

Pandemic Reflections on Whistleblowing Law in the UK

What can employees or workers do in order to gain the protection of whistleblowing law, and what should they do if they are victimised?

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Li Wenliang was the brave Chinese doctor who blew the whistle on a Chinese social media blog about the SARS-like symptoms he had witnessed in Wuhan, China in December 2019. He was detained by police for spreading false rumours and made to sign an admission that he had severely disturbed social order and had made false comments. He subsequently died of COVID-19. While he may have been unique in that he suffered the very harm he sought to prevent, his experience as a whistleblower punished is not unusual.

Protection for whistleblowers was introduced in July 1999 through the *Public Interest Disclosure Act 1998 (PIDA)*. Despite more than 20 years passing since then, the stigma attached to whistleblowers remains ever present.

The pandemic has presented a change and shift in demands to the pharmaceutical industry, including increases in demand, new sources of funding, shortages in pharmaceutical ingredients, pricing challenges, and the race to cure the virus through vaccines. A by-product of such challenges and the pace of change inevitably leads to mistakes and, in some cases, misbehaviour. Whistleblowers need to feel empowered to raise the alarm when it must be raised.

Who Is Protected by UK Whistleblowing Law?

Protect, the UK's whistleblowing charity, is currently campaigning for change in the law. Its 2021 campaign – Let's Fix UK Whistleblowing Law – calls for certain urgent reforms, including to ensure protection for more people. Employees and workers have protection (referred to in this article as 'employees' for ease), but certain categories do not. Those who are not protected include the self-employed, non-executive directors, trustees and governors, volunteers, job applicants, and misidentified whistleblowers. This means most individuals working for pharma companies will be protected, but if, for example, you are an independent contractor you may not be protected by UK whistleblowing law. However, such individuals may still find protection through other avenues set out below.

What Protection Do Whistleblowers Have if They Blow the Whistle?

PIDA makes it unlawful for an employer to dismiss or to subject any employee to a 'detriment' because they have made a protected disclosure. An employee suffers a detriment if a reasonable employee would or might take the view that they have been disadvantaged in the circumstances in which they had to work. This could include denial of bonus or promotion,

exclusion, or baseless disciplinary or performance action.

Unfortunately, UK whistleblowing law is largely remedy focused rather than preventative. As the law stands, there are no legal standards imposed on employers for whistleblowing, nor is there a requirement to put in place recognised procedure. In practice, most good employers will have a whistleblowing policy, a whistleblowing champion, and established processes in place to address concerns raised by whistleblowers. In the absence of such procedures, employees can raise concerns about mistreatment informally with their manager or raising a formal grievance. Details of how to raise a grievance are usually included in an employee handbook. The Advisory, Conciliation and Arbitration Service code of practice on discipline and grievance also sets out basic standards employers should follow when dealing with a grievance. If matters are not capable of resolution, individuals victimised for blowing the whistle have limited remaining options if they wish to achieve justice, other than to commence employment tribunal proceedings against their employer to obtain a remedy. With the pressures currently on the employment tribunal system caused by the pandemic, reaching an employment tribunal hearing can take years. For many, justice delayed is justice denied.



However, there is one incredibly valuable, speedy remedy available to whistleblowers called interim relief. If you have been dismissed, it is possible to apply to be reinstated or re-engaged, or to be granted an order for continuation of employment, which means that you have the right to be paid your salary and benefits, and to accrue continuity of service until the full hearing (potentially years away) without an obligation to do any work. The catch is that you have seven days from the date of dismissal to make an application to an employment tribunal for interim relief, together with the claim. Given the short time frames and high stakes, individuals wishing to make an interim relief application would be well-advised to seek swift and expert legal advice.

What Amounts to Whistleblowing?

