



Department
of Health

Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations

Consultation on Draft Regulations

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1. Executive summary

In the late 1990s the then Government improved legal protection for workers who wanted to raise concerns about wrongdoing in the workplace. The Public Interest Disclosure Act 1998 amended the Employment Rights Act 1996 to assist in holding employing organisations to account for their treatment of whistleblowers. It was hoped that workers, who raised the alarm about serious matters in the public interest, would no longer fear reprisal from employers and, in turn, more people would come forward with their concerns.

However, the 2013 report of the Mid Staffordshire NHS Foundation Trust Public Inquiry exposed unacceptable levels of patient care and a culture that deterred staff from raising concerns. Consequently, significant failings in patient care went unreported for a long time.

In response to concerns about whistleblowing in the NHS, the Secretary of State for Health commissioned Sir Robert Francis QC to carry out an independent policy review, “Freedom to Speak Up”.

Principle 20 of the Freedom to Speak Up report and the three related actions recommended that legal protection for workers raising concerns should be enhanced. The Government responded immediately by introducing new legislation in the Small Business, Enterprise and Employment Act 2015 to enable regulations to be made to protect whistleblowers from discrimination by prospective NHS employers (see Annex A).

We have now developed draft regulations to prohibit an NHS employer from discriminating against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.

This GB-wide consultation is issued in consultation with the three GB Health Departments in England, Scotland and Wales. It seeks comments and views on the draft Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations, a copy of which can be found at Annex B.

2. Policy background

Action 20.1 of the Freedom to Speak Up Review report (2015) recommended that the Government should 'review the protection afforded to those who make protected disclosures, with a view to including discrimination in recruitment by employers (other than those to whom the disclosure relates) on the grounds of having made that disclosure as a breach of either the Employment Rights Act 1996 or the Equality Act 2010.'

In 2015, the Government amended the Employment Rights Act 1996 by introducing a power to make regulations to prohibit a prospective NHS employer from discriminating in recruitment against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.

Aside from the findings of the Freedom to Speak Up Review, there are a number of reasons why the Government is looking to extend the application of the law for the NHS: The health sector has one of the highest instances of whistleblowing reporting and consequently has the greatest potential for discrimination against whistleblowers to occur.

The NHS is one of the largest employers in the world and it should operate to the very highest standards of integrity in its recruiting practices. This legislation is intended to help further the promotion of a culture of openness in the NHS, where raising of concerns should be welcome and supported because of the consequences for patient safety.

The NHS makes a large investment in its employees, particularly those with a clinical role. We do not want to lose such people from the NHS where it is the case that there is no problem with their clinical skills and they are just facing discrimination for doing the right thing.

3. The current legal position

The Freedom to Speak Up Review concluded that ‘individuals are suffering, or at risk of suffering, serious detriments in seeking re-employment in the health service after making a protected disclosure’.¹ The Review received evidence that blacklisting of whistleblowers is taking place in the NHS.

Currently a worker who feels they have suffered detriment or been unfairly dismissed, as a result of making a protected disclosure, can take their case to an Employment Tribunal. If the Employment Tribunal finds in their favour, they can be awarded compensation and, in the case of employees, an order for reinstatement or re-engagement may be made. However, these provisions do not provide protection to an applicant being discriminated against by a potential employer during a recruitment exercise because the employer believes they have previously made a protected disclosure. During The Freedom to Speak Up Review, Sir Robert Francis QC heard from and met a number of people who were struggling to get alternative employment and were concerned that they may have been blacklisted. While the Government has taken action to deal with blacklisting relating to trade union activity, this does not address the behaviour of recruiting organisations who may, for example, have heard, sometimes incorrectly, via the media or ‘grapevine’ that an applicant is a whistleblower.

Section 49B of the Small, Business, Enterprise and Employment Act 2015 (Annex A) aims to address such discrimination and provides the Secretary of State with a power, through regulations, to prohibit certain NHS public bodies from discriminating against an applicant because it appears to the NHS employer that the applicant has previously made a protected disclosure.

