WHISTLEBLOWING BILL – Updated January 2022

Short title: A Bill to strengthen whistleblowing protection

Contents:

Explanatory notes to the Bill are incorporated in comments after each Clause

PART 1 – Amendments to the ERA 1996

The Employment Rights Act 1996, is amended as follows:

Clause 1 – Extending the scope of whistleblowing

Section 43A shall be substituted:

"43A. Meaning of "protected disclosure".

(1) In this Act "protected disclosure" means:
  (a) a qualifying disclosure made by any current or former employee, worker or other connected person, including any persons identified in Section 43K; and
  (b) a disclosure made in accordance with Sections 43C to 43H."

Section 43K shall be substituted:

"43K. Extension of meaning of "worker" etc. for Part IVA.

(1) For the purposes of this Part, any person who makes a qualifying disclosure is protected against detriment and unfair dismissal in accordance with this Act, and such persons include, but are not limited to:
  (a) employees and workers including agency and contract workers;
  (b) job applicants and those who acquire information during a recruitment process;
  (c) persons undertaking work placements and work experience;
  (d) self-employed contractors;
  (e) volunteers and interns;
  (f) paid and unpaid trainees;
  (g) non-executive directors and trustees including pension trustees;
  (h) shareholders;
  (i) foster carers;
  (j) priests and ministers of religion;
  (k) crown employees and those appointed by the crown;
  (l) public and private office holders;
  (m) suppliers, partners and business associates of the employer and any persons working under the supervision and direction of contractors, subcontractors and suppliers;
  (n) third persons connected to the reporting person including family members and colleagues;
  (o) trade union representatives;
  (p) partners in partnerships or limited liability partnerships; and
  (q) a person receiving coaching or training for sporting or recreational purposes (whether or not that person pays for such coaching or training).

(2) Any persons who either:
  (a) receive; or
  (b) investigate

  a protected or qualifying disclosure, shall be protected from detriment in the same manner as the person making the disclosure.

(3) The Secretary of State may by order make amendments to this Section to extend the category of persons whom enjoy protection under this Part.

(4) An order under subsection (4) may not make an amendment that has the effect of removing a category of persons unless the Secretary of State is satisfied that there are no longer any persons in that category."

Explanation
This clause aims to replace the current extended definition of "worker" under Section 43K with a non-exhaustive list of categories of those who should be protected under whistleblowing legislation drawing on international best practice. A non-exhaustive list is set out in Article 4 of the EU Directive (2019/1937). Although EU law no longer applies in the UK, it would be unusual for UK law to diverge from the EU Directive on this point. The recent Supreme Court ruling in *Gilham v Ministry of Justice* [2019] UKSC 44 - that judges should not be denied whistleblowing rights and that the law should be interpreted to include judicial office holders - means that the legislation should be amended to ensure clarity. The Equality Act 2010 already covers employees, contract workers, applicants, police officers, partnerships, public and private office holders, barristers, advocates, qualification bodies, local authority members, employment service providers, and trade associations.

If a non-exhaustive list is included in Section 43A, there is no need for the extended definition of worker in Section 43K.

The updated draft extends legal protection to those who either receive or investigate a protected disclosure, in line with the EU Directive.

Clause 2 – Extending the range of qualifying disclosures

Section 43B is amended as follows:

In subsection (1) after (e), insert:

(f) "gross waste or mismanagement of public funds;
(g) abuse of, or corruption in, public procurement;
(h) animal abuse, neglect or cruelty;
(i) market abuse or manipulation;
(j) serious misuse or abuse of authority;
(k) improper behaviour that seriously harms or is likely to seriously harm the reputation or financial wellbeing of the employer; or
(l) that 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."

Section 43B(3) shall be substituted:

(3) "No cause of action in civil proceedings shall lie against a person in respect of the making of a protected disclosure.

(3A) In a prosecution of a person for any offence prohibiting or restricting the disclosure of information it is a defence for that person to show that, at the time of the alleged offence, the disclosure was, or was reasonably believed by the person to be, a protected disclosure."

