PROTECTED DISCLOSURES SEMINAR

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I. INTRODUCTION

Why protect whistleblowers?

1. The purpose of the Public Interest Disclosure Act 1998 (**PIDA**) is to '*make it more likely that where there is malpractice which threatens the public interest, a worker will -- rather than turn a blind eye -- raise the concern and do so in a responsible way*'[1]. The PIDA provides a statutory framework to protect workers from suffering a detriment for 'blowing the whistle'.

2. "Whistleblowing" denotes the act of an individual worker or a group of workers raising a concern so as to prevent malpractice or dangers to the public.

3. The historical background is important; the PIDA was introduced following a number of scandals: the Zeebruge ferry disaster, rail crash at Clapham junction, the explosion on Piper Alpha, BCCI, Maxwell, Barings etc. Evidence from the inquests and enquiries into these high profile catastrophes established that often employees were well aware of the risks but failed to voice their concerns. Some employees simply did not want to "rock the boat" as they were concerned about the repercussions; in some companies concerns had been raised with middle management, but these were not passed on to senior staff. According to a survey, 84% of workers who informed their employers of fraud in the USA and UK lost their jobs[2].

4. The role of workers in bringing such matters to the attention of their employers, in order to avert future disasters, cannot be overstated. PIDA tries to ensure that workers will make disclosures for the public interest. This purpose must be born in mind if one wishes to understand the stringent protection provided in the PIDA as well as the requirements for protection.

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[1] Formulated in Public Concern at Work's Consultation paper
[2] *The Independent* 28 January 1999

5. PIDA is largely the product of the tireless work of 'Public Concern at Work', an independent consultancy and legal advice centre launched in 1993. Its website at **http://www.pcaw.co.uk/** contains useful information and precedents.

PIDA

6. PIDA has been fully in force since 2 July 1999; it introduced protection for whistleblowers: against dismissal; selection for redundancy and subjection to a detriment as a result of blowing the whistle. The PIDA amends the Employment Rights Act 1996 (**ERA**) by inserting "PART IVA PROTECTED DISCLOSURES"; i.e. the new ss 43A to 43L and some further amendments. In this text all references are to sections of the ERA, unless otherwise stated.

7. Since 1999 a large number of claims have been brought under the new sections[3]. As will be seen later, compensatory awards are not subject to the normal statutory cap for unfair dismissal awards and claimants on average received awards of around twice the statutory limit, the highest award being over £800,000.

8. The Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549) is a piece of secondary legislation supplementing PIDA; it sets out the prescribed persons – see below.

9. The Department for Trade and Industry has published a short guide to the Act (Ref URN 99/511) – this is a useful publication as it lists the contact details for prescribed persons.

10. PIDA has led to further developments; whistleblowing codes have been developed in particular areas: e.g. the NHS, the FSA, Civil Service etc. The April 2009 ACAS Disciplinary and Grievance Procedures state: "*Organisations may wish to consider dealing with issues involving ... whistleblowing under a separate procedure*".

[3] In the first three years of the Act, there have been over 1200 claims registered by workers – Tolley's Employment Law Service. In 1999/2000 there were 157 applications, by 2007/2008 this rose to 1,497 – see *www.pcaw.co.uk/law*

11. The general approach of PIDA is for workers to raise matters internally before making a disclosure to external bodies such as regulatory associations or the press. Where it is not reasonable to raise the matter internally or where no or inadequate redress has been provided, the PIDA affords a worker protection if he makes external disclosures in a specified way.

II. OVERVIEW OF THE PIDA SCHEME

12. A disclosure is "protected" if it is (1) a "qualifying disclosure" (within s. 43B ERA) that (2) has been made in compliance with one of the modes of disclosure set out in ss. 43C to 43H.

13. If the information disclosed does not tend to show one of the 6 specified concerns, there will be no protection under PIDA.

14. Note: **t**his does not necessarily mean that there is no protection – e.g. a worker dismissed for a disclosure not protected under PIDA may still rely on his/her general right not to be unfairly dismissed.

15. Turning to the modes of disclosure, the threshold for protection changes according to how the disclosure was made:

    (i) PIDA seeks to encourage disclosure to the employer and here the threshold is the lowest; the only requirement is "good faith" – ss. 43C, 43D[4] and 43E.

    (ii) In case of regulatory disclosures to "prescribed persons" the threshold is a little higher; the worker, additionally to good faith, must reasonably believe that the information disclosed is substantially true – s. 43F.

[4] Note that for s. 43D (disclosure to legal advisor) not even good faith is needed

(iii) In wider disclosures – to the media, police etc – the threshold is at its highest; though it is slightly lowered if the disclosure relates to an –

(iv) Exceptionally serious concern – s. 43H

16. If the disclosure is protected, the worker will be protected from being subjected to a detriment/dismissed/selected for redundancy as a result of the disclosure. This protection cannot be excluded by contract.

Who is protected?

17. The normal definition of 'worker' in s. 230(3) of ERA is extended by s. 43K(1) for the purposes of protected disclosures to include individuals who would not otherwise be 'workers'.

18. PIDA protects independent contractors who provide services other than in a professional-client or business-client relationship. It expressly protects the following:

(i) Agency workers – s. 43K(1)(a). Note that "*the person who substantially determines or determined the terms*" is treated as the "employer" – s. 43K(2)(a). This will normally be the organization where the agency worker performs the work.