¹ A protected disclosure is defined by section 43A of the Employment Rights Act 1996. To be covered by whistleblowing law, a worker making a disclosure must reasonably believe two things: (i) that they are acting in the public interest; and (ii) that the disclosure tends to show past, present or likely future wrongdoing falling into one or more specified categories, which include endangering someone’s health and safety; criminal offences; failure to comply with an obligation set out in law; miscarriages of justice; and damage to the environment.

4. Proposed Regulations

The intention is to give protection from discrimination to an NHS applicant who has previously made, or appears to have made, a protected disclosure under the Employment Rights Act 1996.

Section 49B of the Small, Business, Enterprise and Employment Act 2015 (Annex A) aims to address such discrimination and provides the Secretary of State with a power, through regulations, to prohibit certain NHS employers from discriminating against an applicant because it appears to the NHS employer that the applicant has previously made a protected disclosure.

The draft regulations are attached at annex A. We have generally used the Employment Relations Act 1999 (Blacklists) Regulations 2010 as a starting point for the draft Regulations.

The draft regulations would do the following:

- Prohibit discrimination by certain NHS employers in the recruitment of an applicant (i.e. by refusing the application or otherwise treating the applicant less favourably than other applicants are treated or would be treated in relation to the same contract post or office) because it appears that the applicant has made a protected disclosure.

- Give the applicant a right to complain to an employment tribunal if they have been discriminated against on this basis.

- Set out a timeframe in which a complaint to the tribunal must be lodged.

- Set out the remedies which the tribunal may or must award if a complaint is upheld.

- Make provision as to the amount of compensation that can be awarded.

- Give the applicant a right to bring a claim in the County Court or the High Court for breach of statutory duty in order to, amongst other things, restrain or prevent discriminatory conduct.

- Treat discrimination of an applicant by a worker or agent of the prospective employer (NHS body), as if it was discrimination by the NHS body itself.

The overarching intent of the draft regulations is to make clear that discrimination against whistleblowers seeking jobs or posts with certain NHS employers is prohibited; that the individual applicants have a legal recourse should they feel they have been discriminated against, with appropriate remedies should their complaint be upheld; and to help embed in NHS bodies a culture that supports workers to raise concerns and welcomes new workers who have done so in the past.

For the purposes of these regulations, section 49B of the Employment Rights Act 1996 (see Annex B):

- lists the NHS bodies that may be included within the meaning of an "NHS employer" in the regulations;

- defines an "applicant" as an individual who applies to an NHS employer for a contract of employment; a contract to do work personally; or appointment to an office or post;

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provides that an NHS employer "discriminates" against an applicant if the NHS employer refuses the applicant's application or in some other way treats the applicant less favourably than it treats or would treat other applicants in relation to the same contract, office or post;

provides that the Secretary of State may make regulations prohibiting a prospective NHS employer from discriminating against the applicant because it appears to the prospective NHS employer that the applicant has previously made a protected disclosure. It does not matter whether the applicant in fact has made such a disclosure or not.

5. Detail of the regulations

This section goes into the detail of the regulations and explains the policy rationale behind the legislation. We would be grateful for your views as to whether our policy aims are appropriate and if there are any additional factors we need to consider.

In addition, your views are sought on whether the regulations, as drafted at Annex B, fulfil the policy aims of the legislation and where it does not, how the provisions of the regulations could be improved.

Interpretation (regulation 2)

This regulation specifies the NHS public bodies that fall within the meaning of "NHS employer" for the purpose of the regulations. It includes all the NHS bodies that we are permitted to include by section 49B of the Employment Rights Act 1996 (see Annex A).

Prohibition of discrimination because of protected disclosure (regulation 3)

This regulation prohibits an NHS employer from discriminating against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.

Right of complaint to an employment tribunal (regulation 4)

This regulation gives an applicant a right to complain to an employment tribunal in respect of a breach of regulation 3. It requires the tribunal to find that discrimination has occurred if there are facts from which it could decide that this is the case, unless the NHS employer shows that it has not discriminated.

Time limit for proceedings under regulation 4 (regulation 5)

This regulation deals with the time limit for bringing such a complaint to an employment tribunal. It sets a time limit of 3 months from the date of the conduct to which the complaint relates but allows the tribunal to consider out of time complaints in some circumstances. The regulation sets out how the 3 months is to be calculated in a range of different circumstances (for example, refusal to employ or appoint, omission to offer a job or post, withdrawal of an offer (of a job or post), and conduct causing an applicant to withdraw from the process).

