

THE BEST WARNING SYSTEM: WHISTLEBLOWING DURING COVID-19

An examination of the experiences of
UK whistleblowers during
a global pandemic



OCTOBER 2020



WHO WE ARE

Protect is the UK's whistleblowing charity. Since 1993, our free, confidential Advice Line has been supporting whistleblowers who wish to speak up about workplace wrongdoing. Each year our advisers handle more than 3,000 cases, and to date we have supported around 45,000 whistleblowers.

In addition to our Advice Line, we work with many diverse organisations offering training and consultancy to help them realise the benefits of a good whistleblowing culture.

WHAT WE DO

Protect aims to make whistleblowing work for individuals, organisations and society in the following three ways:



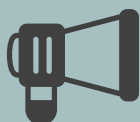
ADVICE LINE

Provides free and confidential information and advice to around 3,000 whistleblowers each year



TRAINING AND CONSULTANCY

We work with organisations to instill best practice



CAMPAIGNING

We campaign for legal and policy reform to better protect whistleblowers

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INTRODUCTION

The outbreak of Covid-19 changed everything, for everyone, across the globe. New ways of working and every day challenges were a reality for us all, none more so than for key workers.

But the pandemic also highlighted the role whistleblowing plays in all of our lives and the perils of not listening to whistleblowers and their concerns. From the late Wuhan doctor, Dr Li Wenliang, who selflessly tried to warn of the dangers of the coronavirus outbreak (and was later reprimanded for his “false comments”), to our own NHS staff and care home workers speaking out about PPE safety concerns and working conditions, and the furlough fraud crisis, whistleblowing has been centre-stage during Covid-19.

Our report, *The best warning system: Whistleblowing during Covid-19*, considers the concerns whistleblowers raised with our Advice Line in the first six months of lockdown in the UK (March - September 2020). We wanted to know if the media reports reflect the reality, namely that it is even harder to speak up and be heard during a pandemic.

Was there a change in the experiences of whistleblowers who contacted our Advice Line or in employer responses? The report focuses on the two main concerns our Advice Line was

receiving calls about - furlough fraud and workplace safety, in particular the shortage of PPE in workplaces and the failure to follow government safety guidance.

As many more of us begin to return to workplaces, there will be huge challenges for both employees and employers to overcome. Making our workplaces safe is a priority for which we all need to take responsibility. We hope our report, *The best warning system: Whistleblowing during Covid-19*, goes some way to demonstrate the need to place far more value on workplace whistleblowing if we are to keep public safety as a number one priority in fighting the spread of Covid-19.

Elizabeth Gardiner
Chief Executive



METHODOLOGY

The Protect workforce, like most organisations, were forced to adapt quickly to a new way of working. We closed our office on 17 March and staff started working remotely.

We reopened the Advice Line telephone service by 23 March but maintained our service supporting whistleblowers and organisations via email throughout.

From the first few weeks of lockdown until the end of September we have seen a 37% increase in calls to our Advice Line compared to 2019, with many of those whistleblowers wanting advice on new Covid-specific concerns and new issues that we have never come across previously, such as social distancing in shops, PPE safety equipment and hand sanitisers in bus depots.

Each time an individual contacts Protect for advice, we take detailed case notes on the concern and the whistleblower. Each year we support more than 3,000 whistleblowers and we have advised more than around 45,000 whistleblowers in our history.

We examined 638 Covid-19 anonymised cases for the period between 23 March – 30 September and a full year data set of 2,134 cases for 2019.

We wanted to compare whistleblowing outcomes for both the individual and the concerns they raised during the pandemic and non-pandemic times. All of our findings compare percentages.[1]

The featured case studies are real cases anonymised from our Advice Line, and permission for their use has been granted by the caller.

[1] We excluded cases that were purely private employment matters (e.g. pay disputes or grievances) or were from members of the public who were not current or former employees. We also excluded data from the sample where the advisor had identified an unknown, non-applicable or other outcome. We did this as this data does not allow us to draw any conclusions.

EXECUTIVE SUMMARY

From the start of lockdown (23 March 2020) to the end of September, Protect's Advice Line received 638 cases related to Covid-19 concerns.

The breakdown of cases fell broadly into two categories: furlough fraud (62%) and increasing risk to public safety (34%) which covered issues of PPE and the lack of social distancing in the workplace.

Particularly unsettling is the high percentage of whistleblowers - 41% overall - who raised Covid-19 related concerns to their employer and were ignored. [2] We are seeing the same failings during this global crisis when compared to 2019 where the figure stood at 39% across the whole year. Yet many of the concerns raised during the pandemic include risks to public safety – with 43% saying they were ignored.

It is inexcusable for a whistleblower's concerns to be ignored, especially during a pandemic when the concerns could be a matter of life and death.

Employers who fail to explain their response to a whistleblower, risk undermining the effectiveness of their arrangements. The risk is that if a whistleblower believes that they have been ignored, then they and their colleagues may fail to come forward, leading to higher rates of fraud and posing a risk to the health and well-being of staff and service users in our most important services. Ignoring a whistleblower and their concerns can exacerbate a dangerous situation.

[2] We categorise the response to workers raising concerns as follows: ignored, denied, admitted, under investigation, resolved or unknown/not applicable.

KEY FINDINGS



Employers ignored **41%** of all whistleblowers raising Covid-19 concerns, this figure climbed to **43%** if the whistleblower was raising a concern about public safety risks.



Almost half of concerns raised regarding 'increasing risk to public safety' were from health and care key workers, with just 10% saying their employers investigated their concerns.*

62%

Furlough fraud within the workplace made up **62%** of Covid-19 cases to the Advice Line – and is the fastest emerging issue Protect has dealt with in its history.



20% of whistleblowers were dismissed after raising concerns about Covid-19 issues.

32%

Managers were more likely to be dismissed for raising concerns during the pandemic, with **32%** of managers compared with 21% of non-managers losing their jobs.

*The remaining percentages included ignored at 43%, denied at 22%, admitted at 17% and resolved at 1%. See page 24 for a graph on these figures.

FURLOUGH FRAUD

41%

of whistleblowers' concerns were ignored by their employer



Furlough fraud was raised as a concern with the employer before going to the regulator by **90%** of whistleblowers



Furlough fraud raised by whistleblowers came mostly from very small organisations with **76%** of callers describing the company size as between 1-49 employees.

Only **9%** of cases involved organisations with 1000-10,000+ staff. When compared to 2019 data (examining all concerns raised), 46% came from employers with 1-49 employees and **31%** from employers with 1000-10,000+ staff.

Furlough fraud whistleblowers were often the most cautious about raising their concerns - **50%** had not attempted to raise their concerns before seeking advice from Protect.

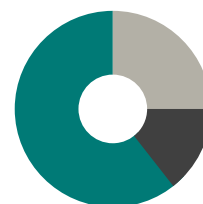
To put this in context, for 2019 our data shows that **18%** of whistleblowers had not raised their concerns before seeking advice from Protect.



INCREASING RISK TO PUBLIC SAFETY

The top three types of concerns raised for this category were **lack of PPE, lack of social distancing and failure to observe government guidance** which made up **68%** of the concerns raised in this area.

68%



Just under half of the concerns raised about risks to public safety came from the health (**29%**) and the care sector (**19%**) which reflects that many of the whistleblowers here were working on-site as key workers rather than at home.



In **43%** of cases where a risk to public safety was raised, the whistleblower's concern was ignored by their employer.

Investigation numbers were low with only **10%** of whistleblowers reporting that their concerns were being looked into, much lower compared to the **25%** who reported that their concerns were being investigated in 2019.





RECOMMENDATIONS

1

There should be a legal standard on employers to have whistleblowing arrangements in place, including a requirement to give whistleblowers feedback on the concerns raised.

2

These new standards should be underpinned by a penalty regime where an organisation can be fined for breaching the whistleblowing standards.

