

Whistleblowing – An update

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Introduction

1. This paper reviews recent developments in the application of those provisions of the Employment Rights Act 1996 introduced by the Public Interest Disclosure Act 1998, generally referred to as PIDA, and conferring protection from dismissal and detrimental treatment on 'whistleblowers'. The legislation is to be found in Part IVA of the Act, together with ss 47B and 48 (protection from detriment and remedy) and 103A and 105(6A) (dismissal and selection for redundancy for having made a protected disclosure).

2. The long title of PIDA indicates the legislative policy:

“An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.”

This statement of purpose is important because it has clearly and significantly influenced the approach of the courts to the interpretation of a highly technical piece of legislation in a way that promotes the protection of those within its scope, and (some would say) stretches the edges of its scope. Until 2009 nearly all of the reported decisions on PIDA could be regarded as liberal in their construction of the law, but in the period under review (from the start of 2009 to date) there have been two significant decisions applying what may be regarded as a more restrictive interpretation of the scope of the law. This may reflect concerns that the scope for misuse of the legislation deriving from some of the earlier decisions (*Parkins v Sodexho Ltd* [2002] IRLR 109 is the case most often referred to in this context).

The context of PIDA

3. It may be helpful, before reviewing the recent cases, and the amendment earlier this year to the Employment Tribunal Rules of Procedure for whistleblowing cases, to set out briefly the context of the legislation.
4. Much of the importance of PIDA derives from the remedies available, and the fact that they may be available in circumstances where there would otherwise be no protection for the claimant. There is no qualifying period of service for protection from unfair dismissal for having made a protected disclosure, or selection for redundancy for that reason, and in both cases no cap on the compensatory award. Interim relief is available in s 103A

cases (but not redundancy selection cases: *McConnell v Bombardier Aerospace Ltd* [2009] IRLR 201). The compensation that may be awarded for detriment under s 48 includes compensation for injury to feelings (*Virgo Fidelis Senior School v Boyle* [2004] IRLR 268), a remedy not otherwise available, save under the discrimination legislation for an employee whose dismissal follows a course of victimising conduct by the employer; and workers who are not qualified to make unfair dismissal claims because they are not employees may instead claim compensation for being subjected to the detriment of the termination of their engagement to work (cf as to the breadth of the definition of 'worker' here *Croke v Hydro Aluminium Worcester Ltd* [2007] ICR 1033).

5. The temptation in these circumstances to allege whistleblowing as the reason for dismissal or other adverse treatment is obvious, but what has concerned many respondents to such claims is that despite the specific reference in the Long Title of PIDA to the 'public interest', the scope of what constitutes a protected disclosure has been interpreted so widely that a claimant can complain, for instance, of a breach of his contract, or of having been bullied, and then assert this as the real reason for some detrimental treatment, or dismissal, so as to engage the legislation. (Perhaps the most extreme example of this encountered by the writer was a claim by a teacher that his dismissal for redundancy was automatically unfair because, as he claimed, his selection was due to the fact that he had reported another teacher for smoking in a classroom (before the smoking ban, but contrary to a school rule)).
6. The reality of a PIDA claim however is of a significant number of hurdles that the claimant must surmount, as to most of which the burden of proof is on him or her. Assuming that it is not disputed that the claimant was employed by the respondent (whether under a contract of employment or a worker's contract), the claimant must first show that he or she made a **disclosure**. This must have been a disclosure of **information**; it must have been the **reasonable belief** of the claimant that the information disclosed tended to show a **relevant failure**; and the disclosure must have been made in **good faith**, and either to the employer or, within the additional conditions laid down by whichever of ss 43C-43H applies, to a person or body within the applicable provision. It is only if all of these conditions are met that any basis for liability for detriment or dismissal can arise. The burden is on the claimant for all of these points except good faith; here the burden is on the employer, but a lack of good faith can be shown even though the claimant believed the truth of the matters disclosed, if his or her predominant motive in making the disclosure was to cause detriment to another: *Street v Derbyshire Unemployed Workers' Centre* [2004] IRLR 687.

