

UK Whistleblowing Update

Date : May 13, 2022

What is this about?

A recent attempt to reform the current UK whistleblowing rules appears to have stalled. This article is a brief look at where things are at with whistleblowing in the UK.

What's the current situation?

Employment

In a nutshell, in the UK workers are protected against retaliatory dismissal or detrimental treatment if they make a so-called "protected disclosure" to their employer or to some other so-called "prescribed person". This has to be a disclosure of information which a worker reasonably believes is made in the public interest that indicates certain types of wrongdoing. The relevant UK whistleblowing legislation here is the Employment Rights Act 1996 (mainly Pt IVA, sections 43A to 43L – see here <https://www.legislation.gov.uk/ukpga/1996/18/part/IVA>) and the Public Interest Disclosure Act 1998 (see here <https://www.legislation.gov.uk/ukpga/1998/23/contents>). The UK government has also issued the "Government Whistleblowing: Guidance for Employers and Code of Practice" ("the Code" – see here <https://www.gov.uk/government/publications/whistleblowing-guidance-and-code-of-practice-for-employers>) which offers support and advice to employers who may need to handle whistleblowing reports; the Code has no statutory force.

Financial Services

In the area of financial services there are also special whistleblowing requirements that apply to certain types of businesses (UK deposit-takers with assets of £250m or greater, Prudential Regulation Authority designated investment firms, insurance and reinsurance firms within the scope of so-called Solvency II, & the Society of Lloyd's and managing agents) under rules set out by the financial regulators the Financial Conduct Authority and the Prudential Regulation Authority – for more about these particular UK regimes see in particular here <https://www.fca.org.uk/publication/policy/ps-15-24.pdf> and here <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2015/ps2415>.

Competition/Antitrust

In the UK the competition/antitrust regulator, the Competition and Markets Authority (the CMA), offers financial rewards of up to £100,000 (currently around USD\$122,000 & €118,000) entirely at the CMA's discretion and in exceptional circumstances for "inside" information about the existence of a cartel (for more see the CMA's "Informant Rewards Policy" here <https://www.gov.uk/government/publications/cartels-informant-rewards-policy>).

Litigation

Whistleblowing claims have been brought before the UK courts, probably the most high profile recent one being in April 2020 when the High Court found Ernst & Young liable to a former employee, Amjad Rihan, for breach of the audit duty of care, and ordered Ernst & Young to pay Mr. Rihan USD \$10,843,941 and £117,950 in damages after Mr. Rihan, acting as a whistleblower, claimed that Ernst & Young had covered up evidence of a money laundering scheme in a client's accounts ([https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2020/901.html&query=\(Case\)+AND+\(No:\)+AND+\(QB-2017-005208\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2020/901.html&query=(Case)+AND+(No:)+AND+(QB-2017-005208))).

What does this mean for compliance?

An organization will typically have an internal whistleblowing team and an internal policy along with procedures to

follow when an individual raises concerns, which may include whistleblowing hotlines.

Whistleblowing in an organization also raises data protection/GDPR issues (for more see “Does whistleblowing present any data protection issues?” in our EU Whistleblowing FAQs which can be found here <https://www.corderycompliance.com/eu-whistleblowing-faqs/>) – there is also some background to GDPR here www.bit.ly/gdprfaq.

Over the years there has been a steady growth in the field of modern slavery/ESG/supply chain due diligence compliance (such as under the UK Modern Slavery Act 2015 disclosure and transparency requirements) – many organizations cater for these issues through their whistleblowing hotlines.

What about reforms of the UK whistleblowing rules?

In 2019 the UK All Party Parliamentary Group for Whistleblowing (see here <https://www.appgwhistleblowing.co.uk/>) set out recommendations for change to the UK whistleblowing legal framework in a report entitled “Whistleblowing – The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring it” (see here <https://www.appgwhistleblowing.co.uk/news>).

Eventually draft legislation was put to the UK Parliament (see here <https://bills.parliament.uk/bills/2630>) which proposed a number of key changes including setting up an independent body to protect whistle-blowers and introducing a ban on non-disclosure agreements that try to gag whistle-blowers. But, in 2020 it failed to complete its passage through Parliament and could not progress further (see here <https://bills.parliament.uk/bills/2630/news>).