3

The penalty regime and the whistleblowing standards would be set by a new regulator the Whistleblowing Commissioner.

4

Regulators need to do much more to drive up the standards of whistleblowing arrangements among entities they regulate.

5

There should be new legal standards on all regulators to ensure they deal effectively and promptly with whistleblowing concerns being raised to them.

6

Legal aid and reform to whistleblowing law is needed to ensure that whistleblowers who are treated badly or dismissed have an effective remedy.

WHISTLEBLOWING DURING THE PANDEMIC

The picture painted of whistleblowing during the pandemic shows whistleblowers are coming forward to raise concerns directly with their employer – only to have their concerns ignored. This is a worrying picture as the country moves through this crisis.

The breakdown of cases to the Advice Line relating to Covid-19 during the first six months of the pandemic were:



The number of whistleblowers who told us their concerns were ignored by their employer has risen slightly from 2019:

39%
2019



41%
Covid-19

Since the overall message is that whistleblowing concerns about the pandemic are ignored by employers, both during the pandemic and from 2019 data, we concluded this is a systematic issue.[3] Many employers will have a whistleblowing policy, but this fails in practice if it is treated as a 'tick box exercise'.

The elements that make up best practice are well known and established but they rarely carry legal weight i.e. if breached there are no legal consequences for the organisation outside of being sued by a worker if they are dismissed or victimised for raising concerns.

Now is the time for the Government to put in place legal standards on whistleblowing arrangements through amending the legal protection for whistleblowing, the Public Interest Disclosure Act 1998 (PIDA) or through the introduction of an ACAS Code of Practice for Whistleblowing. These proposals should cover the following aspects[4]:



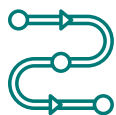
A requirement to have a whistleblowing policy



A means within the organisation to raise concerns confidentially



A designated senior manager or director who is responsible for the effectiveness of the whistleblowing arrangements and the handling of the concerns raised



Diligent follow up of the concerns raised



Feedback to the whistleblower on any action taken within a reasonable time frame and not exceeding three months

[3] Protect has seen a similar story in the financial sector where our research shows 33% of whistleblowers had their concerns ignored by their employer when they raised it with them: <https://protect-advice.org.uk/silence-in-the-city-2/>

[4] For detailed drafting on Standards on Employers see p.g. 4 of Protect's Whistleblowing Bill: <https://s3-eu-west-1.amazonaws.com/public-concern-at-work/wp-content/uploads/images/2019/11/05160222/Protect-Whistleblowing-Bill-Nov-2019.pdf>.

We also believe that there needs to be effective enforcement of these standards that should come in the form of civil penalties – fines - for organisations that have shown to be in breach of these standards.

Sanctions should be closely tied to the above standards and could be in the form of fines related to the percentage of an organisation's turnover (similar to the fines for breaching data protection rules). They could also impact on the registration, supervision, inspections rating etc. of an organisation, much as the Care Quality Commission in using its powers to downgrade a hospital Trust.[5]

The sanctions should also give regulators the power to place failing organisations under supervision for whistleblowing so that recommendations for improvement can be followed up and enforced. Sanctions could be tiered depending on the severity of the breach but should include the following breaches:

- Failure to have in place whistleblowing arrangements (e.g. a policy, designated senior manager or director appointed to oversee the arrangements)
- Failing to take reasonable steps to ensure whistleblowers are not damaged or dismissed for raising public interest concerns
- Failure to act on concerns raised by the whistleblower in a reasonable time frame
- Failure to feed back on the concerns to the whistleblower in a reasonable time frame (not exceeding a maximum of 3 months)

These new standards could be enforced by a new independent regulator, the Whistleblowing Commission (the Commission), which would have the ability to create and amend a new standard for employers.

The Commission would also have the powers to investigate and issue sanctions for those employers shown to have failed to follow these standards. Alternatively, these new powers could be granted to existing regulators giving them more teeth to enforce better standards.

[5] *Hospital hired fingerprint experts to unmask whistleblower, report finds, The Guardian 30th January 2020.*

FURLOUGH FRAUD

Furlough fraud, a new form of concern for Protect Advisers, proved to be the fastest emerging new issue we have had to respond to on our Advice Line in our 27-year history.

Sectors that do not typically call our Advice Line in large numbers - retail, leisure, hospitality and food/beverage - made up 31% of Covid-19 related calls. By way of comparison, in 2019 these sectors only made up 6% of total cases. Fraudsters levitate towards any kind of 'disaster fraud' because a rapid response to a disaster may come with a lack of checks.[6] UK think tank, the Policy Exchange, in their report Daylight Robbery, speculate that the furlough scheme was particularly attractive because it was so easy to pay out, with minimum checks.[7]

This was a point the Treasury was aware of at the time, but the emphasis was on the policy being created quickly in order to safeguard the economy, whilst leaving the risks to be addressed further down the line.[8] Further, the Treasury identified whistleblowing as a key means to discover and prosecute fraud.[9]

It became clear early into the furlough scheme's existence that the key fraudulent activity would be amongst companies telling or asking furloughed staff to continue to work, or claiming for working members of staff without their knowledge. At Protect, we were well aware that workers speaking out on these activities were going to be vital for HMRC to investigate such fraud.

[6] *Day Light Robbery, Policy Exchange, July 2020 p.g16*

[7] *Day Light Robbery, Policy Exchange, July 2020 p.g. 23*

[8] *Day Light Robbery, Policy Exchange, July 2020 p.g.34*

[9] *Ibid*

Research into other fraud related crimes shows the importance of whistleblowing,[10] and one barrier to investigation can be a lack of information - something a whistleblower is often in a place to be able to provide.

The scale of the fraud is breathtaking. We could tell from the call volume to our Advice Line that cases would be high and HMRC have now admitted that £3.5bn may have been paid by fraud or mistake.[11] A study by a group of economists showed that two thirds of workers on the scheme were still required to work by their employer.[12] Whistleblowers have formed a key part of the 7,791 reports of suspected rule flouting by employers across the country.[13] The National Audit Office (NAO) has also warned the Government that there will be no excuse in the future if similar economic measures are introduced without proper checks.[14]

The majority of the cases we received to our Advice Line have focused on situations where workers have either been asked or told to go back to work even though they are part of the furlough scheme. Below are case studies based on the types of calls we received.

Whistleblowers are in a really difficult situation here: they have no power in the decision to enter them onto the scheme and risk dismissal if they refuse to work. Experience from our Advice Line reveals whistleblowers were often also seeking advice on their own liability if they were to continue to work while being on the scheme. Given the prospect of a recession and mass unemployment many whistleblowers were left with an incredibly difficult decision to make.

Some of our cases show whistleblowers being aware that their employer is breaching the rules across the company.

We have also seen cases where whistleblowers have become aware of actions or plans to breach the furlough rules that do not involve them personally.

Against this backdrop we were disappointed to see HMRC at the start of March closed its confidential fraud reporting telephone line with no way for concerned whistleblowers to speak to HMRC.

Case study: Forced to work as a "volunteer"

Craig works for a small company where all the staff have been furloughed. He and other staff have been asked to carry on working for the company as "volunteers", so the work will be unpaid. Craig has raised this as part of a group of concerned colleagues, but his managers have responded to say that such arrangements are legitimate and that they took legal advice.

[10] *Two-thirds continued to work while on furlough, Personnel Today, 10 August 2020*

[11] *Coronavirus: Up to £3.5bn furlough claims fraudulent or paid in error - HMRC 8 September 2020*

[12] *Two-thirds of UK's furloughed workers continued job in Covid-19 lockdown, the Guardian, 9 August 2020*

[13] *Furlough fraud: Warning as reports to HMRC climb to 8,000, The Daily Express, 10th July 2020.*

[14] *Watchdog warns over UK furlough fraud and government contracts, 16 September 2020, the Guardian*

This is a key point, as whistleblowers told us on our Advice Line they were often concerned about their own liability, and wanted to discuss how HMRC could protect their identity if they did raise the concern. At the start of the

furlough scheme, HMRC provided no means of contact for whistleblowers other than an online form, which referred to other types of fraud.

