World Whistleblowers' Day: recent developments in whistleblowing law in the UK

To mark World Whistleblowers' Day on 23 June 2023, we take stock of some of the most important recent developments in whistleblowing law in the UK and consider what they mean for whistleblowers.

RECENT LEGISLATIVE DEVELOPMENTS

Review of the UK's whistleblowing framework

On 27 March 2023, the Government announced the launch of a review **of the current UK whistleblowing legal framework** (you can read our detailed briefing on the review here). The purpose of the review is to take stock of the UK's existing whistleblowing framework and consider whether it is meeting its original objectives. The terms of reference of the review state that the review will look at the following core questions:

- How the whistleblowing framework facilitates disclosures.
- How the whistleblowing framework protects workers (and the review will also consider the definition of "worker" for whistleblowing purposes).
- Whether information about whistleblowing is available

and accessible to workers, employers and others.

- What have been the wider benefits and impacts of the whistleblowing framework on employers, prescribed persons and others.
- What best practice looks like in terms of responding to disclosures.

The review is expected to conclude by Autumn 2023 and could, eventually, lead to improvements to the legal landscape and greater protection for whistleblowers.

Private Members' Bill seeks ambitious reforms

The Protection for Whistleblowers Bill 2022 -23 is currently on its passage through Parliament. It is a Private Members' Bill, sponsored by the Liberal Democrat peer, Baroness Kramer. The aim of the Bill is to increase protection and support for whistleblowers. The Bill seeks to introduce an ambitious set of reforms to the legal landscape including:

- Making it easier to blow the whistle (for example, it would expand the types of malpractice about which a protected disclosure could be made, it would widen the persons to whom a disclosure could be made, and it would extend protection to individuals who were intending to make a disclosure).
- Introducing an independent "Office of the Whistleblower", whose role would be to provide

information and support to whistleblowers, set minimum standards for whistleblowing policies, enforce compliance and have the power to make interim relief orders of any sort it considered appropriate.

- Introducing civil penalties for persons and organisations that failed to comply with notices and orders of the Office of the Whistleblower. Individuals could be fined up to £50,000 and organisations up to 10% of annual global turnover, capped at £18 million.
- Making the mistreatment of whistleblowers a criminal offence punishable by a fine or a maximum 18-month prison term.
- Protecting whistleblowers against criminal or civil action.

As a Private Members' Bill (which does not have the Government's backing) it is unlikely that the Bill will ever make its way onto the statute books. However, it could help the cause of whistleblowers by drawing attention to the need for better protection of whistleblowers and it may also influence future Government legislation. This is particularly pertinent given the current review of the legal framework.

Expansion of the list of "prescribed persons" to whom individuals can blow the whistle

In order for whistleblowing disclosures to acquire protection in law they must be made to certain specified categories of people. For example, the worker's own employer or the person responsible for the failure in question. However, it also includes people prescribed by law, known as "prescribed

persons". On 15 December 2022, the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2022 (SI 2022/1064) expanded the list of "prescribed persons".

New prescribed persons were added, namely, Social Work England, Members of the Scottish Parliament, the Scottish Public Services Ombudsman, Environment Standards Scotland and the Natural Resources Body for Wales. Further, the types of matters for which certain bodies are prescribed was expanded. This affected the Financial Conduct Authority, the Gas and Electricity Markets Authority, the Health and Safety Executive and the Secretary of State for Health and Social Care.

Although technical, these changes give workers wishing to blow the whistle more options about where to direct their disclosure, at the same time ensuring that they acquire legal protection as a whistleblower.

RECENT CASE LAW DEVELOPMENTS

Blowing the whistle: conduct related to a whistleblowing disclosure may be separated from the disclosure itself

One recent decision that is not particularly helpful to whistleblowers is the Court of Appeal's decision in Kong v Gulf International Bank (UK) Ltd (you can read our detailed briefing on this decision here). Here, Ms Kong blew the whistle and was later dismissed for her conduct when discussing the disclosure with a colleague.

The Court said that, in principle, there can be a distinction between the whistleblowing disclosure itself and the worker's conduct when making the disclosure. The role of a Tribunal is to identify the reason or reasons that operated on the mind of the decision maker when deciding to dismiss. Provided a

Tribunal is able to identify a feature of the conduct that is "genuinely separable" from the whistleblowing disclosure, then the principal reason for the dismissal will be the conduct, not the whistleblowing. In this case, the Court agreed with the Tribunal that Ms Kong had been dismissed for her conduct. This decision is concerning for whistleblowers, who often deliver unwanted messages which can result in tense or difficult conversations. Whistleblowers concerned about this risk should seek legal advice on how to make the disclosure and manage the aftermath.

Seeking interim relief after dismissal: applications should be heard in public

Interim relief is only available to claimants bringing a small number of specific claims for automatic unfair dismissal in the Employment Tribunal, including whistleblowing dismissals. If successful in an interim relief application, the employer must either reinstate the claimant in their previous role (or reengage them in a suitable alternative role), pending the determination of the claim at the final hearing. If the employer is not willing to do this, the Tribunal will make a 'continuation order', meaning the respondent is ordered to pay the claimant as if their employment contract was still continuing, until the final hearing. Sums paid to a claimant under a continuation order are irrecoverable. This means that a claimant does not have to repay the salary paid under the order even if they ultimately lose their claim. This makes interim relief a potentially very valuable remedy for claimants.

