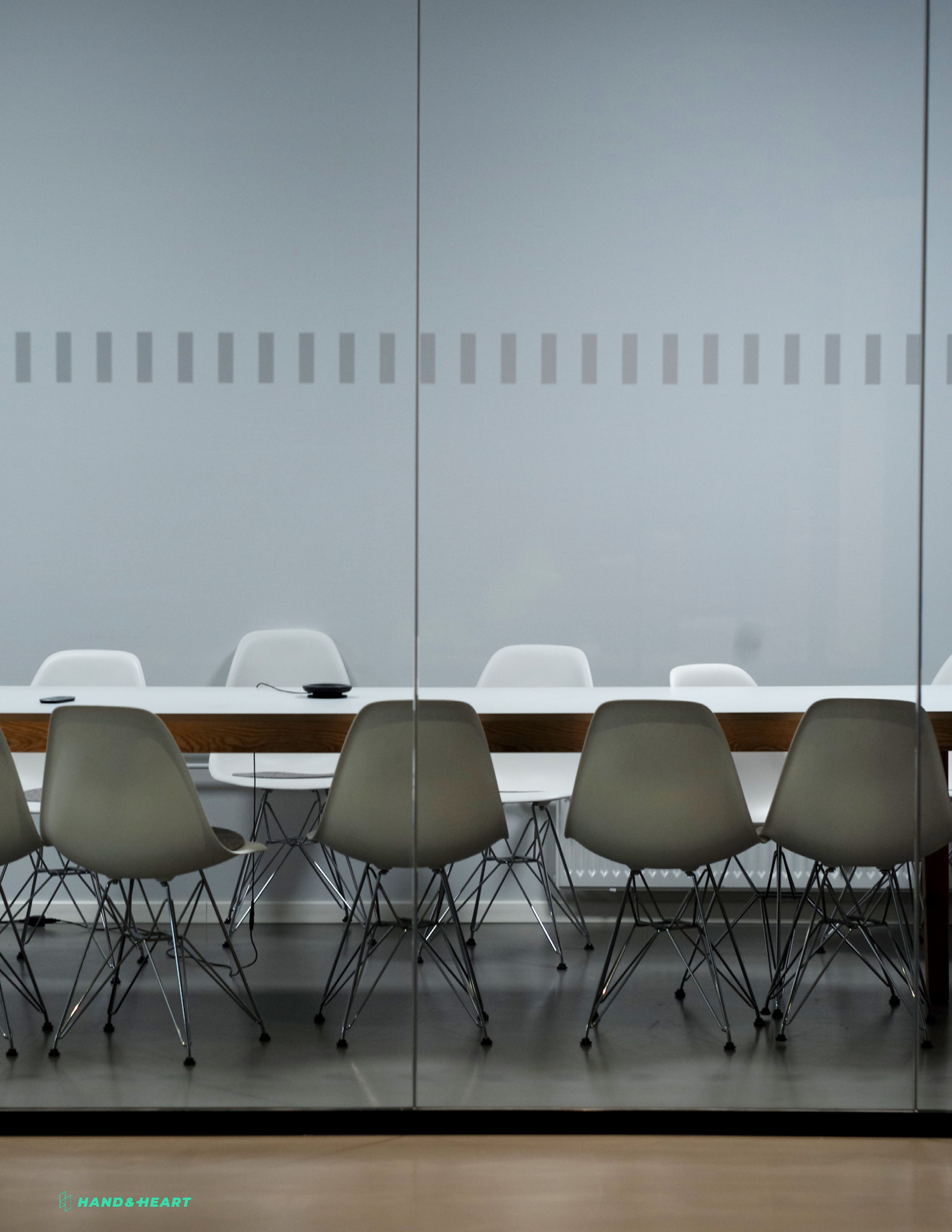
Retaliation Legislation Reform

HAND&HEART

5. RETALIATION LEGISLATION REFORM:



Introduction

The BrewDog Affected Workers Platform report (Sections (2b) (3d) (4)), published 8 February 2023, details allegations of retaliation and intimidation towards workers, current and former, who have spoken out about BrewDog's workplaces and the alleged harm these workers have experienced during employment. BrewDog, and its CEO, have, according to public record, used vast resources and existing media relationships to victimise, discredit and identify individuals who were speaking out about a toxic work culture. This includes the use of private investigators and among other means of intimidation, digital and otherwise.

Several individuals in the U.S., Europe and the U.K. have reported their experiences with police. In Scotland, the initial police response has been that there is no recourse through which the police can act. This is particularly true as it relates to harassment and stalking, as these are traditionally viewed as issues of domestic abuse, but also due to issues of legal personality - can a non-natural person (i.e. a company) stalk you?

