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BIS Call for Evidence on the Whistleblowing Framework

Response from the Employment Lawyers Association

1 November 2013

EMPLOYMENT LAWYERS ASSOCIATION: RESPONSE TO CALL FOR EVIDENCE ON THE WHISTLEBLOWING FRAMEWORK

Introduction

The Employment Lawyers Association (ELA) is a non political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals.

The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation (including consultation exercises prior to legislation).

A sub-committee chaired by Anthony Korn was set up to consider the various questions raised by the Department for Business, Innovation and Skills in its call for evidence on the Whistleblowing Framework. The full membership of the sub-committee is set out at the end of our response.

As stated above, it is not the ELA's role to comment on the political merits or otherwise of proposed legislation but to make observations from a legal standpoint. This has presented a particular challenge in relation to many of the questions posed by the 'call for evidence': Client confidentiality means that we cannot respond to the 'call for evidence' in relation to some of the specific questions. Our response is therefore based on our experience of how the current law operates as practitioners in Employment Law and reflected in the reported caselaw.

In this context, we note that some of the questions are similar to those raised by Public Concern at Work which has set up a Commission to consider how the current law is operating in practice. We have drawn on our responses to the questions posed by the PCAW Commission in replying to the questions raised by BIS.

Section 1: Categories of disclosure which qualify for protection

Question 1: Are the categories sufficient to capture all potential instances of wrongdoing that may require public disclosure? Yes or No

1.1 No

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

2.1 We believe that there are categories of wrongdoing which are not covered by the list of qualifying disclosures in Section 43B of the Employment Rights Act 1996 ("ERA 1996"). This could cover, for example, the mismanagement of public funds by public bodies, or private bodies in receipt of Government funding.

2.2 It has been suggested that there should be a "catch-all" category to cover disclosures which do not currently fall within the statutory list in Section 43B of the ERA 1996. On the other hand, a 'catch-all' category could create uncertainty and therefore it may be considered more appropriate to address this issue by adding this kind of potential wrongdoing to the list of qualifying disclosures.

Section 2: Methods of disclosure

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

3.1 For the reasons explained above, we are unable to comment on this question in detail but we would refer to our replies to question 6 below.

Question 4: If yes how (or why)?

4.1 For the reasons explained above, we are unable to comment on this question, but we would refer to our replies to question 6 below.

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

5.1 Yes

Question 6: If yes, how (or why)?

Application of 'reasonable belief' test

6.1 We believe that there is some uncertainty as to the circumstances in which a potential whistleblower may have 'reasonable grounds' for making a qualifying disclosure, particularly if this is determined on an objective basis rather than on the subjective beliefs of the potential whistleblower. This may act as a deterrent to potential whistleblowers.

6.2 Under section 43B of the ERA 1996, a qualifying disclosure means:

"any disclosure of information which, **in the reasonable belief of** the worker making the disclosure, tends to show one or more of the following – ".

6.3 For the purposes of disclosures to an employer, a belief which is genuinely held by the worker but which is wrong will be protected (***Babula v Waltham Forest College [2007] EWCA Civ 174 [2007] IRLR 346*****).** But the reasonableness of the belief is judged on an objective basis. So in ***Easwaran v St Georges University of London*** **(EAT 0176/2010)** where Mr Easwaran alleged that he suffered a detriment as a result of a disclosure that the room where he worked was freezing and he thought he would contract pneumonia was held not to be a protected disclosure on the basis that it was not reasonable for him to believe that freezing temperatures caused pneumonia.

6.4 A further issue is highlighted by the case of ***Bolton School v. Evans [2006] EWCA Civ 1653*** ([**2007] IRLR 140, EAT [2006] IRLR 500**). This holds that whistleblowers will have protection if they can show that their reasonable belief in the information disclosed falls within one or more of the qualifying disclosures recognised by statute but the whistleblower's actions in seeking to establish that their concerns were reasonably held will not always be protected by the legislation.

The key facts of the case are summarised below.

