Public Concern at Work Whistleblowing Commission: Strengthening Law and Policy

Response by Thompsons Solicitors **June 2013**

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 29 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Introduction

Thompsons has advised on a number of potential whistleblowing claims since the introduction of the Public Interest Disclosure Act 1998. While we have successfully run or settled a number of claims, we turn the majority down as without merit or without reasonable prospects of success. The fact is that employment tribunals loathe whistleblowing claims and rarely find in a claimant's favour.

When we do run whistleblowing claims, it is usually as a second string to an unfair dismissal claim, in order to try to strengthen the main claim. But as these are usually about the sort of breaches that Section 17 of the Enterprise and Regulatory Reform Act (ERRA) will preclude, we anticipate we will be forced to turn the majority of cases down.

In responding to this consultation we address only those questions directly relevant to our work and experience of advising on whistleblowing claims.

The questions

1.How can we embed good practice whistleblowing arrangements in all sectors of the UK? For example, should they be mandatory?

Policies and procedures ensure that employees know their rights and the procedures they must follow to ensure that those rights are protected. Mandatory whistleblowing arrangements would certainly assist lawyers in assessing the merit of potential detriment claims.

Claims are difficult to run not just because of the complexities of demonstrating detriment as a direct result of a protected disclosure, but also because the process employees must follow in order to make a protected disclosure is so technical. Often we are forced to turn a claim down simply because the disclosure has been made to a trade union rep or another person who is not prescribed under the Act. If whistleblowing arrangements were clearly set down by employers, mistakes such as this would be less likely to happen and, when they do, the employee might better understand why their claim has no prospects of success.

However, it is not clear how a duty on employers to have a policy would be enforceable.

2.Do you think there should be financial or other rewards for whistleblowers? What are the advantages and disadvantages? How would the rewards be funded? And what about non-financial wrongdoing?

No. We do not agree with the introduction of a financial motivation for whistleblowing.

3.Do you think the Public Interest Disclosure Act is working? Are there any ways in which it can be simplified or improved?

Our experience is limited to advising and representing those who may have suffered detriment as a result of making a protected disclosure. As said in our introduction, most of the whistleblowing claims that we see lack merit or reasonable prospects of success.

There may be elements of whistleblowing in a claim, but they rarely comply with the definition in the Act or it is not possible to demonstrate that the employee suffered a detriment as a result of them making a protected disclosure. Employers can usually show that disciplinary action or a dismissal was for another reason.

Whether this is a because the legislation is not working, or the way in which it is interpreted by employment tribunals is debatable. The fact is that in employment law, unless it is possible to establish a direct cause then the claim will fail.

4.Should wrongdoing be more broadly defined within PIDA? Are there any other categories which should be added?

We have no comment.

5.Do the Government's amendments to the public interest test and to good faith achieve a fair balance between employer and employee interests?

No. The government is seeking to further load the dice against employees by removing protection for those who blow the whistle about breaches of their own employment contract.

The government justified its amendment of the Employment Rights Act (ERA) 1996 so that qualifying disclosures must, in the reasonable belief of the worker, be made "in the public interest", by describing the protection previously afforded to employees as a "loophole".

Taking out breach of contract complaints will provide employers with greater authority to gag workers. This directly contradicts the comments made by health secretary Jeremy Hunt that NHS Trusts should "pay very serious heed to the warning from Mid Staffordshire that a culture which is legalistic and defensive in responding to reasonable challenges and concerns can all too easily permit the persistence of poor and unacceptable care".

We do no agree that a breach of a contract of employment is any less in the “public interest” than other breaches of the law. In our view, there is little that can be more in the “public interest” than a public authority not abiding by the contracts it makes with its workers.

The implication of the government’s amendments is that those who complain about their contracts are “bad” whistleblowers, while the people in North Staffs who were too scared to reveal what was happening (probably because of their duties of confidentiality under their contract) would be crusaders for justice.

It’s not for the government to say what is or isn’t in the public interest – it is defined in the ERA and is for an employment tribunal to decide.

6.Should there be a broader, more flexible definition of worker within PIDA to deal with the many different types of worker and working arrangements? Are there any categories of persons not now covered which ought to be?

We would welcome a broader definition of worker, both within PIDA and in employment law generally. In all types of employment claims, there are significant hurdles to overcome in order to demonstrate that a claimant is a worker and employers are able to rely on technical arguments to show they are not.

We often find that the claimant has unknowingly entered into a contract which means they are not a worker. The power of employers in being able to achieve this, particularly in the current economic climate, is considerable.

7.Should a worker who has been wrongly identified as having made a protected disclosure be entitled to a claim under PIDA?

Yes. A worker wrongly identified as having made a protected disclosure is unlikely to have any other cause of action to pursue. It may be a breach of contract, with the possibility of an unfair dismissal claim, but if it is just detriment then there is nothing the individual can do. Any extension of legal protection would therefore be a welcome change.

8.Should a job applicant be entitled to claim against a prospective employer if refused employment because of a previous protected disclosure?

