

Page 4, after line 43, insert the following new clause

“Proceedings in public interest disclosure cases

() In the Employment Tribunals Act 1996, after section 8, there is inserted

“8A (1) Where a case includes a claim under the Public Interest Disclosure Act 1998, the President shall within 28 days of the conclusion of the case publish the relevant papers electronically and without charge.

(2) The duty in this section is subject to

(a) (i) sections 10B, 11 and 12 (restrictions of publicity in cases involving national security, sexual misconduct and disability), and

(ii) a decision by a tribunal or the President that particular information should be omitted or deleted from the relevant papers in that case.

(b) A decision may only be made under subsection (2)(a)(ii) where the tribunal or the President is satisfied that the publication of that information would be contrary to the public interest.

(c) A decision made under subsection (2)(a)(ii) shall be in writing and shall include reasons.

(3) In this section

‘conclusion’ means determination, withdrawal or settlement of the case or the time when no party has for the previous six months notified the tribunal of action to progress the case to hearing,

‘relevant papers’ means any claim, response, further particulars, decision, determination, notice of withdrawal or settlement and any decision under subsection (2)(a)(ii), and

‘President’ has the same meaning as in section 7A(3).” ”

Summary

The Public Interest Disclosure Act (PIDA) promotes responsible whistleblowing. It was a private member’s bill introduced in 1997 into the Commons by Richard Shepherd MP and into the Lords by Lord Borrie QC. It received strong support from the Government (led by Ian McCartney MP) and was backed by business, unions and regulators.

PIDA protects workers who raise concerns on wrongdoing that threatens the public interest. It provides the protection most readily where the concern is raised with the employer. It also protects disclosures made to regulators (whether or not they have been raised internally) and wider disclosures where they are both justified and reasonable. The Act is generally seen to be working well in practice and has become an international benchmark.

At the time the Act was passed, its promoters assumed - and the legal position then was - that information about claims made under it would be on the public record. This was important as it would help promote openness, discourage specious claims and encourage employers to deal properly with any significant public interest risk that had been raised with them.

However after it lost a High Court case in 2000, the DTI without consultation or announcement introduced temporary regulations during recess to reverse this position while

it said it would consult on whether claims under PIDA should be treated differently from other employment laws. The promised consultation did not take place and the regulations were subsequently amended - as part of the dispute resolution regime that is being repealed in the Bill now under consideration - to remove all information about PIDA and other employment claims from the public record.

A 2005 report by the Parliamentary Ombudsman castigated the DTI for the way it had handled the matter, finding it had failed to consider the public interest, had repeatedly misled the charity Public Concern at Work to avoid public criticism and had blocked parliamentary scrutiny.

This amendment seeks to make good this issue.

Explanation

This amendment provides that information about cases brought under the Public Interest Disclosure Act will no longer be shrouded in secrecy. Under the current rules, no information is available on the public record about 70% of PIDA claims brought in employment tribunals.

The amendment introduces a strong presumption that information about whistleblowing cases should no longer be kept secret. It creates a presumption, not an absolute or inflexible rule. Sub-clause (2) makes it subject to the statutory safeguards that exist for cases involving national security, sexual misconduct and disability. The presumption is also made subject to a decision by a tribunal or the President of Employment Tribunals that the publication of particular information in a case would be contrary to the public interest.

Where the presumption operates, the information will be made available within 28 days of the conclusion of the case. Conclusion, as defined in sub-clause (3), includes where there has been a decision, withdrawal or settlement of the claim or where it has not been pursued for six months.

The information that will be made available will be the claim, response, any further particulars and the decision, notice of withdrawal or settlement. This will ensure that anyone obtaining the information is able to have a balanced, rather than a one-sided, picture of the whistleblowing case. This is because it will include not only the employee's claim but also the employer's response to it. Where there has been a decision this will also be available and where the claim has been settled or withdrawn, the notice of this will also be available (and this can include any clarification or retraction that the parties agree as part of the withdrawal or settlement). They will be able to see, for example, what the underlying concern was about, who may have been at risk; whether the concern was disputed, ignored, misconceived or put right; and how the issues have been resolved.

The information will be made available electronically (by email or on the internet) and for free. This will ensure the amendment will satisfy the public interest in a way that incurs minimal administrative burden and negligible cost.

The amendment will

- a) reassert Parliament's intention when it enacted the Public Interest Disclosure Act;
- b) allow interested parties and researchers to monitor how the Act is being used;

- c) discourage unscrupulous employees from bringing specious claims and abusing the Act;
- d) discourage unscrupulous employers from buying-off whistleblowers as the cheaper option to dealing with a serious concern, contrary to the Act and the public interest;
- e) encourage all other employees and employers to behave responsibly; and
- f) promote the early and effective resolution of genuine whistleblowing concerns and claims.

The problem

At present, following regulations debated in this House on 27 October 2004 (*Hansard*, HL col 1378 et seq), no information about any whistleblowing claim brought under the Public Interest Disclosure Act is available on the public record. The only exception to this is where the claim results in a tribunal hearing and judgement, in which case the decision is available for inspection by the public at an office in Bury St Edmunds.

Employment tribunal statistics record that in 2005/6, 1015 claims under the Public Interest Disclosure Act were disposed of. Of these, 283 were disposed of after a hearing and so, under the rules, information about these cases is on the record. However, the rules mean that all information about the other 730 claims - 72% of all whistleblowing claims - remain shrouded in secrecy.

