HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

Number CBP 7442, 4 January 2016

Whistleblowing and gagging clauses

By Doug Pyper

Inside:

Contents

Summary

The *Public Interest Disclosure Act 1998* came into force on 2 July 1999. The Act protects workers who disclose information about malpractice at their workplace, or former workplace, provided certain conditions are met. The conditions concern the nature of the information disclosed and the person to whom it is disclosed. If these conditions are met, the Act protects the worker from suffering detriment as a result of having made the disclosure. If the conditions are not met a disclosure may constitute a breach of the worker's duty of confidence to his employer.

"Gagging clauses" are clauses in employment contracts or settlement agreements which purport to prohibit a worker from disclosing information about his current or former workplace. A settlement agreement is a contract concluded at the end an employment relationship that seeks to prevent future disputes. Typically, it is accompanied by a payment to the worker. A gagging clause is unenforceable in so far as it purports to preclude a worker from making a protected disclosure.

1. Background

The *Public Interest Disclosure Act 1998* started life as a Private Members' Bill, introduced by a Conservative Member, Richard Shepherd MP, on 18 June 1997 and supported by the Labour Government. The Bill proceeded to its Committee Stage without debate on Second Reading[1] due to the fact a similar Private Members' Bill, the *Public Interest Disclosure Bill 1995-96,* introduced by Don Touhig MP,[2] had recently been considered in detail. This was explained by Mr Shepherd during the first (and only) sitting of the Committee:

> Normally, I should be one of the first to think it remiss if a Bill were not debated on Second Reading. However, there are, extenuating circumstances, in that the subject was fully considered by the House for some five hours on 1 March 1996. The hon. Member for Makerfield (Mr. McCartney), now Minister of State, Department of Trade and Industry, said that that debate had been won more comprehensively than any other he had heard in the nine years that he has been in the House. That Bill also entitled the Public Interest Disclosure Bill received its Second Reading by 118 votes to nil. Regrettably, it did not reach the statute book last year, notwithstanding its wide support in the House and outside.[3]

Mr Shepherd outlined the purpose of the Bill:

> As with its predecessors, the Bill's purpose is to make it more likely that where there is malpractice that threatens the public interest, a worker will raise the concern in a responsible way rather than turn a blind eye.[4]

He then discussed the reasons for its introduction:

> The clearest illustration of the need for the Bill is to be found in the major disasters and scandals of the last decade. Almost all official inquiries report that workers had seen the dangers, but either had been too scared to sound the alarm, or had raised the matter with the wrong person or in the wrong way. Examples include the rail inspector who, for fear of rocking the boat, did not report loose wiring before the Clapham rail disaster in which 35 people died. There were five warnings that ferries were sailing with their bow doors open before the tragedy at Zeebrugge took 193 lives. At Barlow Clowes and the Bank of Credit and Commerce International and in Maxwell's empire a culture of fear and silence deterred workers from blowing the whistle, costing investors and pensioners billions of pounds. Finally, a Matrix Churchill employee wrote a letter to the Foreign Secretary about munitions equipment for Iraq but it was ignored by civil servants....
>
> The Bill is, as its name implies, a public interest measure. Were it merely an employee rights measure, I doubt that I would be able to inform the committee that its objectives are supported by the Institute of Directors, the Confederation of British Industry and the

---

1 *Public Interest Disclosure Bill 1997-98*, Bill 10. See: HC Deb 18 June 1997 c346; HC Deb 12 December 1997 c1331

2 See: Julia Lourie, Public Interest Disclosure Bill 1995/96, House of Commons Library Research Paper 96/26, 19 February 1996

3 Public Interest Disclosure Bill Deb 11 March 1998

4 Ibid

> Committee on Standards in Public Life as well as the Trades Union Congress.[5]

During the Bill's Second Reading in the House of Lords, Lord Borrie noted its support:

> It passed through another place with strong support from both the Government and the Opposition. I pay tribute to both Mr. Richard Shepherd MP and to the Minister of State at the DTI, Mr. Ian McCartney, for the careful consideration that they and their advisers gave to this matter. The results of that careful consideration can be seen not only in the detail of the Bill but also in the support that the Bill has received from the CBI, the Institute of Directors, the TUC, consumer groups, various professions such as the medical, legal and accountancy professions, and numerous other bodies.[6]

As mentioned, the Bill followed the *Public Interest Disclosure Bill 1995-96,* which failed to become law. That Bill, introduced by a Labour Member, Don Touhig (now Lord Touhig), won sixth place in the ballot for Private Members' Bills on 23 November 1995.[7] The 1995-96 Bill followed Dr Tony Wright's (Labour) *Whistleblower Protection Bill*, which was introduced under the Ten Minute Rule on 28 June 1995 but made no further progress.[8]

The *Public Interest Disclosure Bill* received Royal Assent on 2 July 1998 and came into force a year later. *The Public Interest Disclosure Act 1998* ("PIDA") amended the *Employment Rights Act 1996* to protect individuals from suffering detriment as a result of having made a "protected disclosure". The concept of "protected disclosure" is set within the context of a general duty of confidentiality between employer and employee.

