PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Tenth Delegated Legislation Committee

DRAFT EMPLOYMENT RIGHTS ACT 1996 (NHS RECRUITMENT-PROTECTED DISCLOSURE) REGULATIONS 2018

Wednesday 25 April 2018

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not later than

Sunday 29 April 2018

The Committee consisted of the following Members:

Chair: Ms Nadine Dorries

† Cartlidge, James *(South Suffolk)* (Con)
† Cleverly, James *(Braintree)* (Con)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Dinenage, Caroline *(Minister for Care)*
† Henderson, Gordon *(Sittingbourne and Sheppey)* (Con)
Lammy, Mr David *(Tottenham)* (Lab)
† Lewer, Andrew *(Northampton South)* (Con)
† Lewis, Mr Ivan *(Bury South)* (Ind)
† Madders, Justin *(Ellesmere Port and Neston)* (Lab)
† Menzies, Mark *(Fylde)* (Con)
† Mercer, Johnny *(Plymouth, Moor View)* (Con)
† Morton, Wendy *(Aldridge-Brownhills)* (Con)
† Norris, Alex *(Nottingham North)* (Lab/Co-op)
† Smith, Jeff *(Manchester, Withington)* (Lab)
† Spellar, John *(Warley)* (Lab)
† Villiers, Theresa *(Chipping Barnet)* (Con)
Woodcock, John *(Barrow and Furness)* (Lab/Co-op)

Rob Cope, *Committee Clerk*

† attended the Committee

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Wednesday 25 April 2018

[Ms Nadine Dorries *in the Chair*]

Draft Employment Rights Act 1996 (NHS Recruitment—Protected Disclosure) Regulations 2018

8.55 am

The Minister for Care (Caroline Dinenage): I beg to move,

That the Committee has considered the draft Employment Rights Act 1996 (NHS Recruitment—Protected Disclosure) Regulations 2018.

It is a great pleasure to serve under your chairmanship, Ms Dorries. The draft regulations prohibit certain NHS employers from discriminating against job applicants who have disclosed certain information—often called whistleblowing. Applicants have a legal recourse should they feel they have been discriminated against, with appropriate remedies if their complaint is upheld. An NHS employer discriminates against an applicant if they reject the job application or otherwise treat them less favourably than other applicants.

We want to ensure that the NHS is the safest and most transparent healthcare service in the world. To achieve this, those who work in the NHS must feel safe speaking up and raising concerns at work, and confident that action will be taken without having a negative impact on their career or employment opportunities. The draft regulations will help to send a very clear message that openness, transparency and fairness should be the norm within the NHS. They will also increase the trust that patients, other service users and the wider public, have in the NHS.

We want NHS employers to be exemplars in fostering a culture of openness and willingness to report problems. We want an NHS in which lessons are learned, to provide the safest possible care for patients.

8.56 am

Justin Madders (Ellesmere Port and Neston) (Lab): It is a pleasure to serve under your chairmanship, Ms Dorries. We welcome the Government's implementation of one of the key recommendations of Sir Robert Francis' "Freedom to Speak Up" report on whistleblowing. The report shone a light on the completely unacceptable treatment that hard-working and committed NHS staff experienced when making protected disclosures. One individual told the Francis inquiry that

"finding employment is proving very difficult and I question whether any of it was worth it".

Another said:

"I have often been so depressed by this experience that I have often considered suicide."

It is important that we give those who want to speak out the confidence that doing so will not harm their future employment prospects. The way workers are treated, simply for raising concerns to prevent harm to patients, is shocking and unacceptable. We welcome the offer of additional protections, but we have a range of concerns about the approach taken, and I will welcome the Minister's comments on those.

Although we understand that the draft regulations stem directly from the Francis inquiry report, we struggle to understand why they are limited to one sector. Other sectors have identified a need for such protections—for example, financial services, and we know that in social care a number of people have felt the need to blow the whistle on various issues. There is a case to be made for these protections to be extended to all job applicants.