Case study: Seeing the full fraud

Timothy works in the finance department of a small company. During his work organising the company accounts he noticed that he and 5 other members of staff (including a director) have been placed on furlough leave. All the staff on the scheme are still working for the company.

Timothy raised his concerns with his line manager, the Finance Director. The response was to remove Timothy from the scheme, but the line manager refused to remove anyone else as he felt bodies such as HMRC would not have the resources to prosecute all those companies that breached the rules.

Case study: Furloughed restaurant employee had concerns over illegal working ignored

During the Covid-19 pandemic – whilst restaurants were required to be closed – Jamie's employer told him they would be opening a take-away branch of the existing restaurant and wanted the help of furloughed staff to run it. Jamie objected and challenged this on the basis that it is against the Government Job Retention Scheme and illegal.

But a few days later Jamie's employer produced a new idea to bypass the furlough scheme which would be to operate the take-away business under a new shell company, lease the premises to it and appear to employ the furloughed staff. Jamie again expressed his discomfort and objected to the legality of this idea.

We advised Jamie that he was right to raise his concerns in challenging his employer's practices. However, as his employer is deliberately committing this wrongdoing at a senior level within the company, it seems unlikely that Jamie raising the issue to them again would change their approach.

As such, Jamie was advised to report the fraud directly and confidentially to HMRC.

Furlough fraud reported to Protect is committed in small organisations

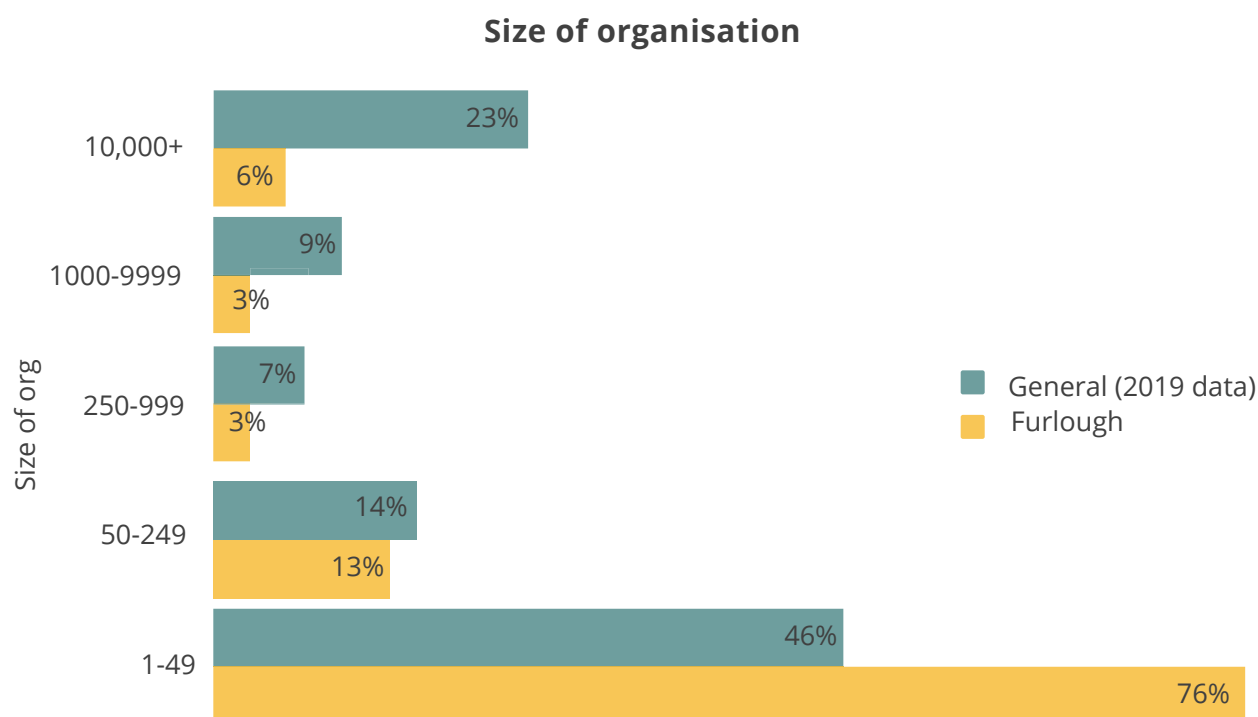
A clear picture of furlough fraud, witnessed by whistleblowers approaching Protect for advice, shows fraud being largely committed by small organisations with fewer than 50 members of staff. This is a unique aspect of furlough fraud.

When we look at organisational size for all concerns raised in 2019 (shown in the graph below), it shows a much more even spread of different sized organisations. The largest organisations (with over 10,000 or more staff) made up 23% of cases in 2019, while for furlough fraud only 6% of employers had 10,000 or more members of staff.

Wrongdoing in such small organisations presents problems for the whistleblower in terms of raising their concern.

Most whistleblowers will want to raise their concern with their employer but, given the size of the organisation, this may not be possible as the fraud often comes from inside the company and possibly involves very senior staff.

Even if the whistleblower wanted to raise their concerns internally, there may be few options beyond approaching the very top of the organisation. Therefore, it is paramount regulators are able to communicate and reassure a whistleblower who calls them to report fraud or any wrongdoing. We challenged HMRC on the closure of its telephone fraud service hotline and called on HMRC to reinstate the service.



N: 1574, source: Advice Line data for Furlough Fraud 23/03/2020 till 30/09/2020 and General (2019 data) from 01/01/2019-31/01/2019

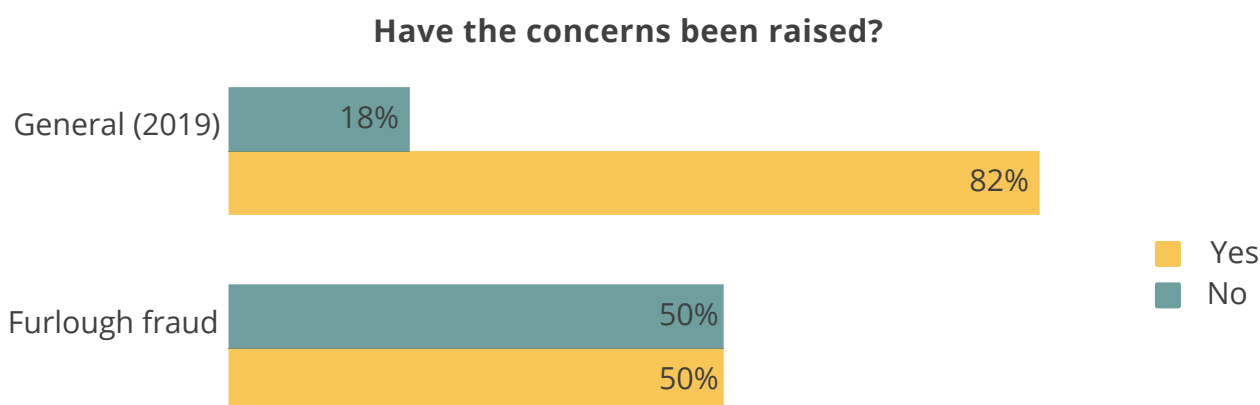
Half of all furlough fraud whistleblowers do not raise their concerns before seeking advice

The graph below shows that before seeking advice from Protect, 50% had not raised their concerns. This is a very different approach compared to concerns raised in 2019, where 82% of individuals had raised their concerns previously before seeking advice from Protect.

However, this is perhaps not that surprising as whistleblowers would naturally be cautious before raising concerns amidst a pandemic and the economic turmoil that comes with it.