- Mr Evans was employed as a technology teacher at Bolton School between 1996 and 2003. He was involved in the Information and Communication Technology ("ICT") project group in relation to which he was seeking to ensure that the school's new network was appropriate.
- Mr Evans expressed concerns that security issues were not satisfactorily addressed and those concerns were shared by his head of department.
- On 5 September 2003 Mr Evans informed Mr Edmundson (the staff member designated by the headmaster as the relevant contact person) that he was attempting to gain access to the system in order to test security and demonstrate what he perceived to be its failings. Mr Evans also discussed potential security weakness with the Head of Computing, Mr Humphreys. Mr Humphreys was content for a simple test to be conducted to see if Mr Evans could gain administrative access from resources available to pupils.
- On 8 September 2003, Mr Evans gained access to the system from a student PC and disabled some of the user accounts. He did not affect any data on the system and staff still had access to it. Mr Evans then informed Mr Edmundson, Mr Humphreys and the headmaster what he had done.
- The ICT services team subsequently spent some hours repairing the system and it was alleged that financial losses in the region of £1,000 were incurred.

- Following an investigation by the headmaster, a disciplinary hearing was held on 11 September 2003. The headmaster concluded that Mr Evans had deliberately hacked into the network and issued him with a written warning. The headmaster nevertheless accepted that Mr Evans had acted in good faith and later conceded at the Employment Tribunal that Mr Evans may have been justified in his belief that his concerns were not being properly listened to.
- Mr Evans appealed. His appeal was dismissed. The following day, the headmaster invited Mr Evans to discuss matters further but he was of the opinion that his position was untenable and he resigned.

6.5 The decision distinguished Mr Evans' disclosure of information from his actions in seeking to show his reasonable belief in that disclosure. Consequently, it was found that Mr Evans had been disciplined for the act of hacking into his employer's IT system, not for having made a protected disclosure about his concerns regarding the IT system. However Mr Evans had only hacked into the system for the purpose of demonstrating his reasonable belief in his disclosure to his employer. Mr Evans' argued and the tribunal accepted that his actions were intrinsically linked to his disclosure.

6.6 Elias J in the EAT disagreed and stated "*It seems to us that the law protects the disclosure of wrongdoing, or anticipated wrongdoing, which is covered by Section 43B. It does not protect the actions of the employee which are directed to establishing or confirming the reasonableness of that belief*".

6.7 The Court of Appeal upheld the EAT's finding that the protection from detriment given to workers under Section 47B of the ERA 1996 applied only to the disclosure of the relevant information itself, and not to the worker's actions and behaviour in connection with that disclosure.

6.8 Whilst we would not condone employees hacking into their employer’s computer system, the outcome means that workers who suspect wrongdoing on the part of their employers may be unable to establish reasonable grounds for that belief. It may be argued that in cases where a disclosure and acts to establish reasonable belief in that disclosure are intrinsically linked, both ‘acts’ should be protected. Further, the absence of a statutory requirement for employers to undertake any investigation following a worker's protected disclosure can lead whistleblowers to want to undertake their own investigations. But there is a real risk that the whistleblower's actions in so doing are not protected and the fear of repercussions by their employer may discourage workers from making disclosures in the first place.

6.9 In addition, it may be argued that the requirement for "reasonable belief" does not work effectively with the overall public interest objective if a worker does not have conclusive evidence to support their belief in the information, for example if they have second-hand or incomplete information. This may discourage workers from making disclosures. If the purpose and spirit of the whistleblowing legislation is to encourage disclosures of matters in the public interest, gaps in the protection afforded to whistleblowers may have the opposite effect.

6.10 All these factors add create uncertainty and may deter potentially whistleblowers from raising concerns at work.

Conditions attached to disclosures to prescribed persons and disclosures in other cases

6.11 We believe that the conditions attached to disclosure to prescribed persons and third party disclosures may inhibit whistleblowers from making ‘reasonable’ disclosures.