Explanation
Subsection (1) adds new categories of concern (f) and (g), which were identified by Protect's Whistleblowing Commission as gaps in the current legislation. Categories (h) and (i) replicate the reportable concerns which are included in the Chapter 18 (Whistleblowing) of the FCA Handbook.

New subsection (3) provides immunity from civil proceedings for those who make a protected disclosure and reflects the Irish legislation.

New subsection (3A) introduces a public interest defence for persons disclosing information in accordance with the Act, in circumstances where they may face criminal prosecution. Wording is taken from the Irish legislation.

New clause – Standards on employers

After Section 43C, insert:

"Section 43CA: Employers' duty to enable reporting and to act on disclosures of information.

(1) Employers which have:
  (a) 50 or more employees;
  (b) an annual business turnover or annual balance sheet total of £10 million or more; or
  (c) operate in the area of financial services or are vulnerable to money laundering or terrorist financing,

shall be required to establish internal channels and procedures for reporting and managing qualifying disclosures. The number of employees under (a) shall include employees of all franchises, subsidiaries and Associated employers as defined under Section 231.

(2) Employers' procedures shall include:
  (a) channels for receiving the disclosures which are designed, set up and operated in a manner that ensures the confidentiality of the identity of the person making the disclosure and prevents access to non-authorised persons;
  (b) the designation of a senior person who has responsibility for the effectiveness of reporting channels and following up on disclosures, whose name and contact details are clearly communicated and accessible;
  (c) the designation of a person or department competent for following up on the disclosures;
  (d) diligent follow up to the disclosures by the designated person or department;
  (e) clear and easily accessible information regarding the procedures and information on how and under what conditions disclosures can be made externally to competent authorities including prescribed persons under Section 43F;
  (f) a comprehensive procedure for documenting whistleblowing concerns, and the actions taken as a result of each concern disclosed, including outcomes;
  (g) a system for record keeping the information in (f) which enables employer to identify patterns and enables assessment of effectiveness; and
  (h) signposting to sources of help for the person making the disclosure, that should include any staff or trade-union representative in place and external sources of advice.

(3) Notwithstanding any duty to third parties, unless a risk assessment identifies a serious risk of harm to any person, the employer shall inform the person making the disclosure:
   (a) that the report has been received, within seven days;
   (b) of all progress taken in response, including any action taken by a prescribed person, and where there has been no action, to explain in writing the reasons every 14 days; and
   (c) within a reasonable timeframe, not exceeding three months following the disclosure, to provide substantive feedback about the follow-up to the disclosure and the impact of the disclosure.

(4) Employers shall be under a duty to establish protective measures as soon after the disclosure as possible, to prevent detrimental treatment by the employer, the employer's officer or agent, or by any third party to someone who has made, is believed to have made, or is believed to have the intention of making a protected disclosure. Such measures include, but are not limited to:
   (a) undertaking a risk assessment to identify and mitigate any risks of detrimental treatment to the person making the disclosure; and
   (b) providing the person making the disclosure with a designated contact within the organisation, for the purpose of reporting any detrimental treatment.

(5) Employers shall be under a duty to provide training to all staff on how to make a disclosure.

(6) The Secretary of State shall consult with interested parties and require the Advisory, Conciliation and Arbitration Service to produce a statutory Code of Practice on receiving and handling protected disclosures.

Section 43CB: Effect of failure to comply with the Code.

(1) A failure on the part of any person to observe any provision of the Code of Practice shall not in itself render him liable to any proceedings.

(2) In any proceedings before a court or tribunal, the Code of Practice shall be admissible in evidence and any provision of the Code which appears to the court or tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

Section 43CC: Effect of failure to comply with the Code: adjustment of award.

(1) If, in proceedings to which this section applies, it appears to the court or tribunal that:
   (a) the claim to which the proceedings relate concerns a matter to which the Code of Practice applies;
   (b) the employer has failed to comply with the Code in relation to that matter; and
   (c) that failure was unreasonable,

the court or tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the worker by no more than 25%."

