

## Public Concern at Work

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9 February 2011

Dear Sir/Madam,

### Response to the Ministry of Justice Consultation: Proposals for the reform of legal aid in England & Wales

We set out below our comments on the proposed changes to the scope of legal aid and specifically answer questions 3 and 4 dealing with scope. In summary, we argue that employment cases should not be removed from the scope of legal aid and this should be considered in the context of the Department of Business Innovation and Skills (DBIS) consultation on Resolving Workplace Disputes which includes proposals to charge fees, an increase of the costs threshold and to place more emphasis on mediation and reconciliation through working more closely with ACAS. We state that given that the proposals from DBIS (in the Resolving Workplace Disputes consultation) emphasise mediation and could increase the cost burdens for individuals, it does not make sense to limit the scope of legal help. Should the Ministry of Justice go ahead and remove legal aid from all employment matters except for discrimination, we argue that whistleblowing (Public Interest Disclosure Act) claims should be included, particularly as there is an increasing body of case law which treats the victimisation of a whistleblower in the same way as victimisation for any other protected ground, such as sex or race (see below for further consideration of this issue and for specific case law). We are also concerned about the impact on voluntary organisations already providing legal assistance to individuals.

### About Public Concern at Work

By way of background Public Concern at Work is the independent whistleblowing charity providing advice for individuals who witness wrongdoing or malpractice in the workplace. Since we were established in 1993, we have promoted whistleblower protection laws in the UK and were instrumental in getting the Public Interest Disclosure Act 1998 passed. We have advised over 19,000 clients on our helpline and have worked with a range of public, voluntary and private organisations, including Lloyds Banking Group, Home Retail Group, the Serious Fraud Office, CIMA and the NHS.

making **whistleblowing** work

## **Removal of employment cases from scope**

At present, legal aid in employment matters falls into two categories: legal help (advice on assistance on a problem excluding representation and advocacy) which currently extends to all employment cases, and legal representation which is available in respect of appeals to Employment Appeal Tribunals onwards. The consultation at paragraph 4.192 proposes to remove all legal aid from this area on the basis that “the issues at stake are relatively less important than the areas for which we prioritise spending. In tribunal cases, appellants are able to present their cases themselves given the user-friendliness of the proceedings, and we note the availability of other sources of advice and funding and other routes to resolution”.

We do not agree with proposals to withdraw legal aid in its entirety from all employment matters and we believe that the reasoning given in the consultation is flawed. The Employment Tribunal process when it was originally envisaged was meant to be a non-adversarial environment where employees and their employers could resolve workplace disputes. Whilst the Employment Tribunals were envisaged to be a more accessible forum for litigants-in-person, our experience on our helpline shows that many prospective litigants-in-person have significant difficulties in understanding the procedural aspects of the Tribunal system. During our analysis of cases under the Public Interest Disclosure Act 1998, we found that it was only in a handful of cases that employer respondents were unrepresented, while the reverse is true for claimants seeking redress at employment tribunals. Thus, the Government’s argument that the Employment Tribunal is user-friendly does not taken into account the fact that employers will frequently employ barristers and solicitors to assemble and represent an employer’s case. In respect of employment cases this is particularly pertinent given that it involves an individual going against an organisation usually with significantly more resources to fund legal advice and representation. We also found that where claimants were unrepresented, they were 10% less likely to win their case.

For most claimants the Employment Tribunal will be their first encounter with a judicial process and if they are representing themselves and have no access to assistance prior to the hearing, their situation becomes increasingly difficult. The tribunal process is itself opaque and there is no register of Employment Tribunal claims and first instance judgments, which could be helpful for all involved. For claimants who are representing themselves, this lack of transparency makes it difficult to assess the pros and cons in taking an Employment Tribunal case. The removal of legal help will mean that individuals will have limited access to early advice or will not be able

to access assistance when a workplace dispute initially arises. Ensuring that individuals have access to early legal advice and assistance can help reduce costs, as the individuals will be more likely to consider settlement and understand the tribunal process, and would also achieve the objective of reducing the level of litigation referred to in the DBIS consultation on resolving workplace disputes and be an example of joined-up government.

