Does UK whistleblowing law need fixing?

[et_pb_section fb_built="1" _builder_version="3.0.100" background_image="http://davidk423.sg-host.com/wp-content/uploads/2017/09/bdbf_final-stages-1-4-1.jpg" custom_padding="|||" global_module="2165" saved_tabs="all"][et_pb_row _builder_version="4.7.4" min_height="66.4px" custom_padding="50px||||false|false"][et_pb_column type="4_4" _builder_version="3.25" custom_padding="|||" custom_padding__hover="|||"][et_pb_text _builder_version="4.7.4" _dynamic_attributes="content" text_font="|700|||||||" text_font_size="27px" background_layout="dark" custom_margin="0px|||" custom_padding="0px|||"]@ET-DC@eyJkeW5hbWljIjp0cnVlLCJjb250ZW50IjoicG9zdF90aXRsZSIsInNldHRpbmdzIjp7ImJlZm9yZSI6IiIsImFmdGVyIjoiIn19@[/et_pb_text][et_pb_text _builder_version="4.7.4" _dynamic_attributes="content" _module_preset="default" background_layout="dark"]@ET-DC@eyJkeW5hbWljIjp0cnVlLCJjb250ZW50IjoicG9zdF9kYXRlIiwic2V0dGluZ3MiOnsiYmVmb3JlIjoiIiwiYWZ0ZXIiOiIiLCJkYXRlX2Zvcm1hdCI6ImRlZmF1bHQiLCJjdXN0b21fZGF0ZV9mb3JtYXQiOiIifX0=@[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" admin_label="section" _builder_version="3.22.3"][et_pb_row admin_label="row" _builder_version="4.7.4" background_size="initial" background_position="top_left" background_repeat="repeat"][et_pb_column type="4_4" _builder_version="3.25" custom_padding="|||" custom_padding__hover="|||"][et_pb_text _builder_version="4.7.4" text_orientation="justified" hover_enabled="0" use_border_color="off" sticky_enabled="0"]

World Whistleblowers Day 2021 (23 June) is a day to raise public awareness about the important role of whistleblowers in

uncovering and challenging malpractice and wrongdoing. We believe it is also a day to reflect on the current state of whistleblowing law in the UK.

Campaigners will seize the day as further opportunity to raise awareness of the inadequacies in UK whistleblowing law. We saw the failure of two Private Members' bills to complete their passage earlier this year. One has been reintroduced and its second reading will take place later this week. Protect, the UK's leading whistleblowing charity has been campaigning for change, saying the law is broken. BEIS has also embarked upon a Whistleblowing Review. It also remains to be seen whether the UK will implement legislation complaint with the EU Directive on Whistleblowing.

In this short article, Paula Chan, Partner at BDBF and whistleblowing expert, looks at the issues addressed by Protect's Campaign, the Office of the Whistleblower Bill and the BEIS review.

Protect's Campaign – Let's Fix UK Whistleblowing Law

Protect's campaign in 2021 – 'Let's Fix UK Whistleblowing Law' – calls on civil society to help fix the UK's whistleblowing law. Protect has declared that the Public Interest Disclosure Act 1998 (PIDA) is out-of-date and fails to protect those who need protecting, set standards for employers to encourage speaking out and fails to offer adequate access to justice. It calls for three urgent reforms of PIDA:

- **Protection of more people:** many groups of people working in the UK are excluded from whistleblowing legal protection, and the safeguarding that is provided to eligible individuals is ineffective. We support Protect's calls for UK's whistleblowing laws to be updated urgently to offer protection to the following five groups – self-employed, non-executive directors,

trustees and governors, volunteers, job applicants, and misidentified whistleblowers.

- **Standards for employers:** all employers should be required to meet standards for whistleblowing and follow recognised procedures. Tougher enforcement against employers is needed for those who fail to listen or treat whistleblowers badly. We see more employers implementing better speaking out policies, appointing whistleblowing champions and training their staff on how to respond to whistleblowing concerns. Whilst good employers will already be setting standards, we believe a change in the law is needed to require greater consistency amongst employers.
- **Better access to justice for whistleblowers:** change is needed to reduce the financial and reputational burden whistleblowers face in the Employment Tribunal to ensure whistleblowers can enforce their legal rights. We often find ourselves instructed to litigate to improve whistleblowers' rights. In a landmark case, we helped change the law so that a claim of detriment of dismissal could be brought against individuals and a claim of vicarious liability for that act could be brought against the employer (see Timis v Osipov [2018] EWCA Civ 2321). This improved access to justice for whistleblowers (and resulted in an award to our client totalling over £2 million). We also fought to establish that interim relief hearings should be heard in public (see the EAT case of Queensgate Investments LLP & others v Millett UK/EAT0256/20/RN). However, we would like to see better access to justice and less need for individuals like Mr Osipov and Mr Millett to embark upon litigation to improve the rights of whistleblowers. As a starting point, we'd like to see the law simplified and time limits extended for bringing Employment Tribunal claims.