7. In practice the crucial issue in PIDA cases is often whether the reason for the treatment of the claimant was the disclosure(s), rather than whether the disclosure(s) was or were protected (it is also often the case that multiple disclosures are alleged). Here the burden is on the employer, subject to an initial and relatively low evidential threshold on the claimant to put the point in issue (see *Maund v Penwith District Council* [1984] ICR 143). However, if, as is often the case, the employer asserts a different reason for the treatment of the claimant, and the tribunal does not accept on the evidence that that reason is made out, it does not follow that the claimant succeeds: in *Kuzel v Roche Products Ltd* [2008] ICR 799, the Court of Appeal held that in those circumstances it was open to the tribunal to find a third reason to be the real reason for the treatment of the claimant. In this respect PIDA does not give the protection to claimants that the reversal of the burden of proof in discrimination cases gives.

8. In 2008-9 there were some 1,700 PIDA claims (the total includes both dismissal and detriment claims). The published statistics of outcomes do not separate out PIDA cases, so it is not possible to give the proportion of cases settled, or the success rate of those going to trial; but the Tribunals Service statistics of ET cases for 2008-9 do reveal that there were only 49 unfair dismissal awards of over £50,000, the highest being £84,005. This does suggest that employers' fears of the leverage given to claimants by the removal of the cap on compensatory awards are rarely justified; what such figures do not disclose, however, are levels of settlements, or the extent to which fear of publicity in whistleblowing cases may lead to more substantial settlements (and see the recent EAT decision in *NCP Services Ltd v Topliss*, UKEAT/0147/09, a successful appeal by the claimant against an award of £162,042, which the EAT held had failed adequately to address future losses; even higher awards have been reported in earlier years). A further potentially very important consequence of a claim of automatically unfair dismissal under s 103A is the possibility of a claim for interim relief; this, and a recent case on the point, are discussed at the end of the paper.

9. The public interest element of PIDA has been emphasised by amendments to the ET Rules of Procedure, which came into force for claims presented on or after 6 April 2010, under which if the claimant agrees (by ticking a box on the claim form, which has been amended to provide for this), the claim can be referred to the relevant regulator for the underlying disclosure to be investigated. This too is discussed further below.

Recent cases: disclosure

10. It is in relation to what is a **disclosure of information** that the two more restrictive cases referred to in para 2 above have been decided. The first, a decision of the EAT under Slade J, is *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38. Mr Geduld, a director and minority shareholder, wrote to the company through his solicitors complaining of unfair prejudice to him as a minority shareholder, and reserving his rights. The company responded by dismissing him. He did not have sufficient service for an ordinary unfair dismissal claim, but succeeded before the tribunal in his claim that the dismissal was automatically unfair as the reason for it was the protected disclosure comprised in the letter his solicitor had sent.
11. The EAT reversed that decision on the basis that the letter was not a qualifying disclosure (and therefore not a protected disclosure). What was required was a disclosure of information, not merely an allegation. 'Information' requires the conveying of facts, not a complaint about something (whether or not coupled with a threat to resign). The letter complained about a potential breach of what was conceded to be a legal obligation (under s 994 Companies Act 2006, the successor to s 459 of the 1985 Act). However there was a clear distinction between information and an allegation, as shown by the wording of s 43F (disclosure to prescribed persons), which refers to 'the information disclosed, and any allegation contained in it', and similar distinctions made in the definitions of protected acts in relation to sex (and race) victimisation.
12. In a passage likely to be regularly quoted, the distinction is illustrated thus (para 24):

"Further the ordinary meaning of giving 'information' is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating 'information' would be 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that 'you are not complying with Health and Safety requirements'. In our view this would be an allegation not information."
13. Having held that the solicitor's letter contained no more than allegations, the EAT went on to hold in the alternative that there was no disclosure. 'Disclosure' is defined by s 43L(3) as including bringing information to the attention of someone who is already aware of it, but as Slade J points out, that extended definition presupposes that 'disclosure' means more than just 'communication'. A communication such as a solicitor's letter setting out the employee's case and reserving the client's right to claim constructive dismissal, or the

equivalent letter sent by the employee personally, is not enough to constitute a *disclosure* of any information referred to. (It has to be added that it is far from clear from the very brief reasoning on this point where the EAT envisaged that the line was to be drawn, but it is at least clear that a prospective claimant cannot 'set up' a PIDA case by writing a letter of this kind.)