Other than as a numerical statistic that can only be obtained under Freedom of Information¹ there is nothing now on the public record about over 70% of whistleblowing claims. No information about the nature of the concern (be it a crime, danger, abuse or other wrongdoing), no information about who was at risk (be they consumers, passengers, patients, taxpayers, shareholders or fellow workers), no information about whom the concern was raised with (be it a manager, a compliance officer, the CEO, the audit committee, regulator or someone else), no information about the employer's response to the concern (whether it was ignored, investigated or hushed up, whether it is claimed it was misconceived, well founded or put right), and no information about the alleged reprisal (whether it was by managers or colleagues and whether dismissal or victimisation).

This is the case even though these are claims being brought in a public forum, at public expense and under the Public Interest Disclosure Act. Other than the two parties, nobody, not even the minister, is able to lawfully find out from the employment tribunal records whether a whistleblowing claim has been brought that relates to (a) the mismanagement at Northern Rock that has caused the country so much damage; (b) the problems of C-difficile or MRSA at a hospital though this has fuelled public and ministerial anxiety about and within the NHS; or (c) the problem with the Nimrod aircraft that crashed in Afghanistan with the tragic loss of 14 servicemen.

Even if there were some plausible reason to advocate that this secrecy might be thought defensible, it creates additional problems which require that it be removed. The secrecy undermines the public interest and the Public Interest Disclosure Act in two essential ways:

1. It enables and encourages unscrupulous employers to buy-off a genuine whistleblower rather than address the underlying malpractice. As the Act expressly encourages employees to raise whistleblowing concerns internally

¹ Data on whistleblowing claims does not appear in the annual statistics published by the Employment Tribunal Service

(so that responsible employers can deal with them properly and without delay), this is no imaginary problem. It means that the current rules - contrary to the intention of Parliament when it passed the Public Interest Disclosure Act - have created a scheme whereby crime, company fraud, public dangers and tax evasion can be readily hushed up contrary to the public interest.

2. This secrecy also damages responsible business as it enables and encourages unscrupulous employees to bring spurious claims. A report in the *Financial Times* on 18 September 2007 quoted the city firm Nomura warning that "The whistleblowing legislation was designed to protect employees who, in good faith, raise legitimate concerns of wrongdoing in the workplace. Its growing use by white men as a litigation tactic when in dispute with the City employers, suggests the legislation is being abused." The secrecy that now exists means it is not possible to assess whether this claim is well founded.

How did we get here?

1999-2004

An authoritative and helpful background to this issue can be found in the two attached debates in Parliament (*Hansard House of Lords*, 27 October 2004 col 1378 and *HC, First Standing Committee on Delegated Legislation*, 28 October 2004). These debates considered the regulations that removed all information about PIDA claims from the public record.

The debates demonstrate that at the time the legislation was passed, the legal position was that information about the claims was on the public record. They refer to the High Court judgement on this matter which ruled that the principles of open justice should apply to employment tribunals. They set out various and serious concerns about the way the policy had been developed by the DTI. They point out that no single body had suggested when consulted that information on whistleblowing claims should be kept secret and that both the CBI and the Engineering Employers Federation had expressly said that it should be. The debates also quote ministerial assurances which were difficult to reconcile with DTI policy that:

- a) One of the purposes of the Public Interest Disclosure Bill is "to put in the public domain things that would otherwise have been kept secret" [DTI minister, Ian McCartney MP, April 1998]
- b) "it is in everyone's interests that there is as much public disclosure as is practical and that this type of legislation is as effective as possible" [DTI minister, Nigel Griffiths MP, Feb 2004], and
- c) "the DTI had no policy objection to the claims being made public" [DTI minister Gerry Sutcliffe MP, Mar 2004].

Notwithstanding the concerns expressed across the floors of both Houses, ministers assured Parliament that in developing the policy and conducting its consultation the DTI had operated in a fair, accurate and considered way. With these assurances, the Government proceeded to introduce the regulations.

2005-2008

Since those debates, on 1 August 2005, the Parliamentary Ombudsman reported on her investigation into the DTI's handling of this matter². As explained in the attached press release issued by Public Concern at Work, the Ombudsman strongly criticised the DTI for the "inherently misleading" way it had introduced the regulations.

² The Report can be found by Googling 'PCaW' at the second item.

Her report revealed that the DTI

- Was never honest with the High Court or the public about why it objected to information about tribunal claims being publicly available,
- Launched a costly appeal it had no intention of pursuing so it could overturn the High Court decision in secret by regulations,
- Repeatedly misled Public Concern at Work to try and head off all public criticism,
- Failed to consider the public interest or to realise that whistleblowing claims "*might involve matters of very great public interest*",
- Issued a one-sided and unfair consultation in breach of Government rules, ignoring 'powerful arguments' for openness, and
- Blocked parliamentary scrutiny by giving assurances it failed to keep.

As a result of her report, in July 2006 the DTI paid Public Concern at Work over £130,000 compensation for misleading the charity and wasting its time. The DTI then declined the charity's request to revisit the substantive policy.

On 22 November 2007 Rt Hon Ian McCartney MP wrote to the Secretary of State and to the Employment Minister at BERR asking them to revisit and correct the issue, pointing out that this present Employment Bill provided a welcome opportunity.

On 14 January 2008³ the Employment minister, Pat McFadden MP, replied that he did not disagree with the conclusions of the Parliamentary Ombudsman in her report and that he is willing to meet to discuss the substantive issue of the secrecy of whistleblowing claims - though he was not convinced of the case being made. In particular, he was concerned at the risk that any provision might lead to employers being named and shamed on untested allegations. As Lord Borrie's amendment and the explanation of it on page 2 makes clear any such risk has been removed.

In advance of the meeting with the minister, we ask that the House again makes clear its support for the principle, policy, practice and public interest that lies at the heart of Lord Borrie's amendment.

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³ By when this Employment Bill had had its Second Reading in the Lords.