As drafted, this regulation is comparable with both the trade union blacklisting regulations. A time limit of 3 months also applies to whistleblowing claims.

Q1. Do you agree with the time limit of 3 months in draft regulation 5? Does this present any issues?

Q2. Are there any types of cases that should be mentioned in regulation 5(3), as to the date of conduct for the purposes of calculating the 3 month time limit?

Remedies in proceedings under regulation 4 (regulation 6)

This regulation deals with the remedies which a tribunal may or must award where a complaint is made under regulation 4 and the employment tribunal has found that the NHS employer has [breached regulation 3][discriminated]. In those circumstances the employment tribunal must make a declaration to that effect. To set right the wrong doing, the Employment Tribunal can order the NHS employer to pay compensation to the complainant. It also may make a recommendation to the NHS employer to take specified steps, within a set time period, to remove or reduce the adverse effect on the complainant.

Amount of compensation (regulation 7)

This regulation provides for awards of compensation to be made in proceedings under regulation 4. The tribunal may award such compensation as it considers just and equitable.

There is no minimum or maximum prescribed in the regulation. This is comparable with existing whistleblowing claims.

This regulation also sets out the factors that the employment tribunal must take into account in considering the sum of compensation that it should award, namely the conduct complained of and loss sustained by the applicant. This includes taking into account loss of any benefit to the complainant. The tribunal must also apply the rule concerning the duty to mitigate loss which applies to damages under common law. This regulation also sets out factors which the tribunal may have regard to (for example the actions of the applicant before the conduct complained of). This regulation allows the tribunal to increase its award or make an award if the NHS employer fails to comply with a recommendation for the NHS employer to take specified steps.

Q3. Do you agree with the approach taken not to limit the amount of compensation, so that these regulations are comparable with existing whistleblowing claims?

Action for breach of statutory duty (regulation 8)

This regulation provides for an applicant to bring a claim in the County Court or the High Court (depending on the claim's value) for breach of statutory duty in respect of a breach of regulation 3. The purpose of such a claim would be to seek a court order to restrain or prevent discriminatory conduct that has occurred or is likely to occur. In addition, the court could award damages, including compensation for injured feelings. The applicant cannot bring a complaint under regulation 4 as well take action under regulation 8 in respect of the same conduct by the NHS employer, except for the purposes of obtaining a court order to restrain or prevent discriminatory conduct. (An employment tribunal does not have powers to make a restraining or similar order.)

Q4. Do you agree that the regulations should provide for discrimination to be actionable as a breach of statutory duty?

Q5. Are there are any practical problems arising from regulation 8?

Detail of the regulations

Discrimination by worker or agent of NHS employer (regulation 9)

This regulation provides for circumstances in which discrimination by a worker or agent of an NHS employer, is to be treated as discrimination by the NHS employer. Those circumstances are where the discriminatory conduct occurs in the course of employment or, in the case of an agent, where discriminatory conduct occurs with the authority of the employer. This regulation seeks to put responsibility on the employer to put in place steps to develop a culture of openness and an expectation on its workers who are involved in recruitment, to carry out the process in a non-discriminatory way as regards whistleblowers and to ensure that it is not at odds with this legislation.

An NHS employer would have a defence if it could demonstrate to the employment tribunal that it took all reasonable steps to prevent the worker [and agent] from doing things or failing to do things in respect of which proceedings have been brought.

Q6: Do you agree with the proposal that, for the purposes of the regulations, discrimination against an applicant by a worker or agent of an NHS body, should be treated as discrimination by the NHS body itself in the above circumstances – and that the NHS body should have a defence if it can demonstrate it took all reasonable steps to prevent workers and agents from doing what they did or failing to do what they did?

Consequential amendments (regulation 10)

5.15 This regulation lists three consequential amendments, which have the following effect:

The complaint must be dismissed if the NHS Employer acted for reasons of national security.

If the applicant is in receipt of certain social security benefits, the Tribunal can order some of the compensation to be paid by the NHS Employer to the Department of Work and Pensions, not to the applicant.