Not all concerns are equal under *PIDA*. In order to be protected, an individual must make what is called a 'protected disclosure'. The disclosure (which may be made in writing or verbally) must, in the reasonable belief of the employee, be made in the public interest and tend to show one or more of the following types of wrongdoing:

- A breach of a legal obligation
- A criminal offence
- Miscarriages of justice
- Endangering the health or safety of any individual
- Damage to the environment
- Concealing wrongdoing of any of the above

Working out whether or not a disclosure is protected is not always a straightforward exercise. Individuals should, if possible, seek legal advice on making a disclosure before they make it to ensure they obtain whistleblowing protection.

If you are considering blowing the whistle, it is usually best to make your disclosure in writing (so you have evidence of your disclosure), which should clearly set out information showing one or more of the six categories of wrongdoing above.

To Whom Should I Raise My Protected Disclosure?

There are various categories of people listed in the *Employment Rights Act*



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1996 to whom an individual can make a disclosure to in order for it to be protected. In our experience, clients tend to consider reporting concerns to their employer or a relevant regulator, or both.

In the case of an employer, an individual should check any whistleblowing policies, which may provide guidance and set out the process one needs to follow when making protected disclosures. This may also specify the person to whom the disclosure should be made. In the absence of that, an employee should consider making the disclosure to their line manager and, if applicable, the relevant person responsible for compliance, or where the disclosure is about the line manager then to HR.

Depending on the circumstances, and an individual's regulatory status, a report may be made to the relevant regulator or professional body.

Other Avenues

Looking beyond UK whistleblowing law, there is, in some cases, the option to pursue what is often referred to as a US Reward Claim introduced by the *Dodd-Frank Act*. This involves reporting whistleblowing concerns through the Securities and Exchange Commission or the Commodity Futures Trading Commission whistleblower programmes about concerns regarding possible violation of the federal security laws and regulations or any other unlawful activity involving futures markets, the options markets, and the swaps trading markets. Pharma entities are often listed and securities traded in the US. Whistleblowers are entitled to an award of between 10-30% of the fine

imposed on the offending party (which could be in the millions). Here, you are not required to be an employee of the organisation you are reporting (1).

How Long Do I Have to Bring a Claim if I Am Dismissed or Suffer Detriments?

A whistleblowing claim needs to be brought three months less one day from the date of the dismissal in automatic unfair dismissal claims, or in detriment claims, within three months of the act or the decision you are complaining about.

The time limits are strict and are not paused by internal processes or appeals.

As above, employees may make an application to get their job back if they have been dismissed, but the application must be made swiftly.

Pitfalls

In our experience, the biggest pitfall is seeking legal advice too late – often well after protected disclosures are made and after detriments are suffered.

Not being clear about the nature of an individual's concerns when making a protected disclosure could also be fatal.

The manner in which a protected disclosure is made is also important. If a person blows the whistle for a reason that is personally motivated, for revenge, or to obtain a financial advantage, this may affect the amount of compensation awarded if the claim is successful. Further, employers can successfully avoid liability if they can

show that detriments suffered are not because of the making of the protected disclosure, but rather misconduct committed in how the disclosure is made. This could include breaching confidentiality or covert recording.

Looking Forward

It is our view that much needs to be done to fix whistleblowing law to improve the protections and remedies available to whistleblowers, and to introduce standards employers must comply with. The *EU Whistleblowing Directive* (which the UK is not obliged to implement) has sparked debate around whistleblowing protection in the UK, and there is a call to broaden the scope of protection and support offered to individuals. However, the pace of change in the pharma world won't wait for lawmakers to change the law. There is never a right time to blow the whistle, but with the help of legal advice, individuals can develop a clear strategy ideally before raising their concerns to have the best chance of availing themselves of all the protections currently available.

Reference

1. Visit: www.sec.gov/whistleblower/frequently-asked-questions#faq-16



Paula Chan has over 11 years' experience as an employment lawyer, advising senior individuals and employers on a wide range of employment matters. She has particular expertise in whistleblowing and workplace sex and maternity discrimination cases. She advises senior individuals and limited liability partnership members, particularly in the regulated sectors, on issues such as negotiating terms, defending performance and misconduct allegations, and challenging unfair and unlawful treatment through grievance and disciplinary procedures.