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# **Whistle-blowing and the equality dimension of victimisation in the workplace**

## **Abstract**

*A considerable amount of attention has been given to the general law of victimisation under the Equality Act 2010<sup>1</sup> but, scant consideration has been given to the equality aspect of victimisation relating to whistleblowing in the UK and this article will address this. The term whistleblowing relates to workers making certain disclosures of information relating to their employer's activities in the public interest. Most workers in the public, private and voluntary sectors are protected from victimisation for making a protected disclosure under the Public Interest Disclosure Act 1998. However, only qualifying disclosures (defined below) are protected by the Public Interest Disclosure Act 1998. The protection against victimisation covers unfair dismissal and an action for suffering a detriment. However, this article will concentrate on the latter. In the process of considering the legal rules in the UK the human rights dimension of cases will be considered as will comparison with the law in the United States.*

**Key Words:** Whistleblowing, Detriment, UK Law, US Law, Comparison

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<sup>1</sup> Connolly, M (2011) The chilling effect and the most ancient form of vengeance: discrimination and victimising third parties *International Journal of Discrimination and the Law* Vol. 11(3) pp 123–139  
Middlemiss, S (2014) Is a claim for post-employment victimisation currently permissible under the Equality Act 2010? *International Journal of Discrimination and the Law* Vol. 14 Issue 2 pp 117-125

## **Introduction**

Whistleblowing has been usefully defined by consumer activists in the US <sup>2</sup> as: ...an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is (involved) in corrupt, illegal, fraudulent or harmful activity.” Although the definition was provided some considerable time ago it is still highly relevant to the position in the United Kingdom. Employment legislation <sup>3</sup> sets out the framework in which employees or workers who believe they have been badly treated because they have made a complaint about the behaviour of their employer can have their rights protected. <sup>4</sup> Consideration of these rights by a judicial body is normally triggered when an employee formally seeks a remedy or redress from an employment tribunal for harm or damage he or she has suffered in this context. <sup>5</sup> Accordingly where an employee is harmed because he has blown the whistle (and made a protected disclosure) he or she will have a claim for victimisation.<sup>6</sup>

## **Legal Framework**

The legal rules dealing with protection for whistleblowing are relatively clear but, because of closely defined threshold requirements in the legislation are, not exactly straightforward. The range of workers covered by the legislation is broad but the

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<sup>2</sup> Nader, R Petkas, P J and Blackwell, K Whistleblowing (1972). Penguin Group (USA) quoted in Rongine, N M Toward a Coherent Legal response to the Public Policy Dilemma Posed by Whistleblowing. American Business Law Journal, Summer (1985), Vol. 23. Issue 2, p 28.

<sup>3</sup> Public Interest (Disclosure) Act 1998 as amended

<sup>4</sup> The rubric of PIDA is: 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.

<sup>5</sup> An employee would expected to raise the matter as a grievance internally before bringing a case to an employment tribunal

<sup>6</sup> The scope of the Act is wide with no qualifying periods of continuity of service needed or age limits applied to restrict the application of its protection (section7).

nature of permitted disclosures is closely defined. Also evidential requirements relating to a public interest element in the disclosure and a causative link between the disclosure and subsequent victimisation can complicate things further for a claimant, as will be seen.

### **Coverage of legislation**

The laws apply to employees and agency workers.<sup>7</sup> Workers who raise concerns about bullying and harassment by work colleagues are also protected provided they fall within the definition of a worker provided by section 230(3) of the Employment Rights Act 1996 (ERA).<sup>8</sup> However, it is important to note that the protection of the Act is not limited to those covered by the definition of workers set out in ERA as the following quote outlines: “Whistleblowing protection covers all ‘workers’. This term is given a special, extended meaning for the purposes of the whistleblowing regime, which is wider than the general definition contained in section 230 of ERA 1996...”<sup>9</sup> However, there are limits to the extended definition. For example job applicants who have not yet entered into contractual relations (see *BP plc. v Elstone*)<sup>10</sup> are excluded as are persons working for the security services and other individuals such as

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<sup>7</sup> *McTigue v University Hospital Bristol* (2016) ICR 1155

<sup>8</sup> The ERA defines two sorts of worker for the purpose of the Act (a) an individual who has entered into, works under or has worked under a contract of employment and (b) an individual who has entered into or works under or worked under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.”