The provision of a right of appeal to the Employment Appeals Tribunal.

6. Impact of proposals

Public Sector Equality Duty

The general Public Sector Equality Duty in section 149 of the Equality Act 2010 comprises three equality objectives, and requires public authorities to have due regard to the need to:

eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act;

advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it; and,

foster good relations between people who share a relevant protected characteristic and people who do not share it.

These three aims all apply to the following relevant protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Marriage and civil partnership is also a protected characteristic in relation to the first aim of having due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act.

The draft Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations would give protection to applicants² to an NHS Employer in relation to certain recruitment processes. The protections that the draft regulations offer to the applicant do not replace any existing employment or equality rights. Indeed they add to the existing protections already available.

The NHS employer will be prohibited from discriminating in relation to recruitment of those applicants applying to the NHS who it appears have previously made a protected disclosure within the meaning of the Employment Rights Act 1996. This is consistent with the duty in the Equality Act 2010 to have due regard to the need to eliminate discrimination. The prohibition on certain NHS employers from discriminating against applicants because it appears they have blown the whistle, is also intended to help advance equality of opportunity for whistleblowers who share relevant protected characteristics, and to foster good relations between those who share protected characteristics and those who do not.

Taking action to eliminate discrimination against whistleblowers is likely to have a positive differential impact on people who share relevant protected characteristics and, in particular those who share the protected characteristic of race. The independent review of Freedom to Speak Up found that individuals from a black, minority or ethnic background ("BME individuals") are more likely to experience disproportionate detriment in response to speaking up. The report

² The definition of an "applicant" is an individual who applies to an NHS employer for a contract of employment; a contract to do work personally; or appointment to an office or post; this is in section 49B(2) of the Employment Rights Act 1996.

Impact of proposals

of FTSU stated that "There is also a perception that BME staff are more likely to be referred to professional regulators if they raise concerns, more likely to receive harsher sanctions, and more likely to experience disproportionate detriment in response to speaking up."

Insofar as there might be a perception of disproportionate detriment experienced by BME individuals seeking recruitment by the NHS, the draft Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations are intended to eliminate such detriment. The protections conferred by these regulations should therefore also help advance equality of opportunity for whistle-blowers from a BME background and help foster good relations between those who share the protected characteristic of race and those who do not, by ensuring a more level playing field, including in relation to employment opportunities in the NHS.

Other research indicates that women may also experience more discrimination than men, if they raise concerns in the work place. We infer from this that the regulations are likely to have a positive differential impact in mitigating discrimination and detriment that women may experience in seeking recruitment, because they had previously raised concerns. Again, the regulations are therefore likely to advance equality of opportunity and to foster good relations between those who share the protected characteristic of sex and those who do not, by ensuring a more level playing field, including in relation to employment opportunities in the NHS.

The FTSU review did not receive evidence to suggest that individuals who share the other protected characteristics and who raised concerns, experienced disproportionate detriment or discrimination but insofar as this could be the case, the regulations are likely to have a positive differential impact in eliminating such detriment and ensuring fairer employment opportunities. This applies to those who share the protected characteristics of disability, gender reassignment, pregnancy and maternity, religion or belief and sexual orientation.

Overall, we do not envisage that these regulations will have a negative impact on individuals sharing any of the relevant protected characteristics listed in the Equality Act 2010 and we think we have gone as far as we can to promote equality of opportunity and to foster good relations between people who share relevant protected characteristics and those who do not. We will keep the implementation of the policy under review and the regulations will be reviewed five years after their implementation. However, if you do have any concerns that the regulations may have an impact on people sharing relevant protected characteristics, we would welcome your comments. We will update our analysis following information received from individuals and organisations during the consultation.

Q7 - Do you have any concerns about the impact of any of the proposals on people sharing relevant protected characteristics as listed in the Equality Act 2010? Is there anything more we can do to advance equality of opportunity and to foster good relations between such people and others?

Family Test

Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations

The Family Test introduces an explicit family perspective to the policy making process, and seeks to ensure that potential impacts on family relationships and functioning are made explicit and recognised in the process of developing new policy

We believe that the proposed regulations will have a positive impact on families. This is because the regulations will give protection from discrimination to an applicant who appears to have made, a protected disclosure within the meaning of the Employment Rights Act 1996, which is a protection that currently does not exist.