In Queensgate Investments LLP v Millet **the EAT ruled that applications for interim relief should be heard in public, save where an order is made to restrict publicity (you can read our detailed briefing on this decision** here**).** Orders restricting publicity are not made lightly – a risk that the

employer will suffer commercial embarrassment is not enough. Rather, the employer would need to demonstrate that publicity could have catastrophic consequences for the business, such that justice could not be done unless the hearing was held in private. This is the first appellant authority on this point and is of particular importance given the public interest nature of whistleblowing cases.

Pleading a whistleblowing claim before a Tribunal: claimants should focus on the protected disclosures that gave rise to the alleged detriments or dismissal

In Frewer v Google UK Ltd and others the EAT reminded whistleblowers to think carefully about how they put their claims before the Tribunal – the focus should be on quality not quantity. In obiter remarks, the EAT Judge said claimants in whistleblowing claims should focus on pleading only the protected disclosures that gave rise to the alleged detriments or dismissal. Here, Mr Frewer had pleaded close to 100 alleged protected disclosures.

The EAT said that parties to a dispute should have regard to the fact that the Tribunal's resources are limited and must be fairly distributed among the many parties that have a right to have their claims heard. The Judgecommented that those drafting whistleblowing complaints often feel that the greater the number of disclosures and detriments that are asserted, the greater the prospects of success, when, in fact, the converse is often the case.

The "public interest" test: public interest can be engaged even where a disclosure concerns a small number of people

In Dobbie v Felton t/a Feltons Solicitors, the EAT underlined that disclosure of information relevant to only one person may

still be a matter of "public interest". In this case, a consultant solicitor had made disclosures about alleged overcharging by the firm at which he had worked. The Employment Tribunal decided that these disclosures had not been made in the public interest, because the disclosures concerned one client only. As such, it was a private matter between that client and the firm.

The EAT said this was wrong. The disclosures could have advanced the general public interest in solicitors' clients not being overcharged, and solicitors complying with their regulatory obligations. Further, a belief in the public interest did not have to be the *primary* motivation for making the disclosures. Disclosures do not cease to be protected merely because they are made in the context of other concerns (in this case, the client's prospects of recovering costs from its opponent). This decision is useful for whistleblowers since it underlines that the threshold of "public interest" is not set unachievably high – public interest can be engaged even if the information relates to a small number of people.

Compensation for whistleblowers: substantial compensation awarded for career loss, psychiatric injury and injury to feelings

In October 2022, an Employment Tribunal awarded a substantial sum to a whistleblower to compensate for detriments and dismissal suffered because she had blown the whistle. In Jhuti v Royal Mail Group, the Tribunal found that the claimant had suffered a *"lengthy and intense period of bullying"* over five months, before she went off sick and was then eventually dismissed. The Tribunal recognised that this treatment had *"destroyed the claimant's life"*. She suffered with PTSD and severe depression, and her relationship with her teenage daughter broke down. The medical evidence was that she would never work again.

The Tribunal awarded:

- financial compensation for career long loss until the age 67.
- £55,000 general damages for psychiatric injury.
- £40,000 for injury to feelings.
- £12,500 aggravated damages to reflect the employer's oppressive conduct at the remedy hearing.
- A 0.5% uplift for unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures.

Although this case was at the more severe end of the spectrum, the decision shows that Tribunals are empowered to make significant awards of compensation to whistleblowers where justified.

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

Whistleblowing in the NHS

This year marks the 25th anniversary of the Public Interest Disclosure Act 1998, the legislation which incorporated protection for workers who report wrongdoing into the Employment Rights Act 1996.

To mark World Whistleblowers' Day on 23 June 2023, we look at whistleblowing in the NHS.

History of whistleblowing in the NHS

Whistleblowing in the NHS is a recurring hot topic, and not just on World Whistleblowers' Day: a safe and fully functioning National Health Service is a life and death matter.

Whistleblowing in the NHS in nothing new. Over recent years numerous enquiries have been established to investigate significant issues within certain Trusts. The most well-known of these was the Francis Review. This arose following the failings at the Mid-Staffordshire Hospital where it was estimated that between 400 and 1,200 patients died between 2005 and 2009 as a result of poor care. It is often described as one of the worst examples of hospital care of recent times. In the review, Robert Francis QC found that "*Staff who spoke out felt ignored and there is strong evidence that many were deterred from doing so through fear and bullying*." Systemic issues of poor care and management, large budget cuts and an environment of fear of speaking out about issues led to the serious failings at the hospital.

Following the Francis Review, various recommendations were made and implemented. One of the most important was the ‘Freedom to Speak Up’ and the requirement for each NHS Trust to have a Whistleblowing ‘Guardian’ to whom concerns could be raised. This initiative was created to develop a more open and supportive culture that encouraged staff to speak up about any issues of patient care, quality or safety. It was intended to enable a cultural change within the NHS with respect to whistleblowing – for this to not only be encouraged but for there to be an active duty on part of medical professionals to raise concerns and for these concerns to be welcomed as part of a healthy discussion over patient care, rather than seen negatively.