6.12 In this context we would first refer to the requirement that the worker must reasonable believe that the information disclosed and any allegation contained in it are substantially true. This is a statutory requirement in relation to disclosures to a prescribed person (Section 43F of the ERA 1996), Disclosure to third parties (Section 43G(1)(b) of the ERA 1996 and disclosures of exceptionally serious failure (Section 43H(1)(b)) of the ERA 1996. But it is likely as a result of the EAT’s ruling in ***Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4*** that a worker who makes a number of disclosures may be in difficulties if there are no reasonable grounds to support each of those disclosures or the totality when read as a whole even though there may be reasonable

grounds to support parts of that disclosure. So, in the ***Korashi*** case, the ET was persuaded that the substance of Dr Korashi's complaint was that a consultant, known in those proceedings as Dr A, had led to the premature death of 4 patients whereas Dr Korashi had also complained that the consultant lacked the necessary training and qualifications to have carried out the operations he had performed for the Health Board's predecessor. The ET's ruling was upheld by the EAT. The case was complicated by the fact that one of the alleged protected disclosures was to South Wales Police which raises the separate question of who should be included in the list of prescribed persons and what conditions should be attached to such disclosures. Nonetheless there is a quite separate issue as to the test which should apply to multiple disclosures and whether the current statutory provisions are too restrictive.

Conditions attached to disclosures in other cases

6.13 We also believe that the other conditions set out in Section 43G(2) of the ERA 1996, whilst not unreasonable in themselves, may deter whistleblowers from exposing wrong doing. For example whilst it will normally be reasonable to expect a worker to raise concerns internally before going to a third party (as required by Section 43G(2)(c) of the ERA 1996, this may depend on the nature of the concern and the identity of a third party. We have in mind a complaint which is made to a regulator who is not included on the list of prescribed persons in circumstances where the workers feels unable to raise the matter internally beforehand. Because of the difficulties associated with updating the list of prescribed persons (referred to in our replies to questions 12 and 13 below, we would strongly support that disclosure to a third party should be easily accessible where disclosure to the employer is not practicable or desirable.

6.14 As regards the condition that the disclosure should not be for "personal gain', we would refer to our reply to question 11 below.

Question 7: Are there any other conditions which we believe deter whistleblowers?

Different statutory test for the determination of "detriment" and unfair dismissal

7.1 We also believe that the different tests which apply to complaints of detriment under Section 47B of the ERA 1996 and complaints of unfair dismissal under Section 103A of the ERA 1996 may deter whistleblowers from exposing wrongdoing. As a result of the Court of Appeal ruling in ***NHS Manchester v Fecitt [2012] IRLR 64***, a different test of causation applies under Section 48(2) of the ERA 1996 to the one that applies under Section 103A of the ERA 1996.

7.2 The burden of proof for a detriment claim is set out at Section 48(2) of the ERA 1996 as follows: "On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

7.3 In ***Fecitt & others v NHS Manchester [2012] IRLR 64***, the court ruled that a detriment claim will succeed if "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."

7.4 This contrasts with the test in Section 103A of the ERA 1996 which provides that "An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

7.5 In ***Kuzel v Roche Products Ltd [2008] IRLR 530***, the Court of Appeal upheld the Employment Appeal Tribunal's approach to the burden of proof in automatic unfair dismissal claims, as follows: (1) has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason? Has she raised some doubt as to that reason by advancing the s103A reason? (2) if so, has the employer proved his reason for dismissal? (3) if not, has the employer disproved the s103A reason advanced by the Claimant? (4) if not, dismissal is for the s103A reason."

7.6 The Court of Appeal in ***Fecitt*** recognised the inconsistency between the two types of claim but clearly felt that this was an issue for parliament to resolve if it saw fit.

7.7 It follows that under the current statutory provisions it is easier for a Claimant to succeed in a detriment claim than an automatic unfair dismissal claim; in a detriment claim because a detriment will be established if the employer's treatment of the Claimant is "materially influenced" by the disclosure, whereas the dismissed Claimant needs to show that the disclosure was the reason or principal reason for the dismissal.

7.8 We find it hard to see any justification in policy terms for distinguishing between the two and in effect making it more difficult for an employee who is dismissed to challenge the fairness of the dismissal than a worker, or employee, who suffers a detriment. This is well illustrated by the following example: two employees subjected to disciplinary proceedings, where one was dismissed and the other given a final written warning and where a protected disclosure materially influenced but was not the only or principal reason for the employer's treatment. It is likely that the dismissed employee would not succeed whereas the employee who remains in employment would.