Explanation
This clause follows the EU Directive in setting standards for employers of 50 or more employees, those with £10m turnover, or those in financial services, and prescribes some detail of how the organisation should respond to disclosures.

It also proposes a statutory Code of Practice, which would follow the best practice already developed by the Whistleblowing Commission to establish whistleblowing procedures. Some of the provisions in (2) go beyond the EU Directive's requirements and are highlighted in comments below. This would harmonise the law and practice with the grievance regime that employers are already very familiar with, the ACAS Code of Practice: Disciplinary and Grievance at Work.

The requirement in (2)(b) of a designated senior person follows existing requirements in some sectors, e.g. in financial services, the FCA requires a "whistleblowing champion" at board level to ensure that there is strategic oversight.

Subclause (3) obliges employers to provide feedback on action they take, or a prescribed person takes, in response to the disclosure (subject to a risk assessment that this will not cause serious risk of harm to any person). Where no action is taken, the employer should provide fortnightly updates in writing to the whistleblower explaining why.

Subclause (4) introduces a mandatory duty on employers to take reasonable steps to prevent detrimental treatment. This is a pro-active duty which does not currently exist, and the intention is to allow regulators/the Whistleblowing Commissioner to enforce this duty, without the need for an individual whistleblower to bring a claim.

Subclause (5) introduces a duty on employers to provide whistleblowing training.

Subclause (6) introduces a statutory Code of Practice, produced by ACAS, to guide employers' obligations.

Section 43CD: Employers' duty to report on transparency in its own business and supply chains

(1) Employers which have 250 or more employees shall be required to prepare a whistleblowing transparency statement for each financial year.

The number of employees shall include employees of all franchises, subsidiaries and Associated employers as defined under Section 231.

(2) The whistleblowing transparency statement for a financial year is:

(a) a statement of the steps the organisation has taken during the financial year to ensure there are internal channels and procedures for reporting and managing qualifying disclosures:

(i) in all parts of its own business, and

(ii) in all parts of its supply chains, or

(b) a statement that the employer has taken no such steps.

(3) An employer's whistleblowing transparency statement may include information about:

(a) the employer's structure and business;

(b) its policies in relation to whistleblowing;

(c) how its whistleblowing policies are communicated to its staff;

(d) the training about whistleblowing given to its staff;

(e) an summary of the types of action taken in response to qualifying disclosures;

(f) its due diligence processes in relation to whistleblowing procedures in its business and supply chains;

(g) the effectiveness of its policies and due diligence processes, measured against such performance indicators as it considers appropriate.

(4) If the employer has a website, it must:

(a) publish the whistleblowing transparency statement on that website, and

(b) include a link to the whistleblowing transparency statement in a prominent place on that website's homepage.

(5) If the employer does not have a website, it must provide a copy of the whistleblowing transparency statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.

(6) The duties imposed by this section are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988.

Explanatory Note – s43CD

This section is modelled on the reporting duty under the Modern Slavery Act 2015, s54. It creates a parallel duty on organisations to report steps they have taken to ensure there are processes for reporting and managing whistleblowing concerns, within their own businesses and within their supply chains. This builds on existing duties in the financial sector, where firms are required to report annually to their governing body on the operations and effectiveness of their whistleblowing systems under SYSC 18.3(f).

Subsection (3) follows the Modern Slavery Act in not requiring employers to include specified content in the report, instead suggesting possible areas to report on. 3(g) gives a wide scope for employers to comment on the effectiveness of their policies using any performance indicators they feel are appropriate, which could include data from staff surveys and exit interviews, or feedback from workers who make protected disclosures. This wording is based on the Modern Slavery Act. While it may lead to some variation between reports, we consider it will nevertheless contribute to the main objective of this section: encouraging employers to regularly reflect on whistleblowing processes in their own business and in their supply chains, and increasing trust in these processes through greater transparency.

The threshold of employers with 250 or more employees is in line with the threshold for self-reporting under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. This means it should represent an additional reporting duty for employers already required to report on various matters in their organisations, rather than imposing entirely new duties on employers.

