The Whistleblowing Framework

STANDING UP FOR YOU

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 many potential whistleblowing claims since the introduction of the Public Interest Disclosure Act 1998 and successfully pursued a number of those but the fact is that employment tribunals are slow to uphold whistleblowing claims and rarely find in a claimant's favour.

When we run whistleblowing claims, it is usually associated with an unfair dismissal claim. We link the claims either in order to strengthen the main claim or because the claimant does not have the requisite service. Unfortunately section 17 of the Enterprise and Regulatory Reform Act (ERRA) will preclude these type of cases in the future.

Fundamentally it is important to note that these provisions are not 'protections' as much as remedies. This is not a semantic point, but a real one that is relevant to a proper understanding of the whistleblowing debate.

The rights that exist are not a complete protection from recrimination and a whistleblower risks a backlash from their employer and colleagues. In order for the whistleblower to be able to seek a remedy the whistleblower needs first to take the risk of and deal with any backlash, and then, having dealt with it, expend their time and resource in seeking a remedy. Unless this reality is properly understood, the rest of what follows cannot be.

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

Section 1 - Categories of disclosure which qualify for protection

Question 1 Are these categories sufficient to capture all potential instances of wrongdoing that may require public disclosure?

No

Question 2 If no, what additional categories should there be? Please provide any relevant evidence to support this.

Our concern with the categories is that they are an exclusive list. If the subject of the complaint is not able to be slotted into one of those categories, but is nevertheless in the public interest, there will be no protection.

The act is called The Public Interest Disclosure Act (PIDA) and yet, ironically, there is no category that covers a disclosure that is in the public interest unless it is a criminal offence or a health and safety concern. It is a significant omission that an individual who reasonably considered a disclosure was in the public interest would not be protected because a criminal offence has not been committed.

Blacklisting for example is an instance where the act is frowned upon by society at large but may not actually fall foul of the justice system. The law states that a blacklist is a blacklist if it was compiled specifically for the purpose of blacklisting. So if an employer in the construction industry makes a 'check off' list to deduct union subs but then subsequently it is used as a 'blacklist', this is not outside the law.

A whistleblower in this instance would be disclosing in the public interest but would not necessarily be protected by any of the categories.

If whistleblowing in the public interest is to be encouraged, the requirement should be expanded to include whether "the worker making the protected disclosure reasonably believed that the disclosure is made in the public interest **and/or** tends to show one or more" of the categories.

Our suggestion is that adding "public interest **and/or** one or more of the categories" as acaveat would allow the whistleblowing framework to borrow a broader concept of 'public interest' used by the media in defence of public disclosures.

While this may present other challenges from a judicial and practical point of view of measuring what actually is or isn't 'public interest', the courts are well versed in defining what is in the public interest. The precedent is in dealing with press complaints.

Section 2 - Methods of disclosure

Question 3 Do these methods of disclosure affect whether a whistleblower might expose wrongdoing? Yes or No

Yes.

Question 4 If yes, how (or why)?

Thompsons considers that it is vital to have both internal and external systems available to the would-be whistleblower. However it is not just the method of disclosure, but the attitude with which it is received that will impact on whether whistleblowers are prepared to put their 'neck on the line' – either externally or internally.

Decent internal disclosure structures are to be encouraged to challenge hostility within organisations towards whistleblowers. Many employers provide a supportive environment to the potential whistleblower, but many others do not. External disclosure mechanisms are important to allow a framework to protect individuals who want to raise a concern where it might not be appropriate to do so internally.

The risk if there were only internal systems is that an employer may be able to 'hush up' the problem by quietly fixing it before attracting any public accountability, or by deterring any disclosure at all. Similarly if there was only an internal method the disincentive element would be very high indeed.

Importantly, external disclosures provide a better system to raise concerns anonymously.

