Euro-Ombudsman

From: Andrew Parsons [redacted]
Sent: 07 October 2014 13:28
To: Consultation-OI-10-2014
Subject: [EOWEB] Response to Internal Rule for Whistleblowing
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Subject Response to Internal Rule for Whistleblowing

Content

To Whom it May Concern,

Please find attached our response to the consultation which we apologisie for being a little late.

If you would like to discuss the submission please do not hestiate to call me on +44 0207 7404 6609 or email me at [redacted]

Kind regards,

Andrew Parsons,

Policy Officer

Public Concern at Work

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Public Concern at Work's (PCaW) response to the draft decision of the European Ombudsman on internal rules concerning whistleblowing

1. We are delighted to contribute our comments on this draft decision on the internal rules for ombudsman staff concerning whistleblowing.

Introduction

2. Public Concern at Work is an independent charity and legal advice centre[1]. The cornerstone of the charity's work is a confidential advice line for workers who have witnessed wrongdoing, risk or malpractice in the workplace but are unsure whether or how to raise their concern. The advice line has advised over 17,000 individuals to date; in turn this informs our approach to policy and campaigns for legal reform.

3. We were instrumental in setting the scope and details of the law that protects whistle-blowers in the UK, the Public Interest Disclosure Act 1998 (PIDA). In 2012 and 2013 we campaigned for improvements to PIDA. Some of our campaign points led to legislative improvements to PIDA, through the Enterprise and Regulatory Reform Act 2013. However PIDA, while essential legislative protection, is only one part of the whistleblowing framework in the UK that is needed to ensure whistleblowing is safe and effective. To this end in 2012/2013 PCaW established the Whistleblowing Commission to examine the effectiveness of whistleblowing in the UK and to make recommendations for change (full membership of the Commission can be found in Annex A).

4. The Whistleblowing Commission considered evidence from several pieces of research including a public consultation to which there were 142 responses, a YouGov survey of public attitudes to whistleblowing and a survey of business practice with EY. Additionally the analysis of 1,000 cases from the PCaW advice line contained in the report The Inside Story.

5. The Whistleblowing Commission published their report in November 2013. The key recommendation of the Commission is the creation of a statutory Code of Practice which can be taken into account by courts and tribunals considering whistleblowing issues. An extract of the Code of Practice can be found at Annex B, alongside a link to the full report. The Commission also recommended that this Code could be used by regulators as part of their inspection and assessment regimes.

6. This response will focus on comparing the proposed internal whistleblowing rules against the Code of Practice.

Legalistic Terms

7. We are concerned that Article 2's definition of whistleblowing uses a number of legalistic phrases, taken from PIDA that are not appropriate for use in this document.

[1] PCaW is regulated by the Charity Commission and the Solicitors' Regulation Authority

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8. The term “good faith”, “reasonable belief” and “substantially true” are legal definitions that in the UK only apply when a court is deliberating on whether a worker qualifies for protection under PIDA. Whistleblowing policies and arrangements aim to resolve the situation before it breaks down into a legal dispute and so it is best to avoid legalistic language in any employer’s policy. Secondly, and more importantly, the policy looks to encourage staff to raise their concern at the earliest opportunity so the wrongdoing or malpractice can be addressed. The use of these legal terms may in fact confuse or alarm staff. We recommend that any document that is disseminated to staff should be drafted in the simplest language possible.

9. A better definition of whistleblowing can be found in section 2 of the Code of Practice-

   “Whistleblowing is the raising of a concern, either within the workplace or externally, about a danger, risk, malpractice or wrongdoing which affects others.”

   In any written guidance issued to staff there should be examples of wrongdoing that can be reported under the whistleblowing arrangements.

An Obligation to Report

10. Assurances made to staff and attempts to foster an open culture in the workplace will be undermined by the obligation to report incidents of wrongdoing or malpractice. As a result staff may feel they have to raise every concern they come across in case they are accused of not coming forward, or not doing so quickly enough. It can also be a distraction for managers trying to investigate the incident of wrongdoing if they also have to discipline members of staff who did not come forward.

11. A strict interpretation of this obligation also fails to take into account the circumstances of the situation a member of staff may be facing in terms of the dilemma as to whether or not to raise a concern. For example where a member of staff has had a bad experience of blowing the whistle in the past, or where staff are unaware of all the options in terms of raising the concern, or where there is a fear of retaliation. We would suggest an expectation that staff will raise a concern about wrongdoing, risk or malpractice might be better language to use than to suggest that staff have a legal duty to do so.