Office of the Whistleblower Bill 2021 – 22

The Bill incorporates recommendations made in a 2019 report by the all-party parliamentary group (APPG) on whistleblowing. Echoing Protect's 2021 Campaign, this said that the Public Interest Disclosure Act 1998, the UK's whistleblowing law, had "failed to provide adequate and comprehensive protection to whistleblowers or the public". This is the second time that the Bill has been introduced in Parliament. The second reading of the Bill is scheduled to take place on 25 June 2021.

The Bill makes provision for the creation of an Office of the Whistleblower which would have various powers including to:

- giving directions to and monitoring the activities of relevant bodies (to be prescribed in regulations) on issues such as confidentiality and the use of disclosed information
- consulting on the amending or replacing of UK whistleblowing legislation;
- being a point of contact for individuals who wish to disclose information about wrongdoing;
- creating and maintaining a panel of accredited legal firms and advisory bodies to advise and support whistleblowers;
- maintaining a fund to support whistleblowers;
- providing financial redress to individuals whose whistleblowing is believed by the office to have harmed the individual's employment, reputation or career; and
- publishing an annual report of office activities that would be laid before Parliament.

Baroness Kramer—the Bill's sponsor—described the reason for the Bill: "Whistleblowers are vital to uncovering abuse at an early stage and […] deterring wrongdoing. But […] the Public Interest Disclosure Act 1998 and the responsibilities of the many regulators leave huge gaps, lack consistency and suffer from complexity and confusion. The consequence is that whistleblowers often suffer retaliation and find their careers are ended. Their only recourse is to an employment tribunal

[…] which can drag on for years, depleting their financial resources. Informal job black-listing is common. Some regulators follow up on information vigorously, but some still treat whistleblowing as complaints from troublesome people. I propose an Office of the Whistleblower to end the fragmented approach to the problems, to sort out the often complex issues of how to best protect and support whistleblowers, and to give a safe point of contact for whistleblowers which can be clearly known and understood."

More needs to be done to displace the notion that whistleblowers are troublemakers and we hope the Bill receives a warmer reception on its second journey. At BDBF, we often see the careers, health and lives of our clients suffer where they blow the whistle. Sometimes, we are called upon to advise at an early stage and find that many of our clients have already resigned themselves to an exit before they have blown the whistle, believing that rather than be supported for escalating wrongdoing, they will likely be victimised. This needs to change.

More also needs to be done to equip and resource regulators to ensure mistreatment of whistleblowers is addressed and to help employers put in place better training and processes to support the reporting of wrongdoing in the workplace.

BEIS Whistleblowing Review

The Department for Business, Energy and Industrial Strategy has committed to reviewing its whistleblowing protections following the publication of data by Protect which revealed that one in four COVID-19 whistleblowers who contacted its advice line were dismissed between September 2020 and March 2021.

BEIS has advised that it is considering the scope and timing of its whistleblowing review, and that it is planning to introduce a single body to enforce workers' rights, including

whistleblower protection, as part of the forthcoming Employment Bill (note, however, that the Government's recent response on the new single enforcement body does not indicate that whistleblowing protection will be within the body's remit). A timeframe for the review has not yet been provided.

In summary

There is no doubt that whistleblowing law needs fixing and we need a cultural shift away from a pure focus on remedies for retaliation to implementing a positive duty upon employers to develop better practices, put in place channels for speaking up and to ensure serious harm and victimisation is avoided. World Whistleblowers Day represents not only a day to reflect on the courage and sacrifices of whistleblowers, but an opportunity for employers to reflect and to take the lead on change before the law requires it of them

Paula Chan is a Partner at BDBF and a whistleblowing expert. If you want to find out more about whistleblowing, please contact Paula on 020 3828 0350 or paulachan@bdbf.co.uk or get in touch with your usual BDBF contact.

[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" _builder_version="3.26.6"][et_pb_row _builder_version="3.26.6"][et_pb_column type="4_4" _builder_version="3.26.6"][/et_pb_column][/et_pb_row][/et_pb_section]