Thompsons is aware of research into whistleblowing behaviour that was carried out by the University of Greenwich in conjunction with Public Concern at Work (PCaW).[1] It noted that:

- 83% of workers blow the whistle at least twice, usually internally.
- 15% of whistleblowers raise a concern externally.
- 74% of whistleblowers say nothing is done about the wrongdoing.
- 60% of whistleblowers receive no response from management, either negative or positive.
- The most likely response is formal action (disciplinary or demotion) (19%).
- 15% of whistleblowers are dismissed.
- Senior whistleblowers are more likely to be dismissed.
- Newer employees are most likely to blow the whistle (39% have less than two years' service).
- Employers have up to two opportunities to listen to staff as the concern is usually raised at most twice with line then middle management.
- Whistleblowers are most likely to experience no response from management either to them personally or to the concern that has been raised.
- Despite dismissal being the most feared response, the most common response is formal reprisal, e.g. written warning or disciplinary. This could be due to a fear of litigation, showing that the law is at least in part working.

[1] Whistleblowing – The Inside Story, 2013 available at http://www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf

- Staff on a more junior level are more likely to be ignored than those in senior positions, who are more likely to be dismissed.
- For the few who raise a concern a third or fourth time it is at this point it becomes more likely that the matter will be addressed but also more likely that the whistleblower will be dismissed or subjected to reprisal.
- Those who raise a concern with a regulator have better outcomes.

Thompsons infers from this information that the crucial factor is not the method of disclosure, but the attitude with which it is received.

Question 5 Do these conditions deter whistleblowers from exposing wrongdoing? Yes or No

Yes

Question 6 If yes, how (or why)?

Yes, or at least internal methods do.

There are plenty of examples of when raising concerns internally could become 'career suicide'. If an individual's concerns are not upheld internally they become a troublemaker not a whistleblower. Whether whistleblowers are prepared to put their 'neck on the line' depends not just on the policy around disclosure, but the attitude with which it is received.

While many employers provide a supportive environment to the potential whistleblower many do not. Where, in the employment relationship the employer holds the balance of power and the disclosed information can only have originated from a small number of colleagues, and sometimes just the one, any anonymity which the employer's procedure might otherwise promise is undermined. Even if handled properly the individual risks alienation and ostracism.

In the NHS it is clear that the culture remains very strongly against whistleblowers as evidenced by the recent public scandals about 'gagging orders' and settlement agreements. The Department of Health sent a letter on 17 April 2013 headed *'Compromise agreements, 'Gagging' clauses, and the Public Disclosure Act 1998'* asking NHS Chief Executives to support the concerns of potential whistleblowers in their organisations and tackle confidentiality agreements which 'gag' individuals. One sentence from the letter reads:

"It is important that you reiterate to all your registrants/members that if they have signed an agreement containing a confidentiality clause, they are still protected by PIDA if they feel the need to make certain disclosures in the public interest."

Despite this, only five months after the edict was issued (in September this year), Thompsons advised a trade union member who made a protected disclosure in the public interest about a NHS Trust one year after signing a compromise agreement. The member is being pursued by the Trust for releasing material referred to in the agreement on the grounds that they are in breach of the clause which specifies they should return all documents (including copies).

Clearly the NHS management is starting to claw back its grip on whistleblowers.

Outside the NHS, Thompsons has other examples where the whistleblower is better not to use internal methods of disclosure but to raise concerns anonymously through a trade union.

Thompsons advised an employee of a leading University who wished to expose extensive plagiarism in a doctoral thesis and elsewhere by a senior member of staff in their department. The concern was that the University or the senior colleague via their circle of influence would close ranks and sacrifice the career of the whistleblower to avoid a scandal. In the end the disclosure was done via a third party to remove that risk entirely.

The difficulty with external disclosures is that while in some cases it will be obvious to an individual who to approach with their concerns, such as a safety being compromised by a missing guard on a machine and contacting the Health and Safety Executive, there are other examples that might not be so clear.

If the signposting about which external body a whistleblower should approach is not clear an individual, already nervous at the risk they are taking, may not have the energy or awareness to take the next step. The more that the whistleblower's protection is reliant upon them having identified and approached the right body, the more that the external structure and signposting becomes an issue.

Question 7 Do these conditions encourage whistleblowers to expose wrongdoing? Yes or No

No

Question 8 If yes, how (or why)?

Thompsons has no direct case examples of where the presence of internal and/or external mechanisms has encouraged any individual to expose wrongdoing as opposed to merely facilitating them in doing so.

See Q5 & Q6 above.