Question 8: Do these conditions encourage whistleblowers to expose wrongdoing? Yes or No

8.1 For the reasons explained above, we are unable to comment further on this question

Question 9: If yes, how (or why)?

9.1 For the reasons explained above, we are unable to comment on this question

Question 10: How clear and understandable are the conditions that need to be met to ensure that the disclosure is protected?

10.1 For the reasons explained in reply to question 6 above, we would suggest that the conditions are quite complex and difficult to understand.

10.2 We would repeat the points made in reply to question 6.

10.3 We would refer to the points made in reply to question 2 in relation to the scope of the current categories of qualifying disclosures. These categories, in our view, are not only not exhaustive, but are also open to interpretations which can lead to a lack of certainty which makes them hard to understand. For example as regards the categories of disclosure amounting to a 'qualifying disclosure' the legislation does not define "miscarriage of justice" and therefore the scope of this category is not entirely clear. There is limited case law on this issue and providing a definition may only serve to limit this category of disclosure with the effect that disclosures which might reasonably otherwise fall into it may be excluded.

Question 11: If you have answered yes to questions 3, 5 and 7, please provide any evidence you have to support your response.

11.1 We are unable to answer this question for the reasons explained above but the case law referred to above, suggests that there are circumstances where whistleblowers are denied protection when they should be protected; for example where some of the allegations they are making are true and others are not and therefore they are unable to meet the requirements of the statutory provisions.

Question 12: What changes, if any do you think are need to the qualification conditions?

12. 1 As regards the issue of 'reasonable belief', there are two possible ways of addressing these concerns:

- Amend the legislation so that reasonable investigations or acts undertaken by workers to support their belief are treated as part of the disclosure itself and consequently are also protected.

- Consider whether a different test for "reasonable belief" is appropriate. For example, in the case of disclosures to an employer or to regulators, it may be appropriate to replace 'reasonable belief with "reasonable suspicion". This was contemplated as part of the Shipman Inquiry. (The reasonable belief requirement may however still be appropriate for disclosures other than to the employer).

12.2 As regards the issue of financial rewards (which impacts on Sections 43G of the ERA 1996(Disclosures in other cases) and Section 43H of the ERA 1996 (Disclosures of exceptionally serious failure), both of which provide that a disclosure will not be protected if it is for personal gain), we believe that the appropriateness of any financial inducement to a potential whistleblower should be factor in considering the reasonableness of a third party disclosure or disclosure in exceptional circumstances rather than a bar to disclosure (see the answer to question 25 below).

12.3 As regards the conditions attached to disclosures to prescribed persons (Section 43F of the ERA 1996), disclosures to other persons (Section 43G of the ERA 1996) and disclosures of exceptionally serious failure (Section 43H) of the ERA 1996, we believe that each of the conditions should be added to the list of factors taken into account in determining the reasonableness of the disclosure under Section 43G(3) of the ERA 1996 rather than pre-condition of protection.

12.4 As regards the issue of causation, it is not for the ELA to say which of the two tests of causation should be adopted but the present situation cannot be just and that the causation test for unfair dismissal and detriment cases should be the same: we believe that in policy terms it would be more consistent if the causation test applied in ***Fecitt*** – that of material influence – is applied to both types of claim, although we note that the wording in discrimination cases on which the Court of Appeal's ruling is based has now been change from "on the grounds of" [the prohibited act] to "because of [the prohibited act] and it may be more consistent to use the same wording in whistleblowing cases.

SECTION 3 Prescribed persons (i)

Question 13: Should this system be amended to one where the prescribed person/body list can be updated by the Secretary of State? Yes or No

13.1 No, for the reasons given in reply to question 14 below.

13.2 We agree that there should be a mechanism for reviewing and updating the list of prescribed persons. It is not for the ELA to say who should and who should not be a 'prescribed person' within the meaning of the regulations but there have been some surprising omissions. For example, the omission of certain professional regulators in the health sector, notably the General Medical Council, the Nursing and Midwifery Council and the Health and Care Professions Council. The new NHS Commissioning Board/NHS England is an example of a body that now needs to be included. This leaves a gap in the current protection that should be addressed, either by making the list of prescribed regulators more comprehensive or by including a catch-all provision for the health sector**.** We believe that the extension of the list of prescribed persons to cover these categories is consistent with the government policy of encouraging responsible whistleblowing in the NHS. It is also arguable that the list should include the police

13.3 It is also unclear as to why (and how) certain persons in the current list have been identified as 'prescribed persons' and why others have not. We would suggest that there should be a statutory duty to review the list of prescribed persons each time a new statutory regulatory body is established.