<sup>9</sup> Section 43K of PIDA

<sup>10</sup> (2010) ICR 879

volunteers and interns.<sup>11</sup> In *Clyde & Co LLP v Bates Van Winkelhof*<sup>12</sup> Ms Winkelhof was a solicitor who contended that she was ejected from the firm after blowing the whistle on them while working in Tanzania. The Court of Appeal<sup>13</sup> held that the claimant could not pursue a whistleblowing claim because she was a limited liability partner and they were not workers for the purposes of PIDA.<sup>14</sup> The Supreme Court<sup>15</sup> on appeal overturned the earlier decision by a majority of 3 out of 5. Lady Hale stated that;<sup>16</sup> “it is common ground that the appellant worked under a contract personally to perform any work or services. It is now common ground that she provided those services for the LLP. It is also now common ground that the LLP was not her ‘client or customer.’ The Court of Appeal accepted that there was a ‘powerful case’ that the definition was satisfied. How then can it be said that she was not a ‘worker’ for this purpose?” She went on to conclude that “ In my view, the appellant clearly is a ‘worker’ within the meaning of section 230(3)(b) of the Employment Rights Act 1996 and entitled to claim the protection of its whistle-blowing provisions.”<sup>17</sup> This decision will particularly impact on the businesses that provide professional services and set themselves up as limited liability partnerships e.g. law and accountancy firms, consultancies and investment firms. These organisations will as a result of this decision have to review and clarify their working arrangements and consider the potential legal liability for the broad definition of ‘workers’ they employ.

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<sup>11</sup> According to the Charity Commission charity employees are covered by the legislation and can report concerns about certain categories of serious wrongdoing at their charity to the Commission. Whistleblowing: guidance for charity employees <https://www.gov.uk/guidance/whistleblowing-guidance-for-charity-employees>

<sup>12</sup> (2014) UKSC 32

<sup>13</sup> (2012) EWCA Civ. 1207

<sup>14</sup> There was no previous case considering whether a partner could be a worker. But, in both *Ellis v Joseph Ellis & Co* (1905) 1 KB 324 and *Cowell v Quilter Goodison Co Ltd* (1989) IRLR 392 they established that a partner could not be an employee.

<sup>15</sup> (2014) UKSC 32

<sup>16</sup> *Ibid* Paragraph 16

<sup>17</sup> *Ibid* Paragraph 46

Under section 43K (4) of ERA 1996,<sup>18</sup> the Secretary of State has the power to amend, by order, the definition of workers covered by the whistleblowing provisions.<sup>19</sup> If a person is a worker he or she will be unable to claim unfair dismissal however, if they have been victimised by having their contract terminated they may be able to take a case to an Employment Tribunal and claim that they have suffered detrimental treatment.

### **Qualifying disclosures**

Qualifying disclosures under the Public Interest Disclosure Act 1998 (PIDA) are disclosures of information which a worker reasonably believes has happened, is happening or will happen in the future.<sup>20</sup> The belief does not have to be correct, but the belief must be ‘in the public interest.’<sup>21</sup> There are various threshold requirements set out in the legislation which need consideration prior to considering the victimisation rules. First it is necessary to identify what are qualifying disclosures. Disclosures that qualify for protection are (1)... 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)

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<sup>18</sup> Introduced by section 20 (7) of the Enterprise and Regulatory Reform Act 2013 (ERRA)

<sup>19</sup> Even if the workers chosen do not fall within the definition of ‘worker’ included in section 230 of ERA 1996

<sup>20</sup> It applies whether or not the information is confidential and whether the malpractice is occurring in the UK or overseas.

<sup>21</sup> *Chesterton Global v Nurmohamed* UKEAT/0335/14/DM

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, is being or is likely to be deliberately concealed.<sup>22</sup> So a fairly broad range of disclosures are protected extending to; breaches of health and safety law, environmental issues and other legal issues including miscarriages of justice. It covers a wide class of information, applying to most malpractice and it does not matter whether the person to whom the disclosure is made is already aware of the information.<sup>23</sup> There are two types of disclosure that are acceptable under the Act. These are regulatory and wider disclosures and a review of both types follows.

### **Regulatory disclosures**

If workers for whatever reason cannot go to their employer with the disclosure first they should contact a prescribed person or body. The barriers to a successful internal whistleblowing programme are: a lack of trust in the internal system: misplaced loyalty to the employer, fear of retaliation by management and peers etc. In *Goode v Marks and Spencer plc.*<sup>24</sup> the employee's disclosure about a change in the employer's redundancy procedure was not protected. This was because his disclosure to the line manager was not in the same form as that which went to the Times newspaper<sup>25</sup> and there was no illegality in the employer's actions. The EAT upheld this decision. However, exceptionally serious information can be disclosed externally without first making an internal complaint. As illustrated in the case of *Collins v The National Trust.*<sup>26</sup> Collins was a National Trust (NT) warden in charge of a stretch of the north

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<sup>22</sup> As defined under section 43B of the Employment Rights Act 1996

<sup>23</sup> Section 43 L (3) of PIDA

<sup>24</sup> UKEAT/0442/09/DM

<sup>25</sup> Section 43B (1)(b)

<sup>26</sup> ET/2507255/05

east coastline, which included the site of a former quarry. Coastal erosion had created a real risk that chemicals and waste from the quarry would leak onto the beach. The NT and the local council had long been in dispute about what should be done and by whom. Mr Collins was shown in confidence by the NT a report the council had obtained which highlighted the risks of further erosion. As the report was already a year old Collins thought that the site should be closed. Two weeks after receiving the report he passed it to the local media, who wrote it up and quoted Mr Collins. As a result, he was dismissed and he made a successful PIDA claim. The employment tribunal found that the disclosure was protected as it involved an exceptionally serious concern because, children played on the beach and the public, relying on the NT's reputation would think it safe.