Clause 3 – Extension of legal advice to include trade union advice

Section 43D is amended as follows:

In Section 43D, after "advice" insert:

(1A) "A qualifying disclosure is made in accordance with this section if it is made to a trade union or staff representative."

Explanation
At present only a trade union lawyer is likely to be covered by the section, but it is likely that a worker would initially discuss their concerns with a trade union representative, or any other staff representative, with a view of obtaining legal advice.

Amendment of Section 43F – Disclosure to the Whistleblowing Commissioner

Section 43F(1) is amended as follows:

"43F Disclosure to prescribed person or the Whistleblowing Commissioner.

(1) A qualifying disclosure is made in accordance with this section if the worker:
  (a) makes the disclosure ... to a person prescribed by an order made by the Secretary of State for the purposes of this section or to the Whistleblowing Commissioner, and
  (b) reasonably believes:
    (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed or established; and
    (ii) that the information disclosed, and any allegation contained in it, are substantially true."

Explanation
This amendment allows a disclosure to be made to the Whistleblowing Commissioner – a new independent body as set out in a new clause below. A failure to investigate a concern by a regulator, or unfavourable treatment of the whistleblower can be raised with the new Commissioner. This is not intended to replace the prescribed person route or the disclosure in other cases in current Section 43G. However, a whistleblower should also be protected if they approach the Commissioner.

Extension of prescribed persons to all professional regulatory bodies

In Section 43F(3), insert:

"For the purpose of this clause, all professional regulatory bodies with discipline and registration authority are prescribed persons."

New clause: Prescribed persons' duty to enable reporting and to act on disclosures of information

After Section 43FA, insert:

"43FB Prescribed persons' duty to enable reporting and to act on disclosures of information.

(1) The Secretary of State shall make regulations requiring all persons prescribed for the purposes of Section 43F excluding members of Parliament to:
   (a) establish reporting channels, which are secure and ensure confidentiality, for receiving and handling information provided by the person making a protected disclosure;
   (b) keep confidential records of all protected disclosures made to them;
   (c) give feedback to the person making a protected disclosure about the follow-up of the disclosure within a reasonable timeframe not exceeding three months or six months in duly justified cases. In such cases, the prescribed person must, at three months, issue the person making the disclosure with a reasonable explanation as to why the timeframe will be exceeded. This explanation may be reviewed by the Whistleblowing Commissioner in cases of dispute or query;
   (d) follow up on disclosures by taking the necessary measures to investigate, as appropriate, the subject-matter of the concerns. Where the prescribed person is not competent to investigate, they shall inform the person making the protected disclosure of their intention to pass the concern to the appropriate body;
   (e) where the prescribed person receives a disclosure from another body under (d) above, they shall take the necessary measures and investigate, as appropriate, the subject matter of the concerns; and
   (f) act to preserve the confidentiality and of the whistleblower.

(2) The regulations must require a person prescribed for the purposes of Section 43F to publish on their websites in a separate, easily identifiable and accessible section at least the following information:
   (a) the conditions under which persons making a protected disclosure qualify for protection under this Act;
   (b) the communication channels for receiving and following-up disclosures;
   (c) the confidentiality regime applicable to disclosures;
   (d) the nature of the follow-up to be given to reported concerns;
   (e) the remedies and procedures available against retaliation and possibilities to receive confidential advice for persons contemplating making a disclosure; and
   (f) a statement clearly explaining that persons making information available to the competent authority in accordance with this Part are not considered to be infringing any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and are not to be involved in liability of any kind related to such disclosure."

Explanation
This new clause follows the wording of Article 6 and Article 10 of the EU Whistleblowing Directive. Subsection (1) sets out the requirements for regulators to establish confidential reporting channels and to provide feedback. Subsection (2) requires all prescribed persons to provide information about their whistleblowing processes on their website, including information explaining that there will be no liability for people making disclosures.