Question 9 How clear and understandable are the conditions that need to be met to ensure that the disclosure is protected?

The prescribed list of external bodies is neither clear nor understandable. The system is complex and uses out of date internet resources.

Thompsons suggests that the clearer and easier the guidelines can be made the more encouraged would-be-whistleblowers will be that they will be protected.

Question 10 If you have answered yes to questions 3, 5 and 7 please provide any evidence you have to support your response.

Please see examples in Question 6.

Question 11 What changes, if any, do you think are needed to the qualification conditions?

The current qualification conditions are too restrictive and rigid. Thompsons considers that protection should be afforded to anyone making a disclosure in the public interest using information acquired during the course of their work.

Internal disclosure structures are to be encouraged and preferred however rogue employers may not enhance their internal disclosure processes and in these circumstances Thompsons considers there needs to be a well signposted and easy to navigate external framework that the whistleblower can use confident in its anonymity.

In our view, unless there is to be one point only to which whistleblowers report concerns (and we understand why that may not be practical) the best way to achieve ease of access is to have both internal and external systems as now but to also establish an independent external body to act as a clearing house or first-point-of-call for a would be whistleblower to signpost where to correctly raise their concern.

An anonymous and independent guidance service would ensure that the onus was not put on the individual to navigate a complex list of external bodies.

There are organisations that exist such as Public Concern at Work (PCaW), which could provide such a function and act as a 'signposting' organisation. An individual would only need to demonstrate that they had raised their concern to a reasonable source (the independent body) to be extended protection by the PIDA.

While ensuring anonymity may present challenges there is precedent for overcoming these challenges in confidential telephone services such as Crimestoppers and the Inland Revenue.

Section 3 - Prescribed persons (I)

Question 12 Should this system be amended, to one where the prescribed person/body list can be updated by the Secretary of State without the need for a statutory instrument? Yes or No

Yes

Question 13 Do you foresee any problems with a system where the prescribed/person body list can be updated by the Secretary of State? Yes or No

Yes

Question 14 If yes, please explain why.

This system should be amendable so long as the power is to add not take away. To remove a prescribed person/body is a move that limits the opportunity for whistleblowing and as such should still require a statutory instrument and parliamentary scrutiny.

A prescribed list should never be an exclusive list. However length brings with it complexity and complexity discourages use. Length would be less of an issue if there was, as suggested above, an independent third party organisation providing advice and able to navigate that list on the whistleblower's behalf.

Without an independent body to offer a signposting service the risk of the Secretary of State adding to the prescribed persons/body list is to add a new layer of complexity and uncertainty that deters disclosures.

Question 15 Are there any other ways to accurately reflect prescribed persons/bodies? (For example, a general description with general characteristics which a prescribed person/body can be recognised by)

If would-be-whistleblowers are to be encouraged it is important to make individuals feel confident that they are making disclosures to the correct body or prescribed persons. At 22 pages, the prescribed list document is already over-complicated.

Consider the position where an individual approaches the wrong body but accepts their offer to pass the concerns raised on to the correct body. Would this still be protected within the whistleblowing framework under to PIDA protection? Can the individual still be said to have raised it with the correct body?

If your protection within the whistleblowing framework is based on having approached the correct prescribed body what happens to those who get it wrong but have done so in good faith?

Thompsons recommends that to overcome this either:

1. the prescribed persons/body list should include a caveat to say that an individual who went to the wrong authority would still be covered so long as their mistake was explicable;

Or:

2. An independent third body would act as a 'signposting service' or 'clearing house' through which any whistleblower unsure as to which body to go to could approach in the first instance.

The bodies on the prescribed list can themselves be proactive in identifying issues as they arise. If high numbers of individuals attempting to blow the whistle are approaching the wrong body there should be a duty on that body to notify the secretary of state since it would suggest that the system is too complicated.

Section 4 - Prescribed persons (II)

Question 16 Should the referral of whistleblowing claims to prescribed persons/bodies be made mandatory? Yes or No

No.

There will be many instances where an individual will not know they have made a disclosure, or they may make an Employment Tribunal claim where the focus is not on whistleblowing but which involves it (e.g. a claim for repercussions for assisting a colleague who acted as a whistleblower).

