

Victimisation

HOW TO GET SAFE, NOT SACKED AND WHAT TO DO WHEN THINGS GO WRONG

Everyone wants workplaces to be safer, right? And everyone thinks getting hazards remedied and dangerous work stopped is OK, OK? Well, not every employer thinks so, as thousands of workers find out each year. Mick Holder looks at how you can get fired up about safety without getting fired.

Raising safety concerns can make your job unsafe, if you don't do it right. Sure, there are laws against victimising workers for raising safety concerns, laws against victimising safety reps and other union reps, and laws against victimising whistleblowers. But those employers willing to break safety laws, sometimes show a similar disdain for all workplace laws.

Although HSE doesn't collate stats on victimisation "it does however have a whistleblowers' website, which receives around 75 hits a week on average," HSE told *Hazards*. It adds: "HSE will usually take action against offending employers."

HSE now receives over 30,000 safety complaints each year – more than double the number a decade ago, and presumably from individuals too scared or too frustrated at inaction to raise the issues within the company.

A July 1997 survey of managers by whistleblowers' campaign and advocacy group Public Concern at Work (PCAW) found that 67 per cent felt employees didn't raise safety concerns because they were uncertain of their employer's response, yet 94 per cent acknowledged that employee concerns were an important means of learning about safety problems at work (*Hazards* 60).

In July 2002 The Work Foundation reported "almost half of organisations (48 per cent) surveyed had not introduced formal whistleblowing policies, three years after the Public Interest Disclosure Act." Only one in three (32 per cent) private sector firms had formal whistleblowing policies, its survey found.

Good habits Whether you are trying to resolve a safety dispute in the workplace or at an employment tribunal, using proper procedures and keeping good records will strengthen your case.

- ◆ Don't be a lone ranger – ensure the union and the membership know what is happening and why. Get safety on the agenda of union meetings
- ◆ If you are a safety rep make sure you are accredited by your union, and the union has informed the employer and the enforcement agency
- ◆ Put any communication you might want to rely on in writing to management, and copy to the union side/safety committee
- ◆ Ask the employer or enforcement authority to put their position in writing
- ◆ Keep your paperwork in good order, dated and easy to access
- ◆ Check minutes of meetings and ensure mistakes are corrected
- ◆ Negotiate a workplace policy on health and safety concerns and whistleblowing
- ◆ Stick to negotiated procedures, including agreed procedures for resolving disputes, eg. grievance procedure, disputes procedure etc.
- ◆ Where other formal procedures fail, use a Union Inspection Notice (*Hazards* 76, www.hazards.org/notices)

Just one in four policies (24 per cent) encouraged whistleblowers to raise their concerns with union or staff reps – and they were almost entirely in the public sector.

How to protect yourself

Use the union – safety reps have the right to raise safety concerns, and legal protection from victimisation for doing their safety rep job. And union muscle makes it harder for an employer to victimise anyone raising safety concerns (*Hazards* 78). Negotiate a whistleblowing policy.

Use enforcement – HSE investigates most of the 30,000 plus complaints it receives each year. But make sure you exhaust agreed procedures before owning up to calling in the enforcers.

Use the law – employment tribunals can arbitrate on cases where a person is victimised or fired for their trade union duties or for raising safety concerns.

Legal protection

There are three main pieces of legislation on health and safety victimisation:

Employment Rights Act 1996:

Sections 44, 100 and 136 of ERA deal with health and safety cases. They say a person should not suffer a detriment or be dismissed or made redundant for reasons including:

- ◆ Carrying out their legal functions as a safety representative or other employee rep or other functions previously agreed with the employer (s.44(1)(b) and s.100(1)(b));
- ◆ Raising health and safety concerns with an employer;
- ◆ Participating in safety consultations with the employer (s.44(1)(ba) and s.100(1)(ba));
- ◆ Leaving or refusing to return to a place of work in circumstances of serious and imminent danger or taking steps to protect themselves or others in those circumstances (s.44(1)(d) and (e) and s.100(1)(d) and (e)); and
- ◆ Carrying out safety duties designated by the employer (s.44(1)(a) and s.100(1)(a)).