(ii) NHS staff – doctors, dentists, ophthalmologists and pharmacists are usually independently contracting professionals and are covered for PIDA's purposes.

(iii) Trainees on work experience or on a vocational scheme – s. 43K(1)(d).

(iv) Crown employees, except soldiers and national security personnel.

19. However, even the extended definition has some limits. Self-employed professionals such as solicitors, accountants -- insofar as their relationship with their clients is concerned --

non-executive directors and those in business genuinely on their own account and volunteers are not protected. Police officers and those who work in the security service, the secret intelligence service or GCHQ are expressly excluded from the provisions of PIDA or workers who work ordinarily outside Great Britain (see ss. 11-13 of PIDA).

20. "Employer" in Part IVA of the ERA 1996 is also given an extended meaning by virtue of s 43K(2). Referring to the extended categories of workers covered under s 43K(1) the 'employer' may be either the person who substantially determines the terms on which the worker is engaged (in agency-type situations); a health authority or health board (for NHS doctors, dentists, opticians and pharmacists); or a person providing work experience or training (for trainees on work experience or vocational schemes).

21. Note that the application of the extended definition of worker may result in the worker having more than one employer.

III. "QUALIFYING DISCLOSURE"

22. S. 43B provides:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—**
>
> > **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
> >
> > **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> >
> > **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
> >
> > **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

"Disclosure of information"

23. PIDA provides for a very broad definition of what amounts to a disclosure: "*any disclosure of information*" will qualify. Section 43L(3) specifically provides that there can be disclosure to a person who is already aware of the matters disclosed.

24. Nonetheless, an actual disclosure is needed – a mere threat of making a disclosure to the press, for example, would not be sufficient. In ***Everett Financial Management Ltd v Murrell***[5] the EAT concluded that merely expressing a concern and seeking reassurance that there was no breach of a legal obligation did not involve any disclosure of information within s. 43B.

[5] EAT/552,553/02 24 February 2003

'Reasonable belief'

25. All disclosures must satisfy the requirement of reasonable belief that the disclosure tends to show a relevant failure. This involves both a subjective and an objective assessment– see ***Welsh Refugee Council v Brown***[6]:

    (i) Did C in fact believe what she was saying?

    (ii) Was C's belief reasonable?

26. The EAT in ***Darnton v University of Surrey***[7] confirmed that the correct test is whether at the time of making the disclosure the employee had a reasonable belief. Whether the allegations were true may be an important tool in determining whether or not the employee had a reasonable belief in them. The EAT emphasised that if C had a "hunch", he should be encouraged to make the disclosure. C does not have to show that the allegations were true, he may have been reasonably mistaken.

27. In ***Sir Robert McAlpine Ltd v Telford (EATS/0018, 13 May 2003)*** the EAT held that the truth of the information disclosed will always be of assistance in establishing whether the belief in it was reasonable. It will, however, not be determinative of the question.

28. The ET should consider "all circumstances". Given that the test is partly a subjective one, presumably, the ET would consider the individual characteristics of the employee/worker in question. The worker may have/lack personal knowledge that makes it more/less likely that his belief was reasonable.

[6] EAT/0032/02, 22 March 2002
[7] [2003] IRLR 133

29. This test does not seem to protect the worker who has a suspicion and genuine concern, but is not in possession of sufficient – or sufficiently reliable – information to form a belief required. Reform has been called for in this area of protected disclosures[8].

'Tends to show'

30. The worker need only demonstrate that the information being disclosed *tends* to show one of the six failures; one of those six things need not actually have occurred or be about to occur. This qualification is essential, since the worker is not in a position to investigate and may be relying on second-hand information.

31. The worker may have sufficient concern for the employer to investigate the matter and should be able to raise the issue. Note that in the case of external disclosures the worker will additionally need to show a substantial belief in the truth.

32. PIDA does not assist as to the extent to which the disclosure must spell out which relevant failure the information disclosed tends to show. In ***Fincham v HM Prison Service***[9] the EAT emphasised that

> **"... there must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the employers are relying" (para. 33)**

33. A more relaxed approach, however, was taken by the EAT in ***Douglas v Birmingham CC***[10] and in ***Odong v Chubb Security Personnel***[11]. It is on the whole likely – and more in line with the purposes of PIDA – that workers can make a qualifying disclosure without having to specify which category of failure the disclosure relates to.

Disclosures in relation to "*likely*" failures

[8] By Dame Janet Smith in her Shipman Inquiry Report
[9] EAT/0925/01 and EAT/0991/01, 19 December 2002
[10] EAT/018/02 17 March 2003
[11] EAT/0819/02 13 May 2003

34. All categories relate to concerns about likely failures in the future.

35. In ***Kraus v Penna plc***[12] the EAT held that "likely" in this context required more than a possibility or a risk; the worker had to show that failure was probable or more probable than not.