To ask the individual to tick box 5.3 on the ET1 if they are making a whistleblowing claim assumes an understanding that might not exist. It may in fact be the Employment Tribunal staff, trained in this process, who spot something in an ET1 which could be referred on.

However, given that a lot of ET1s are not pleaded in detail and given EAT guidance in Grimmer v KLM [2005] IRLR 596, that an ET1 need contain no more detail than the words "unfair dismissal" to cover all types, including whistleblowing. We are concerned that any system which restricts itself to assessing the information in ET1s automatically hampers itself, particularly when it is unclear the extent to which the Employment Tribunal can ask questions which they can pass on to the regulator.

If referrals of suspected whistleblowing from Employment Tribunals was mandatory there would, however, need to be some sort of training or guidance to prevent inconsistency of discipline across the system.

Without guidance, Tribunals mandated to refer whistleblowing claims may either forward everything because they are not sure what qualifies or they won't refer anything because they are too cautious.

Mandating Employment Tribunals to refer cases would leave unanswered questions such as:

1. Stage: Would it be on receipt of the ET1 or when a finding of fact is made? If it was the latter there would need to be recognition that most cases don't go to a hearing.
2. Form: Would this be an administrative or a judicial function?
3. Consent: The whistleblower might not want it passed on if they have already raised their concern with the employer, or they might not want it passed on to a third party.

Question 17 If yes, please provide any evidence you have to demonstrate that this could support the regulators' role.

Please see above our answer to Question 16.

Question 18 What should the prescribed person/body do with the information once received?

As the whistleblower has been referred rather than voluntarily referred themselves, the first thing to do would be to go to the individual and establish the details of the disclosure and whether they want to progress with a whistleblowing protection claim.

Question 19 Should prescribed persons/bodies be under a reasonable obligation to investigate all disclosures they receive? Yes or No

Yes.

Section 5 - Definition of a worker

Question 20 Does the current definition of worker exclude any group that may have need of the protections afforded to whistleblowers? Yes or No

Yes.

Question 21 If yes, what groups are these?

This definition is too exclusive because it does not include a contractual worker or someone who is not their worker.

If whistleblowing is about exposing abuse within an organisation, it should not be dependent upon your employment connection with that organisation. It shouldn't matter, if you discover abuse that should be disclosed, whether you have worked there for 40 years or whether you are an agency worker, a temporary worker, or a student on a placement.

A contract cleaner finding something in a bin that related to wrongdoing in a company who then blew the whistle would be in an extremely vulnerable position. They should be protected from accusations of a breach of trust and calls from the company they were cleaning for their dismissal.

Thompsons 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 particularly in the current economic climate rely upon a range of technical arguments to show they are not.

Question 22 Please provide any evidence to demonstrate these groups require protection.

Society at large either thinks giving a whistleblower protection is a good thing or it doesn't. In Thompson's view anyone who can show a reasonable connection to the organisation they are making a public disclosure about should be afforded protection by the PIDA.

Section 6 - Job applicants

Question 23 What impact does whistleblowing have on the individual's future employment, e.g. if there are issues around 'blacklisting' or other treatment?

Blacklisting regulations were implemented in 2010 when the Employment Relations Act 1999 became law, but they do not provide effective legal protection and remedies for workers.

Individuals who have taken on their employer and blown the whistle will inevitably be treated cautiously by new employers and are inherently disadvantaged by it being an issue at all. Rogue employers may well choose not to employ someone purely on the basis that they made a disclosure.

The challenge with regard to references is to distinguish between those who raise trivial complaints to make a general nuisance of themselves without whistleblowing – something a new employer would want to know about and would be a legitimate fact in a reference – and those given a reference which implies the individual is a nuisance when in fact they were a whistleblower as this is a form of blacklisting.

Thompsons recommends that a job applicant who has made a protected disclosure should be entitled to claim against a prospective employer who fails to take them on and the burden of proof in those circumstances should be on the prospective employer to show that their failure to take them on was not because of a previous protected disclosure. That form of claim would not be available other than to those who have made a protected disclosure.

In some specialist industries, where it is a very small world, verbal comments at industry or social functions can be far more damaging than a formal reference and can have a disastrous impact on people's careers.