Not only do the draft regulations leave employees in other sectors without these important protections, but, as we understand it, they provide only partial protection for NHS workers. They would not protect an NHS whistleblower applying for a job with an employer outside those covered in section 49B(6) and (7) of the Employment Rights Act 1996, as amended. Although that is a long list, it is by no means a comprehensive one. It appears, for example, that neither NHS England or the Department of Health and Social Care is included in that list; nor are other bodies such as GP surgeries or agencies supplying staff to the NHS, including the NHS staff agency, NHS Professionals.

It also appears that private companies supplying services to the NHS are not included. As we know from the Westminster Hall debate on Monday—leaving aside the merits of private involvement in the NHS—there are many private providers embedded within the health service and other bodies in the wider health sector that do not appear to be covered, including academia, private health organisations, pharmacies, medical research and public health. Agency workers in particular raise an important issue: we know that many staff working in the NHS choose to work through agencies, rather than be directly employed by a trust, and often move from workplace to workplace.

Often, those coming into a workplace with a fresh pair of eyes can spot problems that may not be readily visible to those who spend all their time in a specific work situation. Does the Minister think it sends the right message to those who may want to blow the whistle that there are potentially hundreds of providers in the NHS that are not covered by the draft regulations? Whether there is full protection depends on which part of the NHS receives the job application.

Also, the regulations fall short in terms of future-proofing. We are all aware of new models of care, with accountable care organisations, integrated care systems and so on. While these may not yet be formal legal entities, the lack of legislation on that emerging framework is a matter of great concern. We simply do not know at this stage whether the new organisations will ultimately become NHS employers, but we do know that limiting what the regulations cover may create more gaps where NHS staff will not have the same protection as others.

There are developments now, for example in relation to wholly owned subsidiary companies, where it is anticipated that under current plans around 8,000 NHS staff will see their employment transferred to the new companies. Is it intended that the regulations will cover wholly owned subsidiary companies? If, as I suspect,

the regulations will cover the rather narrow remit I have set out, will the Government look at widening their scope in due course?

In common with many of the respondents to the consultation, we are concerned about the complexity of the regulations. Simplifying legislation is something I think we all want to achieve and that could have been done. Concerns about employees who might be missing out because of the narrow scope of the employers and suppliers covered could have been dealt with by amending the definition of "worker" to include applicants for employment under section 49B of the 1996 Act. Will the Minister explain why she took this approach, instead of the one I just outlined? Will she also respond to comments made by the National Guardian's Office, which said that the regulations could cause more litigation and make it more stressful for the applicant, which would

"inevitably have a negative impact on their relationships and family life"?

In "Freedom to Speak Up", Sir Robert Francis wrote:

"When asked for advice by NHS organisations about issues around public interest disclosure, legal advisors have tended to be influenced by an adversarial litigation—and therefore defensive—culture."

That is a description that I think applies across a range of issues in the NHS. Does the Minister recognise that, by drafting the regulations in this way, the Government risk continuing rather than challenging that culture?

Although we welcome the fact that regulation 3 removes any restriction to action being available only in cases where a protected disclosure has taken place, we are concerned that the use of the phrase

"because it appears to the NHS employer"

might have the unintended effect of opening up a range of technical defences to NHS employers. Will the Minister consider, for example, the instance where a protected disclosure has taken place, but the employer is able to argue that it did not appear to it to be a disclosure, or even that it simply did not consider whether a disclosure had taken place at all?

There seems to be an anomaly involving the original whistleblowing legislation, where an employee is dismissed or suffers a detriment as a result of protected disclosure, and the regulations before us. The employee could find themselves without any protection if it turns out that they have not made the disclosure, although the employer has mistakenly concluded that they have. This appears to be at odds with the draft regulations, which suggest that it is irrelevant whether that individual has made the disclosure. The only consideration under the draft regulations is whether it appears to the trust that the disclosure has been made. I would welcome any comments the Minister has about whether there are plans to regularise this situation in the future. Given that it will be for the court to interpret the employer's belief and how the test is applied, would not applicants be placed at a clear disadvantage, requiring them to take expert legal advice?

We are also concerned that, unlike discrimination protection provided by the Equality Act 2010, the legislation provides no whistleblowing protection for a worker who is victimised for supporting another worker who made a protected disclosure. It may be, for example, that two workers are known to have investigated a concern together, but that only one of them makes the disclosure. What protection will be offered to those who are associated with or give evidence in support of a whistleblower under the regulations?