---

5 Ibid
6 HL Deb 11 May 1998 vol 589 cc888
7 *Public Interest Disclosure Bill,* Bill 20 of 1995/96
8 Bill 152 of 1994/95

2. The duty of confidentiality

Workers are subject to a legal duty of confidentiality prohibiting the disclosure of certain information obtained during the course of their employment. If the information disclosed by a whistleblower is not of a kind protected by PIDA, the employee may be in breach of this duty.

The duty may be an express term of a contract. If there is no express term it will be implied by common law. The employee will be in breach of the duty if he communicates confidential information acquired during the course of his employment.[9] This breach could justify dismissal. In certain circumstances, such as information concerning trade secrets, the duty may persist after the employment relationship has ended.[10]

The duty of confidentiality is subject to a common law 'public interest exception', which existed prior to the coming into force of PIDA. This exception, for example, prevented an employer silencing an employee (by obtaining an injunction against him) who sought to disclose information about his employer's regulatory failings.[11] However, this public interest exception offers only limited protection. It merely provides a defence to legal proceedings for breach of the duty of confidentiality; it does not protect employees from suffering detriment at work, or dismissal, for having made a disclosure. PIDA was enacted to provide this protection. The following sections explain how it works.

9 *Amber Size and Chemical Co v Menzel* [1913] 2 Ch 239
10 *Faccenda Chicken v Fowler* [1986] IRLR 69
11 *Re a Company's Application* [1989] IRLR 477

3. The operation of the Public Interest Disclosure Act 1998

PIDA protects workers who make "protected disclosures" from being subjected to detriment by their employers.[12]

PIDA applies to:

- certain categories of person;
- who disclose information of a certain kind;
- in a certain way.

Each of these three elements will be explained below.

3.1 Protected persons

PIDA protects the vast majority of the working population. Employment law makes a distinction between different types of employment status.[13] The main ones are "worker" and "employee". The status of worker is broader than, and includes, the status of employee. Subject to the limited exceptions outlined below, the whistleblowing protections in PIDA apply to all workers.[14] This means that PIDA protects those who work under contracts of employment (ie employees) as well as those who work under contracts that require them to work for someone else but who are not genuinely self-employed (eg agency workers).

PIDA does not apply to employment in the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.[15] As originally enacted, PIDA did not apply to police officers. However, the relevant provisions were amended following the *Police Reform Act 2002.* Police officers received whistleblowing protection on 1 April 2004.[16]

3.2 Protected disclosures

The protections in PIDA apply only to "protected disclosures". Section 43A of the *Employment Rights Act 1996* defines this as:

> In this Act a "protected disclosure" means a **qualifying disclosure** (as defined by section 43B) which is **made by a worker in accordance with any of sections 43C to 43H**

Thus, a protected disclosure is:

- a disclosure of a certain kind of information (a "qualifying disclosure");
- that is disclosed by a worker in a certain way.

---

12 *Employment Rights Act 1996*, section 47B
13 For an overview see: GOV.UK, Employment status (accessed 15 April 2013)
14 *Employment Rights Act 1996*, section 230(1) and section 43K
15 *Employment Rights Act 1996*, section 193
16 *Police Reform Act 2002*, section 37; *Employment Rights Act 1996*, section 43KA; *Police Reform Act 2002 (Commencement No. 9) Order 2004* SI No.1319

3.3 Qualifying disclosures

Section 43B defines a "qualifying disclosure" as any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest (see below, under 'recent changes to the law') and tends to show any of the following:

- a criminal offence has been committed, is being committed or is likely to be committed;
- a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
- a miscarriage of justice has occurred, is occurring or is likely to occur;
- the health or safety of any individual has been, is being or is likely to be endangered;
- the environment has been, is being or is likely to be damaged;
- information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
- The requirement for the disclosure to be "made in the public interest" is a recent addition to the definition of qualifying disclosure, inserted by the *Enterprise and Regulatory Reform Act 2013*. The reason for this addition is that, prior to the amendment, individuals had successfully claimed whistleblowing protection for disclosures about breaches of private contracts (eg breaches of their employment contract). This is discussed more fully below (see the section entitled "Recent changes to the law").
- The definition of "qualifying disclosure" excludes disclosures of information where the person making the disclosure commits an offence by making it, or the disclosure is made in breach of legal professional privilege (ie the confidentiality between a lawyer and her client).[17] The disclosure must be a disclosure of "information", as distinct from allegation or opinion. *Tolley's Employment Law Handbook 2012,* provides an example of the distinction:

  > The distinction is well illustrated by an example given in Mrs Justice Slade's judgment in relation to the state of a hospital. To say "health and safety requirements are not being complied with" is an unprotected allegation. To say "the wards of the hospital have not been cleaned for two weeks and sharps were left lying around" is conveying "information" and is protected.[18]

The discloser must reasonably believe that the information tends to show one of the above failings. This means that it must be objectively reasonable for the discloser to believe that the information tended to show a relevant failing (the discloser's subjective belief is not conclusive), taking into account the discloser's personal circumstances (eg level of education, experience etc).[19]

---

17 *Employment Rights Act 1996,* section 43B(3)-(4)

18 p130; see Geduld v Cavendish Munro Professional Risks Management Ltd [2010] ICR 325, para 24

19 *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] I.R.L.R. 4

3.4 The method of disclosure

As noted above, section 43A states that in order to be protected a disclosure must be "made by a worker in accordance with any of sections 43C to 43H". These sections outline the following scheme of permitted methods of disclosure:

- disclosure to the worker's employer;
- disclosure to another responsible person, if the worker reasonably believes the information relates to that person's conduct or a matter for which they are responsible (eg an agency worker might raise a concern with the organisation hiring him);
- disclosure made in the course of obtaining legal advice;
- disclosure to a Minister of the Crown if the worker's employer is appointed by enactment (this protects workers in government appointed bodies who complain to the sponsoring department; eg a worker in an NHS Trust might disclose to the Department of Health);
- disclosure to prescribed persons (see below);
- disclosure that meets the conditions of section 43G (see below);
- disclosure of an exceptionally serious failure (see below).

Explanations of the last three categories are given below.

Disclosure to prescribed persons

Section 43F protects disclosures made to a person prescribed by an order made by the Secretary of State. The prescribed persons are set out in the *Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549)* as amended,[20] and are bodies responsible for the regulation of various activities, eg the Audit Commission; the Civil Aviation Authority; Director General of Fair Trading; the Environment Agency, etc. In order for the disclosure to be protected, the worker must reasonably believe that the information disclosed relates to a matter for which the prescribed person is responsible (eg disclosure to the Environment Agency about acts which have an effect on the environment). The worker must also believe that the information disclosed is substantially true. The prescribed persons, and the areas for which they are responsible, are set out in a table in the Schedule to the Order. This takes the following format:

Persons and descriptions of persons	Descriptions of matters
Environment Agency	Acts or omissions which have an actual or potential effect on the environment or the management or regulation of the environment, including those relating to pollution, abstraction of water, flooding, the flow in rivers, inland fisheries and migratory salmon or trout.

Thus, for example, a disclosure by a worker to a body in the first column will be protected if the worker reasonably believes the information relates to a matter in the corresponding part of the second column.

[20] By The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2010

Disclosure that meets the conditions of section 43G

Section 43G provides conditions for "disclosure in other cases". It protects disclosure to persons other than those detailed above, provided certain criteria are met. It could be used, for example, to protect disclosure to the press. In order to benefit from this protection one of the following must apply:

- the worker reasonably believes he will be subjected to detriment if he discloses to his employer;
- where there is no relevant prescribed person, the worker reasonably believes that evidence will be concealed or destroyed if he discloses to his employer; or
- the worker has already disclosed substantially the same information to either his employer or a prescribed person.

If one of the above applies, then disclosure by the worker may be eligible for protection under the section, provided all the following conditions are met:

- he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true;
- he does not make the disclosure for purposes of personal gain;
- in all the circumstances of the case, it is reasonable for him to make the disclosure.

As to the last requirement, whether or not the disclosure was reasonable would be a matter of judgment for an employment tribunal, although the section identifies a number of factors that the tribunal must have regard to. The charity Public Concern at Work (see below) has identified a number of cases where disclosure to the press has been held to be reasonable.[21] For example, in *Kay v Northumberland Healthcare NHS Trust* (2001)[22]:

> Kay managed a ward for the elderly. Kay internally raised concerns about bed shortage but was told there were no resources. The problem worsened and some elderly patients were to be moved to a gynaecological ward. Kay wrote a satirical open letter to the Prime Minister for his local paper. With Trust's agreement, Kay was photographed for local press. When letter published, Trust gave final written warning for totally unprofessional and unacceptable conduct. Kay won as the disclosure was protected because [a] 43G, balanced with freedom of expression in the Human Rights Act; [b] Kay did not know of Trust's whistleblowing policy; [c] no reasonable expectation of action following earlier concerns; and [d] it was a serious public concern.[23]