Clause 4 – Contractual duties of confidentiality (prohibition of "gagging" clauses)

Section 43J(1) shall be substituted:

(1) "No agreement made before, during or after employment between a person and an employer may preclude that person from making a protected disclosure. This includes contracts, workplace policies, and any other agreements or requirements, be they verbal or written. Any settlement agreement must contain:
   (a) a clear statement that nothing in the agreement affects the rights of a person to make a protected disclosure and stipulate the types of disclosures that can be made and to which categories of authorities; and
   (b) certification by the independent adviser that the effect of any requirements of confidentiality and the limitations on those requirements have been explained to the employee."

Explanation
The current wording of Section 43J is unclear and has been the subject of considerable debate. The Government has also suggested amendments to NDAs in their recent consultation response. Subclause (2) adds a requirement that settlement agreements cover what may be properly reported.

It also fits with the SRA's updated warning notice on 12/11/20 on compromise agreements that says the NDAs would be improperly used when used as *a means of preventing, or seeking to impede or deter, a person from: […] making a protected disclosure under the Public Interest Disclosure Act 1998.*

New clause – Prohibition of discrimination for making a protected disclosure

After Section 47B(3), insert:

"S.47B(4) Prohibition of discrimination for making a protected disclosure.

(1) An employer must not discriminate, harass or victimise any person because it appears to the employer that the person has made or may make a protected disclosure.

(2) For the purposes of this Act:
   (a) a person (A) discriminates against another (B) if, because of a protected disclosure, A treats B unfavourably;

(b) a person (A) harasses another (B) if A engages in unwanted conduct related to B's protected disclosure and the conduct has the purpose or effect of:
    (i) violating B's dignity; or
    (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B;
(c) in deciding whether conduct has the effect referred to in subsection (2)(b), each of the following must be taken into account:
    (i) the perception of B;
    (ii) the other circumstances of the case; and
    (iii) whether it is reasonable for the conduct to have that effect;
(d) a person (A) victimises another person (B) if A subjects B to a detriment because:
    (i) B has made a protected disclosure; or
    (ii) A believes that B has made, or may make, a protected disclosure."

Explanation
This clause imports the language of the Equality Act and makes it unlawful to discriminate, victimise or harass a person for a protected disclosure. It simplifies and harmonises the law and makes it therefore more accessible. It should be seen as additional to the right not to suffer detriment and covers circumstances of perceived or anticipated whistleblowing. The language of discrimination is already used in regulations for NHS employers and widely understood by workers:

"3. An NHS employer: (1) must not discriminate (2) against an applicant (3) because it appears to the NHS employer that the applicant has made a protected disclosure (4)." The Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018.

New clause – Reversal of the burden of proof

After Section 47B(4), insert:

"In proceedings before a court or tribunal relating to a detriment under Section 47B of the Employment Rights Act 1996, or dismissal under Section 103A of the Employment Rights Act 1996, and subject to the person making the disclosure establishing that he or she made a qualifying disclosure and suffered a detriment or dismissal, it shall be presumed that the detriment or dismissal was made in retaliation for disclosure. In such cases, it shall be for the person who has taken the detrimental measure or dismissed the person to prove that that measure or dismissal was based on duly justified grounds."

Explanation
This new clause ensures that the burden of proof in any tribunal or court proceedings for whistleblowing detriment or dismissal shifts to the employer. Once it is established that the whistleblower has made a qualifying disclosure and suffered detriment, it is for the employer to prove that they had a justifiable reason for their action. The wording follows that in the EU directive. It harmonises the test applicable to whistleblowing with the one used in discrimination cases, which is much better known and understood.

New clause – Tortious duty

After Section 47B(5), insert:

(7) "If a person causes detriment to another person because the other person or a third person made a protected disclosure, the person to whom the detriment is caused has a right of action in tort against the person by whom the detriment is caused."

Explanation
This clause allows a third party to bring a claim in tort for any discrimination or detriment. It may allow family members, those associated with the whistleblower or even other corporate or public bodies to take action against detrimental treatment. This may also allow a tortious action against a regulator if they cause detriment to the whistleblower (e.g. breach of confidentiality or blacklisting). This wording is taken from Irish law.

It also reflects case law development on this issue, see for instance *Rihan vs EY Ltd and others* [2020] EWHC 901 (QB) which imposes a new duty of care on employers to protect against economic loss, in the form of loss of future employment opportunity, by providing an ethically safe work environment, free from professional misconduct (or indeed criminal conduct) in a professional setting.