Seeking employment, be it simply because an individual wants to progress in their career or because they are unemployed, can be a stressful experience. Being fearful that your previous actions in raising concerns might be used against you, makes the process of seeking employment more stressful. These stresses can, in turn, impact on the quality of the family relationship, especially if the family is experiencing a loss of income.

We hope that the protection conferred by the regulations, will mitigate any fear or anxiety of potential discrimination in recruitment processes within the NHS, on the basis of having previously made a protected disclosure. This will, in turn, help reduce negative impacts on families going through a key transitional period such as seeking employment and redundancy.

If you do have any concerns that the regulations may have an impact on families, we would welcome your comments. We will update our analysis following information received from individuals and organisations during the consultation.

Q8 - Do you have any concerns about the impact of any of the proposals may have on families and relationships? Impact on business

Government policy requires us to give consideration to the impact on business and put a cost value on the impact. We have considered how the implementation of these regulations will impact on different sectors and concluded that the proposed regulations do not impact on business. This is because they are only applicable to a defined list of NHS public bodies; which are for this purpose not classified as businesses.

7. Responding to the consultation and next steps

This section outlines the areas where we are seeking a response to this consultation.

In this document we have set out the policy behind the regulations, what the regulations are proposed to deliver and the detail of those regulations. We are seeking your views as to whether the proposed regulations will deliver on the policy of protecting applicants for jobs in the NHS from discrimination, because it is believed they have previously made a protected disclosure.

All the consultation questions throughout this document are listed in the next section.

This consultation will run for eight weeks, closing on 12th May 2017

To respond to this consultation, you can:

Answer the questions online, at Citizens Space

Email your responses to: giles.crompton-howe@dh.gsi.gov.uk

Post your responses to:

c/o Giles Crompton-Howe
Room 2E11
Quarry House
Quarry Hill
Leeds
West Yorkshire
LS2 7UE

Once the consultation has concluded we will undertake an analysis of the responses and consider if any changes to the regulations are necessary. A response to the consultation will be published providing a breakdown of the analysis and details of any changes to the regulations.

As stated in paragraph 1.6 this is a GB-wide consultation issued on behalf of the three GB Health Departments in England, Scotland and Wales. We will seek the views of Ministers in the Scottish Parliament and Welsh Assembly, before the regulations are laid before Parliament.

8. Consultation questions

The Government invites comment on any aspect of its approach to the drafting of the regulations. However, the following are of particular importance and the Government seeks your views on them in particular.

Q1. Do you agree with the time limit of 3 months in draft regulation 5? Does this present any issues?

Q2. Are there any types of cases that should be mentioned in regulation 5(3), as to the date of conduct for the purposes of calculating the 3 month time limit??

Q3. Do you agree with the approach taken not to limit the amount of compensation, so that these regulations are comparable with existing whistleblowing claims?

Q4. Do you agree that the regulations should provide for discrimination to be actionable as a breach of statutory duty?

Q5. Are there any practical problems arising from regulation 8?

Q6: Do you agree with the proposal that, for the purposes of the regulations, discrimination against an applicant by a worker or agent of an NHS body, should be treated as discrimination by the NHS body itself in the above circumstances – and that the NHS body should have a defence if it can demonstrate it took all reasonable steps to prevent workers and agents from doing what they did or failing to do what they did?

Q7 - Do you have any concerns about the impact of any of the proposals on people sharing relevant protected characteristics as listed in the Equality Act 2010? Is there anything more we can do to advance equality of opportunity and to foster good relations between such people and others?

Q8 - Do you have any concerns about the impact of any of the proposals may have on families and relationships?

9. Annex A – Draft Regulations

STATUTORY INSTRUMENTS

2016 No. ***

terms and conditions of employment

Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2016

Made - - - - - ***

Coming into force [in accordance with regulation 1(b)]

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 49B of the Employment Rights Act 1996(3).

In accordance with section 236(3) of that Act, a draft of these Regulations was laid before Parliament and approved by a resolution of each House of Parliament.

