

# Reforms take effect but spotlight stays on whistleblowing

*Following a string of high-profile scandals, interest in whistleblowing looks set to remain high, suggests Fudia Smartt*



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**'The common belief among workers that there are more risks than benefits in blowing the whistle has led to discussion about whether the UK needs to reward whistleblowers financially.'**

**O**n 2 July 1999, the Public Interest Disclosure Act 1998 (PIDA) was introduced, to protect workers from detrimental treatment and victimisation for having 'blown the whistle' on malpractice. It became law, by way of a private members' bill, following a series of disasters and financial scandals, including the misappropriation of the Maxwell pension fund, the collapse of Barings Bank and the capsizing of the Herald of Free Enterprise off Zeebrugge.

Fast forward 14 years and the whistleblowing legislation has again become a hot topic in employment law, due to a fresh wave of public scandals. These range from the high patient-mortality rate at Mid Staffordshire NHS Trust due to poor practices, the illegal phone-tapping practices by sections of the media which led to the Leveson Inquiry, and the apparent failure by the BBC and police to investigate complaints against Jimmy Savile properly.

Against this background, the government has made a number of changes to the whistleblowing legislation, aimed at encouraging workers to speak up about concerns of wrongdoing that are in the public interest. This article will explore these changes, along with the removal of 'gagging clauses' from NHS compromise agreements, which prevented departing staff from blowing the whistle on patient safety or care.

## **What is a protected disclosure?**

The PIDA provisions were inserted into the Employment Rights Act (ERA) 1996 at ss43A to 43L, 47B and

103A. The dismissal of an employee is automatically unfair if the reason or principal reason for dismissal is due to the employee having made a protected disclosure. In addition, 'workers' (a group that includes but is not limited to employees) are protected from being subjected to any detriment for having made a protected disclosure.

For a disclosure to be protected, it must satisfy the following criteria:

- It must amount to a 'qualifying disclosure'. The whistleblower must actually disclose information: compiling evidence or threatening to make a disclosure will not be sufficient to be covered by PIDA.
- The disclosure must relate to one of six types of malpractice:
  - criminal offences (s43B(1)(a) ERA 1996);
  - breach of any legal obligation (s43B(1)(b) ERA 1996);
  - miscarriage of justice (s43B(1)(c) ERA 1996);
  - health and safety concern (s43B(1)(d) ERA 1996);
  - damage to the environment (s43B(1)(e) ERA 1996); or
  - deliberate concealment of information pertaining to any of the above (s43B(1)(f) ERA 1996).
- The whistleblower must have a 'reasonable belief' that the

information disclosed tends to show one of the abovementioned malpractices.

- Disclosure must be made to the appropriate person. PIDA encourages workers to make internal disclosures of any relevant failures to their employer (s43C ERA) or failing that to a 'responsible person'. They may also make protected disclosures to regulatory bodies and government ministers. Where a whistleblower wishes to make a wider public disclosure (to the police or media), this will only be protected if certain exacting requirements have been met, such as the worker having made the disclosure first to the employer. A worker who has not disclosed the matter internally first must be able to establish that this was because of a reasonable belief that the employer would either subject the worker to detrimental treatment or conceal or destroy evidence about the failure.

### The new law

The changes to whistleblowing law have been introduced through the Enterprise and Regulatory Reform Act (ERRA) 2013. As of 25 June 2013, the following changes have been implemented:

- A 'public interest' test for qualifying disclosures has been introduced (s17 ERRA 2013).
- 'Good faith' has been removed from the definition of a protected disclosure and tribunals have instead been given new powers to reduce compensation by up to 25% if the protected disclosure was not made in good faith (s18 ERRA 2013).
- Employers can be held vicariously liable for any detriment caused to a whistleblower by another worker (s19 ERRA 2013).
- The definition of 'worker' for the purposes of the whistleblowing legislation has been widened (s20 ERRA 2013).