The struggles of those affected in the BrewDog case is exemplary of the challenges faced by all workers. Retaliation against former employees is rising, but protections and remedies are woeful. Legitimate criticism of poor employment practices cannot continue to be allowed to be stifled by the inequality of arms between employers and (former) employees; consequently legislation and policy require review in order to ascertain how (former) employees can safely contribute to holding companies accountable for their transgressions without fear of retribution.

a) Retaliation Reform: Campaigning with Legislators

In many jurisdictions, the legislative process can facilitate the concerns of members of the public to be brought to the attention of governments In light of the experiences we have detailed in the BAWPR, we will be providing resources and information encouraging people to reach out to legislators and to create stronger statutory protections for workers from acts of employer retaliation. H&H will be conducting future activities relating to retaliation legislation reform, including Government petitions and awareness campaigns. Here is the overview of our demand and need for stronger protections for workers facing employer retaliation.

What do we want legislators to do?

Create stronger statutory protections for workers from acts of employer retaliation.

We will call on legislators to...

Consider the urgent need to increase worker protections from retaliatory acts carried out by their (ex)employers. Considering retaliation legislation reform, the legislators should consider matters such as expanding whistleblower provisions in favour of workers, defining corporate harassment, providing explicit statutory protection and legal aid to former workers who are victimised by former employers, and create sanctions for offending companies.

Background information

From June 2021 to present, current and former workers of a celebrated company, founded and headquartered in Scotland, have been subjected to acts of harassment and retaliation. The company has used vast resources and existing media relationships to victimise, discredit and identify individuals who were speaking out about a toxic work culture. This includes the use of private investigators, alleged hacking and fraud, among other means of intimidation. Several in the U.S., Europe and the U.K. have reported their experiences with police. The Police Scotland response has been that there is no recourse through which the police can act. None of these victims have had the ability or access to compel relief from this continuous course of retaliatory conduct. These victims fall into a legal grey area, unable to enforce their rights through the police, regulatory bodies or courts of law. We shall seek to implore legislators to rectify this as a matter of urgency.

Support Retaliation Legislation Reform and access resources such as templates -> All resources are available HERE. (32)

b) Understanding the Barriers Workers Face When Experiencing Retaliation

Retaliation, retribution, vengeance, intimidation, harassment. We inherently know what all these things are, but they are difficult to break down into their constituent parts.

A classic example of retaliation against former employees is the case of the whistleblower. Famous cases have highlighted how severe retribution and retaliation can be in the case of whistleblowing: career destruction, privacy violations, political asylum, harassment, intimidation, threat to life. But the whistleblower is only currently offered protection under very limited circumstances: The detriment they suffer must be connected to their employment. What is even more striking, considering the severity of the risks to whistleblowers - legal aid is not available to whistleblowers.

Often criticisms and the manner in which they are made do not qualify an (ex-) employee for the statutory protections afforded to whistleblowers. Statements made in an inappropriate forum, or worded incorrectly, can rinse a worker of any right of redress. The current position of the law fails to consider the possibility of detriment directed at discerning workers but suffered in private, outside of the employment relationship. This detriment can be pervasive, intimidating and amount to harassment.

What is a former worker to do when, as a result of speaking up about transgressions in the (former) workplace in a way which does not afford them remedy, their family and friends are continuously bombarded by private investigators, they're subjected to repeated privacy violations, defamation and malicious allegations in the media, orchestrated by their former employer? This is harassment.

We have witnessed an extraordinary display of abuse of power and inequality of arms. It began by former employees collectively voicing clear concerns of working conditions in the wake of a reckoning within the craft beer industry. A CEO of a Scottish company, by using their influence and reach, instead of acknowledging transgressions, used the opportunity to miscredit these legitimate voices by alleging a criminal conspiracy. Public records of the CEO's comments, indicate that the CEO has spent at least £600k (not including legal fees), using various brow-raising methods across several jurisdictions, investigating who was responsible for informally collectivising aggrieved workers, using methods of intimidation in order to silence them and using media resources to attempt to discredit legitimate concerns. The victims of this campaign of harassment have not only been targeted in a personal capacity, but they include some who have no formal employment connection at all. None of these victims have had the ability or access to compel relief from this continuous course of retaliatory conduct.

This extraordinary case has implications not only for labour rights but unwarranted interference with fundamental rights, as well as corporate governance. It is a case which illustrates that employer retaliation and harassment is a public policy issue which must be addressed.