13.4 We also note that special provision is made for the purpose of obtaining legal advice in Section 43B(4) of the ERA 1996 but there are no equivalent provisions for other advisors such as trade union representatives. Whilst we acknowledge that the issue of including trade union representatives in the list of prescribed persons is a matter of policy, it is questionable whether such disclosures should be subject to the more stringent requirement of Section 43G. Similar considerations apply to disclosures to other advisory bodies such as Public Concern at Work (although recent case law-***Audere Medical***

Services Ltd v Sanderson *UKEAT/0409/12*-suggests that advice from PCAW may be covered by Section 43B(4)) of the ERA 1996.

13.5 However, for the reasons explained below, we do consider that there may be problems if the list is updated by the Secretary of State.

Question 14: 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, for the reasons below.

14. 1 The list of 'prescribed persons' is currently laid down by statutory instrument, the current version of which is the Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549). The key issues when it comes to the list of prescribed persons are clearly its content and accessibility, as identified in the response to the preceding question.

14.2 It seems clear that accessibility is a problem: The statutory instrument has been subject to some eighteen amending instruments since 1999. It is also referred to in other instruments, such as the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, where the series of updating instruments since 1999 are identified: to piece together the list of prescribed persons as at July 2013 requires considerable cross-checking in order to identify the up to date list of prescribed persons. This renders it far from accessible and "user-friendly". We also note statistics by PCAW (published in May 2013) suggest that disclosure in this way arise in only 13.5% of cases, only a fraction of which will involve disclosure to prescribed persons. This could be seen as evidence of inaccessibility.

14.3 Despite these issues, we do not consider that the current procedure for updating the list itself has adverse effect upon accessibility or clarity over content. In the current context, we consider this issue can be dealt with without necessitating change to the current procedure. One way of addressing it, for example, would be to simply improve access to the updated list through PCAW, BIS site or other publication.

14.4 It is not for ELA to say what form regulation should take. However, we do not consider that the list should be updated by the Secretary of State: provided the issues of clarity and accessibility of the current list are addressed, we consider that providing the list and updates via statutory instrument retains the appropriate level of regulation and control over its content, as well as ensuring it legal status. The initial rationale of government in setting out a specific list by way of statutory instrument was to ensure the legislation was tightly regulated. The current procedure would appear to achieve that aim, by allowing a reasonably straightforward updating process but nonetheless subjecting proposed changes to scrutiny.

14.5 Furthermore, we note that, in its Response to the 2009 Consultation, 'Employment Tribunals and the Public Disclosure Act', the Government refers to a "sampling exercise" from which it identified most disclosures to prescribed persons fall within a narrow group. This group is namely, local authorities, health and safety executive, care quality commission, companies investigation branch, financial services authority (as was), HMRC and serious fraud office. We have not seen details of the exercise to know its extent or more detailed results. Even so, this broad conclusion would appear to bear out the experiences of some ELA members that the majority of cases of disclosure to prescribed persons is reasonably narrow. This is unlikely to be affected by the way in which the list is authorised.

14.6 Removing the need for statutory instrument would no doubt have the advantage of speed over the current updating process although this does not appear to be highlighted as a problem. The changes are also frequently uncontroversial. Nonetheless, there have been frequent calls over the years for debate over inclusion of additional bodies within the list, some professional, some representative. Retaining the current statutory instrument approach, is in our view the best way to ensure such debates are properly explored and the implications considered fully, by way of impact assessment where necessary.

Question 15: If yes, explain why

Yes, potentially.