Question 24 Please provide any relevant evidence to confirm whether these practices are taking place.

Thompsons represented a union member who held a specialist role as the Equalities Officer at a local council. When the council made a senior appointment in conflict with their equalities policy she raised a formal complaint which led to her suspension on trumped up charges and ultimately her dismissal. The Tribunal found that she had been ordinarily unfairly dismissed, dismissed as a whistleblower, and had been discriminated against under the Sex Discrimination Act 1975.

The council's Chief Executive played a leading role in manipulating the disciplinary procedure, sabotaging the claimant's job hunting and blackening her name with all local authorities in the region. A move to another region was still vulnerable to the background chat on the phone. The impact was that she was so prejudiced she couldn't get a job in the same industry again - she went from being a key figure in a public authority to losing that career.

Thompsons secured £496,924.13 in compensation for her (which included £7,500 aggravated damages and £12,500 exemplary damages for the quasi-blacklisting behaviour which attacked our client's reputation and ensured her name was mud). Tribunals have the jurisdiction to be able to award exemplary damages, however the current levels are not enough of a deterrent and in the absence of personal liability being placed upon the malefactor there is little personal risk to an individual.

Thompsons recommends that a more prescribed figure be adopted, weighted in relation to turnover, or number of employees. However Employment Tribunals are reticent to penalise the public purse in cases where a public body is at fault.

Where blacklisting can be identified down to an individual and their specific actions, there needs to an element of personal liability to give a cause of action against that person, without them shadowing behind vicarious liability.

Section 7 - Financial incentives

Question 25 Would a system of financial incentives be appropriate in the UK whistleblowing framework? Yes or No

Yes

Question 26 If yes, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrong doing?

Thompsons notes that the Home Office put forward proposals that whistleblowers who uncover economic crime may be given financial incentives and "will examine what lessons can be drawn from the successful 'Qui Tam'79 provisions in the US where individuals who whistle-blow and work with prosecutors and law enforcement can receive a share of financial penalties levied against a company guilty of fraud against the government."[2]

Financial incentives for whistleblowers would encourage people to 'put their neck on the line' to raise a concern in the public interest to expose wrong doing. However the system of investigating the complaint must be robust and effective otherwise the framework risks encouraging bogus claims with being raised and people being rewarded for false allegations.

Significantly, the current whistleblowing legislation means an individual is entitled to statutory protection without having to prove they have exposed wrong doing in good faith. However if it is proved that the disclosure was not in good faith, a whistleblower's compensation can be reduced.

In our view, financial incentives should only be introduced if the risk of them being used by employers to reduce their compensation bill (by giving them a 'statutory out' that the disclosure was for personal gain rather than in good faith) is properly considered and factored into the framework.

Question 27 If no, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrong doing?

See our answer to Question 26 above.

Question 28 Where are financial incentives used as an effective measure to prevent wrongdoing / illegal activity? For example, in certain industries.

Thompsons has no experience of this issue and are unaware of any UK examples.

Section 8 - Non-statutory measures

Question 29 How would the introduction of non-statutory measures make a difference?

There should be some kind of guidance about what is good and bad practice and how you do and don't deal with a whistleblower. In our work, this would help Thompsons to represent whistleblowers by providing a framework.

However, non-statutory also means non-binding, and a non-statutory code of practice will not make a difference to rogue employers who will ignore it.

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf (6.44)

Thompsons would draw a comparison with the ACAS statutory code of practice on disciplinary and grievance procedures, which is binding but there are still 77,000 unfair dismissal claims that go to Employment Tribunal per year.

Question 30 What types of non-statutory measures could Government consider to support the statutory framework?

A code of practice which includes guidance about what is good and bad practice and also a framework for mechanisms once the disclosures has been made would be helpful but it should be statutory if it is going to be of use against rogue employers.

Section 9 - Further evidence

Question 31 Please provide any further evidence in support of any issues you feel should be reflected through this call for evidence but have not been captured in the main document.

Thompsons have no comment to make.

Question 32 Please provide any case studies of situations where a whistleblower has had a positive outcome with their employer after blowing the whistle.

Thompsons have no comment to make.

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