These notes refer to the Enterprise and Regulatory Reform Act 2013 (c.24) which received Royal Assent on 25 April 2013

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Employment

Protected disclosures

Summary and Background

102. The Public Interest Disclosure Act 1998 ("PIDA 1998") inserted a new Part 4A into the ERA 1996 to provide protection, in certain circumstances, for whistleblowers (i.e. those who expose evidence of wrongdoing by employers or third parties in the context of the workplace). The ERA 1996 defines the type of disclosures that are protected and also seeks to regulate to whom the disclosures can be made. The relevant provisions came into force on 2 July 1999.

103. The Employment Appeal Tribunal decision in *Parkins v Sodexho Ltd* [2002] IRLR 109 raised the possibility that any complaint about any aspect of an individual's employment contract could lay the foundation for a protected disclosure. This has led to claims being lodged at employment tribunals that would not otherwise have been brought and is contrary to the intention of the legislation.

104. Sections 43C, 43E, 43F, 43G and 43H of the ERA 1996 require that a disclosure be made in good faith in order to be a protected disclosure and benefit from whistleblowing protections.

105. A worker who makes a protected disclosure within the meaning of Part 4A of the ERA 1996 has a right not to be unfairly dismissed and a right not to suffer a detriment as a result of having made such a disclosure. Section 43K of the ERA 1996 defines who is a "worker" for the purposes of the whistleblowing protections contained in Part 4A of the ERA 1996.

106. The definition of "worker" in section 43K of the ERA 1996 is broader than the definition of "worker" in section 230 of the ERA 1996, which applies to rights set out elsewhere in the ERA 1996. The definition serves to ensure that the protection of the statute in relation to whistleblowers applies more broadly than other employment rights.

107. The following four sections amend Part 4A of the ERA 1996 which deals with public interest disclosures.

Section 17: Disclosures not protected unless believed to be made in the public interest

108. The effect of the section is to insert a specific public interest test into the ERA 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 claimant must also show that the belief that the disclosure was in the public interest was reasonable in the circumstances.

Section 18: Power to reduce compensation where disclosure not made in good faith

109. The effect of this section is to remove the requirement in sections 43C, 43E, 43F, 43G and 43H 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 ERA 1996 to provide employment 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.

110. "Good faith" is not defined in the ERA 1996, but the courts 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 ERA 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*)

111. Currently, the requirement for a disclosure to be made in good faith can effect the success of the claim. If an employment 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.

112. Section 18 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. The employment tribunal will have the discretion to reduce a compensatory award by up to 25% in the event they find the disclosure has not been made in good faith.

Section 19: Worker subjected to detriment by co-worker or agent of employer

113. 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.

114. 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).

115. Employers are able to rely on the defence in new subsection (1D) of section 47B of the ERA 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.

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

Section 20: Extension of meaning of "worker"

117. The effect of this section is to widen the definition of "worker" in section 43K of the ERA 1996. At present, the NHS has certain contractual arrangements in place for workers in health services in England, Scotland and Wales which are not afforded whistleblowing protection because they fall outside the definition. This amendment will ensure that section 43K will apply to these workers.

118. In addition, the section includes a power so that the definition of "worker" in section 43K can more readily be amended so as to keep it up to date. 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 Secretary of State, no such individuals exist (i.e. the category has become obsolete).