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Protect Briefing on the Protection of Whistleblowing Bill
Second Reading 25 November 2022

Protect

Protect is the UK's whistleblowing charity and has the aim of protecting the public interest by helping workers to speak up to stop harm and wrongdoing. We support whistleblowers by providing free and confidential legal advice. We also provide training and consultancy to employers and campaign for better whistleblowing protection.

Reform not repeal of employment rights

There is a clear need to reform the current whistleblowing framework, and there is much to support in the proposal to introduce an Office of the Whistleblower. However, we are concerned by the proposal at Clause 26, to repeal the current whistleblowing protection the Public Interest Disclosure Act 1998 (PIDA). This would remove significant employment law rights for whistleblowers.

PIDA (incorporated in the Employment Rights Act 1996) gives whistleblowers automatic unfair dismissal rights, and a right not to be treated detrimentally for whistleblowing. The automatic unfair dismissal right applies from day one of employment and damages are uncapped at the employment tribunal. PIDA sets out the framework for how public interest concerns can be raised to employers, regulators, MPs or the media, and sets out the whistleblower's legal rights to bring a claim against their employer if they are dismissed, forced out or victimised for raising public interest concerns.

PIDA is not perfect. It requires reform in many ways and has fallen behind international best practice. However, in our view, employment rights need to be strengthened, not removed. An Office of the Whistleblower could be introduced without rowing back on workers' current protections (a good example is the arrangements now being introduced in Ireland).

Advantages of an Office of the Whistleblower

We are supportive of a new body to oversee how employers and regulators respond to whistleblowers. The current law places no duties on employers. Instead, PIDA only provides an after-the-event remedy for whistleblowers who are harmed. This means that, for the vast majority of employers, there is nothing to require them to act on concerns raised, and employment tribunals can only address the harm to the whistleblower. This applied even when people were raising health and safety concerns in a global pandemic. Protect's research on whistleblowing during Covid found that 40% of callers to our advice line raising covid-related concerns told us that their employer ignored their concern. Many employers do not even have a whistleblowing policy: our research with YouGov found only 43% say their employer has a whistleblowing policy, and only 31% of the adults sampled say they know how to raise concerns.[1]

An Office of the Whistleblower could focus on setting standards among employers and regulators on how they deal with whistleblowers. In line with international best practice, employers should be required to acknowledge whistleblowing reports, investigate and feedback to whistleblowers in a timely manner.

A new tribunal system creates complexity for whistleblowers

[1] These figures are better in the financial sector 73% and health sector 65% knew their employer had a whistleblowing policy. All figures taken from Protect commissioned survey from YouGov from sample of 2005 adults (1097 were workers) and fieldwork undertaken April 13-14 2021.

The Protection for Whistleblowing Bill proposes to remove employment law rights for whistleblowers and establish the Office of the Whistleblower as the arbiter of compensation for whistleblowers who are victimised or lose their job for speaking out. A new tribunal system is to be established (Part 3 of the Bill) to allow challenges to decisions of the Office of the Whistleblower. This creates potential complexity for workplace whistleblowers, who may bring whistleblowing claims alongside other employment claims.

For example, today a whistleblower who is dismissed may bring an automatic unfair dismissal claim (the principal reason for the dismissal being the making of a protected disclosure) but they may not know the real reason for dismissal at the outset and bring an ordinary unfair dismissal claim in the alternative. Perhaps their employer has also failed to pay outstanding money or breached their contract in other ways, so they might also bring an unpaid wages or wrongful dismissal claim. Often detrimental treatment goes alongside discrimination, so they may also want to bring a discrimination claim. How would the whistleblower navigate both the employment tribunal and the Office of the Whistleblower for redress? Would they need to choose which forum to bring a claim? Would one claim be stayed while the other determined, and would this add to delays in the system? Would the Office of the Whistleblower use established precedent of the employment tribunals or start afresh, creating additional uncertainty for whistleblowers?

For these reasons, we suggest a more limited remit for the Office of the Whistleblower should be considered, so that it can work alongside the employment tribunal system.

What further reforms are needed

We are keen to see the current whistleblowing protections enhanced and updated. This includes:

a) **Broadening the scope of who can be included as a whistleblower**. While the definition in Clause 2 of the Bill may be too wide, we want to see all those who raise concerns in the workplace being given protections. This should include job applicants, volunteers, non-executive directors and self-employed contractors who do not currently have any protection.

b) **Placing a proactive duty on employers to prevent whistleblower victimisation.** While a new regulator can do much to set standards and may fine those who fail to meet those standards, prevention is better than cure. All employers should have to introduce whistleblowing arrangements and should be under a positive duty to prevent whistleblowers being victimised. Many good employers have risk-assessments and victimisation prevention plans, but this should become the norm.

c) **Improving access to justice.** Many of the criticisms of PIDA are common to all those pursuing employment claims - an inequality of arms, complex law and short time frames to bring claims – all of which can – and should - be reformed across the piece, not just for whistleblowing rights. Specific amendments to PIDA could be made to shift the burden of proof to the employer, to simplify the test for dismissal, or to provide legal aid for whistleblowers, thus rebalancing the law in the whistleblower's favour.

Conclusion

A review of whistleblowing law is much needed, as the UK is now falling behind international best practice. While there is much criticism of PIDA, it has brought about significant changes. Having employment rights means many whistleblowers are able to reach a settlement with their employer, without the costs, risks and uncertainty of going to tribunal. Good employers recognise the importance of listening to and protecting whistleblowers, but an Office of the Whistleblower could help set and enforce standards for all employers. However, repealing PIDA in the same breath as establishing the Office of the Whistleblower could be very dangerous – it may take years for a new regulator to be established with sufficient resources to deal with thousands of whistleblowers' claims for compensation. In the meantime, there may be a black hole for whistleblowers' rights.

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