36. ***Kraus v Penna plc*** however, was disapproved by the Court of Appeal in ***Babula v Waltham Forest College***[13]**.** The Court of Appeal held that for the purpose of s.43B(1)(b) what was relevant was the whistleblower's reasonable belief, and not whether or not that belief turned out to right or wrong. The word "likely" did not import an implication that the whistleblower had to be right, or that, objectively, the facts had to disclose a likely criminal offence or an identified legal obligation. The purpose of the PIDA was to encourage responsible whistleblowing; to expect employees to have a detailed knowledge of criminal law sufficient to enable them to determine whether or not particular facts that they reasonably believed to be true were capable, as a matter of law, of constituting a particular criminal offence was unrealistic and contrary to public policy. The concept of "good faith" added the element of protection for an employer.

The six categories of disclosure

37. The disclosure must tend to show that one of the 6 categories of failures occurred, is in the process of occurring or is likely to occur.

38. It does not matter where the 'relevant failure' occurred, occurs or would occur; it could be within the United Kingdom or elsewhere (s 43B(2), ERA 1996). In ***Bhatia v Sterlite Industries (India) Ltd***[14], an employee had applied for a job working on mergers and acquisitions whilst visiting family in India. Within two months, he had raised concerns about breaches of US and Australian stock exchange rules both internally and to a client seeking admission

[12] [2004] IRLR 260
[13] [2007] IRLR 346
[14] (2003) All ER (D) 410 (March)

to the New York Stock Exchange. These concerns were dealt with internally. When he raised a further concern about a proposed dilution in equity of an Australian company that would breach Australian law, the chairman of the company threw his digital diary at him and threatened to destroy him if he tried to leave. The employment tribunal accepted jurisdiction and awarded the applicant a record sum of £805,000. Subsequently, the tribunal's decision was successfully appealed on an issue in connection with the compensation hearing and the case was remitted to a differently constituted tribunal.

39. Note that there is a considerable overlap between the categories and one scenario may fall into several different categories.

Criminal offence – s. 43B(1)(a)

40. This involves any criminal offence, regardless of seriousness, and may also include a minor breach of regulations that could give rise to a criminal offence.

41. The statutory language is not limited to the employer committing a criminal offence.

Legal obligation – s. 43B(1)(b)

42. This will cover the breach of any contractual, statutory or common law obligation and, presumably, a failure to comply with a Code of Practice.

43. The issue of whether 'legal obligation' covered legal obligations arising from the contract of employment was considered by the EAT. In the case of ***Parkins v Sodexho Ltd***[15] the EAT, albeit *obiter dicta*, held that a breach of an implied term of the contract of employment could amount to a protected disclosure and stated:

[15] [2002] IRLR 109

'We can see no real basis for excluding a legal obligation which arises from a contract of employment from any other legal obligation. It seems to us that it falls within the terms of the Act. It is a very broadly drawn provision.'

44. In ***Fincham v HM Prison Service***[16], the EAT held that failure to deal with a claim of alleged racial harassment and victimisation could amount to a breach of the implied duty of trust and confidence between employer and employee, and as such would amount to 'qualified disclosure' for the purposes of a claim under PIDA. Although, on the facts, the EAT held that the complaints of malice and petty spitefulness by other employees about which she complained did not amount to a breach of the implied term between employer and employee.

45. The decisions above must be correct; the statute talks of failure to comply with "*any legal obligation*". This wording is wide enough to include a breach of the worker's contract of employment. However, this does not sit comfortably with the purpose of PIBA, i.e. to protect public interest disclosures. It seems rather to provide workers with an additional way of raising private grievances.

46. It should be noted that the statute talks of "a person" failing to comply with the obligation. There is no need for that person to be the employer. This has now been confirmed by the EAT in ***Hibbins v Hesters Way Neighbourhood Project***[17]. The case concerned a teacher who disclosed to the police information about a student who was suspected of a sexual offence; the teacher was disciplined for this disclosure by her employer. The EAT held that under s. 43B(1)(b) the protected disclosure could relate to a failure by a person other than the employer (in this case the student).

47. The legal obligation may be imposed by a different jurisdiction. Further, the breach does not have to be done by someone else, the worker can disclose his own breach of an obligation – see e.g. ***Bolton (see below)***.

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[16] [2003] All ER (D) 211 (May)
[17] [2008] All ER (D) 145

48. The triviality of the obligation breached is irrelevant – although it may be relevant as to establishing the worker's ulterior motive. The breach must, however, be a breach of an obligation, not merely a moral obligation. Stating that the worker is "concerned with financial probity" is insufficient – ***Sim v Manchester Action on Street Health***[18]. Breach of a "professional obligation" will only suffice if it amounts to a legal obligation ***Butcher v Salvage Association***[19]

Miscarriage of justice' – s. 43B(1)(c)

49. It is not quite clear what this section provides for that is not already covered; in most cases disclosures warranting protection will be covered already by "criminal offence". There may be instances where the outcome of a civil action may have been influenced by some form of malpractice.

50. Further, there is no reason why the concept of 'miscarriage of justice' should be confined to legal proceedings; it could potentially be applied to situations such as internal disciplinary and appeal hearings where an employee does not believe he has received a fair hearing because of the impropriety of their employer.

Health and safety – s. 43B(1)(d)

51. The provisions relating to health and safety are widely drafted, and go much further than the current protection under s 100(1) ERA. Section 100(1)(e) provides that it is automatically unfair to dismiss an employee where "*in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger*".