Commercial organisations should not rely on confidential information clauses in contracts of employment to prevent workers from making disclosures externally. These are unenforceable if the worker makes a protected disclosure and if the employer seeks to enforce them it could amount to an unlawful detriment against the worker.

The Act makes special provision for disclosures to prescribed persons.<sup>27</sup> These prescribed persons are regulators such as the Health and Safety Executive, the Inland Revenue and the Financial Services Authority. Such disclosures are protected where the whistleblower meets the tests for internal disclosures. This relates to whether the concern had been raised with the employer. If so the tribunal will consider whether any whistleblowing procedure in the organisation was or should have been used. A qualifying disclosure made internally to an employer or other reasonable person is protected. This low threshold is intended to encourage disclosures to be made

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<sup>27</sup> Guidance is available from [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/271112/prescribed-persons-list-of-prescribed-persons-and-bodies-2.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271112/prescribed-persons-list-of-prescribed-persons-and-bodies-2.pdf)



internally with the expectation that employers will address the issue to which the disclosure relates.

### **Wider disclosures**

Wider disclosures (e.g. to the police, the media, MPs, consumers and non-prescribed regulators) are protected if, in addition to the tests for regulatory disclosures, they are reasonable in all the circumstances and are not made for personal gain.

A wider disclosure must also fall within one of four broad circumstances to trigger protection. These are that (a) the whistleblower reasonably believed he would be victimised if he had raised the matter internally or with a prescribed regulator; or (b) there was no prescribed regulator and he reasonably believed the evidence was likely to be concealed or destroyed; or (c) the concern had already been raised with the employer or a prescribed regulator; or (d) the concern was of an exceptionally serious nature. The reasonableness of the whistleblower's behaviour will also be relevant here to determine if acting within the legal rules as the following quote suggests:

“Additionally for these public disclosures to be protected, the tribunal must be satisfied that the particular disclosure was reasonable. In deciding the reasonableness of the disclosure, the tribunal will consider all the circumstances, including the identity of the person to whom it was made, the seriousness of the concern, whether the risk or danger remains, and whether the disclosure breached a duty of confidence which the employer owed a third party. Where the concern had been raised with the employer or a prescribed regulator, the tribunal will also consider the reasonableness of their response.”<sup>28</sup>

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<sup>28</sup> Public concern at work A guide to PIDA, Public Interest Disclosure Act 1998  
<http://www.pcaw.org.uk/guide-to-pida>

On the 1<sup>st</sup> of June 2015 the Department of Business, Innovation and Skills (BIS) updated its list of prescribed persons and bodies to whom individuals can make a protected disclosure.<sup>29</sup>

### **Public Interest**

Section 17 of the Enterprise and Regulatory Reform Act 2013 narrowed the definition of a 'protected disclosure' to those that are made in the 'public interest'. Despite the name of the legislation it has never previously made any reference to public interest in affording protection to whistleblowers. However, since the 25<sup>th</sup> of June 2013 workers must reasonably believe that their disclosures are made in the public interest before any protection from unfair dismissal or detriment is available.<sup>30</sup>

This requirement has been introduced, at least in part, to close a loophole created by the decision in *Parkins v Sodexho*.<sup>31</sup> That case confirmed that a disclosure about a breach of an individual employment contract was sufficient for protection to be afforded under the Act. There is no guidance provided on what the term 'in the public interest' will mean in this context and this will be left to the determination of individual employment tribunals and other relevant judicial bodies. The person making the disclosure must reasonably believe it to be in the public interest but, their belief need not be correct for the protection to apply.<sup>32</sup> Regarding the *Sodexho* decision it might seem unlikely that the public will have an interest in ensuring that

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<sup>29</sup> *Supra* 29

<sup>30</sup> Gobert, James; Maurice Punch (2000) Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998 *Modern Law Review* Vol. 63 (1)

<sup>31</sup> (2002) IRLR 109

<sup>32</sup> Halliday, P Whistleblowing: the new 'public interest' test and other developments Paragraph 26 <http://www.11kbw.com/uploads/files/PHPaper.pdf>

employers comply with their contractual obligations.<sup>33</sup> In *Chesterton Global v Nurmohamed*<sup>34</sup> the Employment Appeal Tribunal considered for the first time the public interest test introduced into UK whistleblowing legislation in 2013. The facts were that the claimant was a director of the Mayfair office of a global firm of estate agents. He reported that he believed his employer was deliberately misstating £2–3 million of actual costs and liabilities through its office and departmental network. He argued that the consequence of the employer's alleged conduct was that 100 senior managers received lower bonuses than they might otherwise have received, thereby increasing the employer's profitability. He was subsequently dismissed and brought a claim for automatic unfair dismissal for having made a protected disclosure.