14. The second case, *Goode v Marks and Spencer plc*, UKEAT/0442/09, Wilkie J presiding, concerned the leaking to *The Times* of proposals put by the employer to its employee representatives to reduce the level of discretionary enhanced redundancy payments. The employee relied on s 43G ER Act, which gives protected status to disclosures to third parties under strict conditions, the relevant one on the facts being that the whistleblower had made a disclosure to his employer of substantially the same information. Additionally, the disclosure must be of information which the whistleblower reasonably believes tends to show a relevant failure; the EAT unsurprisingly accepted a submission for the employer that that entailed that the employee's earlier disclosure to the employer must have amounted to a qualifying disclosure.
15. Mr Goode had indeed spoken to his manager about the matter, opining that the proposals put for consultation were 'disgusting'. However, the EAT held, upholding the ET, that this was far from a disclosure of 'information' tending to show a relevant failure. The fact that the employer was consulting its employee representatives did not indicate that it was likely that there would be breaches either of employees' contracts (it was clear that the enhanced redundancy payments were regarded as discretionary, and they had been changed unilaterally relatively recently) or of the s 188 TULRCA duty to consult over redundancy dismissals: the company was not proposing to dismiss anyone. The assertion that the proposals were 'disgusting' did constitute a disclosure, but only of Mr Goode's state of mind – he was disgusted. That was not 'substantially the same information' as that disclosed to *The Times*. Moreover, it was not 'information' of a nature such as could be sufficient to provide the basis for a qualifying disclosure, as it did not tend to show a relevant failure.
16. This case is thus authority for the point that a disclosure of the whistleblower's (disgusted) state of mind is not enough to amount to a qualifying disclosure (the 'Tunbridge Wells' defence?). It is also authority for the point that a disclosure can only be protected under s 43G, where there is reliance on prior disclosure to the employer, if that disclosure met the requirements for a qualifying disclosure under s 43B(1).

Cases on disclosure – when, by whom, to whom, about whom?

17. Two further recent cases have confirmed the breadth of the circumstances in which protection is given to a claimant victimised for having made a disclosure. On the basis of earlier authority, it was already clear that it is irrelevant *when* a disclosure was made: *Miklaszewicz v Stolt Offshore Ltd* [2002] IRLR 344, where the disclosure had been made by the claimant during a previous period of employment by the respondent, before PIDA came into force; it was irrelevant when the disclosure was made provided that the detriment was inflicted after the Act came into force. Equally, it is irrelevant that the *detriment* occurs after the employment has terminated: *Woodward v Abbey National plc (No 1)* [2006] ICR 1436.
18. Neither of these authorities deals with whether a disclosure made by the claimant at a time when s/he was employed by an employer other than the respondent can be a protected disclosure. This was the issue in *BP plc v Elstone*, UKEAT/0141/09 (Langstaff J). E had been employed by company A, which provided his services to company B. He made a disclosure of safety issues to company B. Company A found out, and dismissed him for gross misconduct, by disclosing confidential information. (It is not clear whether that incident led to a claim, or if so with what result.) E then secured a contract to provide services direct to company B; the latter told him he would get no more work when it found out from company A why they had dismissed him.
19. At a preliminary hearing the ET held that E's disclosure was capable of being a protected disclosure for the purposes of his claim against company B. Its appeal failed. The ET also held that it was necessary that at the time of making the disclosure, the whistleblower had to be a worker, employed by *somebody*. That was the subject of E's cross-appeal, which also failed: the plain wording of the Act precluded an argument that the whistleblower need not be a worker at the time. The outcome of the case is thus that a disclosure made by a worker whilst employed as such is protected if it meets the criteria of s 43B, and whichever is applicable of ss 43C-43L, of the ER Act, both for the purposes of protection from victimisation by the worker's then employer and for the same purposes vis a vis a subsequent employer.
20. Langstaff J reached this conclusion both on the basis of the wording of the legislation and by reference to its purpose, referring to a number of cases in which a purposive approach to construction had been supported. He recognised that the conclusion left an anomalous gap in the legislation: there is no protection against the refusal of a company in the

position of company B in this case to hire the worker because it knows of his/her previous whistleblowing. Equally however there would be serious gaps in the protection of the Act if the construction advocated by company B was applied: the claimant might have been employed by a subsidiary or service company at the time of the disclosure but working for a different subsidiary, or the parent company, by the time of the detriment or dismissal; or there might be other connections between the two employers; or the employee might have been transferred from company A to company B under TUPE. In each of these instances, if there was no protection there would be a serious gap in the legislation.