In addition to the identity of the recipient, when assessing the reasonableness of a disclosure under section 43G, the tribunal must also take into account the seriousness of the relevant failure, whether the failure is continuing or likely to occur and whether the worker had

---

21 Public Interest Disclosure Act, overview of section 43G, PIDA website (accessed 15 April 2013)
22 Unreported judgment
23 Public Concern at Work, Whistleblowing Case Summaries, April 2003

previously attempted to disclose to his employer or a prescribed person and if so how he went about doing so.[24]

Until recently, disclosure under section 43G would only be protected if the worker made the disclosure in good faith (the disclosure would not qualify where the predominant purpose of making it was for some ulterior motive, eg blackmail[25]). However, this requirement was repealed by the *Enterprise and Regulatory Reform Act 2013* (see below under "Recent changes to the law"). It was replaced by a power for a tribunal to reduce any award it makes to a worker by up to 25% where the disclosure is not made in good faith.[26]

Disclosure of an exceptionally serious failure

Section 43H protects disclosures of exceptionally serious failures. It is similar to section 43G, although there is no requirement for the worker to have first contemplated or attempted disclosing the failure to his employer or a prescribed person.

The rationale behind this protection appears to be that, where a matter is exceptionally serious, it is in the public interest that its disclosure should not be delayed. Disclosures under this section are subject to similar conditions to disclosure under section 43G, including the requirement of reasonableness. The gist of the provision was summed up by Ian McCartney MP in the Committee Stage of the Public Interest Disclosure Bill:

> The Government firmly believe that where exceptionally serious matters are at stake, workers should not be deterred from raising them. It is important that they should do so, and that they should not be put off by concerns that a tribunal might hold that they should have delayed their disclosure or made it in some other way.
>
> That does not mean that people should be protected when they act wholly unreasonably: for example, by going straight to the press when there would clearly have been some other less damaging way to resolve matters.[27]

3.5 Disclosure to Members of Parliament

In addition to the prescribed persons that regulate specific areas, the *Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014 (SI 2014/596)*, as of 6 April 2014, amends the 1999 Order to include Members of Parliament, disclosure to whom may be protected in relation to any matter described in the Schedule. The rationale for this is that MPs are "often well placed to make representations on behalf of whistleblowers, including to the regulatory agencies of the kind that already feature in the 1999 Order".[28] The amendment was inspired by a Ten Minute Rule Bill presented by the Rt Hon David Davis MP on 19

---

24 See section 43G(3)
25 *Street v Derbyshire Unemployed Workers Centre* [2004] EWCA Civ 964
26 *Employment Rights Act 1996*, section 49(6A)
27 Public Interest Disclosure Bill Standing Committee D 11 March 1998
28 Explanatory Memorandum to the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014, No. 596

November 2013.[29] For further information, see the Library's briefing *Whistleblowing to MPs*.[30]

3.6 Making a claim

If a worker is subjected to detriment by his employer for having made a protected disclosure that worker may enforce his rights by presenting a complaint to an employment tribunal.[31] The claim must be brought within three months of the act (or failure to act) complained of.[32] Where an employee is dismissed for having made a protected disclosure, the employee will be regarded as having been unfairly dismissed.[33] There is no upper limit on the amount of financial compensation obtainable in whistleblowing-based unfair dismissal claims.[34]

29 *Public Interest Disclosure (Amendment) Bill 2013-14*
30 *Whistleblowing to MPs*, SN06868, April 2014
31 *Employment Rights Act 1996*, section 48(1A)
32 *Employment Rights Act 1996*, section 48(3)
33 *Employment Rights Act 1996*, section 103A
34 *Employment Rights Act 1996*, section 124(1A)

4. Recent changes to the law

4.1 The Enterprise and Regulatory Reform Act 2013

The *Enterprise and Regulatory Reform Bill* received Royal Assent on 25 April 2013.[35] The *Enterprise and Regulatory Reform Act 2013* made three key changes to whistleblowing law:

- amended the definition of "qualifying disclosure" to introduce a public interest test;
- removed the requirement that certain disclosures be made in good faith, replacing this with a power to reduce compensation where disclosure is not made in good faith;
- introduced vicarious liability for employers if a worker is subjected to detriment by a co-worker for making a protected disclosure.