Yes, for the reasons given above.

9.Should there be a broader, more flexible definition of prescribed persons within PIDA? Are there any types of prescribed persons not now covered that ought to be?

We agree that trade unions should be added to the list of prescribed persons. In our experience, union members are often more comfortable with approaching a union rep about concerns than

they are a manager. Indeed this can be a reason why a claim cannot be pursued – the disclosure has not been made to a prescribed person.

However, the sort of concerns that are most likely to be raised by a union member with their rep, such as breach of contract or health and safety issues, are exactly the kind which will be knocked out by s17 ERRA as they are unlikely to satisfy the public interest test.

10.Should there be different protection for those who go to the media?

No.

11.Should the causation test for unfair dismissal be the same as the test for detriment in whistleblowing cases?

Yes.

12.Should a worker be able to obtain interim relief in detriment claims?

Yes.

13.Is the protection related to gagging clauses in section 43J PIDA clear enough? Are people appropriately advised about this aspect of compromise agreements?#

In our experience, confusion as to when an employee is able to make a protected disclosure arises when the employment relationship has come to an end and a compromise agreement has been entered into. The compromise agreement will almost certainly contain a confidentiality clause or non derogatory clause which may prohibit a claimant from making any disclosures.

What is not clear is whether this applies to post termination protected disclosures. While recent case law suggests that a claimant can rely on a protected disclosure made after the termination of a working relationship to bring a whistleblowing claim, we believe that clarification of this would be beneficial.

This is particularly so given the very nature of the types of confidentiality clauses in compromise agreements and the fact that most agreements will have a clause within them requiring the claimant to repay the money if the terms of the agreement are breached.

Further guidance would therefore be of benefit so that claimants are not fearful of making protected disclosures.

14.Should regulators take an interest in the whistleblowing arrangements of the organisations they regulate? Do they make adequate use of information brought to them via whistleblowing? Should regulators do more to protect whistleblowers?

We have no comment.

15.Should the UK set up a whistleblowing ombudsman service? If yes, what could this look like (an ombudsman for each sector or an overarching ombudsman)?

We have no comment.

16.Should there be specialist tribunals or specialised judges for PIDA claims?

Yes. The legal test for PIDA claims is so complex that few employment tribunals properly understand them. That is why, in our experience, they are so hostile to claims.

However, while having specialist tribunals or judges would deal with this issue, it would slow the process up considerably. Waiting months for a specific judge could carry a bigger disadvantage for a claimant than they have under the current arrangements.

17.Should there be an open register of PIDA claims?

No. We oppose a register of PIDA claims. We believe a register would leave claimants vulnerable to being blacklisted.

18.Should the referral of PIDA claims to a regulator be mandatory?

Currently a claimant can tick a box on their claim form to confirm that it is a PIDA claim. They are asked to indicate whether they consent to having their concerns passed to an independent regulator.

While we can see the benefit of referring PIDA claims to a regulator as a matter of course, no referral should be made without the claimant's express authority.

19.Should PIDA claims be exempt from employment tribunal fees?

We oppose ET fees for all types of claims.

20.Should the Employment Tribunal have the power to make recommendations and levy fines in PIDA claims? If so, how?

Yes, in the same way as they currently do in discrimination claims. Employment tribunals were given the broad power to make recommendations for the benefit of the wider workforce in 2010, in relation to discrimination claims brought under the Equality Act. Previously a tribunal's power to make recommendations was limited to what steps an employer should take to reduce the adverse effect of the discrimination on the person bringing the claim, but this could only be used if that person was still working for the company.

However, tribunals do not have the power to compel employers to follow their recommendations. We would support the ability of ETs to levy fines to enforce all types of recommendations.

Given that the government plans to remove ET powers to make recommendations to employers that go beyond the specifics of a particular discrimination claim, it is difficult to imagine that it would confer such powers in respect of PIDA claims.

It should also be noted that few meritorious claims result in a judgment by an ET. In our experience, respondent solicitors take a very aggressive approach to defending litigation which has any element of whistleblowing and matters tend to settle (with confidentiality clauses) rather than continue to a full hearing.

Union officials may also use allegations of detriment as a result of a protected disclosure in order to achieve a negotiated settlement of an unfair dismissal or discrimination claim, thus avoiding the claim ever being issued.

21.Should the ET have the power to refer regulatory or criminal matters to the appropriate authority(ies)?

We refer to our response to Q18. While we see how, in theory, the power to refer regulatory or criminal matters to the appropriate authorities could be useful and effective there should not, in our view, be a referral to any authority without the claimant's express authority. It is not for the employment tribunal to go beyond matters of employment law unless instructed to do so.

22.Please let us know if you have any other comments about whistleblowing or the consultation itself. The Commission would be very interested if you have any positive examples of where whistleblowing has worked well from the perspective of the whistleblower or the organisation receiving the whistleblowing report.

We have few, if any, positive examples, for all the reasons given above. Any changes that would make it easier to pursue claims would be welcome.

Further information:

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