15.1 As alluded to above, it would appear that, on occasion, review of the list has necessitated political, as well as practical, considerations. For example, debate has revolved around the role of representative bodies and whether they might be included as prescribed persons. Whilst access to representation and support in the context of disclosures is vitally important, the distinction between such a role and the role of prescribed persons under the Act, should not be confused.

15.2 Without the safeguards and opportunity for debate presented by the current procedure, if only through committee, we are concerned review of the list might lose some of its rigour and significance.

Question 16: 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)

16.1 Generally speaking, the list of prescribed persons/bodies can be described as the recognised regulatory body for a profession or for a specific sector.

Section 4: Prescribed persons (ii)

Question 17: Should the referral of whistleblowing claims to prescribed persons/bodies be made mandatory? Yes or No

17.1 This is a matter of policy which is outside the remit of the Employment Lawyers' Association.

Question 18: If yes, please provide any evidence you have to demonstrate that this could support the regulators' role.

18.1 For the reasons explained above we cannot comment on this question.

Question 19: What should the prescribed person/body do with the information once received?

19.1 For the reasons explained above, we cannot comment on this question.

Question 20: Should prescribed persons/bodies be under a reasonable obligation to investigate all disclosures they receive? Yes or No

20.1 For the reasons explained above, we cannot comment on this question.

Section 5: Definition of Worker

Question 21: Does the current definition of worker exclude any group that may have need of the protections afforded to whistleblowers? Yes or No

21.1 Yes. The definition of worker is generally more restrictive than in discrimination law.

21.2 In this context we note that the following 'workers' currently fall outside the scope of the current legislation namely:

- partners of solicitors Firms and, subject to appeal, LLP members (***Bates van Winkelhof v Clyde and Co LLP [2012] IRLR 992***);
- Office holders;
- Civil servants;
- Members of the armed forces;
- Volunteers.

21.3 We would point out that most, though not all, of these groups, are expressly covered by the Equality Act 2010 in one way or another and, in policy terms, it may seem strange that, for example, an LLP member can pursue a claim of pregnancy discrimination but cannot pursue a whistleblowing claim.

21.4 Section 20 of the Enterprise and Regulatory Reform Act 2013 gives the Secretary of State the power to make amendments as to "what individuals count as 'workers' for the purpose of the statutory provisions".

21.5 It could be argued that the legislation should cover all individuals who perform roles within a working environment. Special considerations may apply to groups like the armed forces and senior civil servants which would need to be reflected in the statutory provisions.

Question 22: If yes, what groups are these?

22.1 We have answered this question in our response to question 21.

Question 23: Please provide any evidence to demonstrate these groups require protection.

23.1 For the reasons explained above, we are unable to provide such evidence.

Section 6: Job applicants

Question 24: What impact does whistleblowing have on the individual's future employment, e.g. if there are issues around 'blacklisting' or other treatment?

24.1 PIDA has been held to protect workers who are dismissed as a result of protected disclosures made to their previous employers (***BP plc v Elstone [2010] IRLR 558***) but the EAT held that the Claimant does have to be a worker at the time the disclosure was made. It should be noted that in the ***Elstone*** case, Mr Elstone had already started working for BP as a consultant before his consultancy was terminated. It is more debatable whether the Claim could have been brought if he had not been offered the consultancy or, in the case of an employee, where employment is refused because the job applicant had made a protected disclosure to a previous employer and therefore was seen as a trouble maker. It is arguable that if a worker was refused employment because of a previous protected disclosure (assuming that this could be proved), this would amount to a detriment for the purpose of Section 47B of the Employment Rights Act 1996 and a claim could be brought under the existing provisions but the issue is by no means clear.

24.2 It would therefore appear arbitrary not to afford protection immediately before the commencement of employment where it would be available immediately afterwards and therefore we would suggest that protection under PIDA should be extended to job applicants who suffer discrimination as a result of a previous protected disclosure.