Professor Don Berwick was then asked by the Prime Minister at the time to advise on how to improve the quality and safety of care in the NHS following the outcome of the Francis Review. The review recognised that in some instances clear warning signals were ignored, including the issues at Mid-Staffordshire Hospitals, and that fear of raising concerns and/or the fear of retaliation faced as a result of raising concerns was toxic to both safety and improvement.

The Report recommended the system must:

- recognise with clarity and courage the need for wide systemic change
- abandon blame as a tool and trust the goodwill and good intentions of the staff

- recognise that transparency is essential and expect and insist on it

- ensure that responsibility for functions related to safety and improvement are vested clearly and simply

- make sure pride and joy in work, not fear, infuse the NHS

- ensure the NHS becomes a learning organisation and that its leaders should create and support the capability for learning, and therefore change, at scale, within the NHS; and

- ensure supervisory and regulatory systems should be simple and clear. That they should avoid diffusion of responsibility and should be respectful of the goodwill and sound intention of the vast majority of staff, so that all incentives should point in the same direction

So, have these reviews encouraged more staff to blow the whistle and/or improved the experience of whistleblowers within the NHS since?

Whilst it is unfair to tar all NHS Trusts with the same brush, it is fair to say that whistleblowers often feel they are viewed negatively by management and/or colleagues and are not afforded the protection they should be. This is evidenced most recently by surveys conducted during the Coronavirus pandemic and by the findings of the review into the culture at the University Hospitals Birmingham in 2023.

Whistleblowing and Covid-19

Whistleblowing in the NHS was again in the limelight due to the Covid-19 pandemic. Concerns were raised about the availability and use of personal protective equipment ("PPE") by front line workers and the release of individuals into care homes, amongst other issues. There have been numerous reports that healthcare workers have been actively discouraged from raising concerns and in some cases subjected to intimidation from senior managers and/or their NHS Trusts.

In 2020, a survey conducted by the Doctors Association UK of 150 healthcare staff found the following:

- Just under 50% of those questioned had been told not to raise concerns or speak to the press about access to PPE during the Covid-19 pandemic – by Trust management and senior colleagues;
- 75% of respondents had concerns about not having access to PPE;
- A third had reported they had been bullied for raising concerns; and
- 50% did not feel confident about raising concerns within their Trust for fear of reprisal.

Further, the above statistics are likely to be worse for NHS professionals from ethnic minority backgrounds.

The British Medical Association (the organisation which represents doctors in the UK) (the "BMA") has reported that ethnic minority doctors are twice as likely to report that bullying and harassment is a problem within their workplace. Furthermore, the BMA's surveys during the Covid-19 pandemic show that these individuals were two and a half times more likely not to have spoken out about whistleblowing issues out of fear of reprisals.*

University Hospitals Birmingham (UHB)

A more recent example of the continuing problems with whistleblowing in the NHS is highlighted in the major issues found at UHB. A major review was announced following a BBC Newsnight probe into allegations that there was a climate of fear at UHB which was putting patient safety at risk and that staff were being punished by management for raising patient safety concerns.

The report also looked into the horrific case of a suicide of a junior doctor, Dr Vaish Kumar, who had left a suicide note blaming the hospital where she worked.

The first phase of the review was published in March 2023. It found that there was a continuing bullying culture affecting morale within UHB and preventing staff from raising concerns. It found the organisation was '*culturally very reluctant to accept criticism or to acknowledge the adverse views expressed by us*.'

Findings into parts 2 and 3 of the review, into governance and culture within the Trust, are expected to be published later this month.

The review makes for very concerning reading and whilst is not representative of all Trusts, in our clients' experiences, there is still a pervading culture of blame when raising whistleblowing concerns within the NHS. Our clients often say that wholesale cultural change is required so that raising concerns, and the use of Datix's and SIRI's, should be an opportunity for learning and developing, as opposed to apportioning blame.

Common backlash faced by Whistleblowers

Despite 25 years of legal protection, whistleblowers still find themselves on the receiving end of retaliation. And all too often, the backlash faced by some whistleblowers is astonishing in its form, gravity and long-term consequences.

In its report, '*Whistleblowing: The Personal Cost of Doing the Right Thing and the Cost to Society for Ignoring it'*, the All-Party Parliamentary Group on Whistleblowing described the 'Cycle of Abuse' suffered by whistleblowers. This cycle often includes the following forms of retaliation:

- isolation of the whistleblower- e.g. by excluding them from the process once a concern is raised and/or by turning other members of staff against them,

intimidation and harassment;

- closer Scrutiny of the whistleblower – e.g. of their performance or conduct, being set up to fail with impossible workloads, demands or deadlines;

- counter-accusations being raised against the whistleblower – e.g. in respect of their conduct or performance, often the first steps to a 'character assassination';

- disciplinary action;

- demotion; and

- dismissal or forced resignation.

A report by the University of Greenwich, commissioned by the All Party Parliamentary Group for Whistleblowing, '*Making Whistleblowing Work for Society',* examined 600 Employment Tribunal outcomes between 2015-2018. It found that in 2018 nearly 40% of whistleblowers reported going on sick leave.

Unfortunately, even when whistleblowers do seek a legal remedy and even when they are successful in their claims against their employer, they can still suffer harmful consequences.

