Strengthening protections for whistleblowers

Department for Business & Trade

What is the current policy/legal framework?

The Employment Rights Act provides protection and legal recourse for workers who 'blow the whistle'. A worker who blows the whistle, by making a disclosure in accordance with the criteria in the Act is making a "protected disclosure" and has the right not to suffer a detriment as a result of having made that disclosure, or if they are an employee, not to be unfairly dismissed.

For a disclosure to qualify for protection, a worker who makes a disclosure must reasonably believe that they are acting in the public interest and that the disclosure tends to show a past, present, or likely future relevant failure falling into one or more of the following categories, listed under section 43B of the ERA::

- criminal offences
- failure to comply with an obligation set out in law
- miscarriages of justice
- endangering someone's health and safety
- damage to the environment
- covering up wrongdoing in the above categories

To qualify for protection the worker usually has to have made the disclosure to their employer, legal adviser or a prescribed person.

Policy Intent

This measure adds sexual harassment to the list of relevant failures under s.43B of the Employment Rights Act 1996 (ERA) that can form the subject-matter of a protected disclosure.

Currently, sexual harassment may be covered by the existing list of relevant failures for a qualifying disclosure, as it could be a criminal offence, failure to comply with a legal obligation, or a health and safety issue.

This measure will make clear that a disclosure of information by a worker about sexual harassment can be a qualifying disclosure under s.43B of the ERA.

As a result, a worker will not need to identify an existing legal obligation, criminal offence or breach of health and safety in order to make a qualifying disclosure about sexual harassment, provided that they have complied with the other requirements in the legislation.

This will provide welcome clarity for workers and have wider benefits, including encouraging workers to speak up about sexual harassment by using whistleblowing routes.

It will also send a clear signal to employers that workers who make protected disclosures about sexual harassment must be treated fairly, as workers will have legal recourse if their employer subjects them to detriment for speaking up about sexual harassment.

How will it work?

An employee who has made a protected disclosure about sexual harassment has the right not to suffer a detriment, or if they are an employee, not to be unfairly dismissed.

If a worker or employee believes they have been treated unfairly after making a protected disclosure, they can bring a claim to the Employment Tribunal within the relevant time limit of their detriment or dismissal.

Key Stats

According to ONS data[1], a quarter (26%) of those who had experienced sexual harassment said they had experienced harassment at their place of work.

There are barriers to speaking up about sexual harassment. An online survey of 750 workers who experienced sexual harassment carried out by the Equality and Human Rights Commission[2], found that half of the respondents did not report their experience of harassment due to a number of reasons, including:

- Fear that the organisation would not take the issue seriously
- Belief that alleged perpetrators, particularly senior staff, would be protected
- Fear of victimisation
- Lack of appropriate reporting procedures
- Inexperienced, unsupportive managers

In addition, some respondents described being threatened that their career could be damaged if they pursued their complaint or said they had been disciplined or lost their job as a direct consequence of reporting.

Similarly, a survey of over 1,000 women carried out by the Trade Union Congress[3], found that 3 in 5 respondents experienced sexual harassment at work, but less than 30% reported the harassment to their employer due to fear of not being believed or taken seriously, or fear that reporting would negatively impact on their relationships at work or career prospects.

Common questions

Will a disclosure about sexual harassment need to meet the public interest test?

- Yes. To make a qualifying disclosure about sexual harassment, a worker needs to meet the public interest test. This means that they need to have reasonable belief that the issue is in the public interest, for example, if it involves a large or well-known employer, there are a large amount of people involved or if the issue is particularly serious.

Does it matter when the incident of sexual harassment took place?

- No, it does not matter when the incident of sexual harassment took place. The qualifying disclosure could cover sexual harassment that has occurred, is occurring or is likely to occur. An Employment Tribunal claim for detriment or dismissal will still need to be brought within the relevant time limit.

[1] ONS, Experiences of harassment in England and Wales: December 2023, published 7 December 2023
[2] Equality and Human Rights Commission, Turning the tables: Ending Sexual harassment at work, published 26 March 2018
[3] Trade Union Congress, New TUC poll: 2 in 3 young women have experienced sexual harassment, bullying or verbal abuse at work., published 12 May 2023