We are pleased that whistleblowers have come to Protect for advice in this situation - we have evidence that if early advice is sought there are better outcomes for whistleblowers and the concerns are more likely to be addressed.[15]

Although furlough fraud is a new concern, there is value in comparing it against 2019 data - 90% of furlough fraud was raised with the employer, while in 2019, 80% of concerns were raised with the employer. This again emphasises that employees - even in instances like furlough fraud where the concerns are focused on employer-led wrongdoing - still feel compelled to raise concerns with their employer and senior personnel. Many whistleblowers told us that they wanted to raise their concern for ethical reasons: they knew that defrauding tax payers is wrong.



N: 2166, source: Advice Line data for furlough fraud 23/03/2020 till 30/09/2020 and General (2019 data) from 01/01/2019-31/01/2019

[15] See Protect (formerly Public Concern at Work) press release for the 2016 report, *Time for Change*.

So why are whistleblowers seeking advice before raising concerns? One reason could be that given that fraud is being committed in very small organisations, whistleblowers are weighing up the option of raising concerns externally. This can be a difficult decision to make on your own so seeking advice is a sensible first step. For furlough fraud, the correct external body is HMRC who are a prescribed regulator for this sort of concern. A whistleblower making a disclosure to HMRC would be more likely protected under the law (the Public Interest Disclosure Act 1998) than if they made a wider disclosure, such as to the Police or media.[16]

We cannot guarantee whistleblowers who we advised did, in fact, go on to raise their concerns with the regulator. Although Protect encourages and empowers whistleblowers to raise their concerns, we are not always able to track their progress given the volume of calls we receive and our resources.

In fact, our fear is that many whistleblowers simply did not go on to raise their concerns with HMRC. Not being able to speak directly to a HMRC adviser may have impacted on this for the period its fraud reporting hotline was closed between March to early August 2020.

[16] 43F of the *Public Interest Disclosure Act 1998*

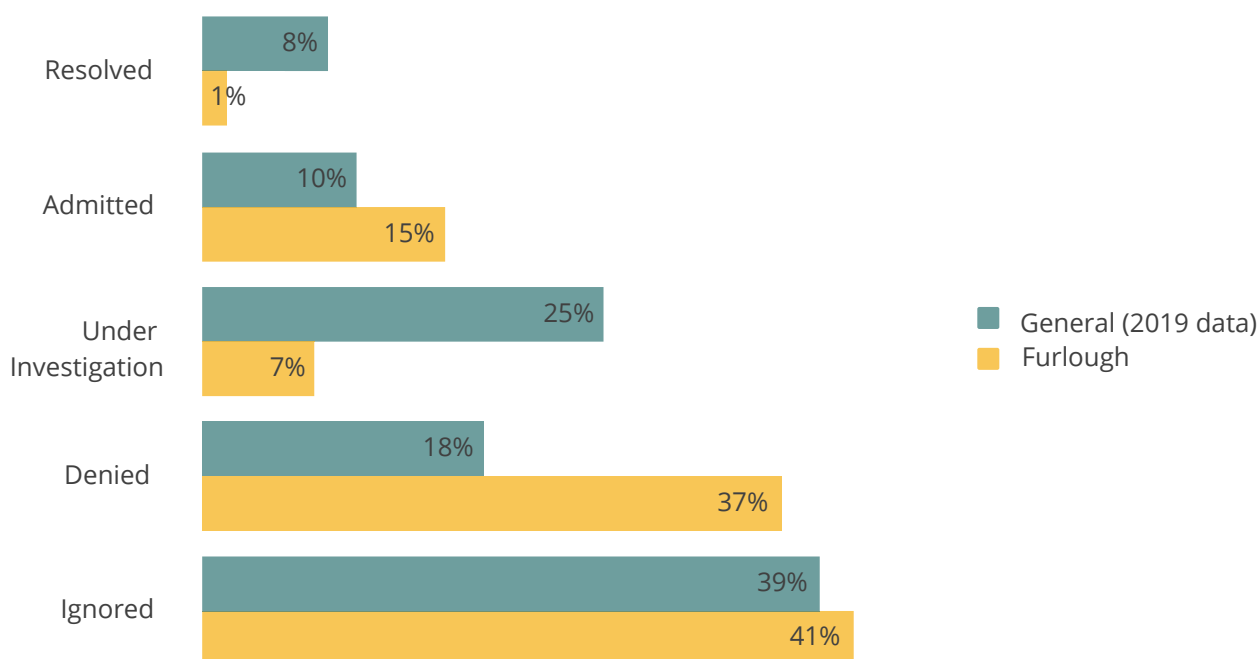
Reacting to the concerns and reacting to the whistleblower

Whistleblowers reporting retaliation for raising furlough fraud issues has been markedly lower when compared to the retaliation rates across all concerns being raised in 2019. This is highlighted by the near doubling of whistleblowers who said they received no response, good or bad, from their employer or co-workers (57%) when compared to 28% across all types of wrongdoing raised in 2019.

We can understand on that basis that whistleblowers and the managers they are raising the concerns with are often 'in the same boat' trying to react to and deal with a global pandemic.

While managers may not be retaliating against whistleblowers, they do not seem to be listening to them either. Our research shows that whistleblowers report in high numbers that their concerns have been ignored by their employer whether they are raising furlough fraud during a pandemic or whether they are raising concerns outside of this period of crisis.

Response to furlough fraud concerns



N: 1519, source: Advice Line data for Furlough Fraud 23/03/2020 till 30/09/2020 and General (2019 data) from 01/01/2019-31/01/2019

What action Protect took

We were disappointed with the initial response of HMRC to shut their fraud reporting telephone service. HMRC explained this was due to staff safety however we did wonder, if like us, there was a way that HMRC could operate remotely.

We contacted HMRC explaining the dramatic spike in calls to our Advice Line, and our concerns over the fraud reporting line closure which attracted some media interest. We explained to HMRC that reporting fraud via its website as the only option was not good for whistleblowers as we know from our own Advice Line work that reassurance and a discussion with an adviser is needed.

As the calls continued and we were dealing with more and more concerned whistleblowers worried about furlough fraud, we felt we had to do more so we briefed Lord Wills, of the Whistleblowing All Party Parliamentary Group (APPG), to ask a parliamentary question about when the HMRC fraud hotline would re-open.

We also sought reassurance from HMRC that whistleblowers would not face having to pay back fraud debts out of their own pockets, and HMRC issued a statement to us that this would not be the case. We like to think our campaigning went some way to HMRC re-opening their fraud hotline on 3 August, albeit with limited hours.

Unfortunately, in terms of furlough fraud, we have no way of knowing whether whistleblowers who came to Protect for advice in the first instance (and who had not raised their concern elsewhere) or whistleblowers

who had concerns ignored by an employer then went on to escalate the concerns further to a regulator. We believe this issue underlines the need for new legal standards on regulators.

Our best practice guide for regulators recommends that all regulators should offer a range of channels for workers to raise their concerns. This could include email, webchat, phone etc. Online forms as the only means of communication can be burdensome and intimidating for the whistleblower.[17] Whistleblowers often seek reassurance before disclosing information to a regulator.

Feedback to the whistleblower is also important, and we want to see standards to ensure all regulators give appropriate and timely feedback to whistleblowers, wherever this is feasible, and within a timeframe of three months in most cases. [18]

There should be a requirement on regulators – as well as on employers – to follow up disclosures by taking the necessary measures and investigate, as appropriate, the subject-matter of the concerns. Where the regulator is unable to investigate the concern, they should ensure it is passed on to an appropriate body.

[17] P.g. 16 *Principles for Recommended Practice: Better Regulators* published by Protect May 2020.

[18] *Ibid*



INCREASING RISK TO PUBLIC SAFETY

The second largest category of cases we received came from whistleblowers worried that their employer's response or inaction posed an increasing risk to public safety.

From the start of lockdown, many key workers were still working in their schools, care homes, wards and other places of employment. They raised concerns about a multitude of issues from a lack of PPE equipment to a lack of social distancing or a lack of hand sanitizers.