The employment tribunal upheld Mr Nurmohamed's claim that he had made a protected disclosure. They found that the disclosure was in the public interest since his allegations covered the interests of around 100 senior managers and this was, in the Tribunal's view, a sufficient proportion of the public to satisfy the test.

The respondent appealed to the EAT but, the appeal was rejected. The EAT decided that in Mr Nurmohamed's case, the public interest test was met, even though the majority of the evidence showed that he had acted for his own personal gain. However, he did have other colleagues' interests in mind and thus the EAT concluded the public were affected. The EAT also found that the public interest test can be satisfied even if the basis for the public interest disclosure is wrong and/or there is no actual public interest in the disclosure, provided the employee's belief that the disclosure was made in the public interest, is objectively reasonable. The impact of this decision is that employers cannot definitively rule out any legal or regulatory

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<sup>33</sup> Lewis, D Is a public interest test for workplace whistleblowing in society's interest?, *International Journal of Law and Management* (2015) Vol. 57, Issue 2 pp 141 - 158

<sup>34</sup> UKEAT/0335/14/DM

breach as being the subject of a 'protected disclosure' under whistleblowing legislation unless the disclosure relates only to an employee's own contract of employment and has no implications beyond that.

### **Good Faith**

Section 18 of the Enterprise and Regulatory Reform Act 2013 removed the requirement in PIDA that a worker or employee must make a protected disclosure 'in good faith'. The rationale for this is that if the public interest is served by disclosures, it doesn't matter what motivation a worker has in making them.<sup>35</sup> This could lead to the somewhat peculiar outcome that disclosures made purely out of malice, or with the intention of personal gain will be protected provided, they are reasonably believed by the claimant to be in the public interest.<sup>36</sup> However, tribunals will have the power to reduce compensation by up to 25% for a detriment or dismissal of a worker relating to a protected disclosure that was not made in good faith.<sup>37</sup>

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<sup>35</sup> In *Hayes v Reed Social Care & Bradford MDC* ET Case No. 1805531/00 the employment tribunal confirmed that the motive of the perpetrator of victimisation was irrelevant.

<sup>36</sup> E.g. *Chesterton Global v Nurmohamed* UKEAT/0335/14/DM

<sup>37</sup> The need for good faith is paramount. under French law and employees cannot be sanctioned, dismissed or be subject to direct or indirect discriminatory measures (especially concerning salary, training, reclassification or appointment) for reporting in good faith suspected wrongdoing by their employer. So any form of retaliation against an employee who has utilised a whistleblowing mechanism in good faith is deemed to be null and void. However, an exception to this legal principle is that an employee may face disciplinary action and even incur criminal liability should he or she report a violation in bad faith or with malicious intent. This is clearly a strong disadvantage to a person wishing to pursue a whistleblowing case in France. There are normally no criminal consequences for whistleblowers in the UK.

## **Victimisation**

Whistleblowing in itself does not justify a legal claim by an employee and there can be no claim under PIDA unless the employer has victimised them after a protected disclosure has been made about them by an employee.<sup>38</sup> The victimisation rules dealing with inequality of treatment are set out under section 47B of the Employment Rights Act 1996 whereby: (1) a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker had made a protected disclosure.<sup>39</sup> A good example is *A v B & C*<sup>40</sup> where a failure to investigate a complaint of sexual assault was a detriment justifying the victim's resignation. Ms A was the personal assistant to the Managing Director (MD) of B Company. The MD took Ms A on a business trip to New York and sexually assaulted her when she was drunk and insensible. After the incident Ms A was too ill to work for 13 months. When Ms A was ready to return, she wrote to the Financial Director saying what had occurred and pointed out the on-going risk posed by the managing director to the female staff of the company. She said she would not work for the MD, whom she thought should be investigated by the company's Board and sacked. After 3 months there had been no news of any investigation or a considered response so Ms A resigned. The tribunal held that Ms A's letter was a protected disclosure, and that company's failure to investigate was a detriment entitling her to resign. She was awarded £79,308. This case although only a tribunal decision does highlight that inaction on the part of an employer to an internal

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<sup>38</sup> Under French law, employees cannot be sanctioned, dismissed or be subject to direct or indirect discriminatory measures (especially concerning salary, training, reclassification or appointment) for reporting in good faith suspected wrongdoing by their employer.