21. A further point highlighted by *Elstone* is the scope of s 43C of the Act, which is the principal provision under which a qualifying disclosure may be come protected. This section covers not only disclosure to the worker's employer, but also, where the disclosure concerns the conduct of a person other than the employer, or a matter for which another person has legal responsibility, that other person. The first of the two alternatives applied in *Elstone* – the safety breaches disclosed were breaches by company B, and had been disclosed to that company (hence the breach of confidentiality cited as grounds for dismissal by company A). Adopting a broad approach to the second limb, it would cover a diverse range of situations ranging from cases where legal responsibility for matters of safety or environmental protection are placed on parties other than the party responsible in fact for the failure (such as where the main contractor has overall responsibility for safety at a construction site) to a disclosure to a parent that their child has been truanting from school.

22. One of the cases cited with approval in *Elstone* is *Hester v Hibbins Way Neighbourhood Project* [2009] IRLR198. This case concerns the persons in respect of whose conduct a protected disclosure may be made. The simple answer is 'anybody'; to put it more formally, 'there is no limitation whatsoever on the people or entities whose wrongdoings can be [the] subject of qualifying disclosures' (para 14). Miss Hibbins worked for an organisation which recruited students for courses. She recognised the description of a man wanted by the police for rape as a prospective student she had interviewed for a place on a course, and contacted the police to pass on his address and mobile number. She subsequently suffered what she considered to be victimisation, and resigned. The EAT (Silber J presiding) reversed the decision of the ET that the disclosure to the police could not be a protected disclosure (even on the footing that the conditions of s 43H were satisfied) because the disclosure was not about her employer. A disclosure need merely be of information believed to tend to show that 'a person' has, inter alia, committed a criminal offence. The EAT's interpretation was not only a literal application of that wording

but also consonant with the purpose of the legislation, which would be artificially constrained if, for instance, a whistleblower would have no protection if s/he disclosed wrongdoing by a client of his/her employer.

Other recent cases

23. The nature of 'detriment' has been clarified by the EAT's decision in *Unilever plc v Hickinson*, UKEAT/0192/09 (HHJ Reid QC). The claimant H was employed by company Y to act as a security officer at the premises of company Z. Company Z discovered that H was making covert recordings of its employees, and instructed company Y to remove him from the premises, which they did. Having failed to find him other work, a month later company Y made H redundant. He brought a claim of detriment under s 48 less than 3 months after he was dismissed but more than three months after he was removed from company Z's site. The EAT held that the claim was out of time. The detriment suffered was being removed from the site. It had continuing consequences, culminating in his dismissal, but it was not a continuing *act* – the only detriment to which company Z subjected him was his removal from their premises. (No doubt once that had happened they were indifferent as to how company Y addressed what should happen to his job.)
24. It should be added, in the light of the decision and reasoning of the Court of Appeal in *Bolton school v Evans* [2007] IRLR 140 (where the Court held that the treatment of the claimant was not by reason of his making a disclosure that the school's computer system was insecure but his hacking into the system to obtain evidence that it was), that the judgment of the EAT in *Hickinson* does not explain how it was that the surreptitious recording of employees could constitute a protected disclosure; this point was not within the remit of the preliminary hearing on time, and in view of the EAT's decision did not require thereafter to be considered.
25. As has been mentioned, it is common that claimants in whistleblowing cases allege a number of disclosures. It is sufficient, for the purposes of crossing the threshold to the position where the employer must show that the reason for dismissal or subjecting the claimant to a detriment was not the making of a protected disclosure or disclosures, that the tribunal accepts that there was at least one disclosure qualifying for protection. However if there are held to be multiple protected disclosures, it is necessary for the tribunal to decide whether the making of the disclosures collectively was the reason or principal reason for the dismissal or detriment; they must be viewed together. This is the point made in *El-Megrisi v Azad University (IR) in Oxford*, UKEAT/0448/08, where the

