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Ministers told to change their tune on whistleblowers

The EU praises Britain's protections, but campaigners want a dedicated watchdog and fear employers will still be able to hound dissenting workers

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Families protest about deaths at Gosport War Memorial Hospital. Similar scandals could happen if whistleblowers are not better protected, campaigners say

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Senior politicians and campaigners are demanding a radical overhaul of whistleblowing protections after a series of high profile cases have highlighted gaps in public interest disclosure legislation.

They warn that scandals such as the deaths at Gosport War Memorial Hospital will be repeated because employers are not statutorily required to investigate concerns raised by whistleblowers. Instead, those who speak out can find their careers in tatters and face a battle for compensation through the employment tribunal at huge personal and financial cost.

The UK led the way in Europe with the Public Interest Disclosure Act 1998 (Pida), but campaigners say that 20 years on the legislation is inadequate as it leaves too many people – including volunteers and holders of office such as judges – out in the cold.

In April, the European Commission published proposals for a law to protect whistleblowers who report breaches of EU law. It says that scandals such as those involving Volkswagen emissions tests, the Panama papers and Cambridge Analytica only came to light because insiders leaked vital documents, often at great risk. Only ten of the 28 member states have comprehensive measures in place, and the commission praised the UK for having “one of the most advanced systems of whistleblowing protection in the EU”.

However, Baroness Kramer, the Liberal Democrat peer, says that there is a “growing drumbeat” for the UK’s legislation to be reformed. She is co-chairwoman of the all-party parliamentary group on whistleblowing. “I spent many years working in the US corporate world, where there is much greater respect for whistleblowers,” she recalls. “Seeing how so many whistleblowers here were treated while I was on the parliamentary commission on banking standards was shocking.”

The group is supporting a proposal by the campaign group Whistleblowers UK (WBUK) for an Office for the Whistleblower to protect and support whistleblowers by setting standards and holding regulators and employers to account.

Georgina Halford-Hall set up WBUK in 2014 after experiencing first-hand the trauma of being a whistleblower and finding herself under arrest. She was vindicated but she says: “The legal protections are nothing more than a placebo. There is no statutory obligation to investigate allegations under Pida and it is not the role of the employment tribunal to decide if a protected disclosure is upheld, which allows unsafe and illegal practices to continue.”

WBUK supported the City trader John Banerjee, who won a rare victory last month when an employment tribunal agreed he had been unfairly dismissed from the Royal Bank of Canada after raising concerns about compliance. Mr Banerjee is seeking millions of pounds in compensation but the bank is challenging the verdict and has lodged an appeal.

The campaign group Public Concern at Work — which celebrates its 25th anniversary in October — receives 2,500 cases a year, most from health, financial services, education and the charity sector. The number of reports has surged following recent scandals. The organisation is intervening in the test case being brought by District Judge Claire Gilham in the Supreme Court after an employment tribunal decided she was not entitled to whistleblower protections when she spoke out about death threats and violent claimants in courtrooms. Judges are not classed as “workers” under the act.

The charity also intervened in the case of Chris Day, a junior doctor whose career was ruined after he raised the alarm over staff shortages. He found he was not protected by Pida because it was unclear whether he was employed by the hospital trust or Health Education England. With the help of crowdfunding donations of £140,000, he took his fight to the Court of Appeal, which said there needed to be a new interpretation of employment law legislation to “maximise the protection” for the NHS’s 54,000 junior doctors. It sent his case back to the employment tribunal, where Health Education England admitted it was his employer and Dr Day is now seeking compensation.

His case has paved the way for claims from agency workers and workers in triangular working relationships involving multiple organisations. Francesca West, chief executive of Public Concern at Work, says: “Pida was a private member’s bill tacked on to employment legislation and it has run out of steam. Important provisions such as the anti-gagging measures relevant to the #MeToo campaign are poorly understood.”

Steps have been taken to beef up protections in the NHS. The National Guardian’s Office was set up in 2016 following the Mid Staffs hospital scandal, in which staff concerns were repeatedly ignored. In the office’s first year, 7,000 concerns were reported to the guardian’s “champions” at hospital and ambulance trusts, a third of which related to patient safety concerns and half to bullying and harassment. Some 356 whistleblowers in 2017-18 said they had experienced repercussions, ranging from “subtle” persecution by closing off career opportunities through to being fired.

Whistleblowers play a crucial role. Research published earlier this month by Clyde & Co, a City of London law firm, found that whistleblowers were increasingly reporting their employers to the Pensions Regulator for failing to comply with the auto-enrolment regulations. The regulator, which more than doubled its enforcement actions last year, received 4,856 whistleblower reports, up by more than a third on 2016-17.

The Department for Business, Energy, and Industrial Strategy says it has no plans to review Pida and cites the European Commission’s praise of the UK’s protections. It is analysing the EU directive to see how it might work in practice. But a spokeswoman argues that the right body to investigate concerns is the relevant regulator, adding that the government has already strengthened protections, which will be reviewed early next year.

Where the EU directive goes further than Pida is in extending protections to volunteers, unpaid trainees and job applicants, providing a clear timeframe for employers to respond before an employee is entitled to “go public”, and giving whistleblowers access to free comprehensive advice.

Mary Inman, a partner at the London office of US law firm Constantine Cannon, launched a specialist team last year and claims to have already been contacted by 50 international whistleblowers, 80 per cent from the UK. She argues the directive’s protections do not go far enough. She picks out insufficient confidentiality protections, no protections for citizens of EU countries blowing the whistle to non-EU authorities such as Interpol, and no rewards for reporting, while penalties and compensation for “malicious or abusive” reports give companies an avenue for harassing whistle blowers.

Inman says it is time for the UK to introduce incentives. While she says there is a “visceral” reaction here to anything seen as a “bounty”, she thinks the UK could create a culturally appropriate scheme which caps any rewards.

Kevin McNerney, employment law barrister at the Manchester branch of St John’s Buildings chambers, says rewarding whistleblowers with a percentage of a company’s payroll would bring about a culture change. “I would have no problem,” he says, “with an accounts manager from a pharmaceutical company receiving a windfall following dismissal had they blown the whistle on dodgy pricing that would save the NHS/taxpayer millions.”

Neither Whistleblower UK nor Public Concern at Work is in favour of rewards. West says: “We need to build a culture where it is completely socially unacceptable to victimise someone for raising concerns. It’s about how employers cope with the challenge when someone reports concerns - and that doesn’t mean shooting the messenger.”

Coming up

- Cambridge Symposium on Economic Crime, September 8, “Speaking truth to power — is anyone really listening?” under the auspices of WBUK.
- EU Directive – This may only come into effect after Brexit but it is likely to form part of fundamental EU standards in any trade deal so it will be applicable to the UK.
- Court of Appeal judgement in *International Petroleum v Osipov* over ruling that non-executive directors were also liable with the employer company for a £1.7 million compensation award.