24.3 Therefore it should be made clear that where an individual commences work for a new employer, they are protected against both dismissal and detriment if the employer subsequently discovers a protected disclosure they had made against a previous employer. The ERA does not require the disclosure to relate to the current employer in order to qualify for protection. This would more closely mirror the protection given to job applicants in relation to victimisation that is provided by the Equality Act 2010. It would of course still be necessary for the Claimant to establish a causal link between the disclosure and the refusal of employment which would be an important safeguard to the scope of the protection offered

24.4 Indeed in the course of our discussions, it was suggested that such protection against 'blacklisting' should be extended to anyone who suffers a detriment or is dismissed as a result of making a protected disclosure even if they were not a worker at the time the disclosure was made. For example, a student who raised a concern about the activities of a drug company whose subsequent application for employment was unsuccessful for that reason. We acknowledge that there is a case for making the

scope of such protection as wide a possible but, on balance, we have concluded that extending the law to anyone who has raised complaints against a prospective employer at any time during their lives in any capacity would be fraught with difficulties.

Question 25: Please provide any relevant evidence to confirm whether these practices are taking place.

25.1 For the reasons explained above, we are unable to provide such evidence

Section 7: Financial incentives

Question 26: Would a system of financial incentives be appropriate in the UK Whistleblowing framework? Yes or No

26.1 In general terms this raises policy issues outside the remit of the Employment Lawyers Association. We are aware that in certain sectors in some states in the US, rewards are offered to whistleblowers as an incentive to make disclosures; for example, relating to financial irregularity. This contrasts with the position under PIDA where at least in relation to disclosure to third parties and disclosures in exceptional circumstances, it is a condition that the disclosure is not made for personal gain.

26.2 If, as a matter of policy, it was considered appropriate to offer financial rewards as an incentive to whistleblowers, it would be necessary to consider how such rewards or any other financial inducement, would interact with the existing system for resolving whistleblowing complaints. For example, would such rewards be taken into account or ignored in determining any award made by a Tribunal? If so, how? Similarly the timing and status of such rewards would need to be considered as there is potential for them to impact on the Tribunal process. It is not clear from the Consultation document who would be responsible for administering such rewards? At what point would a reward be made? How would a determination be reached? Would a reward be dependent on the successful outcome of an Employment Tribunal Hearing? If so, this may have an impact on a Claimant's willingness to settle? What would happen if the Tribunal's ruling was overturned on appeal?

26.3 As stated above, it is not our role to say whether such incentivisation would be a good or a bad thing but a first step might be to remove the statutory prohibition referred to above and provide that personal gain should no longer be a bar to the disclosure being protected as such but a factor to be considered in the overall reasonableness of the disclosure. This would at least allow certain sectors to offer rewards without penalising those who wish to bring legal proceedings against their employers [see the reply to Question 11 above].

Question 27: 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?

27.1 For the reasons explained above, we are unable to provide such evidence.

Question 28: If no, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrongdoing?

28.1 For the reasons explained above, we are unable to provide such evidence.

Question 29: Where are financial incentives used as an effective measure to prevent wrongdoing/illegal activity? For example, in certain industries.

29.1 We are unable to comment on this question

Section 8 Non-statutory measures

Question 30: How would the introduction of non-statutory measures make a difference?

30.1 Many of the employers represented by our members do have express policies and procedures covering whistleblowing but this is by no means universal and of course is not mandatory.

30.2 We believe that in the current political climate there may be considerable resistance to the introduction of mandatory whistleblowing procedures, not least because of their impact on small and medium sized employers (a "one size fits all" approach).

30.3 There may be less resistance to a voluntary or statutory code of practice (either through ACAS or some other qualified body) which Tribunals could take into account in deciding the reasonableness of the disclosure and reasonableness of the employer's response to the disclosure (where this is relevant). The development of such procedures may be further encouraged if Tribunals were empowered to make recommendations. Overall, we consider that the introduction of a Code of Practice would offer valuable guidance to potential whistleblowers and assist employers in their response to complaints of this kind.

Question 31: What types of non-statutory measures could Government consider to support the statutory framework?

31.1 See the answer to question 29.

Section 9: Further evidence

Question 32: 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.

32.1 For the reasons explained above, we are not able to provide such evidence.

Question 33: please provide any case studies of situations where a whistleblower has had a positive outcome with their employer after blowing the whistle

33.1 For the reasons explained above, we are not able to provide such evidence.

Members of ELA Sub-committee

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