In accordance with section 49B(8) of that Act, the Secretary of State has consulted Welsh Ministers in relation to regulation 2(l) to (n) (inclusion of certain Welsh health bodies in definition of “NHS employer”).

In accordance with section 49B(9) of that Act, the Secretary of State has consulted the Scottish Ministers in relation to regulation 2(o) to (r) (inclusion of certain Scottish health bodies in definition of “NHS employer”).

Citation, commencement and extent

These Regulations–

may be cited as the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2016;

come into force on the day after the day on which they are made;

extend to Great Britain.

Interpretation

In these Regulations, “NHS employer” means any of the following NHS public bodies–
the National Health Service Commissioning Board;

a clinical commissioning group;

a Special Health Authority in England;

an NHS trust in England;

an NHS foundation trust;

the Care Quality Commission;

Health Education England;

the Health Research Authority;

⁽³⁾ 1996 c.18. Section 49B was inserted by section 149 of the Small Business, Enterprise and Employment Act 2015 (c.26).

Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations

the Health and Social Care Information Centre;

the National Institute for Health and Care Excellence;

Monitor;

a Special Health Authority established under section 22 of the National Health Services (Wales) Act 2006;

an NHS trust established under section 18 of that Act;

a Local Health Board established under section 11 of that Act;

the Common Services Agency for the Scottish Health Service;

Healthcare Improvement Scotland;

a Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978;

a Special Health Board constituted under that section.

Prohibition of discrimination because of protected disclosure [power: s.49B(1)]

An NHS employer must not discriminate⁽⁴⁾ against an applicant⁽⁵⁾ because it appears to the NHS employer that the applicant has made a protected disclosure⁽⁶⁾.

Right of complaint to an employment tribunal [power s.49B(4)(b)]

—a) An applicant has a right of complaint to an employment tribunal⁽⁷⁾ against an NHS employer if the NHS employer contravenes regulation 3.

If there are facts from which the employment tribunal could decide, in the absence of any other explanation, that an NHS employer contravened regulation 3, the tribunal must find that such a contravention occurred unless the NHS employer shows that it did not contravene regulation 3.

Time limit for proceedings under regulation 4 [power: section 49B(4)(f)]

—b) Subject to paragraph (4), an employment tribunal may not consider a complaint under regulation 4 unless it is presented to the tribunal before the end of the period of three months beginning with the date of the conduct to which the complaint relates.

An employment tribunal may consider a complaint under regulation 4 that is otherwise out of time if, in all the circumstances of the case, it considers it just and equitable to do so.

In the cases specified in paragraphs (a) to (f), the date of the conduct to which a complaint under regulation 4 relates is-

in the case of an actual refusal by an NHS employer to employ or appoint an applicant, the date of the actual refusal;

in the case of a deliberate omission-

⁽⁴⁾ “Discriminate” has the meaning given by section 49B(3) of the Employment Rights Act 1996.

⁽⁵⁾ S.49B(2) of the Employment Rights Act 1996 provides that an “applicant”, in relation to an NHS employer, means an individual who applies to the NHS employer for (a) a contract of employment, (b) a contract to do work personally, or (c) appointment to an office or post.

⁽⁶⁾ “Protected disclosure” is defined in section 43A of the Employment Rights Act 1996.

⁽⁷⁾ An “employment tribunal” is a tribunal established under section 1 of the Employment Tribunals Act 1996 (c.17).

Annex A – Draft Regulations

to entertain and process an applicant's application or enquiry, or

to offer a contract of employment, a contract to do work personally, or an appointment to an office or post,

the end of the period within which it was reasonable to expect the NHS employer to act;

in the case of conduct which causes an applicant to withdraw or no longer pursue an application or enquiry, the date of that conduct;

in a case where the NHS employer withdrew an offer, the date when the offer was withdrawn;

in any other case where the NHS employer made an offer which was not accepted, the date when the NHS employer made the offer.

Where a complaint under regulation 4 relates to conduct extending over a period, the conduct is to be treated as done at the end of the period.