Guidance, Support and Advice

12. The Whistleblowing Commission’s Code of Practice states that any whistleblowing policy or guidance should inform staff that they have access to independent advice. This is vital if the whistleblowing arrangements are to establish a safe environment for concerns to be raised. Independent advice will reassure some members of staff to come forward, while others may wish to test whether the concern is within the scope of the whistleblowing arrangements.

13. It’s unclear whether Article 4 can provide independent advice as the nominated representative from the Staff Committee and managers within the Ombudsman’s office are still staff, and so are subject to the legal obligation to “blow the whistle” if they become aware of wrongdoing or malpractice.[2] This obligation may put off staff from approaching these sources of advice if they feel the conversations will inevitably lead to the concerns being investigated.

[2] Article 22a (96) Staff Regulations

14. This also puts managers in a difficult position if they are expected to not only potentially investigate the concerns raised, but also deliver advice to the whistleblower.

15. Our suggestion is managers should be removed as a source of advice within the article.

Reassurances to the Whistleblower

16. This section of our response covers Articles 6, 8 and 9 which relate to the assurances provided to the whistleblower as part of the internal arrangements. Generally we welcome these articles as good, practical attempts to reassure members of staff.

17. We do though have concerns about the final paragraph of article 6 which states an act of whistleblowing will be positively taken into account where someone is also involved in serious misconduct prior to blowing the whistle. This has the danger of sending the wrong message that whistleblowing will provide a shield to accusations of wrongdoing. It also detracts from the article's key message which is that a whistleblower will not suffer retaliation where they raise genuine concerns.

Confidentiality

18. We would comment in relation to assurances on confidentiality (article 7) that it is incredibly important for this to be at the highest level of assurance possible, namely that that confidentiality, where requested, is guaranteed unless the identity of the person raising the concern is required to be disclosed by law.[3]

Retaliatory Action against a Whistleblower and Malicious Concerns

19. We welcome Article 10 which puts a duty on someone accused of retaliating against a whistleblower to justify their actions. This article is very much in line with section 6 of the Code of Practice which states an employer should sanction those who subject an individual to detrimental treatment for raising concerns.

20. There are problems with Article 12's definition that a whistleblower will be disciplined if the concerns they raise are "malicious" or "frivolous". Whistleblowing arrangements are written to reassure the majority of staff that there is safe alternative to silence. There is of course a risk that such concerns are raised with ulterior motives. This might involve an attempt to secure immunity for their own wrongdoing, or to gain leverage for their own employment position, or the whistleblower may have a personal issue with the person at the centre of the wrongdoing. Experience shows that there are often mixed motives involved with whistleblowing issues, particularly if, as part of trying to raise a concern, an individual finds that their personal situation has deteriorated. It is too easy for those involved in wrongdoing to use the question of motive as a means to attack the person who has raised the concern and we would suggest that there needs to be much caution used in considering the circumstances in which an individual can be disciplined for having questioned malpractice.

    For these reasons the Code of Practice recommends when deciding whether to discipline a member of staff who is deemed to have misused the whistleblowing arrangements, this should only take place where the information provided was false and the member of staff was aware of this at the time the concern was raised.[4]

[3] Section 4 d) of the Whisleblowing Code of Practice
[4] Section 4 c) of the Whistleblowing Code of Practice

21. The wording for Article 12 should be changed to mirror section 5 c) of the Code of Practice removing "malicious" and "frivolous", replacing it with an assurance that a whistleblower will not suffer a detriment for raising a concern unless later it was shown that the information provided was false and the member of staff was aware of this.

Training and Awareness

22. We welcome the commitment in Article 14 around training for staff in terms of general awareness over the whistleblowing arrangements and for managers on how to handle a whistleblowing concerns raised with them. We also welcome the proposal that training will form part of the induction for new staff, and training will be repeated annually.

23. We suggest adding to this article a commitment to produce a specific whistleblowing policy for all staff and a stand-alone piece of guidance for managers on how to handle reported concerns. We would suggest that both written policies follow the principles established in the Code of Practice (see Annex B for more details).[5]

Reporting

24. The proposal for the Ombudsman to report whistleblowing figures around the use of whistleblowing arrangements and training as part of existing reporting mechanisms is welcome. There are similar recommendations within the Code of Practice but the document goes a little further in suggesting the following areas additional reporting areas-

    1. The number and types of concerns raised;
    2. Any relevant litigation; and
    3. Staff awareness, trust and confidence in the arrangements.[6]

    We recommend that the European Ombudsman considers including these measures in any reporting mechanism.