52. There is no requirement under the PIDA for there to be a prospect of 'danger' which is 'serious and imminent' for the health and safety protection to apply. In ***Masiak v City Restau-***

[18] EAT10085/01 6 December 2001
[19] EAT/988/01 21 January 2002

rants (UK) Ltd[20] the EAT held that reference to 'other persons' s. 100(1)(e) was not deemed to be restricted to fellow employees but could include members of the public. Protection under s. 100(1)(e) is only given if the employee takes 'appropriate steps' to protect people from the danger. Following the introduction of PIBA, 'appropriate steps' will probably include the employee making his complaints through the proper channels in accordance with PIBA.

Environmental damage – s. 43B(1)(e)

53. No definition of 'environment' is provided. As with disclosures relating to health and safety, there is no requirement for any particular level of damage to be inflicted on the environment for the disclosure to amount to a 'qualifying disclosure'.

54. The textbook authors assume that something more than trivial damage will be required. However, there does not seem to be any reason for this requirement, nor would it be in line with the courts' treatment of the other categories[21].

Cover ups – s. 43B(1)(f)

55. A worker will also be protected if he blows the whistle on an attempt to destroy or conceal evidence relating to one of the specified categories of malpractice set out above.

Offences and qualifying disclosure

56. There will be no qualifying disclosure if the person making the disclosure commits an offence by making it – s. 43B(3). For example, disclosures by a former MI5 officer may not be protected if they are in breach of the Official Secrets Acts 1989.

[20] [1999] IRLR 780
[21] On this issue, please see my article, "Trivial pursuits" in the Solicitors' Journal of 30 May 2009

57. Of more general application, particular difficulties may arise in relation to offences under the Data Protection Act 1998, e.g. unlawful obtaining of personal data under section 55 of the DPA.

58. One would expect that tribunals would adopt the criminal standard of proof when deciding whether a worker has committed a criminal offence by making the disclosure; in fact, this is what Lord Nolan and Lord Borrie QC argued for when speaking on the Bill that later became PIDA.

Legal professional privilege

59. A disclosure of information subject to legal professional privilege is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice – s. 43B(4).

60. Legal representatives must take care that they do not inadvertently disclose details of their client's complaint to a third party and thereby lose the protection, which would otherwise be afforded by PIDA.

61. It seems that once the worker gave instructions to his/her lawyer to make the disclosure, the disclosure may 'qualify'.

IV. PROCEDURES FOR DISCLOSURE

Methods of disclosure

62. There are six different categories of ways in which a worker can make a protected disclosure, set out in ss 43C to 43H ERA.

63. As a general rule, the worker should seek to resolve the matter privately within his employer's organisation. However, in certain circumstances this may be unrealistic or impossible and it may be reasonable to bring the matter to a wider audience. Matters of a serious nature receive special treatment.

64. As set out above, the threshold for the protection will depend on the method of disclosure used.

Good faith

65. All disclosures (apart from those to a legal adviser under s. 43D) have to be made in good faith.

66. For good faith the worker's motives are to be examined; it is not enough that the worker was 'honest'. The worker may disclose something that is true, but for an ulterior motive and such a disclosure would not be protected. This is because the aim of PIBA is not to enable people to advance personal grudges, but to protect those who make disclosures in the public interest. In such a case, the ulterior motive must be the dominant or predominant one. Ulterior motives would include personal antagonism, pursuing a personal campaign or seeking to gain a personal advantage. The burden of pleading and proving bad faith is on the Respondent. It should be specifically set out and put to the Claimant in cross-examination. It seems that a predominant ulterior motive necessarily negatives good faith: see *dicta* in ***Lucas v Chichester Diocesan Housing Association Ltd***[22].

67. Disclosures made due to a personal grudge are not protected even if they are true and would otherwise qualify for protection: see ***Street v Derbyshire Unemployed Workers' Centre***[23]. The Court of Appeal in that case emphasised that where a statement is made without reasonable belief in its truth, that fact would be highly relevant as to whether it was made in

[22] EAT/0713/04
[23] [2004] IRLR 687

good faith. But where a statement is made in that belief, it does not necessarily follow that it is made in good faith.

68. There might be particular suspicion as to C's motives for making a disclosure where C has some other claim or dispute with the employer – see e.g. ***Bachnak v Emerging Markets Partnership (Europe) Ltd***[24]

69. Anonymous tip-offs are not necessarily made in bad faith, a worker may have a perfectly good reason for not disclosing his identity and employers should not necessarily argue that they are free to punish those who are identified as the source of anonymous leaks. In ***Brothers of Charity Services v Eleady-Cole***[25] the Claimant worked in a registered home for those with severe learning difficulties. He noticed a member of staff drunk on duty and others watching pornography and taking illegal substances on the premises and reported this to the Employee Assistance Programme (EAP), a confidential telephone report service to which his employer subscribed. The EAP reported the concerns to the Respondent whilst keeping the identity of the Claimant anonymous. Subsequently, the Claimant's employment was terminated due to alleged poor performance. The EAT accepted that reporting concerns to the EAP could constitute a protected disclosure, although the EAT did not find that the principal reason for the Claimant's dismissal was his disclosure to the EAP.

70. The requirement of good faith is controversial. It is perfectly conceivable that a disclosure for an ulterior motive may still be in the public interest.