Trade Union Labour Relations (Consolidation) Act 1992: TULR(C)A covers those seeking remedy for the victimisation (s.146) or dismissal (s.152) of any union member or union representative.



photo: Eve Barker

RAILROADED: RMT safety rep Sarah Friday (right) won her unfair dismissal industrial tribunal – but still lost her job on South West Trains. "All I asked for was proper risk assessments to protect the health of our drivers and the travelling public," she said. "It not just an attack on me, but the right of all safety reps to have any safety on safety at work."

There is an interim remedy procedure (s.161) so a worker can keep their job until the ET.

Public Disclosure Information Act 1999: PDIA, the main "whistleblower" law:

- ◆ Applies to people at work raising genuine concerns about crime, including danger to health and safety or the environment;
- ◆ covers employees, trainees, agency staff, contractors, homeworkers, and the NHS, but not for now the genuinely self-employed, volunteers, the intelligence services, the army or police officers;
- ◆ covers disclosures within any organisation, to government departments such as the HSE, to government ministers, to the media, the police and MPs;
- ◆ allows claims to be made to an employment tribunal for reinstatement and compensation. Awards are uncapped. Fired employees can apply for an interim order to keep their job; and
- ◆ renders "gagging clauses" void.

Employment tribunals

Employment Tribunals (ET) determine the issues of a victimisation case, hear evidence from both sides and following questions decide on the facts of the case and make a judgment. If they find in favour of the victimised person (the applicant) they can award damages and request reinstatement. Winning a case is difficult.

HSE and ETs will expect a person making a complaint to have tried using all internal mechanisms – safety reps, the safety committee or the grievance procedure, for example – before taking

a case to a tribunal.

The amount of damages awarded is normally quite small. If the employer refuses to reinstate then the award will be bigger. Either side can appeal the ET decision to an Employment Appeals Tribunal (EAT).

There is a rigid 13-week deadline for starting a case at ET – even if you are still going through procedures at work.

ET pointers

If you win a case your conduct after dismissal will be taken into account – have you been looking for work, going to interviews, accepted another job? You will be expected to try and minimise your losses following dismissal.

But beware – if you lose you could end up paying costs, but normally only in frivolous or vexatious cases or where you have been told the case is unfounded.

If you are considering taking a case to an ET, try attending one first as an observer. ET offices are in the phone book and the hearings are open to the public.

Most unfair dismissal cases involving agency workers fail because they are not "employed" by the company they are dismissed by.

Case in point

- ◆ Former train driver and ASLEF safety rep Laurie Holden was found by an ET in 2002 to have been unfairly dismissed for raising health and safety issues at work. His award was limited to £55,000 because he turned down a job, even though taking it would have meant moving home (*Hazards* 78).

◆ An ET ruled in 2001 that construction company Balfour Kilpatrick had unfairly dismissed 80 electricians, mostly T&G and AEEU (Amicus) members, after they refused to wear damp "protective" clothing and walked off the job. The company had to pay at least the basic award of £3,300 a worker (*Hazards* 76).

◆ Train driver and RMT safety rep Sarah Friday was found in 2000 to have been fired for raising health and safety issues and awarded £16,000. The award would have been much higher, but the ET said she contributed 60 per cent towards her own dismissal (*Hazards* 71).

◆ UCATT safety rep Dave Smith was found in 1998 to have been unfairly dismissed by construction giant Costain after raising safety concerns (*Hazards* 63). In 1999 an EAT overturned the judgment, because Smith was not a Costain employee, but agency labour.

Information

HSE whistleblower web page www.hse.gov.uk/workers/content/whistleblowing.htm
Public Concern At Work - advice, support, newsletter, *the Whistleblower* (updates@pcaw.co.uk). Tel: 020 7404 6609. email: whistle@pcaw.co.uk web: www.pcaw.co.uk
Centre for Corporate Accountability - advice on employer and HSE accountability. Tel: 020 7490 4494. www.corporateaccountability.org
Employment Tribunals web site. www.employmenttribunals.gov.uk
Employment Appeal Tribunals web site, with searchable appeal tribunal cases. www.employmentappeals.gov.uk
Speaking out without fear, UNISON guide to whistleblowing, pdf version on the web: www.unison.org.uk/acrobat/10377.pdf