External Whistleblowing

25. The Code of Practice recommends that any whistleblowing arrangements should include a list of external routes for staff to use (typically these tend to be regulators or law enforcement bodies). We are pleased to note Article 16 has the European Anti-Fraud Office (OLAF) included as an option, but we are concerned that the article misses a number of other external options. Under Article 22b (96) staff are protected when they approach the following external bodies[7]-

    1) The President of the Commission
    2) The Court of Auditors
    3) The Council of Europe
    4) The European Parliament

[5] Section 4- 6 of the Whistleblowing Code of Practice
[6] Section 8 of the Whistleblowing Code of Practice
[7] Article 22b (96) Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, OJ 2013 L 287, p. 15, both as last amended on 22 October 2013.

26. All whistleblowing arrangements seek to assure staff that raising concerns through internal systems is a safe option, but there will be occasions where staff feel the internal options are not appropriate. This can be for a variety of reasons, for example, where the concerns have been raised but not responded to, or where the managers who normally receive concerns are implicated in the wrongdoing etc. Without acknowledging these external options it may increase the possibility that staff either raise their concerns anonymously to the media, or worse they will stay silent about the wrongdoing or malpractice they have witnessed.

27. External whistleblowing options create a key release valve within the system when they are needed, even if the majority of staff will want to use the internal options. Our suggestions is the external bodies listed in Article 22b (96) are added to the list of options that staff can use to raise concerns.[8]

28. We are also pleased to note Article 16 states the Ombudsman will encourage contractors to adopt their own whistleblowing rules and procedures.

Review of the Whistleblowing Arrangements

29. There is always the danger that policies can become static documents that are left to gather dust in draws or on shelves. The Whistleblowing Code of Practice recommends a number of review and assessment measures that can test how well whistleblowing policies and arrangements operate in practice. These assessment measures are most effective when they are reviewed at a senior level within an organisation.

30. Our suggestion is that the Ombudsman should adopt the proposals in the Code of Practice which states that in addition to written guidance on raising and handling concerns the organisations should-

> "a) identify how and when concerns should be recorded;
> b) ensure, through training at all levels, the effective implementation of the whistleblowing arrangements;
> c) identify the person with overall responsibility for the effective implementation of the whistleblowing arrangements;
> d) conduct periodic audits of the effectiveness of the whistleblowing arrangements, to include at least: i. a record of the number and types of concerns raised and the outcomes of investigations;
> ii. feedback from individuals who have used the arrangements;
> iii. any complaints of victimisation;
> iv. any complaints of failures to maintain confidentiality;
> v. a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety reports;
> vi. a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);"

[8] Article 22b (96) Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, OJ 2013 L 287, p. 15, both as last amended on 22 October 2013.

These measures will help the Ombudsman assess the level of awareness and the level of trust for the whistleblowing arrangements among staff.

A Summary of PCaW's Recommendations

1. Article 2 should have the legal language removed from the definition of whistleblowing with the definition from section 2 of the Code of Practice adopted in its place.
2. Article 4 should be exclude managers as a source of advice.
3. Article 6 should have removed from it any reference to blowing the whistle being viewed positively in relation to any prior misconduct issue.
4. Article 7 should be extended so that confidentiality if requested is guaranteed unless disclosure is required by law.
5. Article 12 should have the terms "malicious" and "frivolous" removed when deciding whether to discipline someone for raising a malicious concern. Instead the wording from section 5 c) of the Code of Practice should be adopted which says a whistleblower will be protected unless it is shown this person knowingly raised concerns that were false.
6. Article 14 should include a provision that creates a written whistleblowing policy for all staff, and a standalone piece of guidance for managers handling whistleblowing concerns. Both policies should follow the principles laid out in the Code of Practice.
7. Article 15 should include reporting measures suggested in section 8 of the Code of Practice.
8. Article 16 should include all external whistleblowing routes found in Article 22b (96).
9. Article 18 should include measures for an annual review of the whistleblowing policy and arrangements at the most senior level within the Ombudsman.