<sup>39</sup> Lewis, D (2005) Providing rights for whistleblowers: would an anti-discrimination model be more effective? *Industrial Law Journal* Vol. 34(3) pp 239-252

<sup>40</sup> (2002) Unreported

complaint can lead to a detriment being established for the victim and liability for them to pay substantial damages.

An employer subjects a worker to a detriment if for example he offers less work to a casual worker than non-casual workers. In *Almond v Alphabet Children's Services*<sup>41</sup> Ms Almond was a casual worker at a care home. The employment tribunal held that after she made a protected disclosure her employer offered her less work than previously and this was a detriment. Similarly, in *Bhatia v Sterlite Industries*<sup>42</sup> Bhatia was visiting family in India when he saw a job advert for a senior post at Sterlite Industries on mergers and acquisitions and he applied for it and was appointed. Bhatia had raised concerns about breaches of US and Australian stock exchange rules. He had raised these concerns internally and to the relevant investment bank that the information Sterlite Industries was supplying about a \$5 million initiative for a proposed listing on NYSE was misleading and would breach its legal rules. This concern was then properly addressed. Bhatia subsequently raised a concern internally that the proposed dilution of equity in an Australian company, contrary to an understanding, would breach Australian legal rules. As a result of these concerns being raised the chairman of the company threw his digital diary at Bhatia and threatened to destroy him prompting, Bhatia to leave his employment. The employment tribunal awarded him £805,000 in compensation. The case went on appeal to the EAT<sup>43</sup> on the ground inter alia that the amount of the award was excessive. The EAT decided that the award of compensation would be set aside and the case was remitted to a differently constituted tribunal for the amount of Mr Bhatia's compensation for unfair dismissal and his damages for wrongful dismissal to

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<sup>41</sup> (2001) Unreported

<sup>42</sup> ET, Case No 2204571/00

<sup>43</sup> *Sterlite Industries (India) Ltd v Bhatia* [2003] UKEAT 194\_02\_2703

be reconsidered. They are all employment tribunal decisions (with the Exception of Bhatia) however they do illustrate the nature and severity of detriments that are protected. In contrast see the decision in Allison v Sefton M.B. Council.<sup>44</sup> where Mr Allison was an environmental health officer who made a protected disclosure about the conduct of his manager<sup>45</sup> with whom there had been bad relations for some time. The issue was investigated although not very quickly. Allison's relations with his manager did not improve and then for operational reasons Sefton Council subsequently moved Mr Allison to another office. The employment tribunal held that the continuation of the claimant's bad relations with his manager was not a detriment and that his transfer to another office was not caused by the disclosure. This somewhat unsatisfactory decision does illustrate the need to establish a causative link between the disclosure and the subsequent victimisation.

Under s.48 (4) where the complaint relates to a deliberate failure to act, time runs from the date that the employer decided not to act. In the absence of evidence of this, it is the date the employer did an act inconsistent with the failed act or, in the absence of such evidence, the date by when the employer might reasonably have been expected to have acted. It should be noted that time runs from the date of the detriment, not the date of disclosure.<sup>46</sup> Section 47B(2) of PIDA provides that where the worker is an employee and the detriment complained of relates to a dismissal then

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<sup>44</sup> (2001) Unreported

<sup>45</sup> In relation to the issuing of a noise abatement notice

<sup>46</sup> In *Miklaszewicz v Stolt Offshore Ltd* (2002) IRLR 344 Mr Miklaszewicz, had been an employee of Stolt Offshore in 1993 when he reported his employer to the Inland Revenue for fraudulently trying to change his status from employee to self-employed. Stolt dismissed him for contacting the Revenue. Six years later the claimant found himself employed by Stolt again due to a number of TUPE transfers. In September 1999, he was again dismissed this time purportedly for redundancy. He brought an unfair dismissal claim. A preliminary issue was whether or not he could bring a claim relying on a disclosure which was made some six years before the dismissal which was the subject of his Employment Tribunal claim. The EAT and Court of Session found that he could. It was the dismissal itself which triggered the employee's entitlement to rely on the statutory protection provided.

the relevant complaint is one of unfair dismissal. However, the interrelationship between a detriment and a dismissal in this context was considered by the Court of Appeal in *Melia v Magna Kansei Ltd.*<sup>47</sup> They confirmed that the relevant provisions as to detriment and dismissal must be construed as part of the overriding statutory scheme. Accordingly, an employee who made a complaint of unfair constructive dismissal was entitled to rely upon the statutory protections relating to detriment right up until the effective date of termination when the dismissal in question became effective. It was only after this moment in time that the provisions relating to dismissal came into play. If the detriment is dismissal then if the complainant is an employee there is no detriment claim, simply an unfair dismissal claim under section 103A. If the complainant is a worker but is not an employee then unfair dismissal claim is not available but a detriment claim under section 47B may be made in relation to a dismissal.