### Public interest requirement

Before the implementation of ERRA 2013, there was no specific requirement that a qualifying disclosure should have been made in the public interest. In the seminal case of *Parkins v Sodexho*

*Ltd* [2002], the Employment Appeal Tribunal (EAT) held that the definition of 'qualifying disclosure' was broad enough to cover a disclosure about a breach of the whistleblower's own contract of employment even though this was not, on the face of it, in the public interest.

Many commentators (and judges) complained that this decision unnecessarily widened the scope of qualifying disclosures, resulting in the misuse of the whistleblowing legislation for tactical purposes by disgruntled

should be prepared for the inevitable legal debate about what 'the public interest' means. For example, will a concern raised about an employee's own contract of employment, if it also affects other members of staff, be in the public interest? Public Concern at Work (PCaW), the leading whistleblowing charity, has warned that adding on further requirements to an already complex piece of legislation is likely to have a 'chilling effect' on workers considering making a disclosure. It

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workers. Whistleblowing claims based on the *Parkins* interpretation were brought in particular by employees who did not have sufficient service to bring an ordinary unfair dismissal claim and highly paid employees who wanted to get around the cap on compensatory awards.

A policy decision was made to reverse *Parkins*, using s17 ERRA 2013 to amend s43B ERA 1996. As a result, a disclosure made on or after 25 June 2013 will only be a qualifying disclosure if the worker reasonably believes that the disclosure is 'in the public interest'.

Until we have case law to flesh this out, however, employment lawyers

argues that they may be too fearful of getting the law wrong to blow the whistle and not be adequately protected from detriment if they do so.

### Good faith changes

Previously, for a qualifying disclosure to be protected (if made to anyone other than a legal adviser), the worker had to make it in good faith, meaning with honest motives. Section 18 of ERRA 2013 has now removed this 'good faith' requirement.

Many commentators see this amendment as a concession to workers following the introduction of the new public interest test, as it could

## NHS gagging clauses

In March 2013, Jeremy Hunt, the health secretary, announced that the government had outlawed gagging clauses that constrained departing NHS employees from speaking out about patient safety or care. This was heralded in the press as a significant move, but it is questionable whether the announcement amounted to an actual change in the law.

As all employment lawyers will be aware, the vast majority of compromise agreements include non-denigration provisions as standard boilerplate clauses, so that departing employees cannot make any statements which are likely to damage an employer's reputation. However, s43J (1) ERA 1996 renders any contractual term void in so far as it purports to stop the worker from making a protected disclosure. Further, even where a worker's disclosure does not amount to a protected disclosure for the purposes of PIDA, if the information revealed is in the public interest, or there is a 'just cause', there is a common-law defence to breach of confidence. Consequently, even if NHS compromise agreements previously included non-denigration clauses, which, in theory, prevented a departing employee from making disclosures about (for example) patient safety, such clauses were at least arguably unenforceable for that purpose.

Much of the press attention surrounding NHS compromise agreements and gagging clauses failed to acknowledge that the restrictions on ex-employees disclosing concerns were usually contained in agreements which the departing staff members had voluntarily entered into. The bigger issue that the government needs to focus on is how to motivate workers in all sectors to blow the whistle where it is appropriate to do so, in light of the very considerable damage this can do to their career.

be helpful to a worker who has dual motives for blowing the whistle. As a counterbalance to the removal of this requirement, however, where a worker has made a whistleblowing complaint that is found not to have been in good faith, a tribunal can reduce any compensation awarded by up to 25%.

#### Vicarious liability

Before the June 2013 changes, an employer could not be held vicariously liable for a whistleblowing detriment caused to one worker by another worker in the course of employment, in the way that it could be in a discrimination case.