Categories of disclosure

Internal disclosures – s. 43C

71. Disclosure must be made, either to the employer or, where the matter causing concern is the responsibility of someone other than the employer, to that person.

[24] EAT/0288/05 27 January 2006
[25] (2002, EAT/0661/00)

72. Disclosure to the employer must be made to him/her/it *qua* employer. In ***Douglas v Birmingham CC (see above)*** C raised concerns in confidence with a fellow governor. The EAT held that this did not fall within s. 43C(1)(a) because the disclosure was made to the governor "*in a confidential manner and not to her* qua *employer*".

73. It seems therefore that the concept would ordinarily include a disclosure to any person senior to the worker, who has been expressly or implicitly authorized by the employer as having management responsibility over C.

74. There may be disclosure to a third party where C reasonably believes the failure relates solely or mainly to the third party's conduct or has legal responsibility for – s. 43C(1)(b). Note that this disclosure does not amount to raising the matter with the employer for the purposes of s. 43G (see below). Further, any claim can only be brought against the employer, not the third party.

75. Under s. 43C(2) C may make a disclosure to a person authorised by the employer – e.g. an authorized health and safety representative or union official.

76. Note that PIDA does not require employers to set up whistleblowing procedures. However, a worker who makes a wide, public disclosure is more likely to be protected if there was no such procedure.

Disclosure to legal adviser – s. 43D

77. Where a disclosure is made in the course of obtaining legal advice, it will be protected under s. 43D. There is no requirement for disclosure to be made 'in good faith' under this section, although, as with all qualifying disclosures, there must still be a 'reasonable belief' that a relevant failure has occurred, is occurring or is likely to occur.

78. If the lawyer then discloses that information which had been disclosed to him in the course of obtaining legal advice, that disclosure will not be protected (see above).

Disclosure to Minister of the Crown – s. 43E

79. Where the worker's employment is either with an individual appointed by a Minister of the Crown under any enactment or with a body whose members are similarly appointed, a disclosure in good faith to a Minister of the Crown will be protected.

80. The PCAW consultation paper stated that workers in quangos will be protected if they raise their concerns directly with their sponsoring department; they need not raise their concern with the quango itself first.

Disclosure to prescribed person – s. 43F

81. These are regulatory disclosures – the prescribed person will be under a statutory duty to investigate the matter disclosed to it and will not pay for the information.

82. Under this section a disclosure is protected even if the worker does not first make the disclosure to his employer so long as he:

(i) makes a disclosure in good faith to a person prescribed in an order made by the Secretary of State;
(ii) reasonably believes that the relevant failure falls within any description of matters in respect of which that person is so prescribed; and
(iii) reasonably believes that the information disclosed and any allegation contained in it are substantially true.

83. The Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549) lists all prescribed persons and matters in respect of which those persons are prescribed. There are around 40 different categories of persons listed to which protected disclosure can be made and they include a wide range of authorities: the Audit Commission, the Commissioners of the Inland Revenue, the Information Commissioner, the Environment Agency, the Health and Safety Executive, the Rail Regulator, the Secretary of State for Trade and Industry and

local authorities responsible for the enforcement of consumer protection legislation. There is also one category covering successors of prescribed persons.

84. In addition to the requirement of good faith, the worker has to show that he had reasonable belief that the relevant failure fell within the "description of matters" of the prescribed person. It would be good practice, if there is uncertainty as to whether the matter is appropriately raised with the prescribed person, to first consult the person informally.

85. Further, the worker has to have reasonable belief that the information disclosed and any allegation contained in it are substantially true. The worker's belief would be tested by reference to the circumstances as they were understood.

86. Under s. 43F, the worker does not first need to raise the concern with the employer.

External disclosures – s. 43G

87. Where a worker decides to make a disclosure to an external organisation, the most stringent rules apply. The provisions give the ET much more scope for determining the reasonableness of aspects of C's behaviour.

88. An external disclosure may be made to a whole host of different people/organizations: e.g. the police, a professional body, a non-prescribed regulator, a union official, and MP, an individual, shareholders, NGOs, newspapers etc.

89. In addition to the requirements of <u>good faith</u> and <u>reasonable belief in the substantial truth of the allegations</u>, the worker must satisfy the following requirements:

(i) Disclosure not made for the purposes of personal gain

90. This requirement is somewhat uncertain. The statutory language is not limited to *financial* gain, so presumably other personal benefits will also be caught. Further, arguably, it may be

C's personal gain if a member of his family receives a benefit as a result of the disclosure. What about if a newspaper makes a charitable donation in return for disclosure?

91. Although a worker's primary motive for disclosure must not be personal gain, s 43G(1)(c) does not outlaw personal gain *per se*. Legal advisors should use their gut instinct – the relevant question remains: why did the worker decide to make the disclosure? Was it to earn a fortune from the tabloids or did he/she want to make the disclosure in the public interest and happened to have been paid as well?

92. Note that rewards payable under any enactment are specifically disregarded for the question of personal gain – see s. 42L(2).

(ii) The conditions set out in s 43G(2) are met

93. There are three conditions specified in s 43G(2) for a worker to gain protection for an external disclosure:

- *Reasonable fear of detriment:* At the time of the disclosure, the worker must reasonably believe that he will be subjected to a detriment by raising the concern with his employer or a prescribed person. The ET may consider the following factors relevant: (a) nature of the failure, (b) identity of the person alleged to be responsible, (c) whether there is an effective whistleblowing policy, (d) the employer's culture etc.