Where the whistleblower's claim is for victimisation (but not unfair dismissal) he or she can be compensated for injury to feelings. In England and Wales an element of aggravated damages can also be awarded.

In respect of unfair dismissal as a form of victimisation where the whistleblower is an employee and is dismissed he may within seven days of his dismissal seek interim relief to ensure his employment continues or is deemed to continue until the full hearing.<sup>48</sup>

What type of behaviour might be regarded as victimisation in respect of subjecting to a detriment? Some case examples were given earlier but a hypothetical example would be denying promotion to an employee after he has made a complaint to an

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<sup>47</sup> (2006) IRLR 117

<sup>48</sup> Interim relief is available for employees who are likely to succeed in unfair dismissal cases linked to whistleblowing. Employment Tribunals can make an order for the continuation of employment pending the final determination of the case.



external regulatory body e.g. reporting to the HSE that the health and safety of individuals are being put at risk by his employer. Another instance would be a manager bullying or harassing an employee after he has made a protected disclosure. On this latter point, an amendment was introduced into PIDA by the Enterprise and Regulatory Reform Act 2013 which extended personal liability for co-workers who victimise whistleblowers.<sup>49</sup> Protection was also extended to situations where workers are bullied and harassed by co-workers.<sup>50</sup> It is important to note that these provisions apply to all such information, whether or not it is confidential.

This amendment to PIDA became law on 25 June 2013 and has strengthened the protection afforded to whistleblowers. Employers could also be liable if they fail to prevent acts of victimisation, unless they can show that they took all reasonable steps to prevent it. Reasonable steps for employers might include; ensuring they have appropriate policies to deal with whistleblowing and updating them regularly and training their workforce on how to treat disclosures made by employees and other workers.

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<sup>49</sup> This is similar to section 26 of the Equality Act 2010. However, they will not be held responsible if they have a statement from their employer confirming that their actions did not breach the Public Interest Disclosure Act 1998. It must have been reasonable for them to rely on the statement.

<sup>50</sup> Section 19

## **Post-termination whistleblowing**

There was some doubt whether an employee could bring a claim after leaving their employment relating to disclosures during or after their employment<sup>51</sup> however, this uncertainty has been resolved in recent cases. In *Woodward v Abbey National PLC*<sup>52</sup> Mrs Woodward was head of financial institutions for Abbey National plc for three years. She complained that after she had left her employment the company had subjected her to a detriment, contrary to section 47B of the ERA. This was because she had blown the whistle on various dubious financial practices undertaken while she was still an employee. She alleged that, since leaving the company the company had failed to provide her with a number of references that she had requested and failed to try to find her any alternative employment. The EAT considered the ERA and the discrimination legislation and concluded that although the language and framework were slightly different in each, they were all dealing with the same concept. Namely, to protect employees 'from detriment in retaliation or victimisation for his or her claim for discrimination or whistle-blowing. Given the legislation was dealing with the common theme of victimisation, it would be unusual if the same sort of act (post-termination) could be victimisation for one purpose but, not for another. Also, it said that it was absurd to limit victimisation to acts during an employment contract, as opposed to events after termination.<sup>53</sup> A similar issue arose in *Onyango v Berkeley*

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<sup>51</sup> In *Fadipe v Reed Nursing Personnel* [2001] All ER (D) 23 (Dec) the Court of Appeal held that section 44 of PIDA did not confer any rights in respect of detriment inflicted by an ex-employer on an ex-employee after the contract of employment had ceased. However, the correctness of this decision was cast in doubt by the Court of Appeal in *Diana Woodward v Abbey National Plc* [2006] IRLR 677) in light of the House of Lords decision in *Rhys Relaxion Group Plc v Rhys-Harper* [2003] UKHL 33

<sup>52</sup> (2006) ICR 1436

<sup>53</sup> The Court of Appeal said that it was difficult to believe that Parliament could have intended to let employers discriminate in giving or withholding references for existing employees but perfectly lawful in the case of ex-employees.

Solicitors<sup>54</sup> where the EAT clarified that a disclosure made after someone's employment had terminated could still be a protected disclosure. They accepted that a post-termination disclosure could be protected principally, because the terms 'worker' and 'employer'<sup>55</sup> included those who are or have ceased to be in a contractual relationship. In *Onyango* the EAT decided the most likely scenarios in which an ex-employee is likely to argue that a former employer has subjected him to a detriment for a post-termination protected disclosure are firstly where the employer refuses to provide a reference (as in *Woodward*) and secondly, where the employer refuses to consider him or her in a future recruitment exercise.