Under Scots law, every individual has a right to be free from harassment and, accordingly, a person must not pursue a court of conduct which amounts to harassment of another and is intended to amount to harassment of that person or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person [33] (Protection From Harassment Act 1997 s8). Actual or apprehended harassment can be subject to a civil claim. Moreover, in Scotland a person commits the offence of stalking when they engage in a course of conduct that causes another to suffer fear or alarm, either intentionally or where they know or ought in all the circumstances that engaging in the course of conduct would be likely to cause another to suffer fear or alarm [34] (Criminal Justice & Licensing Act (Scotland) 2010 s39). Both harassment and stalking are subject to

the same defence in Scotland - it is a defence to show that the course of conduct was engaged in for the purpose of preventing or detecting crime (PHA 1997 s8(4)(b) & CJLA 2010 s39(5)(b)). What is unclear is whether a non-natural person (i.e. a company) can be a perpetrator of harassment or stalking. There is limited precedent on the issue in England, where courts have found that for the purposes of s1 (a provision of the act which is not applicable in Scotland) of Protection From Harassment act 1997, "a person" is inclusive of any legal personality (see Kosar v Bank of Scotland Plc (t/a Halifax) [2011]). A further complicating issue is delineating 1. The instructor or orchestrator of harassment, i.e. person or company or both 2. The funding for the harassment 3. The perpetrators of harassment; and what action is subsequently appropriate considering these factors.

Furthermore, the existence of an employment relationship causes jurisdictional issues. A dispute between an employee and employer falls in the jurisdiction of the Employment Tribunal ("ET"), even if the employment relationship has ended and the dispute is in relation to issues after the termination of the employment relationship. For the Tribunal to consider detriment, the (ex-)employee must demonstrate that any detriment they have suffered is because of a protected characteristic or protected act, and detriment suffered must be *in the field of employment*, meaning the detriment must not be in a private capacity. Meaning that the detriment must be in relation to their employability, interference with their new employer etc. Whistleblower remedies offer little recourse in these circumstances for a legitimately critical (ex-)worker, as an (ex-)employee must satisfy several legal tests in order to qualify for remedies. To benefit from these, an (ex-) employee has the burden of:

- Knowing they must engage with Acas prior to filing a Tribunal claim,
- Meeting the legal tests for qualifying and protected disclosures,
- Understanding the distinction between an allegation and information,
- Ensuring the manner of disclosure was appropriate,
- Ensuring the disclosure was to prescribed persons and/or meets the wider disclosure requirements,
- Proving detriment and the associated time limits,
- Proving that the disclosure caused the detriment - but only in the field of employment.

Moreover, although access to ETs is only subject to limited fees and representation is not required, it is a fact, across all forms of dispute resolution, that litigants in person (people who represent themselves) are always worse off in any dispute than if they have representation. It is worth noting that legal aid is only available for employment disputes relating to discrimination. The overwhelming majority of employees are unaware of applicable time limits and procedural requirements in relation to complaints - usually 3 months from the date of the event - and legitimate cases can be dismissed for minor procedural or administrative errors on the part of the lay complainant (for a recent case, see Pryce v Baxterstorey Ltd [2022] EAT 61). Not to mention the length of time it takes to resolve a dispute through ET.

