to meet a long list of conditions in order to obtain statutory protection.⁵ Many of the prerequisites are vague and subjective so whistleblowers will not know in advance of reporting whether or not they will be protected. Inevitably, if protection depends on the uncertainty of a subsequent tribunal ruling, many will err on the side of caution and think it wise to remain silent. Thus a Catch 22 situation may arise when there is a statutory or contractual obligation to report danger – workers may fear reprisals for raising concerns but be in dereliction of a legal or professional duty if they do not do so.⁶ Clearly, anything that deters the reporting of serious wrongdoing is undesirable. Another argument against external reporting is the research evidence that employers are more likely to retaliate against those who disclose information outside of the organisation since such reporting is regarded as disloyal and potentially damaging to the reputation of managers.

Nevertheless, in the last resort, Section 43H ERA 1996 recognises that it is appropriate for the reporting of exceptionally serious failures to be protected. Again, there are many statutory hurdles that have to be overcome and workers should take specialist advice before contacting the press or using social media to raise their concerns (as in the example of the warehouse worker mentioned in the Cloisters legal opinion).

In terms of the remedies available to those who experience a detriment or dismissal for whistleblowing, unlimited compensation is available in both types of claim. However, where a detriment is shown the employer will have to show

⁵ See Section 43G ERA 1996

⁶ Many working in the NHS are members of professional bodies which put the duty to safeguard patients ahead of contractual obligations to their employer.

that the disclosure of information did not materially influence the decision to penalise the worker. By way of contrast, an employee who has been sacked has to establish that the protected disclosure was the reason (or, if there is more than one, the principal reason) for dismissal. If this can be achieved, as with Section 100 ERA 1996 claims discussed above, interim relief is available. However, this requires an application to be made within seven days and merely obliges the employer to re-employ the individual or continue with the contract until a full tribunal hearing. Ultimately, an employment tribunal cannot force an employer to reinstate or re-engage an employee however unfair the dismissal is proved to be.

One final but important point to make about getting unions involved in the resolution of concerns about health and safety is that they can take a collective perspective. In an ideal world no one should be subjected to unsafe conditions but, if protective equipment is simply not available or unsafe conditions cannot be eradicated in the short or long term, should an employer be forced to close down? In the case of health and social care as well as other vital services shutting shop may simply not be feasible. It is the role of trade unions to cater for the interests of the majority of their members and sometimes the view may be taken that it is in their own best interests that workers function in less than ideal conditions rather than be laid off and essential services withdrawn. Although in principle health and safety failings should not be negotiable, in practice unions can feel forced to seek solutions that promote the greatest good. This is particularly the case when there is global pandemic.