### **Causation & Burden of Proof**

In *Hayes v Reed Social Care & Bradford MDC*<sup>56</sup> the employment tribunal dealt with two important issues. Firstly how important does the cause of the detriment have to be and secondly what motive, if any, does the employer need in these cases. Regarding the first point the tribunal stated that: "there may be cases in which an employer has a number of grounds for taking action detrimental to an employee which include the making of a protected disclosure. What matters is whether the ground was significant or substantial. On the second point they said that given the terminology used in PIDA<sup>57</sup> was identical to that used in the equality legislation<sup>58</sup> they were justified in ignoring any question of motive.<sup>59</sup> In *Fecitt and others v NHS Manchester*<sup>60</sup> Ms Fecitt and two colleagues were employed as registered nurses by NHS

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<sup>54</sup> (2013) IRLR 338

<sup>55</sup> As defined in section 230 of ERA 1996

<sup>56</sup> ET Case No. 1805531/00

<sup>57</sup> Section 47 B

<sup>58</sup> Under section 13 of the Equality Act 2010 direct discrimination cannot be justified, whatever the employer's motive.

<sup>59</sup> See *Borley v Suffolk CC*, 2002 Unreported where the tribunal stated that to establish causation under this provision it was not necessary to prove that reprisal was the employer's motive or intention.

<sup>60</sup> (2011) IRLR 111

Manchester. They made protected disclosures regarding a nurse whom Ms Fecitt believed did not have the clinical experience or qualifications that he claimed to have. As a result of these disclosures, relations between staff at the workplace deteriorated and the three women claimed they had suffered detriments. These detriments included being subjected to unpleasant behaviour by other staff and redeployment. The three nurses brought tribunal claims alleging that they had suffered detriments on the ground of having made protected disclosures. The Employment Appeal Tribunal found that the process for determining what amounts to causation in cases of victimisation in discrimination claims<sup>61</sup> is the same as in victimisation cases for whistleblowing. The EAT allowed the nurses' appeal. It found that, where an employer has the burden of proving that an alleged detriment was not on the ground of a protected disclosure, the employer must show that the alleged detriment was 'in no sense whatsoever' due to the protected act.

This decision was overturned by the Court of Appeal<sup>62</sup> which set out the correct causation test. They held that the test where a worker is alleging a detriment for whistleblowing is to decide whether or not the protected disclosure has materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the individual.<sup>63</sup> The Court of Appeal went on to hold that the EAT was wrong to find that, in principle, the employer could be vicariously liable for the acts

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<sup>61</sup> Under section 27 of the Equality Act 2010

<sup>62</sup> NHS Manchester v Fecitt and others [2011] EWCA Civ 1190 CA

<sup>63</sup> Kohaszad, R The Burden of Proof in Whistleblowing: Fecitt and others v NHS Manchester Industrial Law Journal (2011) Vol. 40 (2) pp 214-221 dealt with the EAT decision.

of victimisation of its employees in circumstances where the employees had committed no legal wrong.<sup>64</sup>

All these cases highlight the fact that for the disclosure to be protected it must have been a material reason for the detrimental behaviour and the behaviour complained of should involve a degree of illegality. Lastly the motive of the perpetrator of victimisation or his employer in victimising the worker is irrelevant.

## **Review of Whistleblower Claims**

The organisation Public Concern at Work <sup>65</sup> recently carried out research into the outcome of employment tribunal claims involving whistleblowing between 2011 and 2013. These judgments were reviewed to determine the effectiveness of the whistleblowing law namely, the Public Interest Disclosure Act 1998.<sup>66</sup> Their key findings were that certain categories of workers were denied protection including; GPs, foster carers, non-executive directors, volunteers and healthcare students. They also found that only 7 % of the claimants over the period that brought interim relief claims for unfair dismissal were successful.

Also the majority of claimants (56%) did not have legal representation and they had a much poorer success rate compared to those with legal representation. There was also a 20% drop in the number of whistleblowing claims lodged with employment tribunals following the introduction of tribunal fees. <sup>67</sup> Other interesting findings relate to the profile of the claimants. For example the majority of cases (66%) were

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<sup>64</sup> The House of Lords decided in a case brought under the Protection from Harassment Act 1997 *Majrowski v Guy's and St Thomas's NHS Trust* [2006] IRLR 695 HL that an employer can be vicariously liable for the harassment of its employees.