We have acted for whistleblowers who have faced years of uncertainty whilst their Tribunal cases are decided, who have developed mental health problems as a result of their

treatment and who have ultimately lost or been forced out of their jobs, even where their claims have been successful. Financial compensation is often not enough to compensate them properly for the impact the experience has had on their private and professional life.

Practical steps for whistleblowers to consider

Clearly the wholesale cultural change towards raising concerns within the NHS envisaged and recommended by both the Francis and Berwick Reviews has, for the main part, not yet happened. It will be interesting to see the findings and recommendations of the latest review into UHB and whether this will provide further impetus for the change needed.

In the meantime, if you have concerns about practices being adopted by your employer which you reasonably believe might impact the health and safety of patients or other staff members, or is potentially unlawful, then you should consider the following steps:

1. Take time to understand what amounts to a whistleblowing disclosure before raising concerns – this will better enable you to properly identify whether your concerns are about wrongdoing, malpractice or unlawful conduct in the workplace (known as ‘protected disclosures’) and so fall within whistleblowing protection.

2. Further to above, understanding the law means you can better formulate your concerns in a manner which is more likely to afford protection under whistleblowing laws. You should seek to relate the activity you are concerned

about to one of the examples of malpractice afforded by whistleblowing law. For example, stating factually '*I am concerned that X practice is occurring which I believe is presenting or may present harm to the health and safety of patients*' would amount to a protected disclosure. Stating '*X is doing this*' will not.

3. Ensure you read your employer's whistleblowing policy so that you are raising your concerns in the right forum and to the right individuals.

4. Ensure you behave reasonably and responsibly at all times – employers often try to argue that any detrimental treatment meted out was not on the grounds of what an employee said or did, but the way in which they said or did it.

5. Aligned to the above is to ensure you raise concerns factually, without unnecessarily apportioning blame or throwing around accusations. You also do not need to conduct your own investigations in alleged wrongdoing; simply flag the issues factually and leave it to your employer to investigate these concerns further.

6. In the event your concerns are not investigated, dismissed out of hand or if any findings reached are unfair or unreasonable, then you can escalate the matter if necessary. Just be careful who you escalate to (generally it is better to keep things in-house rather than reporting to external organisations or the press – albeit that can be reasonable in some situations), how you escalate it and how often you escalate it. Otherwise you are in danger of providing your employer with the arguments set out in point 4 above.

7. Take time to understand the protections afforded by whistleblowing law – this will enable you to better identify when you may have been treated detrimentally on the grounds you raised protected disclosures and/or in cases where your employment is terminated, whether the reason or principle reason for that dismissal was that you made a protected disclosure.

8. Research the time limits involved in bringing whistleblowing claims. You generally have 3 months less one day from the date your employment terminated to start Acas Early Conciliation (the first mandatory step for initiating Employment Tribunal proceedings). Or, if you remain in employment, within 3 months less one day of the date of the act or omission you are complaining about, or if there have been a series of similar acts or omissions, the last date of them.

9. Keep records – it is so important to evidence the protected disclosures made, but also any detrimental treatment you have faced. This can assist your employer to investigate your concerns, any retaliation faced as a result and ultimately if you bring an Employment Tribunal claim to enforce your rights.

10. It helps to have expert support in place. You may want to seek advice and support from your trade union, the BMA or the whistleblowing charity Protect who run a free helpline for whistleblowers. In some circumstances, it will make sense to take specialist legal advice.

BDBF is a leading employment law firm based at Bank in the

City of London. If you would like to discuss any issues relating to the content of this article, please contact Samantha Prosser (SamanthaProsser@bdbf.co.uk) or your usual BDBF contact.

**Source: https://www.bma.org.uk/news-and-opinion/doctors-must-be-free-and-protected-to-raise-concerns-without-fear*

LUNCHTIME WEBINAR – Employment law developments in 2023: past, present and yet to come

LUNCHTIME WEBINAR – 18 JULY 2023

2023 has already been a busy year for employers. Our lunchtime webinar will quickly bring you up to speed on the key cases and developments from the first half of the year and round up what lies ahead in the coming months.

We will cover the following areas:

- Recent cases on settlement negotiations and agreements, disability discrimination and flexible working.
- New laws passed on neonatal leave, carer's leave and pregnancy and redundancy.
- New guidance for employers on adjustments for mental health, managing stress at work and menopause and menstrual health in the workplace.

- Looking ahead: proposals to reform the law on employee competition, working time and holidays, TUPE consultation and whistleblowing.

Date: Tuesday, 18 July 2023

Time: 12.00pm-12.50pm

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Employment law developments in 2023: past, present and yet to come



BDBF Lunchtime webinar: 18th July 2023

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Date:
Tuesday, 18th July 2023

Time:
12:00pm - 12:50pm

Please click here to register for the webinar

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BDBF Partners recognised in 12th edition of the Best Lawyers in the United Kingdom

BDBF Partners Gareth Brahams, Claire Dawson, Nick Wilcox and Polly Rodway have been recognised in the 12th edition of the Best Lawyers in the United Kingdom for Employment Law. We are delighted to see Claire, Nick and Polly newly ranked this year for their expertise in this field. Gareth has been recognised consecutively every year since 2009.

Congratulations to our colleagues in the employment law world who have also been ranked this year.