The PPE crisis dominated the headlines and featured heavily on the Advice Line. The NHS was put under considerable strain with rising admission and death rates from the virus. In April, a BMA survey of 6000 doctors found that around half of doctors working in high risk areas said there were shortages or no supply at all of long-sleeved disposable gowns and disposable goggles, while 56% said the same for full-face visors.[19]

During this period, the Health and Social Care Secretary, Matt Hancock, came to the defence of whistleblowers, saying: 'People should feel free to talk about what happens at work. I think that transparency is important.'[20] Yet there was criticism of the response from regulators; the Care Quality Commission suspended routine inspections in late March , [21] and they remain suspended until the Autumn of 2020.[22]

[19] Doctors Still Without Adequate Supplies Of PPE, Major BMA Survey Finds (BMA, 2020d) <https://www.bma.org.uk/bma-media-centre/doctors-still-without-adequate-supplies-of-ppe-major-bma-survey-finds> 18th April 2020.

[20] Hancock: Staff should be free to speak out over coronavirus concerns, HSJ, 21 April 2020

[21] Coronavirus: Care regulator suspends inspections of hospitals and care homes, the Independent, 16 March 2020

[22] CQC will restart routine GP practice inspections from this autumn, PULSE, 17th June 2020

As we took to the streets to clap for the NHS, we too wanted to do what we could to support our key NHS and care workers so we collaborated with DAUK (Doctors Association UK) to share with their supporters that we were here to help with advice and legal pro-bono support.

Our Legal Support Network - made up of law firms and barristers - said they would be on hand to offer free legal advice and support to any health and care professional who found themselves victimised, dismissed, or told to keep quiet about a Covid-19 whistleblowing concern. We approached NHS England, NHS Scotland and the National Guardian's Office to offer anonymised fortnightly bulletins outlining the types of concerns we were receiving on our Advice Line to share vital intelligence around key Covid-19 issues.

In the care sector, the outbreak of Covid-19 was widely attributed to the delayed response from the Government in addressing the spread of the virus in social care settings compared to healthcare settings.[23]

Sky News reported that many care homes were pressured into admitting service users from hospitals that tested positive for Covid-19.[24] The Office for National Statistics reported that from March 2020 to April 2020 the number of Covid-19 related deaths in care homes far exceeded the number of such deaths within a hospital (12,526 and 3,444 respectively). [25]

Protect Legal Support Network case study: Care worker raising Covid-19 safety concerns dismissed by bullying managers

Raj worked as a care assistant for a company of care homes. Raj raised concerns that an outbreak of Covid-19 within the home had been handled poorly and a decision taken by the home not to refer a patient to hospital had resulted in their death. Raj also raised concerns about patients being treated outside of the Care Quality Commission's Regulations on Dignity and Respect.

These issues were reported to Raj's manager and the CQC. Following a period of targeted bullying by managers within the home, Raj was dismissed by his employer on the grounds of poor conduct which were unfounded. Protect advised Raj of his rights under the Public Interest Disclosure Act 1998 and reassured him that he had done the right thing. We secured pro bono support for Raj from a member of Protect's Legal Support Network who also offered to represent him.

[23] R Harrison, 'Almost 20,000. covid-19 deaths in care homes' (GMB, 2020) <https://www.gmb.org.uk/news/almost-20000-covid-19-deaths-care-homes> accessed 7 August 2020.

[24] T Burki, *England And Wales See 20 000 Excess Deaths In Care Homes* (2020) 395 *The Lancet*.

[25] *Ibid*.

Identifying the increased risk to public safety?

This section considers the way employers responded to Covid-19 risks. Whistleblowing becomes vital here because workers are the key way that employers will become aware of Covid-19 risks or flaws in the safety systems they have put in place.

The three top concerns in this area reflect the struggles that employers and workers face in trying to ensure the workplace is safe. These issues not only impact on the health and safety of workers but, if PPE is not provided or government guidance is not properly followed, then this also has an impact on the wider community. This was shown most starkly by

the reported practices of Leicester City factories, flouting national lockdown rules which then led to the local lockdown.[26]

The sectors where the concerns have come from reflect this wider risk to the community. Health is the biggest sector at 29% and Care comes in second at 19% - both essential services classed by the Government as key worker sectors that have been vital in responding to the pandemic. It is therefore unsurprising that whistleblowers would be raising concerns related to failing safety systems or a lack of PPE.

CONCERN	%
Lack of PPE	24%
Lack of social distancing	24%
Failure to observe Government guidance	20%
Lack of cleaning and/or cleaning facilities	9%
No risk assessments	9%
Improper designation as a 'key worker'	6%
Key worker doing non-essential work	3%
Non-essential travel	3%
Failure to test for Covid-19	2%

N: 271, source: Advice Line data for increasing risk to public safety 23/03/2020 till 30/09/2020.

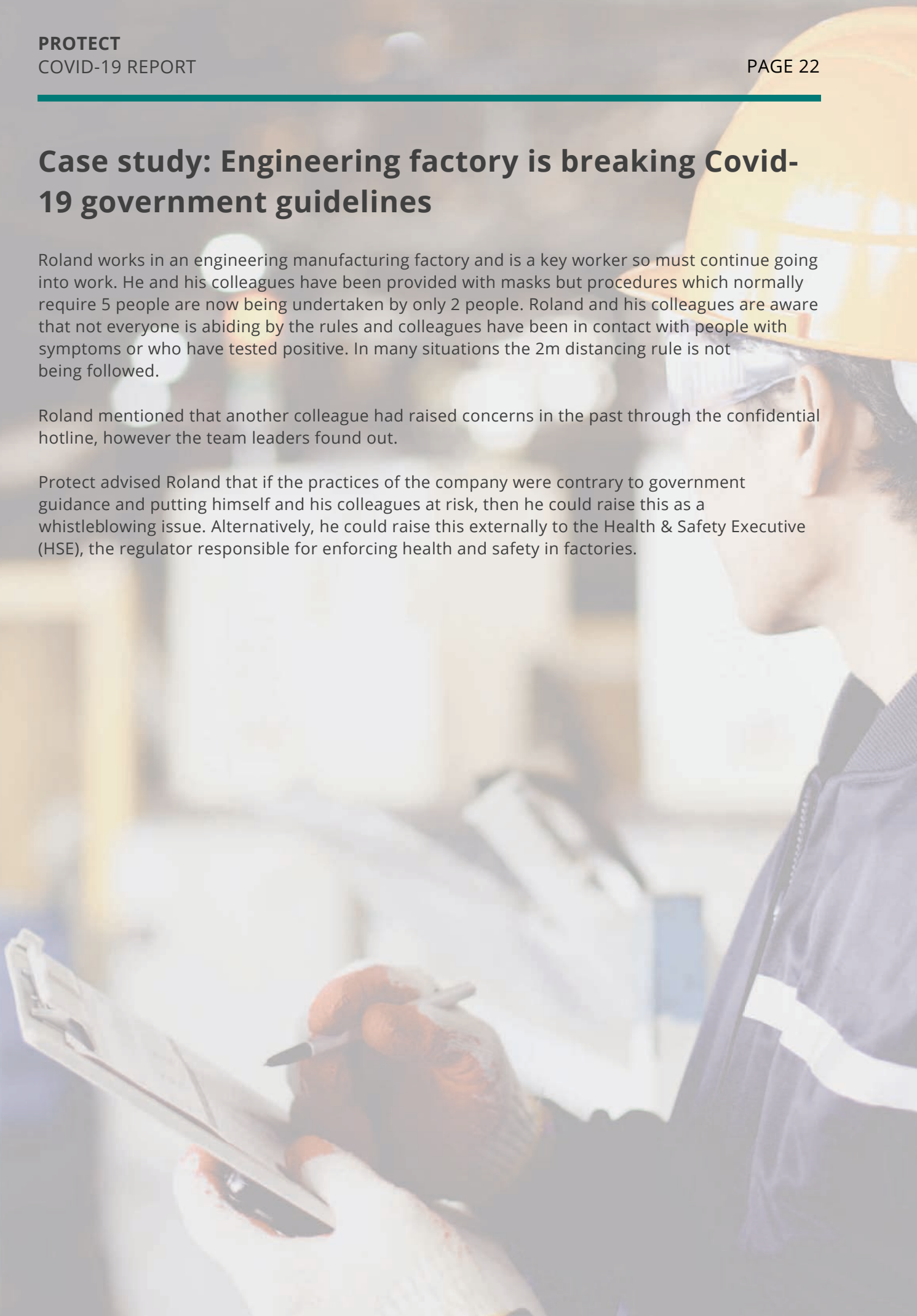
[26] Report: Boohoo & COVID-19: The people behind the profit (Label Behind the Label, 2020) available at <https://labourbehindthelabel.net/wp-content/uploads/2020/06/LBL-Boohoo-WEB.pdf> accessed 30 July 2020.