  It is essential therefore for employers to have an effective whistleblowing policy, make the staff aware of it and ensure that victimisation of whistleblowers is unacceptable.

- *Reasonable belief that concealment or destruction of evidence is likely*: Where <u>there is no prescribed person</u> in relation to the relevant failure, the worker must reasonably believe that evidence is likely to be concealed or destroyed if he makes a disclosure to his employer.

- *Previous disclosure*: The worker must previously have made a disclosure of substantially the same information, either internally or to a prescribed person. Note that the disclosure only has to have been *substantially* the same, i.e. does not have to be identical. Specifically, the worker may include information about the action that the employer took in repose to the previous disclosure – see s. 43G(3). That is not to say that the worker has to take into account the employer's response to the previous disclosure before making an external disclosure – although that may influence the question of whether further disclosure was reasonable under s. 43G(1)(e). Employers therefore should ensure that they act promptly and indicate in as precise terms as possible how they intend to address the worker's concerns.

94. The worker is not under any obligation to approach a prescribed person before making an external disclosure (if, indeed, there is a relevant prescribed person). If the worker has received what he considers to be an inadequate response from his employer, the worker is within his rights to by-pass the prescribed person entirely.

(iii) '*Reasonable in all the circumstances*'

95. Courts and tribunals will have regard in particular to the factors set out in s 43G(3) when deciding whether it was reasonable for the worker to make the external disclosure:

(a) the identity of the person to whom the disclosure is made;

(b) the seriousness of the relevant failure;

(c) whether the relevant failure is continuing or is likely to recur;

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person. Note that this does not apply to the duty of confidentiality which the worker owes to his employer;

(e) in the case of a 'previous disclosure' to the worker's employer or a prescribed person, the response of the employer or prescribed person; and

(f) in the case of a previous disclosure to the worker's employer, whether the worker complied with an internal procedure authorised by the employer. It is important for the employer to show not only that it introduced a policy, but that it sought to make staff aware of it: team briefings, newsletters and posters.

Exceptionally serious failures – s. 43H

96. The rules which apply to externally disclosing exceptionally serious failures are less onerous than for other external disclosures. The basis for this is so that workers should not be deterred from raising concerns where exceptionally serious matters are at stake.

97. "Exceptionally serious failure" is not defined; the PCAW consultation paper gives the example of child sex abuse. Considerations as to whether something is exceptionally serious would, presumably, include: the number of potential victims, whether the harm is imminent and the seriousness of the harm.

98. The requirements under this section are that workers:

(a) make the disclosure in good faith;

(b) reasonably believe that the information disclosed, and any allegation contained in it, are substantially true;

(c) not make the disclosure for the purposes of personal gain;

(d) ensure that the relevant failure is of an exceptionally serious nature; and

(e) ensure that in all the circumstances of the case, it is reasonable for him to make the disclosure.

99. Therefore, in cases where the external disclosure relates to an exceptionally serious failure, the conditions of s 43G(2) (see above) will not apply. Further, in determining the reasonableness of the disclosure, there is no need to consider the list of factors set out in s 43G(3); the Tribunal merely has to have a particular regard to the identity of the person to whom the disclosure is made.

100. S. 43H does not specify to whom the protected disclosure may be made or the process for doing so.

V. PROTECTION UNDER PIDA

Contractual duties of confidentiality

101. Section 43J makes void any provision in an agreement which purports to preclude a worker from making a protected disclosure.

102. Employers are best advised to redraft 'gagging' clauses so that it is clear that they do not attempt to prevent the disclosure of legitimate concerns through appropriate channels. In addition, any agreement between a worker and his employer that requires the worker to refrain from instituting or continuing proceedings under the ERA 1996 or for breach of contract will be void.

103. This section will have an impact on, including compromise agreements and ACAS-conciliated agreements. If there is a confidentiality clause in a settlement agreement that purports to restrict the disclosure of a matter that would otherwise be protected under the Act, this section will invalidate any such restriction.

Right not to suffer detriment

104. S. 47B provides for the right not to be subjected to a detriment for making a protected disclosure.

105. Once it is established that there was a protected disclosure, C must prove the four elements of s. 47B – see ***Pinnington v Swansea CC***[26]:

(i) C was subjected to "detriment"

(ii) "by an act or failure to act"

(iii) by the employer

(iv) on the ground that C made the protected disclosure.

106. Note the time limit set out in s. 48(3) – 3 months from the date of the act or failure to act.

Detriment

107. Elias J in ***Moyhing v Barts and London NHS Trust***[27] summarised two recent House of Lords decisions in the context of a sex discrimination claim:

> **15. The only issue therefore is whether the appellant suffered a detriment. There are two recent House of Lords authorities which cast some light upon the meaning of that concept. In Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48; [2001] ICR1065, a case of victimisation discrimination, Lord Hoffmann observed (para 53):**
>
> > **"Being subject to a detriment…is an element in the statutory cause of action additional to being treated "less favourably" which forms part of the definition of discrimination. A**

[26] [2005] ICR 685 (CA)
[27] [2009] IRLR 860

person may be treated less favourably and yet suffer no detriment. But, bearing in mind that the employment tribunal has jurisdiction to award compensation for injured feelings, the courts have given the concept of the term "detriment" a wide meaning. In Ministry of Defence v Jeremiah [1980] ICR13, 31 Brightman LJ said that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment." Mr Khan plainly did take that view…and I do not think that, in his state of knowledge at the time, he can be said to have been unreasonable."