Gareth Brahams speaking at 4th IFSEA Annual

International Conference

On 20 June 2023, BDBF Managing Partner Gareth Brahams is chairing a session on “The Executive Whistleblower” at the 4th IFSEA Annual International Conference on Risk, Reward, Regulatory and Reputation Management Issues for Senior Executives & Founders. Register here.



BDBF announces promotion of Samantha Prosser to Managing Associate

Congratulations! BDBF is pleased to announce the promotion of Samantha Prosser to Managing Associate, effective 1 June, 2023. Her promotion supports the continued growth of BDBF as a top-ranked employment firm. Since joining the firm seven years ago, Samantha has built her practice focusing on advising

private and NHS consultants from leading hospitals on whistleblowing and discrimination claims, raising grievances, bullying, harassment and contractual claims. Samantha also acts for clients in other sectors, particularly in relation to sex and disability discrimination and whistleblowing claims, and is an experienced employment law litigator.

Gareth Brahams, Managing Partner said, *"Samantha is a compassionate and capable lawyer with real inner steel. We are delighted to announce her promotion which is so well deserved."*



LexisNexis: Government consults on reforms to working time rules, holiday pay and TUPE

In a recent LexisNexis article, BDBF's Principal Knowledge Lawyer Amanda Steadman discusses the UK government's consultation on retained EU employment law following publication of the "Smarter regulation to grow the economy" policy paper. The consultation asks for views on proposed reforms affecting the calculation of holiday pay, working time rules, and TUPE.

Please click the image below to view the PDF:

Government consults on reforms to working time rules, holiday pay and TUPE

Employment analysis: On 12 May 2023, the government published a consultation paper, setting out its plans regarding the future of retained EU employment law. The consultation paper confirms the government's intention to keep retained EU employment laws in the following areas without any change: family leave rights (maternity, paternity, adoption and parental leave), 'atypical' workers' rights (part-time workers, fixed-term workers and agency workers), and information and consulta-tion rights. However, certain reforms are proposed in the areas of working time, paid holiday rights and rights upon the transfer of a business or an outsourcing. The government says it has identified areas for reform of laws it considers are 'too onerous for business to be used effectively or too complex for workers to know, understand and use'. Amanda Steadman, principal knowledge lawyer at Brahams Dutt Badrick French LLP, sets out the proposed changes in the consultation and the next steps.

This analysis was first published on Lexis®PSL on 25 May 2023 and can be found here (subscription required).

Changes to working time record-keeping requirements

In 2019, the Court of Justice of the European Union (CJEU) in *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, Case C-55/18 ruled that Directive 2003/88/EC, the Working Time Directive (WTD) required employers to have a system in place to measure the daily working time of all workers. Importantly, that system had to go beyond merely recording overtime hours or drawing upon other sources of information which could be pieced together to identify daily working hours. The system of recording daily hours had to be objective, reliable and accessible.

The consultation says the government believes that this requirement is 'disproportionate' and 'damaging to relationships between employers and their workers' (although it is not said exactly how it is damaging). The government wishes to legislate to clarify that businesses do not have to keep a record of daily working hours of their workers.

In fact, the Working Time Regulations 1998 (WTR 1998), SI 1998/1833 (which implement the WTD) only require employers to keep adequate records to show whether the weekly working time limits (and night work limits) are being complied with. Currently, there is no requirement in the WTR 1998 to record daily or weekly rest breaks, or the actual number of hours worked overall each day. Therefore, the proposal does not involve removing anything from the WTR 1998, rather it would mean adding a new provision stating that such records are not required.

Technically speaking, employers should have complied with the daily working time record-keeping obligation following the CJEU's decision. Yet we suspect that many employers would not even have been aware of the CJEU's ruling and, even if they had been, would not have put in place such a system without it being required expressly by the WTR 1998. In conclusion, this reform is unlikely to make much difference in the real world to the way that the majority of employers are managing their working time records.

Creation of a single annual leave entitlement of 5.6 weeks

Currently, the WTR 1998 provides that workers are entitled to 5.6 weeks' annual leave per year. However, this holiday entitlement is split into two allocations:

- four weeks' leave as required by the WTD (known as 'regulation 13 leave')

Brahams Dutt Badrick French LLP are a leading specialist employment law firm based at Bank in the City. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

The FCA and PRA review of the Senior Managers and Certification Regime (SM&CR) – BDBF Response

On 30 March 2023, the Financial Conduct Authority (FCA) and UK Prudential Regulation Authority (PRA) published a joint discussion paper on the review of the Senior Managers and Certification Regime (SM&CR), inviting responses by 1 June 2023.

The FCA and PRA are seeking views on the effectiveness, scope and proportionality of the SM&CR, and potential improvements to the regime. Of particular interest is how the regime is operating in practice (we include comments from the employee perspective).

You can read our full response in the PDF below:

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The FCA and PRA review of the Senior Manager and Certification Regime (SM&CR)

Brahams Dutt Badrick French LLP - Response

Details of the Respondent

We are a specialist employment law firm based in the City of London. We are experienced in advising on the impact of the SM&CR for individuals, including issues such as:

- the scope and consequences of statements of responsibility;
- the certification process;
- investigations into an individual's conduct or competence;
- the impact of findings regarding fitness and propriety; and
- regulatory references

We have answered those questions from the SM&CR Discussion Paper where we feel our practical experience in this area may be of assistance.