Case study: Engineering factory is breaking Covid-19 government guidelines

Roland works in an engineering manufacturing factory and is a key worker so must continue going into work. He and his colleagues have been provided with masks but procedures which normally require 5 people are now being undertaken by only 2 people. Roland and his colleagues are aware that not everyone is abiding by the rules and colleagues have been in contact with people with symptoms or who have tested positive. In many situations the 2m distancing rule is not being followed.

Roland mentioned that another colleague had raised concerns in the past through the confidential hotline, however the team leaders found out.

Protect advised Roland that if the practices of the company were contrary to government guidance and putting himself and his colleagues at risk, then he could raise this as a whistleblowing issue. Alternatively, he could raise this externally to the Health & Safety Executive (HSE), the regulator responsible for enforcing health and safety in factories.



Case study: Social distancing safety concerns ignored in food factory – then employee dismissed

Terry works in production at a food factory and has been raising concerns about Covid-19 safety to his employers since February. People queueing in corridors is not compliant with social distancing guidelines which he raised with HR – but his concerns were ignored.

He was told not to come into work wearing a face mask, but when he did, to protect himself and colleagues, he was suspended. Now staff are allowed to wear face masks, but Terry has been dismissed. He is being supported by his union and appealing the dismissal.

Case study: Medical call centre not observing social distance guidelines

Saritha is a nurse who was helping with the Covid-19 effort by working in a call centre offering medical advice. She was concerned that a large number of people were working in one room in the call centre and government guidance on social distancing was not being observed.

Saritha and her colleagues suggested that the work could be done remotely or at safe distances but the employer refused and claimed that it was following government guidance. Those who raised concerns were called for meetings with management where they were told that they would be reported to the health regulator if they refused to do work. In this climate, Saritha did not trust managers and had not raised her concerns.

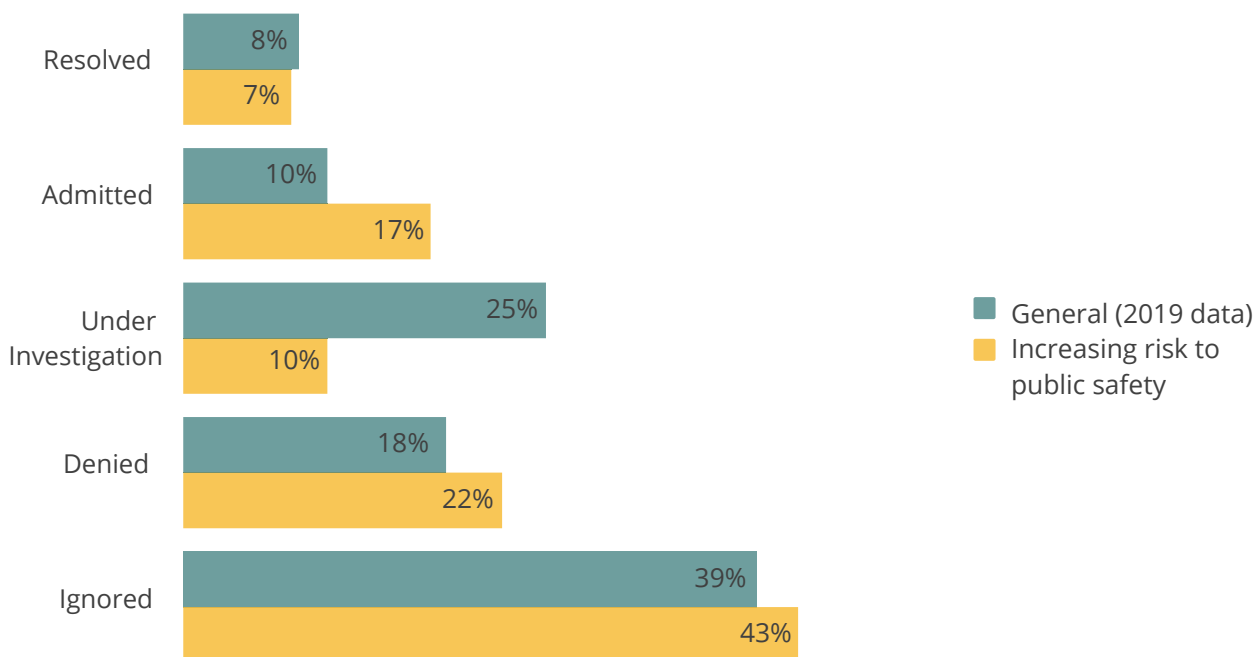
Protect advised that these were serious concerns that affected the health and safety of a large number of people. Saritha should locate the staff whistleblowing policy for details of someone independent and more senior to contact than her immediate managers. She could also raise concerns confidentially to reduce any personal risks to her.

Most whistleblowers found their concerns were ignored

When comparing concerns raised about increasing risk to public safety to all concerns raised in 2019 the most common response to the wrongdoing, risk or malpractice raised is to be ignored.[27] The data does not show us that all the concerns raised pose a risk to workers and the public but if employers are not even looking into the concerns then this is a worrying approach. In some cases, the

whistleblower may simply perceive that their concerns are ignored: employers may be looking into the concerns raised but not communicating findings back to the whistleblower. This illustrates why feedback is so important – if a whistleblower experiences or sees colleagues being ignored when they come forward, this may deter them and others from raising concerns in the future.

2019 Data vs Increasing Risk to Public Safety



N: 1519, source: Advice Line data for increasing risk to public safety 23/03/2020 till 30/09/2020 and General (2019 data) from 01/01/2019- 31/01/2019

[27] 43% of whistleblowers raising Covid-19 safety concerns were ignored and in 2019, of all concerns raised, 39% of whistleblowers were ignored.

Unlike with furlough fraud, high levels of whistleblowers seeking Protect's advice had already tried to raise the issue with their employer – perhaps signaling that they recognise the seriousness of the issue and the urgency of speaking up to stop harm.

Beyond the theme of being ignored, the picture is more mixed.

When comparing data from 2019 we see that increasing risk to public safety concerns are investigated at a lower rate. During lockdown, only 8% of our cases (considering both risk to public safety and furlough fraud) had an employer respond by investigating the concerns, this compares to 25% in 2019. There are also higher rates of the employer denying that the concerns exist, going from 18% in 2019 for all concerns raised to 22% for increasing risk to public safety in 2020.

There are positives in the data with 17% of employers admitting concerns around increasing risk to public safety, which contrasts to 10% in 2019. This could be a reflection of the severity of the concerns being raised.

This reflects a developing situation for both the whistleblower and the employer in that this is a new set of concerns. There may well be occasions where employers are happy to admit certain concerns, and other situations where they disagree with the whistleblower's assessment of what is a 'concern'. The lower rates of investigation are another worrying development as this may indicate that there is often a lack of consideration of the concerns.