The provisions came into force on 25 June 2013.[36] The following gives an overview the provisions as debated during the passage of the Bill.[37]

Public interest test

The *Enterprise and Regulatory Reform Act 2013* (ERRA 2013) amended the definition of qualifying disclosure. In order to benefit from whistleblower protection a disclosures must "in the reasonable belief of the worker making the disclosure" be "made in the public interest". A Department for Business, Innovation and Skills review document (March 2012) explains the thinking behind this:

> It has come to light through case law that employees are able to blow the whistle about breaches to their own personal work contract, which is not what the legislation (Public Interest Disclosure Act (PIDA)) was designed for.[38]

The case law in question resulted from the decision in *Parkins v Sodexho Ltd* [2001].[39] As noted above, a protected disclosure may be of information that tends to show that "a person has failed, is failing or is likely to fail to comply with any legal obligation".[40] In *Parkins v Sodexho* it was held that the relevant legal obligations include contractual obligations. This allowed workers to use PIDA's protections when disclosing breaches of their own employment contract, irrespective of whether the breach raised issues of public interest. Thus, if a worker was dismissed for disclosing a breach of his employment contract, he could claim protection as a whistleblower. Because whistleblowing protections apply to all workers, and compensation is uncapped, *Parkins v Sodexho* allowed workers to sidestep the normal

---

35 HL Deb 25 April 2013 c1563

36 BIS, Enterprise and Regulatory Reform Bill receives Royal Assent, 25 April 2013 (accessed 30 April 2013)

37 See also: Parker, J., et al, Enterprise and Regulatory Reform Bill , Library Research Paper RP12/33, 07 June 2012; Parker, J., et al, Enterprise and Regulatory Reform Bill: Committee Stage Report , Library Research Paper, RP12/56, 03 October 2013

38 Department for Business, Innovation and Skill, Employment Law Review - Annual Update 2012, March 2012, p13

39 UKEAT 1239_00_2206

40 *Employment Rights Act 1996*, section 43B; see above under the heading "protected disclosures"

qualifying criteria for bringing unfair dismissal claims, and to avoid the cap on compensation for such claims.

During the *Enterprise and Regulatory Reform Bill's* Committee Stage in the Commons, the Parliamentary Under-Secretary of State for Business, Innovation and Skills, Norman Lamb MP (Lib Dem), explained the Government's position on *Parkins v Sodexho,* and the reason for the public interest test:

> To return to my explanation of the purpose of the clause and of why the Government have designed it in such a way, the decision in the case of Parkins v. Sodexho Ltd has resulted in a fundamental change in how the Public Interest Disclosure Act operates and has widened its scope beyond what was originally intended. The ruling in that case stated that there is no reason to distinguish a legal obligation that arises from a contract of employment from any other form of legal obligation. The effect is that individuals make a disclosure about a breach of their employment contract, where this is a matter of purely private rather than public interest, and then claim protection, for example, for unfair dismissal.
>
> The ruling has left the Public Interest Disclosure Act open to abuse and is creating a level of uncertainty for business. Concerns have been expressed, underpinned by anecdotal evidence, which I appreciate is a dangerous word to use in this Committee, from lawyers—that is an even more dangerous word—that it is now common practice to encourage an individual to include a Public Interest Disclosure Act claim when making a claim at an employment tribunal, regardless of there being any public interest at stake. That has a negative effect on businesses, which face spending time preparing to deal unnecessarily with claims that lack a genuine public interest element. It also has a negative effect on genuine whistleblowers, by encouraging speculative claims. Furthermore, by widening the scope of the Public Interest Disclosure Act to allow claims of a personal nature, the effectiveness and credibility of the legislation is, in my view, called into question. It is common ground between all Committee members that those issues need to be dealt with.
>
> The clause will amend part IVA of the Employment Rights Act 1996 to close the loophole that case law has created. The clause emphasises the need for there to be an issue of public interest involved when an individual is pursuing a public interest disclosure case. The Government support protection for genuine whistleblowers. The clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest.[41]

Prior to the introduction of the Bill, Lord Touhig (who, whilst Member of Parliament for Islwyn, introduced the *Public Interest Disclosure Bill 1995-96*, which failed to become law[42]) discussed the proposed public interest test during the Queen's Speech Debate. Lord Touhig was concerned that the introduction of a public interest test would create an additional legal obstacle for whistleblowers:

> over the years a number of legal loopholes have come to the fore and now the Act is ripe for review. I understand that the

41 PBC 3 July 2012 c387
42 See above, under the heading "background"

> Government, rather than do this, intend to bring forward legislation this Session to remove just one of the loopholes by which workers complaining about their private employment rights can be protected.
>
> While I support the premise of such an amendment, I worry that it will fail to address the underlying problem. I fear that it will be viewed as an obstacle to genuine and honest whistleblowers who will have to show that their concern is in the public interest. More than that, the amendment does not address the issue of private employment rights and will instead result in a field day for lawyers.[43]