Remedies in proceedings under regulation 4 [power: section 49B(4)(c) and (d)]

—c) Where an employment tribunal finds in proceedings under regulation 4 that there has been a contravention of regulation 3-

it must make a declaration to that effect;

it may order the NHS employer to pay compensation to the applicant in respect of the conduct complained of;

it may recommend that, within a specified period, the NHS employer take specified steps for the purpose of obviating or reducing the adverse effect on the applicant of the discrimination to which the proceedings relate.

Amount of compensation [power: section 49B(4)(d)]

—d) Subject to the following paragraphs, the amount of compensation which the employment tribunal may award must be such as the tribunal considers just and equitable in all the circumstances.

When considering the amount of compensation to award, if any, the tribunal must have regard to the conduct complained of and to any loss sustained by the applicant which was caused by that conduct.

The reference in paragraph (2) to loss sustained by the applicant includes-

any expenses which the applicant reasonably incurred because of the discriminatory conduct of the NHS employer;

the loss of any benefit which P might reasonably be expected to have had but for that conduct.

In ascertaining the loss, the tribunal must apply the same rule concerning the duty to mitigate loss as applies to damages recoverable under the common law of England and Wales or Scotland.

When considering the amount of compensation, if any, to award, the tribunal may also have regard to-

the actions of the applicant before the conduct complained of;

whether the applicant acted so as to contribute to or cause, to any extent, that conduct.

If the NHS employer fails without reasonable justification to comply with a recommendation under regulation 6(c), the tribunal may increase its award or, if it has not made such an award, make one.

Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations

Action for breach of statutory duty [power: section 49B(4)(c)]

—e) A contravention of regulation 3 is actionable as a breach of statutory duty.

If there are facts from which the court could conclude, in the absence of any other explanation, that the defendant has contravened, or is likely to contravene, regulation 3, the court must find that such a contravention has occurred, or is likely to occur, unless the defendant shows that it did not, or is not likely to occur.

In proceedings brought by virtue of this regulation, the court may (without prejudice to any of its other powers)-

make such order as it considers appropriate for the purpose of restraining or preventing the defendant from contravening regulation 3; and

award damages, which may include compensation for injured feelings.

Except as provided in paragraph (5), an applicant may not complain to an employment tribunal under regulation 4 and bring an action for breach of statutory duty in respect of the same conduct.

An applicant may complain to an employment tribunal under regulation 4 and bring an action for breach of statutory duty in respect of the same conduct for the purpose of restraining or preventing the defendant from contravening regulation 3.

Discrimination by worker or agent of NHS employer [power: s.49B(4)(a)]

—f) Discrimination by a worker of an NHS employer is to be treated, for the purposes of these Regulations, as discrimination by the NHS employer where the discriminatory conduct occurs in the course of the worker's employment.

Discrimination by an agent of an NHS employer is to be treated, for the purposes of these Regulations, as discrimination by the NHS employer where the discriminatory conduct occurs with the authority of the NHS employer.

It does not matter whether the NHS employer knows about or approves the conduct of the worker or agent.

In proceedings under regulation 4 (complaint to employment tribunal) or 8 (breach of statutory duty), in respect of anything done in the course of employment by a worker of an NHS employer, or in the course of an agent acting with the authority of the NHS employer, it is a defence for the NHS employer to show that it took all reasonable steps to prevent the worker from doing [or failing to do] that thing; or

from doing [or failing to do] anything of that description.

Consequential amendments [power: s.49B(4)(f)]

—g) The Employment Tribunals Act 1996 is amended as follows.

In section 10(1) (dismissal of complaint where action taken for purpose of safeguarding national security)-

omit the word "or" at the end of paragraph (b); and

after paragraph (c) insert-

“, or

(a) regulation 4 of the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2016 (complaint to employment tribunal).”.

Annex A – Draft Regulations

In section 16(1) (recoupment of benefits: payments in relation to which power exercisable)–
omit the word “or” at the end of paragraph (d); and
after paragraph (e) insert–

“or

(f) payments by NHS employers to applicants under regulation 6 of the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2016 (remedies).”.

In section 21(1) (jurisdiction of Appeal Tribunal) –

omit the word “or” at the end of paragraph (w); and

after paragraph (x) insert

“or

(z) the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2016.”.

Name

Date

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations give protection to individuals who apply to an NHS employer for a contract of employment, a contract to do work personally or appointment to an office or post.