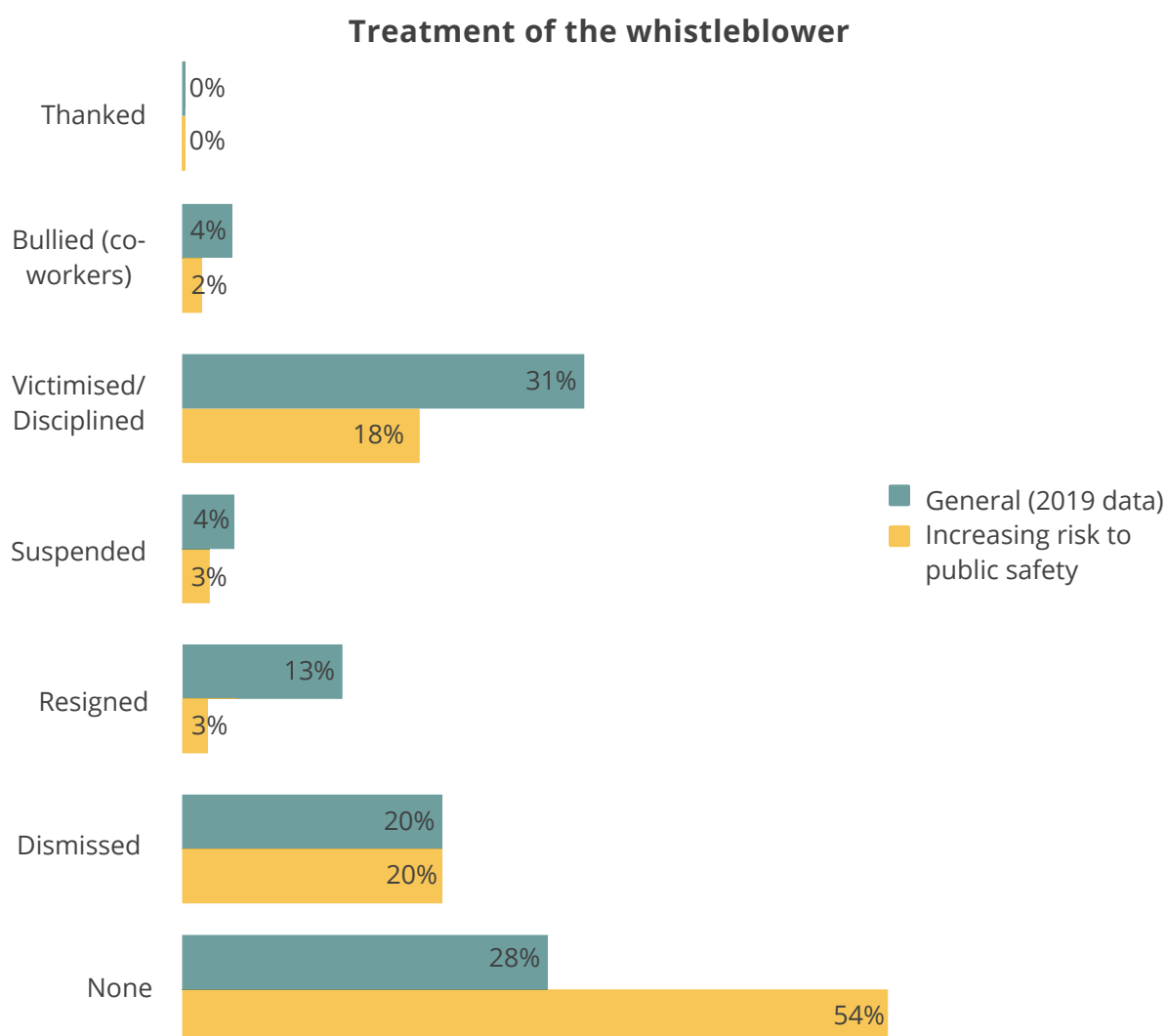
Bubbling underneath this is the prospect of dispute between whistleblowers and employers – which may impact on future attempts to raise concerns as workers will be reluctant to come forward where it causes a dispute. The ability of the employer to acknowledge the concerns and communicate

(or feedback) decisions made and actions taken becomes important. A denial of a whistleblowing concern can be very difficult for a whistleblower to accept if it is not explained by the employer. A failure to do this may mean the information on problems in the future dry up entirely.

Whistleblowers not always suffering for raising concerns

When looking at the treatment workers suffer when they raise concerns about increasing risk to public safety, we note that when compared to 2019 figures, rates of victimisation are much lower. In fact, nearly double the number of

whistleblowers find no positive or negative responses from managers or co-workers compared to 2019 (54% during lockdown compared with 28% for 2019).



N: 1518, source: Advice Line data for increasing risk to public safety 23/03/2020 till 30/09/2020 and General (2019 data) from 01/01/2019- 31/01/2019

Victimisation and disciplinary actions, from managers in particular, is markedly lower falling from 31% in 2019 to 18% during lockdown. It could well be that managers and workers are facing similar problems so there is less personal retaliation against the whistleblower.

The caveat for these statistics is that the rates of dismissal stay worryingly constant - 20% in 2019 and 20% during lockdown. Our research has also found that managers over non-managers are bearing the brunt of victimisation from the employer. Persistently high dismissal rates could undermine the willingness of other whistleblowers to come forward in the future. The situation is exacerbated by lengthy delays in the employment tribunals making it harder for those who have been unfairly dismissed to access justice.

We are pleased to note the Employment Tribunal prioritises Interim Relief Applications, which includes whistleblowing cases.[28]

These are reinstatement orders in an event the claimant (in our case the whistleblower) has been dismissed which can be ordered by the tribunal on reviewing the case file and deciding that the case has a 'likely' chance of success for the whistleblower before a full hearing. Success, though, requires applying for the order in 7 days from the point of dismissal and the whistleblower must state their entire case.

To put this into context, an employment tribunal claim without an interim relief application has a longer time limit of 3 months

from the date of dismissal. This process is made even more of an ordeal given that research has shown one in three whistleblowers lack legal representation while the employer has legal representation in 80-90% of cases.[29]

Our concern is that a reduction in the ability of whistleblowers to enforce their legal rights will undermine the legal protection itself and may reduce the ability for whistleblowers to raise their concerns. We propose in response to these threats to increase time limits which are too short and seem unfair given the reported delays at tribunal for both interim relief and full employment tribunal claims. We would recommend extending interim relief from 7 to 21 days and full employment claims from 3 months to 6 months. This would give whistleblowers more time to prepare their case.[30]

The biggest change in tribunals in response to the threat of dismissal and poor treatment for raising public interest concerns would be to extend the provision of legal aid to these cases. Research has shown that having legal representation improves the legal outcome for whistleblowers and would even the playing field against employers who often have access to legal representation for such cases.

Protect would also like to see employers placed under a positive duty to prevent detrimental treatment of a whistleblower – so that sanctions on employers for mistreating whistleblowers do not solely rely on individuals bringing claims.

[28] *Coronavirus: interim relief – a glimmer of hope for claimants facing employment tribunal delay?*: <https://www.farrer.co.uk/news-and-insights/blogs/coronavirus-interim-relief--a-glimmer-of-hope-for-claimants-facing-employment-tribunal-delay/#>

[29] P.g.10 of *Making Whistleblowing Work for Society, Greenwich University and others, July 2020*: https://a02f9c2f-03a1-4206-859b-06ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf

[30] P.g. 10 *legal aid and changes to Employment Tribunal procedures, Protect's Whistleblowing Bill*: <https://s3-eu-west-1.amazonaws.com/public-concern-at-work/wp-content/uploads/images/2019/11/05160222/Protect-Whistleblowing-Bill-Nov-2019.pdf>

EXPERIENCE OF MANAGERS AND NON-MANAGERS

Within the data we were also able to compare the experiences of managers and non-managers when raising concerns during the pandemic.

It should be noted that those with management duties in this instance means those who are line managers, supervisors, senior managers or executives within the organisation compared to more junior members of staff with no managerial duties.