Clause 6 – Test for unfair dismissal

Section 103A shall be substituted:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the dismissal is on the grounds that the employee made a protected disclosure."

Explanation
This clause imports the lower test "on the grounds that" for an unfair dismissal claim (which the courts have interpreted as meaning "a material factor in"). This new language is used in PIDA for bringing a detriment claim, but PIDA currently sets a higher hurdle for an unfair dismissal claim for making a protected disclosure – it has to be the "main or principal reason" for a dismissal.

New clause – The Whistleblowing Commissioner

After Section 49A, insert:

"S.49AA The Whistleblowing Commissioner.

(1) The Secretary of State shall establish a Whistleblowing Commissioner.

(2) The objectives of the Whistleblowing Commissioner are:
  (a) to ensure that concerns raised by whistleblowers are acted upon;
  (b) to promote good corporate governance and discourage misconduct and malfeasance;

(c) to protect the public purse and ensure that wrongdoers bear the cost of wrongdoing revealed by whistleblowing;
(d) to promote the normalisation of whistleblowing as part of ethical governance, operating with a presumption in favour of transparency; and
(e) to reduce conflict and litigation relating to whistleblowing.

(3) The Secretary of State shall ensure that there is an efficient and effective system to support the carrying out of the business of the Commissioner.

(4) The Whistleblowing Commissioner shall have the following functions:
(a) to act as an investigator of alleged maladministration or a failure to investigate a protected disclosure either by an employer or by a prescribed person;
(b) to ensure the duties on employers and prescribed persons under Section 43CA and Section 43FB are upheld;
(c) to set standards about protected disclosures expected of prescribed persons and employers and issue guidance of such standards;
(d) to improve public awareness and education of people's rights regarding protected disclosures; and
(e) to administer civil penalties where they judge appropriate against employers or prescribed persons for breaches of their responsibilities under this Act.

(5) The Whistleblowing Commissioner shall have powers:
(a) to require any person to provide such documentation or information as requested in order to perform the functions under (3);
(b) To enter any premises and undertake such enquiry as necessary in order to perform the functions under (3);
(c) to issue warning notices and redress orders to ensure that employers and prescribed persons fulfil their responsibilities under this Act; and
(d) to issue civil penalties where warning notices and redress orders are not complied with.

(6) The Secretary of State shall establish a civil penalty fine regime where a person, employer or prescribed person is found to be in breach of (5) and (6) above.

(7) The Whistleblowing Commissioner shall provide the person making the protected disclosure to them with the proposed findings of fact and legal conclusions before concluding any investigation. The person making the protected disclosure may submit written comments about the report which will be considered by the Whistleblowing Commissioner in the final outcome of the investigations.

(8) For the purposes of (3) above, the functions of the Whistleblowing Commissioner will apply to employers and prescribed persons as defined in Section 43F and Section 43K(2) of the Employment Rights Act 1996.

(9) Prescribed persons shall provide the Whistleblowing Commissioner with relevant information on request. The Secretary of State may by order identify information that a prescribed person may decline to provide for the purposes of safeguarding national security or where such information would prejudice a police investigation."

Explanation
This clause will establish a new independent body to set standards expected of employers and regulatory bodies and to investigate complaints from whistleblowers where an employer or prescribed person has failed to investigate properly or at all or adhere to the requirements under this Bill. This clause also introduces a civil penalties regime that the Whistleblowing Commissioner should administer. An additional element has been imported from the Office of the Special Council in US – providing the whistleblower a right to reply before a report is concluded. Experience in the US is that whistleblower's evaluation comments can improve or even change conclusions.

New clause – Interim relief for detriment claims

After Section 49AA, insert:

"S.49AB Interim relief for detriment claims.

(1) An employee who presents a complaint to an employment tribunal that:
(a) they have been subjected to a detriment in contravention of section 47B, and
(b) the ground for the detriment is the making of a protected disclosure under Part IVA,
may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of twenty-one days immediately following the effective date on which the detriment first occurred or, where the detriment is part of a series of similar detriments, the last of them.