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This deficiency in the law was highlighted by the Court of Appeal in *NHS Manchester v Fecitt* [2012]. This case involved three nurses who raised concerns that another nurse had lied about his qualifications, after which they claimed that other staff members subjected them to detrimental treatment. The court referred to the House of Lords decision in *Majrowski v Guys and St Thomas' NHS Trust* [2006], which it said had made clear that (para 32 of *Fecitt*):

... an employer can be vicariously liable only for the legal wrongs of its employees.

As there was no provision at that time making it unlawful for an employee to victimise a whistleblower, the employer could not be vicariously liable for such behaviour.

Following his inquiry into the failings at Mid Staffordshire NHS Foundation Trust in 2010, Robert Francis QC recommended providing staff with protection from co-workers, a need also highlighted by *Fecitt*. The government has addressed this concern by implementing s19 ERRA 2013, which has introduced the concept of vicarious liability into the whistleblowing provisions of ERA 1996.

#### Widening the definition of worker

The whistleblowing protection covers workers, using a definition which is wider than that used for most other

employment rights (compare the definitions in s230(3) and s43K ERA 1996).

The definition of a worker for the purposes of the whistleblowing legislation includes home-workers, agency workers, self-employed NHS doctors, dentists, ophthalmologists and pharmacists, non-employees on training courses and work experience, and police officers. At present, the genuinely self-employed (bar those in the NHS), voluntary workers and workers in the intelligence services are not protected by the whistleblowing legislation. Under s20 ERRA 2013, however, the business secretary has the power to amend s43K

ERA 1996 to include further categories in the definition of 'worker'.

This could (and probably should) lead to a change in the law so that the whistleblowing legislation covers partners and members of LLPs. In *Clyde & Co LLP v Bates van Winkelhof* [2012], the Court of Appeal held that a junior equity partner in a LLP law firm could not be considered to be a 'worker' for the purposes of PIDA and therefore was not covered by the whistleblowing legislation. Ms van Winkelhof had alleged that she was dismissed after disclosing bribery and corruption at the Tanzanian law firm to which she was seconded. She is currently seeking leave to appeal to the Supreme Court.

The decision excludes a very large number of partners at professional and financial service firms from PIDA at a time when the public appetite to protect whistleblowers is increasing. It is likely to discourage partners (particularly junior partners) from raising concerns which could have serious consequences for society at large. This is particularly worrying in light of the credit crisis and a recent spate of financial scandals, including the LIBOR affair.

#### Where next?

Earlier in the year, PCaW set up a commission consisting of a former whistleblower, industry leaders, lawyers and trade union representatives to look at strengthening whistleblowers'

protection. The commission's public consultation process ran from 27 March to 21 June 2013, during which it gathered evidence on:

- attitudes to whistleblowing by individuals, organisations and society at large;
- the efficacy of the whistleblowing legislation;
- whether whistleblowers should be incentivised;
- whether regulators need to be doing more; and
- whether tribunals are doing enough to protect whistleblowers and wider society.

The common belief among workers that there are more risks than benefits in blowing the whistle has led to discussion about whether the UK needs to reward whistleblowers financially. For instance, the UK could adopt the US system of allowing monetary awards where a whistleblower has highlighted a significant financial loss to the government. It will be interesting to read the commission's views on this.

It is clear that whistleblowing will remain in the spotlight for the foreseeable future given that malpractice by public bodies remains a hot media topic. The number of whistleblowing claims has continued to rise, with 2500 claims submitted in 2011/12. Awards are also high, with the average award over the past ten years standing at £113,667, according to PCaW. Although it is difficult to predict with any certainty the effect that the changes in the law will have on these figures, one would expect a reduction in the overall number of claims, as a result of the public interest requirement, but a possible increase in their average value. ■

*Clyde & Co LLP & anor v Bates van Winkelhof* [2012] EWCA Civ 1207  
*Majrowski v Guys and St Thomas' NHS Trust* [2006] IRLR 695  
*NHS Manchester v Fecitt & ors* [2012] IRLR 64 (CA)  
*Parkins v Sodexho Ltd* [2002] IRLR 109