We found the following key points of difference [31]:

During the pandemic, concerns raised by non-management employees were almost **twice as likely** to be admitted by the employer than those raised by management.



*16% admitted for non-management whistleblowers compared to 9% admitted for management whistleblowers.

Managers were dismissed at a higher rate than non-management workers

21%

non-
management
workers



32%

managers

Both sets of results may indicate that organisations find it easier to admit concerns from more junior staff than those who are more senior because managers are expected to deal with issues or defend the status quo. The results also seem to indicate that managers who raise concerns are at a higher risk than non-managers which again may indicate that, although they are more senior, they are expected to deal with or tow the line on issues as they come up rather than expose them.

[31] Sample size 614 cases between the period 24th March 2020-1st July 2020.



CONCLUSION

The Best Warning System
highlights the real danger
of ignoring whistleblowers
in the workplace.

The pandemic has shown us the importance of whistleblowing and how it plays a role in keeping all of us safe – yet it is unnerving that employers are ignoring staff who whistleblow. Worse still, 20% of whistleblowers who sought advice from our Advice Line told us they had been dismissed after raising concerns during Covid-19.

It is a misconception that whistleblowing has to be on a grand scale. Of course, the media will highlight the huge whistleblowing scandals but as we know all too well from our Advice Line, and from the featured case studies in this report, whistleblowing concerns come in all shapes and sizes - and all matter.

If we take the example of PPE, a small issue can highlight something much more serious. “I don’t have a glove” might not usually be a whistleblowing matter, but today it can be the difference between life and death. The failure

of an employer to follow government guidance on social distancing at work could accelerate the rate of infection and hasten local lockdown measures.

Where employers fail to listen – or worse - ignore the concern raised, there should be consequences for this decision.

From looking at our non-pandemic data in 2019 and 2020 pandemic data, we can see the failings are systemic. What is particularly unnerving is that employers are prepared to ignore UK whistleblowers raising pandemic related issues – an issue we should all be extremely worried about.

There needs to be legal standards on employers to have whistleblowing arrangements. Best practice for whistleblowing systems is well established but the pandemic has exposed how, in reality, it is too easy to ignore whistleblowers.[32]

To support these new changes, organisations should face sanctions where they are found to be in breach of the whistleblowing standards, which should include fines and regulatory action. Penalties should be issued either by a new whistleblowing regulator or via the existing framework of regulators.[33]

Regulators and enforcement bodies should also be alarmed by the message coming from the findings of this report that so many whistleblowers feel their concerns have either been ignored or denied. Regulators have a role to play both in responding to the concerns raised by whistleblowers, and shaping the systems that employers have in place.[34] Whether it is HMRC dealing with furlough fraud or the HSE regulating an employer's response to work safety, they should all be worried about high levels of whistleblowers being ignored and the apparent low level of employer-led investigations. Regulators should ensure they provide accessible channels of communication (not just a reporting form), be required to follow up and take action on disclosures, and provide appropriate and timely feedback to the whistleblower.

If whistleblowing is to remain, as this report suggests, the best warning system, then society needs to ensure that legal rights given to whistleblowers can be enforced by

extending legal aid to whistleblowing cases. Research has shown the hostile legal environment whistleblowers face, and the lack of resources they have to fight for their legal rights compared to employers – issues which affect too many callers to our Advice Line.

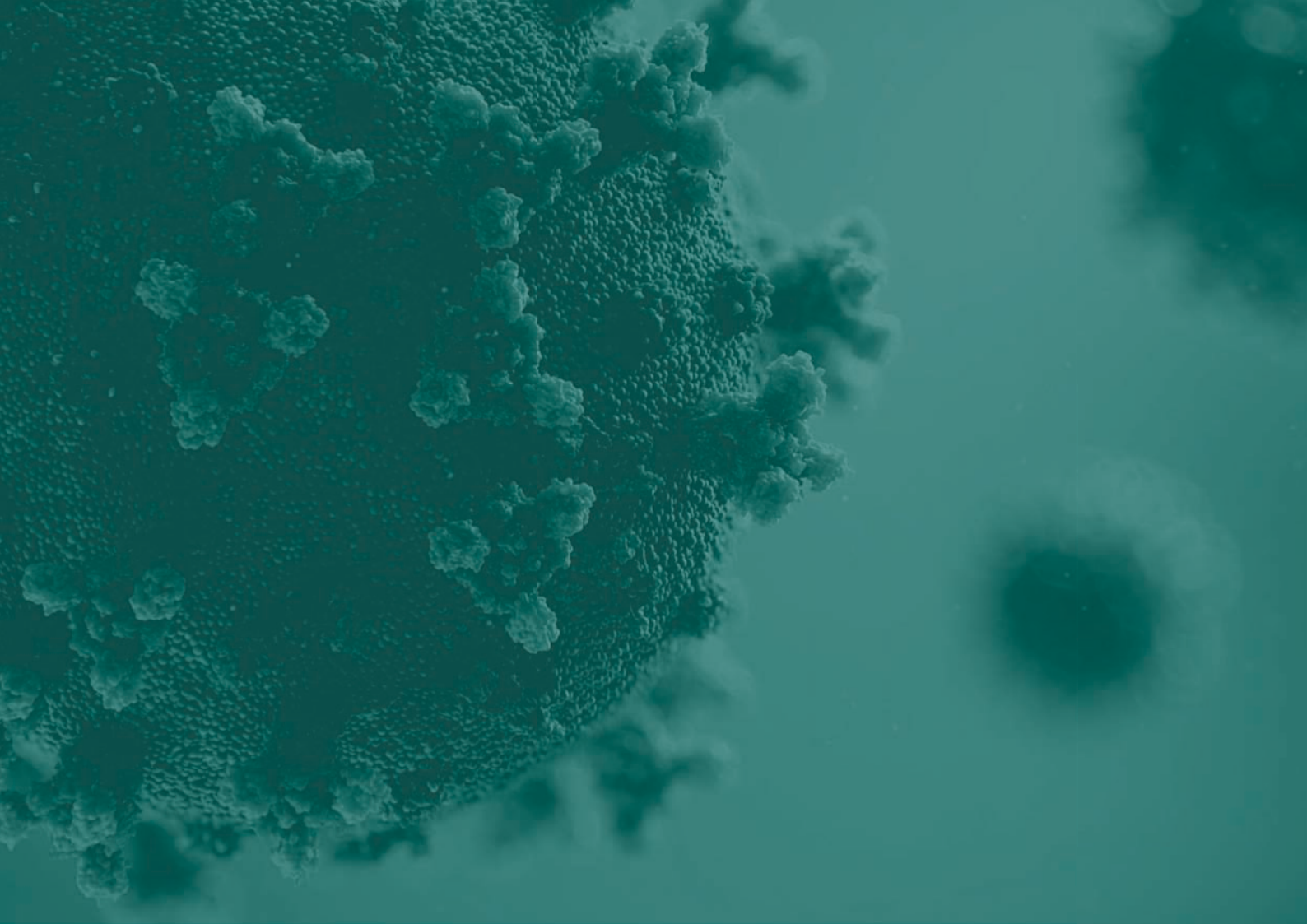
It is time to reform the whistleblowing law to ensure that whistleblowers through the pandemic and beyond, can speak up safely to stop harm.

Special thanks to Andrew Pepper-Parsons, Louise O'Neill, Laura Fatah, Rhiannon Plimmer-Craig, Victoria Benaityte and the Advice Line team at Protect.

[32] As seen in the EU Directive on Whistleblowing's requirements on organisations to have whistleblowing arrangements: <https://protect-advice.org.uk/protect-urges-government-to-safeguard-uks-countless-unprotected-whistleblowers-by-adopting-ground-breaking-eu-legislation/>

[33] For more details on the Whistleblowing Commission see page 9 of our draft Whistleblowing Bill.

[34] An issue Protect addressed in its Better Regulators Guide p.g.34.



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