During the *Enterprise and Regulatory Reform Bill's* Committee Stage, Ian Murray (Labour) moved an amendment to replace the public interest test with new wording, expressly excluding whistleblowing complaints regarding contractual obligations owed to the complainant:

> There is a significant danger in introducing a public interest test to whistleblowing claims. The important thing to remember is that any amendment to the legislation must be designed to deal with the Parkins issue and individual contract disputes. The amendment deals with the removal of the loophole by inserting that the PIDA legislation cannot be used for a private contractual issue, rather than a very subjective public interest test. The definition is so subjective that the implication will be that case law will again determine what is in the public interest and may mean that we are back in a Parkins v. Sodexho situation to determine that. The other aspects of PIDA are very clear-cut in terms of potential wrongdoing and criminality; this particular aspect is not.
>
> The Bill is right to consider this issue, but the wording of the clause goes too far. The Government need to look at this very carefully and come back on Report with a solution to the problem, rather than a potential complication and an inadvertent weakening of the legislation.[44]

The proposed amendment was defeated on division by 12 votes to 8.[45]

Good faith

The ERRA 2015 removed the requirement that certain disclosures be made in good faith. During debate on the public interest test, concerns were voiced that it would create a legal hurdle for disclosers, additional to the existing requirement that certain disclosures be made in good faith. The Government sought to address these concerns by removing the absolute requirement that certain disclosures be made in good faith.

Instead, an absence of good faith will now only lead to a reduction in compensation, rather than prevent a claim succeeding, as the Minister, Viscount Younger of Leckie, explained:

> Amendment 33 is the government amendment on the good faith test in whistleblowing claims. Amendment 33 amends Part 4A of the Employment Rights Act 1996 to remove the requirement that certain disclosures be made in good faith. As a result, a claim will not fail as a result of an absence of good faith. Instead, the employment tribunal will have the power to reduce the compensation awarded to the claimant where it concludes that a

43 HL Deb 16 May 2012 c495
44 PBC 3 July 2012 c382
45 Ibid c390

> disclosure was not made in good faith. This is an issue that my noble friend Lord Marland indicated we should return to at Report.
>
> I note the argument that by introducing a public interest test, the Government have inadvertently created a double hurdle for potential whistleblowers to navigate. To succeed, a claimant would need to show that they reasonably believed that the disclosure was in the public interest and that it was made in good faith. It is not the Government's intention to make it harder for whistleblowers to speak out. It remains a government commitment that they have the right protection in law. However, I can see that by fixing the legal loophole created by Parkins v Sodexho in the way that the Government propose, there is a risk that some individuals may be concerned that it is too hard to benefit from whistleblowing protection, and therefore they will decide not to blow the whistle. We have listened to the arguments made by noble Lords on this point, but the Government remain unconvinced that the good faith test should be removed in its entirety. There are instances where it is important that the tribunal is able to assess the motives of a disclosure, even where it was in the public interest.
>
> The judiciary tells us that the good faith test is well understood and utilised. As such, the Government have not sought to alter the substance of the test, but have reconsidered how it should affect the outcome of a claim. Currently, the good faith test can affect the success of a claim. This amendment moves the test so it will be relevant only when considering remedy. Instead of a claim failing, the judge will have the discretion to reduce a compensation award by up to 25% in the event that they find the disclosure was not made in good faith. We believe this to be an acceptable compromise, and my conversations with the noble Lord, Lord Stevenson, the noble Lord, Lord Mitchell, who is in his place, and the noble Lord, Lord Young, have assured me that this goes a good way to addressing their concerns.[46]

Vicarious liability of employers

The ERRA 2015 amended the *Employment Rights Act 1996* to make an employer vicariously liable if a worker is subjected to detriment by a co-worker for making a protected disclosure. This was explained in the Lords by the Minister during the passage of the Bill:

> Individuals have a personal responsibility to make sure that they act in the right way towards people with whom they interact. The law recognises this in many different ways. For example, the law of negligence makes you personally liable if you crash your car into someone and contract law makes you liable if you misrepresent an item that you are selling to somebody. If you are a taxi driver and you crash your car into someone, or a salesman and you misrepresent an item you are selling, the principle of vicarious liability means that your employer will be liable, too. We think that the same should be true in whistleblowing. If you cause a co-worker a detriment after they blow the whistle, perhaps by bullying them, you should be liable for that conduct and your employer should be liable, too. This amendment therefore will encourage workers to behave appropriately to each other and will

46 HL Deb 26 February 2013 c1008

encourage employers to have the right processes in place to protect whistleblowers.[47]

4.2 Small Business, Enterprise and Employment Act 2015

Protected disclosures: reporting requirements

Following the Government's response to a call for evidence on whistleblowing laws (see below), section 148 of the *Small Business, Enterprise and Employment Act 2015* (SBEE 2015) amended the *Employment Rights Act 1996*, inserting a new section 43FA after section 43F. The new section commenced on 1 January 2016, empowering the Secretary of State to make regulations requiring a prescribed person "to produce an annual report on disclosures of information made to the person by workers". The regulations would be required to set out the matters that should be covered in the report, but must not require the report to identify workers or employers. The regulations may provide how and to whom the report should be published as well as the period within which it must be published.