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Annex A

The Whistleblowing Commission was formed of the following members:

- The Right Honourable Sir Anthony Hooper (Former Court of Appeal Judge and Member of Matrix Chambers (Chair))
- Gary Walker (Former NHS Chief Executive and whistleblower)
- Michael Woodford (Former Olympus President & CEO and whistleblower)
- Lord Burns (Chairman of Santander UK and Channel 4)
- The Very Revd Dr David Ison (Dean of St Paul's Cathedral)
- John Longworth (Director General British Chambers of Commerce)
- Michael Rubenstein (Independent legal publisher and discrimination law expert)
- Sarah Veale (Head of Equality and Employment Rights at the Trades Union Congress)

Annex B

Extract from the Whistleblowing Commission Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK, pages 28 – 29, published November 2013

"Draft Code of Practice Whistleblowing Arrangements

Introduction
Every employer faces the risk that something will go badly wrong in their organisation and ought to welcome the opportunity to address it as early as possible. Whenever such a situation arises the first people to know of such a risk will usually be "workers"[9]yet while these are the people best placed to speak up before damage is done, they often fear they have the most to lose if they do (otherwise known as "whistleblowing").

This Code of Practice provides practical guidance to employers, workers and their representatives and sets out recommendations for raising, handling, training and reviewing whistleblowing in the workplace. The Code is issued under section X of the Employment Rights Act 1996 and it was laid before both houses of Parliament on X. It comes into effect by order of the Secretary of State on X.

A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, courts and tribunals must take the code into account when considering issues of whistleblowing.

The Code of Practice

1. This Code sets out standards for effective whistleblowing arrangements. It is designed to help employers, workers and their representatives deal with whistleblowing.

2. Whistleblowing is the raising of a concern, either within the workplace or externally, about a danger, risk, malpractice or wrongdoing which affects others.

3. When developing whistleblowing arrangements employers should consult staff and their representatives.

4. As part of the whistleblowing arrangements, there should be written procedures covering the raising and handling of concerns. These procedures should be clear, readily available, well-publicised and easily understandable.

5. The written procedures for raising and handling concerns:

    a) should identify the types of concerns to which the procedure relates, giving examples relevant to the employer;

[9] Worker is defined in section 230 of the Employment Relations Act 1996

b) should include a list of the persons and bodies with whom workers can raise concerns, this list should be sufficiently broad to permit the worker, according to the circumstances,[10] to raise concerns with:

   i. the worker's line manager;

   ii. more senior managers;

   iii. an identified senior executive and /or board member; and

   iv. relevant external organisations (such as regulators);

c) should require an assurance to be given to the worker that he/she will not suffer detriment for having raised a concern, unless it is later proved that the information provided by the worker was false to his or her knowledge;

d) should require an assurance to be given to the worker that his or her identity will be kept confidential if the worker so requests unless disclosure is required by law;

e) should require that a worker raising a concern:

   i. be told how and by whom the concern will be handled; ii. be given an estimate of how long the investigation will take;

   ii. be told, where appropriate, the outcome of the investigation[3]

   iii. be told that if the worker believes that he/she is suffering a detriment for having raised a concern, he/she should report this; and

   iv. be told that he/she is entitled to independent advice.

6. The employer should not only comply with these procedures but should also sanction those who subject an individual to detriment because he/she has raised a concern and should inform all workers accordingly.

7. In addition to the written procedure for raising and handling concerns, the employer should:

   a) identify how and when concerns should be recorded;

   b) ensure, through training at all levels, the effective implementation of the whistleblowing arrangements;

   c) identify the person with overall responsibility for the effective implementation of the whistleblowing arrangements;

   d) conduct periodic audits of the effectiveness of the whistleblowing arrangements, to include at least:

[10] By "according to the circumstances" we mean workers should be able to bypass their manager, where they fear that they will suffer a detriment or that their concern will not be listened to.

i. a record of the number and types of concerns raised and the outcomes of investigations;

ii. feedback from individuals who have used the arrangements;

iii. any complaints of victimisation;

iv. any complaints of failures to maintain confidentiality;

v. a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety reports;

vi. a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);

vii. a review of any relevant litigation; and

viii. a review of staff awareness, trust and confidence in the arrangements.

e) make provision for the independent oversight and review of the whistleblowing arrangements by the Board, the Audit or Risk Committee or equivalent body. This body should set the terms of reference for the periodic audits set out in 7(d) and should review the reports.

8. Where an organisation publishes an annual report, that report should include information about the effectiveness of the whistleblowing arrangements, including:

a) the number and types of concerns raised;

b) any relevant litigation; and

c) staff awareness, trust and confidence in the arrangements."

The full report is available on the PCAW website, http://www.pcaw.org.uk/whistleblowing-commission-public-consultation