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

Explanation
This new clause extends the availability of interim relief, which is currently only available in unfair dismissal claims, to detriment claims. This idea has been championed by the Protected Disclosures (Amendment) Bill 2021 in Ireland. In unfair dismissal claims, interim relief sustains an employee's employment contract pending the final hearing. If extended to detriment claims, interim relief could reverse detriment such as demotions and suspensions pending the final hearing.

New clause – Extension of protection to negative treatment from other responsible person

After Section 43C, insert:

"S.43CA Application to other responsible person of section 47B and related provisions.

(1) For the purposes of section 47B, and of sections 48 and 49 so far as relating to that section, the other responsible person shall be treated as the employer of the worker.
(2) In this section "the other responsible person" in relation to a worker means the person to whom that worker makes a qualifying disclosure in accordance with section 43C(1)(b).

Explanation

Section 43C(1)(b) gives a worker the right to make a protected disclosure to another responsible person, where they reasonably believe that this person bears sole or primary responsibility for the wrongdoing in question. However, the scope of protection remains unchanged - the worker is still only protected from negative treatment from the employer, and not from the other responsible person. This new clause seeks to address this loophole, and extend the duty not to subject a worker to negative treatment to the other responsible person, where a worker makes a protected disclosure under section 43C(1)(b).

s43CD: Employers' duty to report on transparency in its own business and supply chains

(1) Employers which have 250 or more employees shall be required to prepare a whistleblowing transparency statement for each financial year.

The number of employees shall include employees of all franchises, subsidiaries and Associated employers as defined under Section 231.

(2) The whistleblowing transparency statement for a financial year is:

(a) a statement of the steps the organisation has taken during the financial year to ensure there are internal channels and procedures for reporting and managing qualifying disclosures:

(i) in all parts of its own business, and

(ii) in all parts of its supply chains, or

(b) a statement that the employer has taken no such steps.

(3) An employer's whistleblowing transparency statement may include information about:

(a) the employer's structure and business;

(b) its policies in relation to whistleblowing;

(c) how its whistleblowing policies are communicated to its staff;

(d) the training about whistleblowing given to its staff;

(e) a summary of the actions taken in response to qualifying disclosures;

(f) its due diligence processes in relation to whistleblowing procedures in its business and supply chains;

(g) the effectiveness of its policies and due diligence processes, measured against such performance indicators as it considers appropriate.

(4) If the employer has a website, it must:

(a) publish the whistleblowing transparency statement on that website, and

(b) include a link to the whistleblowing transparency statement in a prominent place on that website's homepage.

(5) If the employer does not have a website, it must provide a copy of the whistleblowing transparency statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.

(6) The duties imposed by this section are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988.

Explanatory Note – s43CD

This section is modelled on the reporting duty under the Modern Slavery Act 2015, s54, and creates a parallel duty for companies to report on steps taken to ensure there are processes for reporting and managing whistleblowing concerns within their own businesses and within their supply chains. The threshold of employers with 250 or more employees is in line with the threshold for self-reporting under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

PART 2 – Amendments to other Acts and procedures

New clause – Legal aid and changes to employment tribunal procedures

In the Legal Aid Sentencing and Punishing of Offenders Act 2012 ("LAPSO") in Schedule 1 after paragraph 43, insert:

"43A Protected disclosures.

(1) Civil legal services provided in relation to contravention of the rights not to suffer detriment or be dismissed on the ground that the worker has made a protected disclosure under the Employment Rights Act 1996."

Explanation
This new clause adds to the list of civil legal services for which legal aid may be provided under Schedule 1 to LASPO.

Amendments to the Employment Rights Act 1996

1. In Section 48 (Complaints to employment tribunal) in subsection (3), for all occurrences leave out "three" and insert "six".

2. In Section 48(3)(a), after "last of them, or", insert "such other period that the tribunal thinks just and equitable." and leave out (b) entirely.