It is also unclear what position an employee will be in if they believe that they are being discriminated against, based on matters that are subject to an existing settlement agreement. In the Minister's view, could bringing an action under the regulations leave an applicant in breach of such a settlement agreement?

We welcome the confirmation in regulation 4 that the burden of proof will apply to the employer rather than the employee,

"in the absence of any other explanation".

Will the Minister confirm that a high bar will be set for the kinds of explanation that a tribunal would consider reasonable?

Regulation 5 applies a three-month time limit on making a claim, consistent with existing rules on applications to an employment tribunal, but there are clear differences between cases brought by an employee and those brought by an applicant. The applicant will know that they have been rejected for the position, but they may not know for some time—if at all—that that rejection is connected to their having previously made a protected disclosure. For example, in response to the consultation on the regulations, the British Medical Association raised concerns that the applicant might be able to obtain the required information about the conduct that might give rise to a claim only by using the Data Protection Act 1998, which is often a time-consuming process. Given how long it can take an applicant to understand that they may have been discriminated against, a better time limit might start the clock from the claimant first becoming aware of the conduct, as is the case for negligence claims.

Regulations 6 and 7 relate to compensation. We welcome the fact that there is no upper limit on compensation, consistent with existing practice on the settlement of whistleblowing claims, although the Department has a self-imposed limit on compensation claims made to employees upon loss of office. However, I have a concern about regulation 7(5), which relates to the conduct of the applicant. It is difficult to see, if a tribunal finds that a job application was wrongly rejected on the grounds of a protected disclosure, how an applicant's actions could have contributed to the rejection. I would welcome some guidance from the Minister about the types of situation in which that might apply, as it seems to give employers an opportunity to water down the amount of compensation that they may pay, perhaps on spurious grounds.

In effect, regulation 8 includes injunctive relief, restraining employers from imposing detriment or requiring any detriment to be brought to an end, which seems akin to an interim relief application in respect of an existing employee. As a number of the consultation responses highlighted, the costs of bringing actions in the county court and the High Court are significantly higher than in the employment tribunal. Will the Minister therefore consider making representations to her colleagues in the Ministry of Justice about whether the costs regime used in employment tribunals could be applied in those cases? Will she also comment on whether there are any plans to reintroduce employment tribunal fees, which act as a barrier to justice?

[Justin Madders]

There are also concerns about injunctive relief from the perspective of NHS employers. There is clearly a prospect that the injunction process could cause recruitment exercises to be delayed, disrupted or abandoned altogether, which could have a significant impact if there is an urgent need to fill a vacancy, or if a very specialist role is vacant. As we all know, there are significant vacancies across the NHS in a range of disciplines. Putting a process on hold would also have an impact on other applicants for that position.

If the applicant is successful in obtaining injunctive relief, that gives rise to a question: what if they would not have been offered the job in any event? Having been ordered by the court to disregard a protected disclosure, would the employer then feel obliged to employ that candidate, even if they did not consider the candidate to be the best person for the job? Is it realistic to think that an employment relationship that starts on the basis of a court order can last?

Subject to the Minister's response, we are minded to support the draft regulations. Although they are piecemeal in many ways, and do not go far enough in their scope, they still represent a significant improvement on the current position and, I hope, the start of further improvements to protections for whistleblowers.

9.9 am

Caroline Dinenage: I am grateful to the hon. Gentleman for his support in this important matter. For too long, we have failed to protect those who are brave enough to speak out when others do not. We learned from the Mid Staffs case about what happens when there is a defensive culture and people cover up mistakes. We want to make the NHS the safest healthcare system in the world, so we must build a culture of openness and transparency. If we are to do that, healthcare professionals need to feel that they are safe to speak out about problems in the workplace. We want them to feel safe in raising problems, so that speaking out becomes the norm and not the exception. These important measures should ensure that staff can raise concerns, knowing that they are protected by the law and that their career in the NHS will not be damaged as a result of doing the right thing.

