



Protecting whistleblowers seeking jobs in the NHS

Joint response from the Association of Anaesthetists of Great Britain & Ireland (AAGBI) and Royal College of Anaesthetists (RCoA)

Questions:

The Government invites comment on any aspect of its approach to the drafting of the regulations. However, the following are of particular importance and the Government seeks your views on them in particular.

Q1. Do you agree with the time limit of 3 months in draft regulation 5? Does this present any issues?

We agree with the time limit of three months.

Q2. Are there any types of cases that should be mentioned in regulation 5(3), as to the date of conduct for the purposes of calculating the 3-month time limit?

There may be circumstances in which a recruitment process is protracted and the applicant does not hear for some weeks after a decision has been made that they have been unsuccessful. If this delay might otherwise have led to the applicant being out of time we expect such situations to be dealt by the statement: 'An employment tribunal may consider a complaint under regulation 4 that is otherwise out of time if, in all the circumstances of the case, it considers it just and equitable to do so.'

Organisations should not be able to prevent a complaint to an employment tribunal by informing unsuccessful candidates very near to the end of the three-month period.

Q3. Do you agree with the approach taken not to limit the amount of compensation, so that these regulations are comparable with existing whistleblowing claims?

Yes

Q4. Do you agree that the regulations should provide for discrimination to be actionable as a breach of statutory duty?

Yes

Q5. Are there any practical problems arising from regulation 8?

We cannot envisage any

Q6: Do you agree with the proposal that, for the purposes of the regulations, discrimination against an applicant by a worker or agent of an NHS body, should be treated as discrimination by the NHS body itself in the above circumstances – and that the NHS body should have a defence if it can demonstrate it took all reasonable steps to prevent workers and agents from doing what they did or failing to do what they did?

The NHS body should have vicarious liability for an employee's actions, including discrimination.

Q7 - Do you have any concerns about the impact of any of the proposals on people sharing relevant protected characteristics as listed in the Equality Act 2010? Is there anything more we can do to advance equality of opportunity and to foster good relations between such people and others?

No



THE ASSOCIATION OF ANAESTHETISTS

of Great Britain & Ireland

Q8 - Do you have any concerns about the impact of any of the proposals may have on families and relationships?

No

Comments:

Some whistleblowers have complaints made against them to their regulator (for doctors this is the GMC). The regulator can take many months (or longer) to investigate and close such cases, but applicants are required to report that they have a 'live' complaint against them when they apply for a post. In this circumstance they may find it very difficult to gain further employment. In many cases the regulator's investigation finds there is no case to answer. It may be considered that on occasion the action of reporting to the regulator was harassment or vengeful. We suggest consideration is given to whether the costs (including lost salary) of such a period of unemployment during a regulator's investigation can be part of the restitution imposed by the employment tribunal. One solution might be that these regulations force employers who dismiss whistleblowing staff to pay their salary until the regulator finds they have no case to answer?

Furthermore, if the act of whistleblowing results in the member of staff being reported to their regulator, so preventing appointment to a new post, the three-month period should start from the date at which the regulator finds there is no case to answer.

RCOA

Royal College of Anaesthetists