16.A similarly broad analysis was adopted in Shamoon v Chief Constable of Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337. The Northern Ireland Court of Appeal in that case had held, following a decision of the Employment Appeal Tribunal in Lord Chancellor v Coker [2001] ICR 507 that in order for there to be a detriment there had to be some physical or economic consequence arising as a result of the discrimination which was material and substantial. The House of Lords rejected that approach. Lord Hope said this (paras 34-35):

"The statutory cause of action which the applicant has invoked in this case is discrimination in the field of employment. So the first requirement if the disadvantage is to qualify as a "detriment" within the meaning of article 8(2)(b), is that it has arisen in that field. The various acts and omissions mentioned in article 8(2)(a) are all of that character and so are the words "dismissing her" in section 8(2)(b). The word "detriment" draws this limitation on its broad and ordinary meaning from its context and from the words with which it is associated. *Res noscitur a sociis*. As May LJ put in De Souza v Automobile Association [1986] ICR 514, 522G, the court or Tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

But once this requirement is satisfied, the only limitation that can be read into the word is that indicated by Brightman LJ. As he put it in Ministry of Defence v Jeremiah [1980] ICR 13, 30, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": Barclays Bank plc v Kapur (No 2) [1995] IRLR 87. But contrary to the view that was expressed in Lord Chancellor v Coker [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence."

17. Lord Hutton (para 91) and Lord Scott (paras 103-105) both expressly approved this analysis. Lord Scott said that "if the victim's opinion that the treatment was to his or her detriment was a reasonable one to hold, that ought…to suffice."

Daniel Tivadar
3 Hare Court Chambers
7th October 2009

108. The meaning of detriment should be at least as wide in the PIDA context; this seems to be supported by ***Woodward v Abbey National plc***[28]. In that case, the Court of Appeal held that protection of the employee extended to acts done after termination acts of his/her employment.

109. There is no requirement of some physical or economic consequence for there to be a detriment, it means merely putting to disadvantage – ***Ministry of Defence v Jeremiah***[29]. It does not matter if C was unaware of it at the time – ***Garry v Ealing LBC***[30]. It does not have to be "substantial", although an 'unjustified sense of grievance' will not suffice. – ***Shamoon (see above).***

'Act or deliberate failure to act'

110. Obvious examples of failure to act are refusing promotion, not giving a pay rise, disciplining the worker etc. It must be shown that these were deliberate decisions.

111. S. 48(4) provides:

> **in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.**

112. In the case of ***Knight v Harrow London Borough Council***[31], a complaint was made that C suffered stress as a result of the way in which his protected disclosure was handled. The employer failed to keep the matter confidential, resulting in C being cold-shouldered by colleagues. C became increasingly stressed, culminating in a nervous breakdown. C nonethe-

[28] [2006] IRLR 677
[29] [1980] ICR 13
[30] [2001] IRLR 681
[31] [2003] IRLR 140

less lost, since there was no finding that the failure to act was "deliberate" as opposed to merely insensitive or careless.

Subjection by the employer

113. PIDA does not contain an equivalent vicarious liability provision like the discrimination statutes do. It seems likely, however, that the courts would impose vicarious liability on the employer in this context as well.

114. The employer will not, however, be liable for the actions of third parties – e.g. the employer's supplier or client. Further, a potential employer may subject C to a detriment (e.g. by not offering a job) with impunity.

'On the ground that'

115. C must establish that he/she was subjected to the detriment on the ground of his/her disclosure. Further, the worker is protected only against the detriment or dismissal he/she receives <u>because of the disclosure</u> and not due to some other, albeit related, matter.

116. In ***Bolton School v Evans***[32] the Court of Appeal dealt with the case of an IT teacher who, when his complaint to the school about internet security was rejected, decided to hack into the system to demonstrate his point. He told his employer that he would do this, nevertheless, he was disciplined. The EAT, however, rejected his claim as he had been disciplined because of the hacking, not because of his disclosure. The Court of Appeal upheld this; Buxton LJ emphasised that "disclosure" should be given its normal meaning. Elias J stated in the EAT:

> **"An employee cannot be entitled to break into his employer's filing cabinet in the hope of finding papers which will demonstrate some relevant wrongdoing which he can then disclose to the appropriate person. He is liable to be disciplined for such conduct, and that is so whether he turns up**

[32] [2006] EWCA Civ 1653; UKEAT/0648/05/SM

such papers or not. Provided that his misconduct is genuinely the reason for the disciplinary action, the employee will not be protected even if he does in fact discover incriminating papers. Success does not retrospectively provide a cloak of immunity for his actions, although he will then of course be protected with respect to the subsequent disclosure of the information itself."

Right not to be unfairly dismissed/selected for redundancy

117. Dismissal is treated separately from other detriments – see s. 47B(2). An employee who is dismissed as a result of (or principally as a result of) making a protected disclosure will be regarded as automatically unfairly dismissed under s. 103A.