Responses

Q1: To what extent do you agree or disagree that the SM&CR has made it easier to hold individuals to account?

We would strongly agree that it is having the effect of holding individuals to account.

Q2: To what extent do you agree or disagree that the SM&CR regime has improved safety and soundness and conduct within firms?

We are not able to comment in relation to 'safety and soundness'. In relation to 'conduct', we continue to advise individuals who are accused of issues of conduct. Generally speaking, there is a trend away from cases of financial misconduct (e.g. market manipulation) and towards non-financial misconduct (e.g. sexual harassment).

Q3: To what extent do you agree or disagree that the fitness and propriety requirements support firms in appointing appropriately qualified individuals to Senior Manager roles?

Not able to comment.

Q4: Please provide any suggestions that can help ensure that appropriately qualified individuals are not deterred from taking up relevant Senior Manager roles.

Not able to comment.

Q5: To what extent do you agree or disagree that the SM&CR has made it easier for firms to hold staff to account and take disciplinary action when appropriate against them?

In our view, the pendulum has swung too far the other way. Of course it is right that staff should be held to account and, where appropriate, disciplined if there are legitimate concerns about their

If you need advice on the Senior Managers and Certification Regime (SM&CR), please contact Nick Wilcox (nickwilcox@bdbf.co.uk) or your usual BDBF contact.

Waiver of future claims in a settlement agreement was effective resulting in the strike out of disability discrimination claims

In Clifford v IBM UK Ltd an Employment Tribunal Judge has ruled that a waiver of future claims contained in a settlement agreement was effective, meaning that the claimant's claims were struck out.

What happened in this case?

The claimant, Mr Clifford, started working for IBM in 2001. He was disabled and began a period of extended sick leave in 2008. In 2012, he raised a grievance about the fact that IBM had not increased his salary or paid holiday pay to him during his sickness absence. He said this amounted to disability discrimination and he asked to be moved onto IBM's disability plan (the Plan). Under the Plan, Mr Clifford would be paid 75% of his former salary until the earlier of recovery, retirement or death.

In 2013, Mr Clifford and IBM entered into a settlement agreement under which IBM agreed to:

- pay £8,685 to settle the complaint about the unpaid holiday pay, however, no payment was to be made in respect of the unawarded pay rises;

- place Mr Clifford on the Plan, under which he would receive around £54,000 per year until retirement (and the terms of the Plan stipulated that any pay increases were to be at IBM's discretion); and

- pay employer pension contributions based upon his full salary of around £72,000.

In exchange, Mr Clifford agreed:

- to waive his rights to bring claims about the matters raised in his grievance or any other claims that he had against IBM;

- to waive his rights to bring a long list of other possible claims;

- not to raise any further grievances where such grievances were "substantially similar" to the original grievance; and

- to waive his rights to bring any future claims connected to the matters set out in the grievance or the transfer to the Plan.

Yet, in 2022, Mr Clifford brought claims against IBM, alleging that it was discriminatory (and also a breach of working time rules) to have paid only 75% of his previous salary to him throughout the year. He said he was entitled to 100% of pay in respect of periods of annual leave, which meant that IBM owed him around £69,000. He also claimed that it was discriminatory not to have awarded pay increases to him while he was on the Plan. He argued that the Plan was intended to give security to disabled employees, but inflation had reduced the real value of the benefit.

IBM applied to have the claims struck out arguing, amongst other things, that they were precluded by the waivers contained in the settlement agreement, which extended to future claims concerning similar matters raised in the grievance or the transfer to the Plan. Mr Clifford sought to resist the strike out, pointing to the recent EAT decision in Bathgate v Technip UK Ltd, which said that settlement agreements *cannot* settle future claims which had not arisen at the date of the agreement and that both blanket waivers (which purport to waive all and any claims) and kitchen sink waivers (which purport to waive all claims set out in a long list of claims) were ineffective. Therefore, Mr Clifford said that the waivers in the settlement agreement were invalid and did not prevent him from pursuing the claims.

What was decided?

The Employment Tribunal Judge struck out the claims, concluding that they had no reasonable prospect of success.

As far as the claims concerning holiday pay were concerned, the transfer of Mr Clifford to the Plan amounted to a consensual variation of contract, under which all the normal features of the employment contract disappeared, and he only had the right to be paid 75% of his previous salary throughout the entire year. Therefore, pay for any holidays would have been at the rate that he was actually paid.

As to the claim concerning the failure to award a pay increase, the Employment Judge said that, properly understood, this was a complaint that the benefit was not generous enough. The Plan conferred no right to a pay increase, only a *discretion* to award an increase. However, Mr Clifford had not sought to argue that IBM had exercised its discretion in a capricious or arbitrary way – his only claim was for disability discrimination. The Judge said that the terms of something which is *only* given as a benefit to disabled workers, and not to non-disabled workers, cannot amount to less favourable treatment related to disability. Rather, it is *more* favourable treatment.