Protection for applicants for employment etc in the health service

Section 149 SBEE 2015 commenced on 26 May 2015, empowering the Secretary of State to make regulations prohibiting an NHS employer from discriminating against a job applicant because it appears to the employer that the applicant has made a protected disclosure. At the time of writing regulations have yet to be made. Whistleblowing in the NHS is discussed in a separate Library briefing, *NHS whistleblowing procedure in England*, CBP6490.

47 HL Deb 26 February 2013 c1004

5. Call for evidence

On 12 July 2013 the Department for Business, Innovation and Skills (BIS) published a call for evidence on whistleblowing laws, seeking "feedback on whether the whistleblowing framework is operating effectively in today's labour market."[48] The closing date was 1 November 2013. Among the issues considered was the possibility of financial incentives for whistleblowing in the financial sector; an approach which is well-established in the United States of America.[49]

The Government published its response to the call for evidence on 25 June 2014. The response to committed to take forward non statutory measures, including the production of improved whistleblowing guidance and the creation of a model whistleblowing policy. It also stated that the Government would

> introduce a requirement on prescribed persons to report annually on whistleblowing and consult on the detail of the matters which should be included within this report. We envisage this would cover matters such as number of disclosures received, numbers investigated, and of those claims investigated, the number of organisations which had a whistleblowing policy in place.[50]

As noted above, the Small Business, Enterprise and Employment Act 2015 created a power for the Secretary of State to introduce these reporting requirements.

5.1 Guidance and code of practice

Following the recommendations in the call for evidence, in March 2015 BIS published guidance for employers and a code of practice, setting out advice for the implementation, content and management of whistleblowing policies.[51]

---

48 BIS, The whistleblowing framework: call for evidence, 12 July 2013

49 See 'Home Office looks at 'bounty' plan for corporate whistleblowers', *FT* [online], 9 October 2013 (accessed 10 October 2013)

50 BIS, *Whistleblowing framework: call for evidence - government response*, June 2014, p15

51 BIS, *Whistleblowing: guidance for employers and code of practice*, 20 March 2015

6. Gagging clauses

A "gagging clause" is a confidentiality clause in a contract, typically a type of contract known as a "settlement agreement" (prior to 2013, these were known as a "compromise agreements"[52]). A settlement agreement is a contract concluded at the end an employment relationship that seeks to prevent future disputes, usually accompanied by a payment to the worker, who waives his entitlement to pursue any legal claims he may have against the employer. A gagging clause is unenforceable in so far as it purports to preclude a worker from making a protected disclosure.

6.1 The use of gagging clauses in the NHS

The use of gagging clauses in the NHS came to prominence with the case of Gary Walker. Mr Walker was dismissed in 2010 from his position as chief executive of United Lincolnshire Hospitals Trust. He signed a compromise agreement containing a gagging clause, yet subsequently spoke about his experience at the NHS. A *Guardian* report of 14 February 2013 stated:

> Gary Walker was sacked in 2010 from his job as chief executive of United Lincolnshire Hospitals Trust for gross professional misconduct over alleged swearing at a meeting. He claims he was forced to quit for refusing to meet Whitehall targets for non-emergency patients and was then gagged from speaking out as part of a settlement deal.
>
> Walker said he warned senior civil servants that he was confronted with the same choices that resulted in the Mid Staffordshire NHS Foundation Trust scandal. He blamed a "culture of fear" at the highest levels in the health service for attempts to silence critics.[53]

As the above report indicates, the use of gagging clauses has been associated with the Mid Staffordshire NHS Foundation Trust scandal, concerning severe failings in emergency care between 2005 and 2008.[54] Commentators argue that the use of gagging clauses in the NHS threatens to suppress information about patient care, heightening the risk of repeating similar failings. There was also speculation that the former chief executive of the Trust, Martin Yeates, signed a compromise agreement containing a gagging clause. This was the subject of a Parliamentary Question asked by Stephen Barclay on 22 March 2013:

> **Stephen Barclay**: To ask the Secretary of State for Health whether a gagging clause was part of the settlement Martin Yeates received when he resigned as chief executive of Mid Staffordshire Hospital Foundation. [149624]
>
> **Dr Poulter**: Mid Staffordshire NHS Foundation Trust has confirmed that Martin Yeates did not receive a special severance payment when he left the trust's employment. He was entitled to