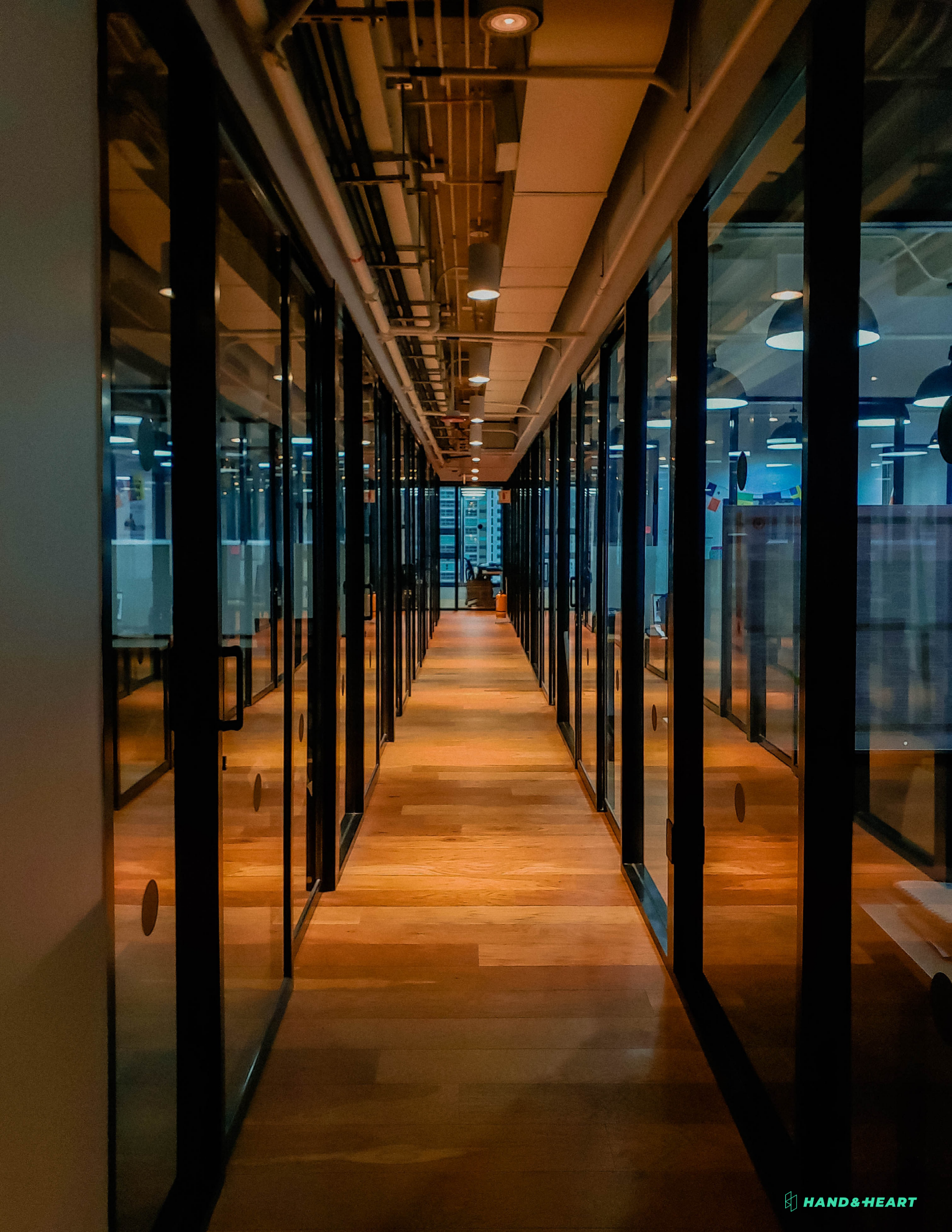
Importantly, access to Employment Tribunals is subject to Acas. Acas' purpose is to resolve disputes - which is largely in the form of COT3 settlements - to stop disputes from progressing to a Tribunal. Settling employment disputes has the effect of keeping the realities of employer misconduct and employment related disputes outside the purview of public and Parliamentary scrutiny. Acas is not a mechanism by which (ex-)employees can enforce their rights - it's a mechanism by which they can waive their rights. Acas conciliation is confidential and therefore information and statistics beyond case classification and case outcome do not exist - at least publicly. Settlements, AKA non-disclosure agreements, are almost exclusively on a *no admission of fault or

liability* basis and are confidential. Therefore it is clear that governments do not have an adequate overview of employer behaviour and/or transgressions, and this represents a serious threat to labour rights as employment practices are not being subjected to effective oversight or to judicial control. This is an issue of public policy.

Therefore, if the (ex-)worker does not raise a Tribunal claim within three months of the detriment occurring and cannot prove that the detriment, i.e. harassment, they are experiencing is in the field of employment and due to a protected characteristic or protected act, or if their disclosures do not satisfy the whistleblower tests... then their claim at Tribunal will fail. This leaves (ex-) employees completely open and vulnerable to acts of intimidation and harassment in a private capacity. Current statutory protections for employees are inadequate. Consequently, the current position is that there is no recourse for (ex-)employees without the means of raising a civil action of harassment, which may be struck out for inappropriate forum, or convincing the authorities that the course of conduct amounts to stalking by a non-natural person.

Legislators need to do more to protect employees, workers and the general public from the egregious abuses of power of companies and their executives, overtly abusing the inequality of arms to silence and intimidate those who dare speak, individually and/or collectively, for corporate transgressions. We have witnessed a Scottish company and their executives intimidate and harass their (ex-)employees and critics in several jurisdictions, under the guise of "preventing or detecting a crime," and have failed to secure relief for several of these victims. We implore you to recognise that the current state of affairs leaves many vulnerable and victim to retaliatory conduct, amounting to harassment and stalking under Scots law, explicitly designed by experienced lawyers to circumnavigate the statutory protections afforded to (ex-)employees.
Retaliation against former employees is rising, but protections and remedies are out of reach without substantial resources, which will never match those of the employer.

Legitimate criticism of poor employment practices cannot continue to be allowed to be stifled by the inequality of arms between employers and (former) employees, and legislation and policy need to be reviewed in order to ascertain how (former) employees can safely contribute to holding companies accountable for their transgressions without fear of retribution.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