tribunal was held to have been in error in considering only the most recent of the disclosures. That is not to say, however, that a claim will fail if only one of the protected disclosures has sufficiently enraged the employer to lead it to shoot the messenger. That would be sufficient. The point in *El-Megrisi* is that the tribunal must also consider whether the cumulative weight of protected disclosures has provoked the employer to lose patience with the employee and retaliate by dismissal or victimisation.

Referring cases to the Regulator

26. Following a round of consultation by BIS, which retains the responsibility for ET Rules of Procedure, the Rules were amended by the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010, SI 2010/131, with effect for claims presented on or after 6 April 2010. The prescribed claim form now includes a question whether the claimant consents to his/her claim being forwarded to the appropriate regulator. If the claimant does consent, and if the claim form asserts that the claimant has made a protected disclosure, the claim will be forwarded to the relevant regulator. The new provisions apply regardless of when the disclosure was made or the detriment suffered, provided that the claim was presented on or after 6 April 2010.

27. The wording on the amended Claim Form reads:

'If your claim consists of, or includes, a claim that you have made a protected disclosure under the Employment Rights Act 1996 (otherwise known as a whistleblowing claim), please tick the box below if you wish a copy of this form, or information from it, to be forwarded on your behalf to a relevant regulator (known as a 'prescribed person' under the relevant legislation) by the Tribunals Service.'

The relevant regulators are, as the quotation indicates, the 'Prescribed Persons' listed in the Regulations made under PIDA (see the Public Interest Disclosure (Prescribed Persons) Order 1999, SI 1999/1549, as amended). For technical reasons, the list has been re-enacted as an Annex to the Tribunal Rules. The Tribunals Service has set up a unit in Manchester to which all claims where the box has been ticked are to be referred, to ensure consistency in identifying the correct or most appropriate 'prescribed person' to whom to send the particulars of the claim. No judgment is made at this stage as to the genuineness or credibility of, or good faith underlying, the disclosure, and the legislation says nothing about what the regulator has to do with the information passed on under the procedure. There is however reference in the BIS Response to the consultation exercise, published in January 2010, to the need for the Tribunals Service to comply with the Data

Protection Act with regard to third party information, and if necessary redact the claim before forwarding it.

28. The intention behind this measure is clearly legitimate – to promote the investigation by the relevant regulator of concerns about matters of public interest. It is also reasonably clear that it will have little impact on the progress of proceedings in the tribunal (it would not be likely, for instance, that any application to stay the proceedings until an investigation by a regulator was complete would succeed, since it would be rare that anything in the proceedings would turn on whether the allegations made by the whistleblower were substantiated). However there are obvious limitations to the utility of the procedure.
29. The first point is that the list of regulators is far from complete. For instance, it does not include the General Medical Council – an important and puzzling omission given the prominence of the NHS in the issues leading to the enactment of PIDA. It is also likely that there will be difficulties in identifying the correct regulator in many cases, especially those where the disclosure is of a matter internal to the employer such as bullying, which in most employments would not be within the remit of an external regulator in an event. Nor can it be certain that regulators will wish to investigate matters that are at least indirectly the subject of pending litigation, or will have the resources to do so. The procedure is no doubt intended to allow employees to circumvent or overcome restrictions on disclosure imposed by duties of confidentiality, but it is far from obvious that that objective is achieved, in the absence of any specific safeguard for claimants.
30. The claim itself would be covered by absolute privilege, and even malicious allegations would not be actionable, eg in defamation. But the further disclosure, initiated by the claimant albeit effected by the Tribunals Service as his/her agent, would not necessarily carry the same protection. Would a court accept the extension of absolute privilege to such circumstances, and if not, might aggrieved employers sue for defamation, alleging express malice, possibly for tactical reasons? There are clearly possibilities for additional litigation here, not intended by the framers of the rule change.
31. These points apart, the main effects of the change are likely to be, for employees, an opportunity to do vicariously what they have been too afraid to do personally, in pursuing their concerns; and for employers, the concern that a determined whistleblower will have the facility to cause more problems for his or her employer by way of initiating a time-consuming and potentially very damaging investigation by a regulator.

