

*These notes refer to the Employment Act (Northern Ireland)
2016 (c.15) which received Royal Assent on 22nd April 2016*

Employment Act (Northern Ireland) 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Protected Disclosures

Section 13: Disclosures not protected unless believed to be made in the public interest

The effect of section 13 is to insert a specific public interest test into the ERO 1996. This ensures that, in order to benefit from protection, whistleblowing claims must, in the future, satisfy a public interest test and disclosures, which can be characterised as being of a personal rather than public interest, will not be protected.

For example, if a worker does not receive the correct amount of holiday pay (which may be a breach of the terms of his/her contract of employment), this is a matter of personal rather than wider interest.

The worker must also show that the belief that the disclosure was in the public interest was reasonable in the circumstances.

Section 14: Power to reduce compensation where disclosure not made in good faith

The effect of this section is to remove the requirement in Articles 67C, 67E, 67F, 67G and 67H of the ERO 1996 that a disclosure be made in good faith in order to be a protected disclosure and benefit from whistleblowing protections. In addition, the section amends the ERO 1996 to provide industrial tribunals with the power to reduce an award of compensation by up to 25%, where a protected disclosure has not been made in good faith.

“Good faith” is not defined in the ERO 1996, but the courts in Great Britain have held that where the predominant motive of the individual making the disclosure was not directed at remedying one of the wrongs listed in section 43B of the Employment Rights Act 1996, but was instead for some ulterior purpose, the disclosure is unlikely to have been made in good faith (see *Street -v- Derbyshire Unemployed Workers’ Centre* [2004] IRLR 687). Article 67B is the corresponding provision in the ERO 1996.

Currently, the requirement for a disclosure to be made in good faith can affect the success of the claim. If an industrial tribunal finds that a disclosure was not made in good faith and instead there was an ulterior motive which was the predominant reason for the disclosure, the claim will fail.

Section 14 alters the effect of the good faith test; the issue of good faith will now be considered by a tribunal in relation to remedy, rather than liability, so a claim will not fail as a result of an absence of good faith. An industrial tribunal will have the discretion to reduce a compensatory award by up to 25% in the event that it finds the disclosure has not been made in good faith.

Section 15: Protected disclosures: reporting requirements

This section introduces a power to enable the Department to make regulations requiring a person prescribed for the purposes of Article 67F of the ERO 1996 to produce an annual report on disclosures of information made to the person by workers. The purpose of the annual reporting requirement is to ensure more systematic processes across all prescribed persons in the way public interest disclosures are handled, thereby working towards a consistent standard of best practice for disclosures. It will also provide greater assurance to the whistleblower that action is being taken by the prescribed person, thereby increasing confidence in their role.

The content of the report is to be prescribed by regulations, which will also determine how the report is published and its timing. Reports may not include content that would reveal the identity of the individual who has made the disclosure or the employer or organisation to which the disclosure relates.

Section 16: Worker subjected to detriment by co-worker or agent of employer

The effect of this section is to introduce a vicarious liability provision so that where a worker is subjected to a detriment by a co-worker done on the ground that the worker made a protected disclosure, and this detriment is done in the course of the co-worker's employment with the employer, that detriment is a legal wrong and is actionable against both the employer and the co-worker.

The employer will only be liable for a detriment where it is done by a worker in the course of employment or by an agent of the employer with the employer's authority. In this context, the term "agent" refers to someone who is appointed by the employer to perform duties on their behalf (such as a contractor).

Employers are able to rely on the defence in new paragraph (1D) of Article 70B of the ERO 1996 if they have taken all reasonable steps to prevent the co-worker from subjecting the whistleblower to a detriment. If the defence applies the employer will not be liable for the actions of the co-worker.

Where a whistleblower is bullied or harassed by a co-worker but the employer can use the defence in paragraph (1D), the co-worker will still be liable and the worker could bring a claim against that co-worker.

Section 17: Extension of meaning of “worker”

This section amends Article 67K of the ERO 1996 in relation to protected disclosures. Article 67K extends the meaning of "worker" for Part VA of the ERO 1996. The effect of the amendment is that student nurses and student midwives who undertake work experience as part of a course of education or training approved by, or under arrangements with, the Nursing and Midwifery Council in accordance with article 15(6)(a) of the Nursing and Midwifery Order 2001 will fall within the extended definition of worker who may make a protected disclosure. A student nurse or student midwife who makes a protected disclosure concerning his/her work experience may bring a claim against the person providing that work experience, which will be determined by industrial tribunal.

In addition, section 17 introduces a power in Article 67K of the ERO 1996 to permit the Department to amend, by order, the definition of “worker” in that Article. The power can be used to increase the scope of protection. It can, however, only be used to remove categories of individuals where, in the opinion of the Department, no such individuals exist (i.e. the category has become obsolete).