---

52 See *Enterprise and Regulatory Reform Act 2013*, s. 23

53 NHS whistleblower claims he was forced to quit then gagged, *The Guardian* [online], 14 February 2013 (accessed 15 April 2013)

54 Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust January 2005 – March 2009, HC375-I, 24 February 2010

> six months' salary on notice of his resignation, which he received in lieu of notice. As Mr Yeates did not receive a payment over and above his contractual entitlement, HM Treasury approval was not required. We understand from Monitor that this payment was made in the context of a compromise agreement between the trust and Mr Yeates, the terms of which are confidential between the parties, and therefore are not known to the Department. The Department has been consistently clear that nothing within a contract of employment or compromise agreement should prevent an individual from speaking out about issues such as patient care and safety, or anything else that could be in the wider public interest.[55]

A *BBC News* report of 14 March 2013 stated:

In the last five years, more than 400 compromise agreements outlining special severance payments for departing NHS staff have been approved by the Department of Health.[56]

A report in *The Telegraph* stated:

> In the three years up to 2011, a total of £14.7million of taxpayers' money was spent on almost 600 compromise agreements, most of which included gagging clauses to silence whistleblowers.[57]

The ban of the use of gagging clauses in the NHS

In an interview with the *Daily Mail* on 13 March 2013, the Health Secretary, Jeremy Hunt, stated that the Government would ban the use of gagging clauses in the NHS with immediate effect. Mr Hunt stated that compromise agreements would have to be approved by the Department of Health and the Treasury, and that none would be approved if they contained a clause preventing workers from speaking out about patient care:

> Last night Health Secretary Jeremy Hunt insisted that creating a culture of 'openness and transparency' across the NHS was vital to prevent a repeat of the Mid Staffordshire scandal, in which as many as 1,200 patients died.
>
> In an interview with the Daily Mail, he said that so-called 'compromise agreements', under which NHS staff cannot raise anything embarrassing to their employers when they leave their jobs, would be barred with immediate effect....
>
> The Health Secretary said: 'We are just going to ban them. All these compromise agreements have to be approved by the Department of Health and the Treasury.
>
> 'We are now saying we won't approve any with a confidentiality clause that prevents people speaking out about patient safety or patient care.
>
> 'We will make sure there is a specific clause in them saying that nothing in them can prevent people speaking out on issues such as patient care.[58]

---

55 HC Deb 22 Mar 2013 c847W

56 NHS 'gagging clauses' must end, says health secretary, BBC News [online], 14 March 2013 (accessed 15 April 2013)

57 'Former Mid Staffs chief executive may have been 'gagged' when he resigned, MP claims', *The Telegraph* [online], 26 March 2013 (accessed 15 April 2013)

58 Victory for NHS whistleblowers: After Daily Mail campaign, Health Secretary bans gagging orders on NHS staff, Mail Online, 13 March 2013, (accessed 15 April 2013)

6.2 Gagging clauses and the law

Section 43J of the *Employment Rights Act 1996* provides that gagging clauses are unenforceable in so far as they purport to preclude the making of a protected disclosure:

> **Contractual duties of confidentiality**
>
> (1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.
>
> (2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

This raises the question: what happens if a worker breaches a gagging clause yet has been paid a sum of money in support of the settlement agreement? Given that the clause is void, the worker would not be breaching any valid clause of the settlement agreement by making a protected disclosure. Some commentators have argued that this means the former employer may not be able to recover any damages for breach of contract.[59]

[59] See: James Laddie QC, 'Gagging Clauses For Whistleblowers: Worth The Paper They're Written On?', Inforrm Blog', 26 February 2013 (accessed 15 April 2013)

7. Public Concern at Work

Public Concern at Work (PCaW) is a charity established in October 1993 which offers legal advice about whistleblowing.[60] PCaW operates an advice line, managed by lawyers and subject to lawyer-client privilege (ie confidential). The advice line can be reached on: 020 7404 6609.[61]

7.1 Whistleblowing Commission report

In February 2013 PCaW established a Whistleblowing Commission to investigate the effectiveness of whistleblowing law and policy. The Commission reported on 27 November 2013,[62] making 25 recommendations, chief amongst which was a call for an amendment to whistleblowing law authorising "the Secretary of State to issue a code of practice, to be taken into account by courts and tribunals when issues of whistleblowing arise".[63]

60 See Public Concern at Work website (accessed 15 April 2013)
61 Public Concern at Work website, Advice Line (accessed 15 April 2013)
62 PCaW, *The Whistleblowing Commission - Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK,* November 2013
63 Ibid, p12

BRIEFING PAPER
Number CBP 7442, 4 January 2016