In any event, future claims about holiday pay and pay increases had been expressly waived in the settlement agreement and that waiver was effective. The Judge distinguished the decision in Bathgate, which was directed at future claims which had not yet arisen and were truly unknowable. By contrast, in this case, the issues of holiday pay and pay increases *were* known about at the time of entering into the settlement agreement and had been raised in Mr Clifford's grievance and subsequent appeal. The settlement agreement was clear that he could not bring future claims arising out of similar matters to those that had been settled.

What are the learning points for employers?

It is worth noting that the Judge did not go as far as saying that *all* types of future claims could be waived in settlement agreements. Indeed, he said that whether or not future claims could be settled as a matter of principle was an *"academic dispute"* in the context of this claim. Here the "future claims" which were held to have been validly waived arose out of matters which were well known to the parties and had been the subject of a grievance, appeal and settlement agreement. This put them in a different category to claims concerning matters which had not yet arisen, and which were truly unknown.

The Judge also sought to introduce public policy considerations into the debate. He drew a distinction between settling a future holiday pay claim and settling a future sexual harassment claim. There was every reason of public policy for the settlement of past holiday pay claims to extend to future claims on the same issue, otherwise the employer would be compelled to litigate rather than settle. By contrast, it would *"inevitably be contrary to public policy"* if a claimant settling a sexual harassment claim was prevented from bringing a future sexual harassment claim, since this would doom them to suffer future harassment without remedy.

Where does this leave employers entering into settlement agreements?

- **Actual** claims and complaints can settled and must be identified in the settlement agreement either by a description of the claim or reference to the relevant statutory provision.

- Future claims that are **known and in existence** at the point of settlement (but about which no complaint had been raised) may be settled, provided that a description of the claim or the relevant statutory provision is included in the settlement agreement.

- The recent decision of the Court of Appeal in Arvunescu v Quick Release (Automotive) Ltd suggests that future claims that are **unknown but in existence** at the point of settlement may also be settled. However, that case concerned settlement by way of a COT3 agreement, where blanket waivers are permitted. You can read more about the Arvunescu decision here.

- This latest decision suggests that future claims that are a **known risk but not in existence** may also be settled provided that they are expressly addressed in the settlement agreement and there are no public policy reasons why that should not be the case. However, this is a first instance decision and does not bind other Tribunals so it is possible that a case with similar facts would be decided differently by another Tribunal.

- Claims which are **unknown and not in existence** are truly unknowable and may not be settled according to the decision in Bathgate.

BDBF is a leading law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

Clifford v IBM UK Ltd

Some further details published on proposal to limit non-compete clauses to three months

On 12 May 2023, the Government released some further details about its plans to limit the use of non-compete clauses in employment contracts. In this briefing, we round up the key points to note.

On 10 May 2023, the Government announced plans to legislate to limit the use of non-compete restrictions in employment

contracts to three months. You can read our detailed briefing on that announcement here, where we outlined a number of "known unknowns" about the proposals. Since then, the Government has published its response to the consultation on reform of non-competes (Response), which closed on 26 February 2021. The Response provides more information about the proposals and answers some, but not all, of the known unknowns.

The Response confirms the following points:

- **The proposed reforms will apply to workers engaged under a worker contract.** The initial announcement referred to "employment contracts" and "employees" only and made no reference to individuals classified as "workers" who worked under a contract to work or perform services for the employer. The Response confirms that the proposed reforms will apply to worker contracts.

- **The proposed reforms will not apply to wider types of workplace contracts.** It was unclear whether the proposed reforms would apply to other types of agreements connected to the workplace e.g. LLP agreements, shareholders' agreements or long-term incentive plans. The Response confirms that the limitation will not apply to non-compete clauses used in such agreements, on the basis that the bargaining power between the parties is different. However, it is worth noting that the Response is silent about whether the limitation will apply to a non-compete restriction

contained in a settlement agreement. The Response also appears to overlook the fact that LLP members can be classified as workers depending on the circumstances.

- **The proposed reforms will apply to non-compete clauses only and not to other types of covenants.** The initial announcement suggested that the limitation would not apply to other types of post-termination restriction, such as non-solicitation, non-dealing or non-poaching clauses. The Response clarifies that this is the case. Therefore, other types of post-termination restriction may run for longer than three months and will be upheld provided that they are reasonable and go no further than necessary to protect the employer's legitimate business interests. The logic for this distinction is that such restrictions do not have such a significant impact on an individual's ability to earn a living in their chosen profession.

- **Guidance to be published.** The Response also states that the Government plans to enhance transparency by producing guidance on the use of non-competes and the law underpinning them.

However, there are still a number of questions yet to be answered:

- **Will the law apply to existing employment contracts?** It is still not clear whether the new law will apply retrospectively or only to new contracts. In the event that it applies retrospectively, will an existing non-compete restriction which is in excess of three months be deemed to be void in its entirety? Or will it be potentially enforceable, but only up to the three-month cap? If it would be deemed void, employers will either need to agree changes to the employment contracts of affected employees or accept the loss of the non-compete protection.

- **How will the new law work alongside garden leave clauses?** The initial announcement says that the reforms will not affect an employer's ability to use paid notice periods or place employees on garden leave. However, the risk is that employers will respond to the loss of longer non-competes by extending periods of notice in order to place the employee on garden leave and keep them out of the market that way. Further information about the interplay between non-competes and garden leave is awaited.