The hon. Gentleman asked a number of important questions and I will attempt to answer as many as I can, but I will respond in writing on any that I omit, if that is acceptable. We need the draft regulations, in addition to the Employment Rights Act 1996, to protect people from detriment when they have spoken up in the public interest when they reasonably believe that they witnessed wrongdoing. "Worker" has a wide meaning in this context: the original legislation does not include job applicants, so the draft regulations address that. In addition, they provide that discrimination against a job applicant by an NHS employer is actionable as a breach of statutory duty. That gives job applicants additional protection and includes the right to bring a claim in the civil courts for a breach of statutory duty—for example, to prevent discriminatory conduct.

The draft regulations also treat the discrimination of an applicant by a worker or agent of the prospective NHS employer as if it were discrimination by an NHS employer. NHS staff who are prepared to speak out are an important asset, and workers who have previously had the courage and the compassion to do this should also be considered a valuable asset by the NHS body that is considering whether to employ them. I am sure that the hon. Gentleman agrees.

The draft regulations give NHS job applicants a right to complain to an employment tribunal if they feel that they have been discriminated against. The draft regulations set out a timeframe of three months, as he identified: that is consistent with the time limit for employment claims generally. The draft regulations also make it clear that, in the case of a decision by an NHS employer not to employ or appoint an applicant, the three-month time limit starts from the date that the decision was communicated to the applicant and not the time that the decision was made by the employer. The draft regulations enable the tribunal to consider a complaint that is otherwise out of time, if it considers it just and equitable in the circumstances.

Justin Madders: I know that the Government want to reduce the number of tribunal applications made. Does not the hon. Lady feel that there is a risk that, if employers are putting in applications not in possession of the full facts, more litigation would actually be encouraged rather than less?

Caroline Dinenage: The Government will keep that under review. It is important that we keep this as consistent as possible with the time limits for general employment cases, but if there do appear to be any issues along those lines, they can be reviewed.

The draft regulations also set out the remedies that the tribunal may or must award if the complaint is upheld. The employer may be ordered to pay compensation or the tribunal may recommend that the employer take other specified steps or make a provision on the amount of the compensation that may be awarded.

The application to an employment tribunal under the draft regulations is subject to the early conciliation regime, which provides an opportunity to resolve the claim via ACAS. We often find that, when people are able to resolve their differences via ACAS, it helps to alleviate the problem of someone who has had tribunal experience to the detriment of their future employment. It should also help to ensure that only cases that cannot be resolved through other methods actually reach the final step of an employment tribunal.

The draft regulations enable an employment tribunal to order compensation to be paid where there has been an actual breach of the prohibition on discrimination. The power to award damages is discretionary. Ultimately it is for the court to decide whether damages should be awarded, and we expect the court to take into account all the relevant factors when deciding whether that is appropriate, and to act fairly.

The hon. Gentleman is right to ask why the measures focus specifically on NHS employers. That was the original reason behind the legislation. The freedom to speak up is important, though, and we shall keep the regulations under review and assess their impact on the NHS before we assess the possible impact on other employers, such as social care providers.

Justin Madders: It was not just the fact that it is applied only to NHS employers, but that it is applied only to some NHS employers. I gave examples of various organisations within the NHS that are not covered by the regulations.

Caroline Dinenage: I totally understand what the hon. Gentleman is saying—for example, GPs are not covered if they have independent contractor status, because the powers for the regulations in the 1996 Act are limited to NHS public bodies. As I said, though, we will keep all of that under review and come back to it if necessary.

We talked about future-proofing. As I said, we will review it over time. It is important that there are existing protections for employers as well; this is not just about employees. Under the draft regulations, the normal route for individuals would be via a normal employment tribunal. The fees have recently been abolished, and I do not think there are any plans to revisit that decision. The Government will keep the matter under review to assess the impact, before making any further decisions.

The hon. Gentleman mentioned the definition of a "worker", which for the purposes of these regulations would carry the extended meaning under the Employment Rights Act. That is already a broad definition, and we will need to consider carefully whether there is a case for extending it. The test for discrimination includes the concept of appearance to the employer. That is actually in the primary legislation—the Employment Rights Act—and the regulations reflect that. We will again keep under review how that legislation is working.

If there are any questions I have not answered, I shall be happy to write to the hon. Gentleman. I commend the draft regulations to the Committee.

Question put and agreed to.

9.17 am

Committee rose.