Regulation 1 deals with citation, commencement and extent.

Regulation 2 defines NHS bodies who are within the NHS bodies who are to be treated as NHS employers for the purposes of the Regulations.

Regulation 3 imposes a duty on an NHS employer not to discriminate against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.

Regulation 4 allows an applicant to complain to an employment tribunal in respect of an alleged breach of regulation 3.

Regulation 5 deals with the time limit for bringing such a complaint.

Regulation 6 deals with the remedies which an employment tribunal may award where a complaint is made under regulation 4.

Regulation 7 provides for how awards of calculation are to be calculated in proceedings under regulation 4.

Regulation 8 provides that a claim may also be made for breach of statutory duty in respect of a breach of regulation 3.

Regulation 9 provides for circumstances in which discrimination by a worker or agent of an NHS employer is to be treated as discrimination by the NHS employer.

Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations

Regulation 10 makes consequential amendments to other legislation.

NB. Include paragraph re impact assessment

10. Annex B – Small, Business, Enterprise and Employment Act 2015

Section 49B Regulations prohibiting discrimination because of protected disclosure

(1) The Secretary of State may make regulations prohibiting an NHS employer from discriminating against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.

(2) An “applicant”, in relation to an NHS employer, means an individual who applies to the NHS employer for—

- (a) a contract of employment,
- (b) a contract to do work personally, or
- (c) appointment to an office or post.

(3) For the purposes of subsection (1), an NHS employer discriminates against an applicant if the NHS employer refuses the applicant's application or in some other way treats the applicant less favourably than it treats or would treat other applicants in relation to the same contract, office or post.

(4) Regulations under this section may, in particular—

(a) make provision as to circumstances in which discrimination by a worker or agent of an NHS employer is to be treated, for the purposes of the regulations, as discrimination by the NHS employer;

(b) confer jurisdiction (including exclusive jurisdiction) on employment tribunals or the Employment Appeal Tribunal;

(c) make provision for or about the grant or enforcement of specified remedies by a court or tribunal;

(d) make provision for the making of awards of compensation calculated in accordance with the regulations;

(e) make different provision for different cases or circumstances;

(f) make incidental or consequential provision, including incidental or consequential provision amending—

- (i) an Act of Parliament (including this Act),
- (ii) an Act of the Scottish Parliament,
- (iii) a Measure or Act of the National Assembly for Wales, or
- (iv) an instrument made under an Act or Measure within any of sub-paragraphs (i) to (iii).

(5) Subsection (4)(f) does not affect the application of section 236(5) to the power conferred by this section.

(6) “NHS employer” means an NHS public body prescribed by regulations under this section.

(7) “NHS public body” means—

- (a) the National Health Service Commissioning Board;

Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations

- (b) a clinical commissioning group;
- (c) a Special Health Authority;
- (d) an NHS trust;
- (e) an NHS foundation trust;
- (f) the Care Quality Commission;
- (g) Health Education England;
- (h) the Health Research Authority;
- (i) the Health and Social Care Information Centre;
- (j) the National Institute for Health and Care Excellence;
- (k) Monitor;
- (l) a Local Health Board established under [section 11](#) of the National Health Service (Wales) Act 2006;
- (m) the Common Services Agency for the Scottish Health Service;
- (n) Healthcare Improvement Scotland;
- (o) a Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978;
- (p) a Special Health Board constituted under that section.

(8) The Secretary of State must consult the Welsh Ministers before making regulations prescribing any of the following NHS public bodies for the purposes of the definition of “NHS employer”—

- (a) a Special Health Authority established under [section 22](#) of the National Health Service (Wales) Act 2006;
- (b) an NHS trust established under section 18 of that Act;
- (c) a Local Health Board established under section 11 of that Act.

(9) The Secretary of State must consult the Scottish Ministers before making regulations prescribing an NHS public body within any of paragraphs (m) to (p) of subsection (7) for the purposes of the definition of “NHS employer”.

(10) For the purposes of subsection (4)(a)—

- (a) “worker” has the extended meaning given by section 43K, and
- (b) a person is a worker of an NHS employer if the NHS employer is an employer in relation to the person within the extended meaning given by that section.