- **When will the reforms come into force?** The Government has said the legislation will be introduced *"when Parliamentary time allows".* At the time of writing, no timeline for the introduction of the new law has been given. With a General Election looming, it remains to be seen whether the proposal will ever make its way on to the statute books.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Managing Associate Tom McLaughlin (tommclaughlin@bdbf.co.uk), Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Non-compete clauses: Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment – 12 May 2023

Gareth Brahams speaking at 2023 ELA Annual Conference

On 25 May 2023, BDBF Managing Partner Gareth Brahams is speaking on remedies at the ELA Annual Conference, alongside Gavin Mansfield KC, Littleton. Look out for their session: "Remedy decisions in high value cases: why when the case has been decided there is still everything to play for."



BDBF
EMPLOYMENT LAW

Government changes approach to discarding EU laws and announces plans to reform the Working Time Regulations 1998 and TUPE

The Government has backtracked on its pledge to discard all retained EU laws at the end of year. Instead, around 600 pieces of legislation will be revoked, including some relatively niche employment laws. The rest will remain on the statute books but may be reformed over time. In connection with this, the Government has already announced plans to reform the Working Time Regulations 1998 and the Transfer of Undertakings (Protection of Employment) Regulations 2006.

What is the Retained EU Law Bill?

A large proportion of the UK's legal framework – including its

employment law framework – was underpinned by the law of the European Union as follows:

- EU "directives" had to be implemented into UK law, either as an Act of Parliament or a statutory instrument.
- Certain other forms of EU law were directly applicable in the UK without the need for any implementing laws.
- Decisions of the Court of Justice of the European Union were also binding on the UK.

Brexit required changes to be made to this legal framework. Acts of Parliament which implemented EU directives (e.g. the Equality Act 2010) remained in place. However, all the relevant statutory instruments would have automatically fallen away upon Brexit. To avoid legal chaos when Brexit happened, the Government decided to keep these statutory instruments and transfer them into UK law. It also chose to keep directly applicable EU law and decisions of the Court of Justice of the European Union made on or before 31 December 2020. Together, all these laws and decisions became known as "retained EU law".

In September 2022, the Government decided that the time was right to look again at whether retained EU law should be kept or repealed. The Government published the Retained EU Law (Revocation and Reform) Bill (the Bill), which is aimed at removing the presence and influence of retained EU law within UK law. Initially, the Bill provided that all retained EU law contained in statutory instruments would automatically expire on 31 December 2023 unless a positive decision was made to

keep it after this date. This was referred to as the “sunset” provision.

How has the Government changed its approach?

On 10 May 2023 the Government performed a surprise U-turn on the sunset provision. The Government announced that it would table an amendment to the Bill which would scrap the sunset provision and replace it with a list of around 600 pieces of retained EU law to be revoked on 31 December 2023. Any piece of retained EU law which was notincluded in that list would stay on the statute books (for now at least – it may be revoked or reformed at a later date).

Why did the Government change its approach? It had become clear that civil servants would simply not have enough time to assess which retained EU laws should be kept, reformed or discarded before the sunset date. If the sunset provision had stayed, the concern was that we would be left with a legal vacuum on 1 January 2024 – including in the field of employment law.

Will any retained EU employment laws be revoked on 31 December 2023?

Yes. The Government’s list of retained EU law to be revoked contains the following employment laws:

- The Posted Workers (Enforcement of Employment Rights) Regulations 2016.
- The Posted Workers (Agency Workers) Regulations 2020.
- The European Cooperative Society (Involvement of

Employees) Regulations 2006.

The concepts of a "posted worker" and a "European Cooperative Society" do not apply to the UK as they did when we were members of the EU. The consultation says the revocation of these rules should be regarded as a *"tidying up of the statute book".*

Will any retained EU employment laws be kept or reformed after 31 December 2023?

Yes. On 12 May 2023, the Government published a consultation paper, setting out its plans regarding the future of retained EU employment law. The consultation confirms the Government's intention to keep retained EU employment laws in the following areas without any change:

- Family leave rights (maternity, paternity, adoption and parental leave).
- "Atypical" workers' rights (part-time workers, fixed-term workers and agency workers).
- Information and consultation rights.

However, some reforms are proposed to the Working Time Regulations 1998 (**WTR**) and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) namely:

- Changes to working time record-keeping requirements.
- Changes to annual leave entitlements.
- Introduction of "rolled up" holiday pay.

- Changes to the consultation requirements under TUPE.

You can read our detailed briefing on the proposed changes here.

What are the next steps?

The Bill has completed its passage through the House of Commons and is currently at the report stage in the House of Lords (meaning it has almost completed its passage there). There will then be a consideration of amendments before the Bill passes into law. Assuming that the Bill passes in its revised format, the employment laws concerning posted workers and European Co-operative Societies will be revoked on 31 December 2023.

The consultation seeking views on the proposed reforms to the WTR and TUPE closes on 7 July 2023. The Government will need to consider the responses and decide what changes, if any, it wishes to make to the law. Its position will be set out in a response paper, which we would expect to be published by the end of 2023. Legislation will then need to be passed, meaning that the reforms to the WTR and TUPE are unlikely to take effect before the latter part of 2024 at the earliest. However, we will continue to monitor this development and keep you updated.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.