118. An employee who is selected for redundancy as a result of (or principally as a result of) having made a protected disclosure will be regarded as having been automatically unfairly dismissed under s 105(6A).

119. The protection is wider than in 'normal' unfair dismissal claims:

(i) No equivalent minimum service requirement;

(ii) Compensation is not capped under s. 124(1);

(iii) There is a right to claim interim relief;

(iv) Dismissal is automatically unfair.

Complaints to the Employment Tribunal

120. Employees can bring a claim in an employment tribunal for unfair dismissal (including unfair selection for redundancy) and workers (including employees) can bring a claim for any other detriment they have suffered as a result of making a protected disclosure – ss. 48(1A) and 205(1A).

Compensation

Detrimental treatment

121. For detrimental treatment that falls short of dismissal, compensation will be awarded on a just and equitable basis for any losses suffered by a complainant under s. 49. Awards do not tend to be as substantial as for unfair dismissal, although there can be high awards if the detriment was failure to promote or raise salary.

122. Where a worker who is not an employee has his contract terminated the maximum award of compensation cannot exceed that which is available to a dismissed employee – s. 49(6). Re-employment orders are not available for such workers.

123. Awards can include compensation for non-pecuniary losses. In ***Virgo Fidelis Senior School v Boyle***[33] the Employment Appeal Tribunal held that the guidelines laid down in ***Vento v Chief Constable of West Yorkshire Police*** on levels of compensation for injury to feelings awarded to employees subjected to discrimination, apply also to compensation for injury to feelings awarded to whistleblowers. Additional aggravated damages may be awarded and there is no reason why, in principle, exemplary damages cannot be awarded provided the conditions set out in ***Rookes v Barnard*** are made out.

124. Note that in many cases C can argue that he/she suffered detriment all the way up to dismissal – e.g. victimisation or disciplinary hearings conducted in a vindictive manner. For those acts C can claim compensation for injury to feelings as well as claiming for unfair dismissal at the same time.

Compensation for unfair dismissal

[33] [2004] IRLR 268

125. As already noted, the statutory limit on compensatory awards does not apply in cases of dismissal for a protected disclosure – s. 124(1A).

126. The Tribunal may – pursuant to ss 128 and 129 – grant interim relief pending determination of the Claimant's complaint. Non-employees are not able to benefit from this provision. If an employee seeks interim relief within seven days of the effective date of termination and the Tribunal considers that it is likely to find that the Claimant was dismissed for making a protected disclosure:

(a) if the employer is willing to reinstate or re-engage the employee, the tribunal shall order the employer to do so pending the determination of the employee's claim; or

(b) if the employer is unwilling to reinstate or re-engage the employee, the tribunal will make an order for the continuation of the employment contract.

127. If an order is made with which the employer subsequently fails to comply, the tribunal will make an order for the continuation of the employment contract and for compensation to be paid to the employee.

Impact of the Human Rights Act

128. The HRA 1998 gives effect to the rights and freedoms guaranteed under the European Convention on Human Rights. Art. 10 of the Convention provides for the right to freedom of expression. This right is qualified by virtue of art 10(2), which states that the exercise of the freedom of expression, '*may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society*', such as '*... for the protection of the reputation or rights of others [or] for preventing the disclosure of information received in confidence ...*'.

129. The HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right (s 6). 'Public authorities' are widely defined to include courts and tribunals and 'any person certain of whose functions are functions of a public nature'. Courts and tribunals must make decisions based on human rights principles and interpret legislation in a way that, as far as possible, is compatible with the Convention.

130. Public sector whistleblowers can invoke art 10 against their employers as the basis for justifying their actions. Private sector employees can also argue that the ERA should be interpreted in a way compatible with the Art 10 right. The employer's response no doubt would be to point out the limitations of the right as set out in Art 10(2).

V. AND FINALLY...

131. Dame Janet Smith in the Shipman Inquiry Report made significant reform proposals, for example: to change "disclosure" to "report"; consider whether the good faith requirement is needed; substitute "suspicion" for "belief". There has also been much academic criticism of PIDA. Therefore, there may be reform on its way.

132. Remember that whistleblowing cases are notoriously adversarial. Claimants often self-righteously insist that they would never do anything for any other purpose but to serve the public interest; meanwhile, employers believe that there is nothing wrong in their organisation and therefore nothing to disclose.

133. In an ideal situation the potential whistleblowers should seek legal advice before making a disclosure. It is essential to advise them carefully as to whether and how disclosure should be made. The advisor should always bear in mind that the statutory protection may need to be litigated which can be costly, emotionally tiring and uncertain.

134. Respondents should be encouraged to ensure that whistleblowers can confidently come forward with disclosures. Policies should be drafted, circulated and discussed with staff; it

should further be emphasised that victimisation of whistleblowers is unacceptable. Once a disclosure has been made, it should be quickly investigated and the worker should be made aware of the progress and outcome of the investigations and any right of appeal.

135. Always assess the case in the light of all the circumstances. Remember that in all areas of the law, but especially in the employment tribunals, cases are mostly decided on their facts, the law merely provides a structure in which the facts can be aired. Discuss the facts of your case with colleagues and, of course, you can always call Counsel!

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