### Retention of discrimination cases from scope

In the circumstances that the majority of employment cases are excluded from scope, we agree with the Government's proposal to retain discrimination cases within scope and would also argue that by analogy claims under the Public Interest Disclosure Act 1998 (PIDA or whistleblowing claims) should also be brought within scope, particularly as there is a growing amount of case law to show that negative treatment (or in the words of PIDA, a detriment) suffered on the ground of the claimant whistleblowing, is considered a form of discrimination. The Court of Appeal in the cases of *Woodward v Abbey National Plc* [2006] 4 All ER 1209 (where the Court of Appeal found that detriment could extend to post employment), *Melia v Magna Kinsei Limited* [2005] EWCA Civ 154 (compensation for detriment applies until the point of dismissal) and *Ezias v North Glamorgan NHS Trust* [2007] EWCA Civ 330 (whistleblowing cases should be treated similarly to discrimination cases in that unfair dismissal cases should not be struck out except in the most plain and obvious circumstances). This approach is echoed in the recent case of *Fecitt, Woodcock & Hughes v NHS Manchester* [2010] UKEAT 0150\_10\_2311, where the Employment Appeals Tribunal commented as follows:

*64. We accept the submission that what amounts to causation in cases of victimisation in discrimination claims is the same as that that should apply to victimisation for whistleblowing and to other forms of discrimination.*

*65. We also recognise that Igen v Wong was a case that concerned race discrimination (as in fact was Nagarajan) where the European Directive applied. Such cases therefore differ from whistle-blowing cases where the legislation is entirely home-grown. We were, however, impressed by the argument as to the assimilation of the law of victimisation in discrimination cases and victimisation in whistle-blowing cases. Peter Gibson LJ held that the appropriate test required the employer to prove that the treatment [discrimination] and was "in no sense whatever" on the grounds of the Claimant's race or sex as the case may be. The same would apply to detriment suffered on the ground that the Claimant had been (whistle-blowing) and thus done a protected act. As we have noted Peter*

*Gibson LJ held that this test did not differ from Lord Nicholls' formula in **Nagarajan**; a "significant" influence was an influence which was more than trivial.*

*66. We bear in mind that, in the legislation relating to whistle-blowing, Parliament has sought to offer protection to whistle-blowers. We consider that we should take a broad view of provisions for their protection. Further, the law, as stated by the Court of Appeal in **Igen v Wong** is binding upon us. The Court of Appeal considered the relevant earlier authorities and so far as we are concerned its decision is both definitive and binding upon us. Accordingly in our opinion once less favourable treatment amounting to a detriment has been shown to have occurred following a protected act the employer's liability under section 48(2) is to show the ground on which any act or deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. That is the meaning of the test in **Igen v Wong**. The employer is required to prove on the balance of probabilities that the treatment was in no sense whatever on the ground of the protected act.*

In addition the proposal makes frequent mention of cases where there is a risk to life or risk of serious harm. There will be a number of PIDA cases in which an individual has compromised their own livelihood in order to draw attention to some kind of wrongdoing which involved a risk of serious harm or even loss of life to colleagues or the wider public. If such a person is victimised for exposing such a risk they should be supported to seek legal redress for this.

### **Alternative sources of advice**

We are also concerned about the provision of 'alternative forms of advice and assistance' which the Proposal makes reference to. Whilst the Proposal suggests there is no reason to believe these forms will cease to be available, given the cuts in local authorities this is likely to directly impact on local advice-giving organisations, as we have already seen in the case of Citizens' Advice Bureaux (CAB). Here at Public Concern at Work we find there are limited sources of legal support for those going to Employment Tribunal to take PIDA (or other) claims, who are unable to afford a lawyer, and will often refer people to the CAB for support, but the advice received often varies drastically depending on whether or not there is an employment specialist available. If legal aid is to be withdrawn so extensively, serious consideration needs to be given to how the voluntary sector organisations expected to fill in the void will sustain themselves in the long term, when significant local and central government funding is withdrawn.

## Recommendations

1. The Government should not limit the scope of legal aid in employment matters. If the Government does limit its scope, those seeking redress under the Public Interest Disclosure Act 1998 should be treated in the same way as other discrimination cases, and therefore legal aid should remain in those instances.
2. Further analysis of the sustainability of legal advice from the voluntary sector should be commissioned by the government.

I would be happy to discuss these comments in further detail, should that be of assistance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Cathy James'.

Cathy James  
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