Interim Relief

32. Under ss 128-131 ER Act, an employee who claims that he/she has been unfairly dismissed for having made a protected disclosure may apply to the ET for interim relief. The right is available only to employees (and police officers, who are deemed such for the purpose of PIDA unfair dismissal claims: see s 134A), and only relates to claims under s 103A, not claims of redundancy selection for having made a protected disclosure (s 105(6A): see *McConnell*, cited at para 4 above). Claims must be presented before notice of dismissal expires (if notice has been given) or within 7 days of the date of termination. Claims for interim relief are given the highest listing priority by tribunals: s 128(3) requires that the application be determined 'as soon as practicable'; only 7 days' notice of the hearing need be given (s 128(4)); and the power to postpone the hearing can only be exercised if there are 'special circumstances' which justify doing so.
33. The relief itself is either the reinstatement or re-engagement of the claimant until the determination of the substantive claim or, if the employer is not prepared to agree to reinstate or re-engage, as the case may be, an order for the continuation of the employee's contract (and thus of his/her pay and benefits). In either case, there is no facility for the employee to be required to repay the remuneration received if the final decision is against him/her. There are specific provisions about the criteria for and terms of any re-engagement, the need for employee consent to reinstatement or re-engagement, and the refusal of any order if the employee unreasonably refuses to consent to being re-employed.
34. The tactical advantages to the employee of such an application (or potentially to the employer, if the application is refused) are significant and obvious. The criterion to be satisfied for an order to be made is that the employee is 'likely' to succeed. This was held (in a trade union reasons case, where the statutory wording is materially indistinguishable) to mean that s/he must show that s/he has a 'pretty good chance' of succeeding at trial: *Taplin v C Shippam Ltd* [1978] ICR 1068.
35. In *Raja v Secretary of State for Justice*, UKEAT/0364/09, the EAT (HHJ Birtles) declined to revisit that test, despite the more liberal interpretation of 'likely' by the House of Lords in *SCA Packaging Ltd v Boyle* [2009] IRLR 746 (in the context of the likelihood of recurrence of a disabling condition). The test therefore remains set at the higher level, subject to any consideration in future by the Court of Appeal. But the more important

point in the case is that the tribunal was held to have erred in refusing to hear the application because it was too complicated and there was too much supporting documentation. It is a matter of entitlement that if an application for interim relief is made in time in connection with an allegation of a kind that carries the remedy, the tribunal must hear the application.

36. This leads to the question what procedure is to be followed in hearing an application. Interim relief hearings are 'interim hearings' within Rule 18A, and will normally be conducted by a judge sitting alone: the rules (in particular Rule 18) applying to PHRs apply equally to interim relief hearings: rule 18A(2). This also means that there is a *facility* to hear evidence. Practice varies as to whether the tribunal will *agree* to do so, possibly depending on time constraints: there is no set procedure. What is important for both parties is preparation for the hearing under what may be quite extreme pressure of time; the hearing may effectively determine the course of the case, or the basis from which each party can negotiate terms of settlement.

Conclusion

37. Whistleblowing claims are sufficiently frequent, and have sufficient potential to be very damaging to the reputation of the respondent, or to its pocket, or both, that they punch above their weight in terms of importance to respondent clients. Equally, they are frequently cases of particular significance from the claimant's perspective, with every likelihood of a more intense sense of grievance than in ordinary cases, greater single-mindedness in pursuing the litigation, and much more for the claimant to play for financially (at least as perceived). The developments summarised in this paper will do nothing to alter these factors. How far the legislation and cases brought under it have served to promote the original legislative objective of encouraging responsible disclosures of matters of public interest and concern, particularly of suspected wrongdoing, by giving effective protection to those who blow the whistle in good faith, is very much another question, to be answered through systematic research rather than through the inevitably distorted perspective of litigation.

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