Other draft legislation was also put to the UK Parliament (see here <https://bills.parliament.uk/bills/2589>) which proposed setting up a so-called Office of the Whistle-blower, a kind of whistle-blower czar with various powers to facilitate whistleblowing and provide financial redress to individuals harmed by whistleblowing, but in 2020 this too failed to progress through Parliament (see here <https://bills.parliament.uk/bills/2589/news>).

In April 2022 a Private Member’s Bill was introduced in the UK Parliament to:

- Establish an independent Office of the Whistleblower to protect whistleblowers and whistleblowing in accordance with the public interest;
- Make provision for the Office of the Whistleblower to set, monitor and enforce standards for the management of whistleblowing cases, to provide disclosure and advice services, to direct whistleblowing investigations and to order redress of detriment suffered by whistleblowers;
- Create offences relating to the treatment of whistleblowers and the handling of whistleblowing cases; and,
- Repeal the Public Interest Disclosure Act 1998.

The UK Member of Parliament who introduced the Bill, Mary Robinson, said, in introducing the Bill on 26 April 2022, that:

[...] if you name an industry, I can name you a scandal brought to light by whistleblowers – whistleblowers who were stifled, ignored or gaslit before they were listened to. For every one listened to, there are more would-be whistleblowers who remain silent or who were silenced”. “[...] It is unacceptable that whistleblowers are silenced and coerced into signing non-disclosure agreements. The office of the whistleblower will put an end to that practice [...]”. [...] It will champion whistleblowers and whistleblowing. It will be a central point where the would-be whistleblower could come for information and support. It will have support and advice services for regulators, organizations and the public. It will set standards and report back to the Government. It will ensure that those who inflict or suffer detriment will be properly compensated or properly held to account. It will have real teeth with the ability to issue redress orders, fines and penalties. For the worst offenders, there will be prison sentences.” (<https://hansard.parliament.uk/commons/2022-04-26/debates/9CD2DC9F-2DB8-4781-AAF0-A3B7DCF4A710/Whistleblowing>)

But, according to the UK Parliament’s website “[t]he 2021-2022 session of Parliament has prorogued and this Bill will make no further progress” (<https://bills.parliament.uk/bills/3150/news>). So, it seems that yet again progress on

reforming the UK's whistleblowing rules has stalled.

As a final point about UK whistleblowing reforms, although the UK has left the EU and won't be implementing the EU whistleblowing rules, the post-Brexit EU-UK Trade and Co-operation Agreement requires the UK to maintain level playing fields with EU rules including with regard to EU levels of employment protection. So, it may be that if UK whistleblowing legal reforms are revived again certain aspects of the EU whistleblowing rules might still make their way into UK whistleblowing law.

Key takeaways

Despite the stalling of reforming whistleblowing rules in the UK this doesn't mean that organizations should be complacent about whistleblowing. In particular, organizations should consider doing the following:

- Review their whistleblowing policy, internal procedures and training materials; and,
- Ensure that everything that they do concerning whistleblowing complies with data protection/UK & EU GDPR requirements – probably the best way to do this is by undertaking a Data Protection Impact Assessment.

Further Information

Our FAQs and film about the EU whistleblowing regime can be found here <https://www.corderycompliance.com/eu-whistleblowing-faqs/>.

We write about modern slavery/ESG/supply chain due diligence and compliance issues here <https://www.corderycompliance.com/category/modern-slavery-supply-chain-management/> and most recently about proposed EU rules here <https://www.corderycompliance.com/eu-hr-eai-and-supply-chain-dd/>.

We write about privacy/data protection issues here <https://www.corderycompliance.com/category/data-protection-privacy/>.

We write about anti-bribery and corruption issues here <https://www.corderycompliance.com/category/bribery-corruption/>.

We have written about the UK criminal offence of failure to prevent the facilitation of tax evasion here <https://www.corderycompliance.com/failure-to-prevent-tax-evasion/>.

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