3. In Section 49(1)(b) (Remedies), insert "Compensation may include injury to feelings, aggravated damages, punitive or exemplary damages", and insert subsection (c):

   (c) "make an appropriate recommendation. An appropriate recommendation is a recommendation that, within a specified period of time, the respondent takes specified steps for the purpose of obviating or reducing the detriment of any matter to which the proceedings relate. If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation, the tribunal may:
   (a) if an order was made under subsection (1) increase the amount of compensation to be paid; or
   (b) if no order was made, make one."

4. In Section 111 (Complaints to employment tribunal) in subsection 2(a), leave out "three" and insert "six"; after "date of termination", insert "or such other period that the tribunal thinks just and equitable." and leave out (b) entirely.

5. In Section 112 (The remedies: order and compensation) in subsection (2)(b), insert "Compensation may include injury to feelings, aggravated damages, punitive or exemplary damages" and insert subsection (c):

   (c) "make an appropriate recommendation. An appropriate recommendation is a recommendation that, within a specified period of time, the respondent takes specified steps for the purpose of obviating or reducing the detriment of any matter to which the proceedings relate".

6. In Section 112(4), after "to the employee" insert "and make an appropriate recommendation. An appropriate recommendation is a recommendation that within a specified period of time the respondent takes specified steps for the purpose of obviating or reducing the detriment of any matter to which the proceedings relate."

7. After Section 112(4), insert subsection (5):

   (5) "If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation, the tribunal may:

(a) if an order was made under subsection (2) or (4), increase the amount of compensation to be paid; or
(b) if no order was made, make one."

8. In Section 128 (Interim relief pending determination of complaint) in subsection (2) and in subsection (4), leave out "seven" and insert "twenty-one or such other period that the tribunal thinks just and equitable".

Explanation
Subsection 1 extends the time limit for bringing a detriment claim to the employment tribunal ("ET") to six months. Subsection 4 extends all time limits for bringing unfair dismissal claims to the ET similarly to six months.

Three months is insufficient when claims are often complex, grievances may be ongoing, and the whistleblower may be off work with stress as a result of the victimisation that they have experienced. (For simplicity, time limits for all ET claims are extended, not just whistleblower detriment and dismissal).

Subsections 2, 4 and 6 add the possibility for the ET to extend these time limits in the same way they do in discrimination claims, in order to harmonise and simplify further the whole scheme with discrimination regime. We have copied the language of Section 123(1) of the Equality Act 2010.

Subsections 3 and 5 add the power for the ET to order recommendations to benefit other employees rather than just the individual claimant who has often left employment at the time of the hearing, following the Regime set in place by the Equality Act in 2010. It also spells out the kind of damages currently available to whistleblowers via case law but that are not spelt out in legislation – making it harder for Litigants in Person to know about them.

Subsection 6 extends the period for bringing an interim relief claim from 7 days from the date of dismissal to 21 days (Whistleblowing Commission). The opportunity to bring a claim for interim relief is hampered by the very short timeframe for presenting what needs to be a near complete Form ET1 in order for a judge to make a determination on the papers. Few cases are brought as a result, but it is a potentially powerful deterrent for employers to dismiss whistleblowers.

The following is a non-exhaustive list of factors which may require careful consideration by a court in deciding whether to extend the time for bringing an application for interim relief:

1. The nature of the disclosure involved;
2. The nature of the dismissal involved;
3. The length of time involved since the expiration of the 21 days;
4. The capacity and ability of the applicant to process an application to the court;
5. The nature of the employer and employee relationship;
6. The extent of legal advice afforded to an applicant;
7. The extent to which the applicant may be able to explain the delay;
8. The merits of the case and the issue as to whether the applicant has established an arguable case that there are substantial grounds for contending that there is a link between the protected disclosure and the dismissal to the extent that the dismissal resulted wholly or mainly from the protected disclosure;
9. The prejudice that any party might suffer by reason of the delay in making the application; and
10. The extent to which in all the circumstances a court will deem it just and equitable to grant an extension of time to an applicant.

For further information, contact Elizabeth Gardiner: elizabeth@protect-advice.org.uk