<sup>65</sup> [www.pcaaw.org.uk](http://www.pcaaw.org.uk)

<sup>66</sup> Is the law protecting whistleblowers? A review of PIDA claims (2014) Public Concern at Work [www.pcaaw.org.uk/files/PIDAREPORTFINAL.pdf](http://www.pcaaw.org.uk/files/PIDAREPORTFINAL.pdf)

<sup>67</sup> *Ibid* p 4

brought by claimants in the private sector.<sup>68</sup> Regarding the basis for victimisation claims harassment was the most common concern in whistleblowing claims followed by concerns about work safety and financial malpractice. Finally over the period reviewed around £7.3 million was awarded to whistleblowing claimants. While these findings are in no way definitive covering a period of only three years they do help explain the nature and importance of these claims and support the underlying focus of this article.<sup>69</sup>

### **Whistleblowing Law in the United States**

The federal law of the United States<sup>70</sup> prohibits employers from taking adverse action against workers who engage in whistleblowing activities. It specifically protects employees that blow the whistle on environmental, workplace safety, and securities law violations. The Sarbanes-Oxley Corporate Reform Act 2002, the Dodd-Frank Wall Street Reform and the Consumer Protection Act of 2010 protect whistleblowers at all publicly traded companies.<sup>71</sup> Those companies are prohibited from taking adverse action against any employee in retaliation for that employee ‘initiating, testifying in, or assisting in any investigation or judicial or administrative action’ relating to the employer’s violation of the federal securities law. Internal<sup>72</sup> and external whistleblower protection<sup>73</sup> has been extended to all employees in publicly

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<sup>68</sup> Twenty one percent of claims related to the health and social care sectors.

<sup>69</sup> Whistleblowing Case Summaries, April 2003 Public Concern at Work  
[http://www.pcaw.org.uk/files/whistleblowing\\_case\\_summaries.pdf](http://www.pcaw.org.uk/files/whistleblowing_case_summaries.pdf)

<sup>70</sup> An overview of the federal provisions are detailed on the U.S. Dept. of Labor website  
<http://www.dol.gov>.

<sup>71</sup> The Sarbanes-Oxley Act of 2002 (“SOX”) The SOX and Dodd-Frank whistleblower protections are particularly broad, encompassing adverse action taken even in minor part as a result of protected activity.

<sup>72</sup> The Act requires board audit committees to establish procedures for hearing whistleblower complaints

<sup>73</sup> The Act gives a whistleblower the right to a jury trial, bypassing months or years of administrative hearings.

traded companies for the first time.<sup>74</sup> The provisions of Sarbanes-Oxley made it illegal to discharge, demote, suspend, threaten, harass or in any manner discriminate against whistleblowers.<sup>75</sup> Federal whistleblower laws also prohibit retaliation against employees who participate in governmental or administrative investigations into potential workplace law violations even, if that employee did not initiate the complaint. Within this context, the statutes can take different approaches to protecting the worker. Other federal laws require the Secretary of Labor or other government officials to bring an action in a case of retaliatory discharge or discrimination against a whistleblower.<sup>76</sup> These acts do not allow the whistleblower to bring his (or her) own private cause of action.<sup>77</sup>

The Occupational Health and Safety Act of 1970 protects employees from retaliation as a result of reporting/investigating health or safety violations in the workplace. Under section 11(c) of the OSH Act and other federal laws an employee has the right to raise safety-related questions and complaints on the job. An employee can discuss safety with other workers, ask his employer for information about potential hazards and complain about existing hazards to his employer, the Occupational Safety and Health Administration (OSHA) or another government agency. OSHA is an agency of the United States Department of Labor and has a similar role to that of the Health and

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<sup>74</sup> Section 806

<sup>75</sup> The Act provided that criminal penalties of up to 10 years could be faced by executives who retaliate against whistleblowers. The Act also allows the Secretary of Labor to order a company to rehire a terminated employee without a court hearing.

<sup>76</sup> Those statutes include: the Age Discrimination in Employment Act, the Civil Service Reform Act, Compensation and Liability Act and the Employee Retirement Investment Securities Act.

<sup>77</sup> Certain states provide the whistleblower with a private cause of action against the employer and allow the person to bring an action themselves.<sup>77</sup> e.g. Delaware, Hawaii, Kentucky

Safety Executive (HSE) in the UK. However, unlike the HSE <sup>78</sup> it is also specifically charged with enforcing a variety of whistleblower statutes and regulations. <sup>79</sup>

It specifically protects those employees who blow the whistle on environmental and workplace safety violations. Now most states have independent whistleblower statutes protecting whistleblowers from retaliation <sup>80</sup> for filing a claim or reporting a violation.

<sup>81</sup> The coverage of these statutes and their effectiveness varies considerably. “Most of the state whistle-blowing laws were enacted to encourage public employees to report fraud, waste, and abuse in government agencies. Some laws protect only public employees; others include government contractors and private-sector employees. <sup>82</sup> In New York, there is broad coverage under state law with both public and private employers prohibited from disciplining or taking retaliatory action against any employee who has disclosed or threatened to disclose policies or practices that violate the law or that otherwise threaten public health or safety. In Texas the whistleblower regulation is more restrictive. Here it protects public employees from retaliation who report violations of law to appropriate law enforcement agencies, provided the employee had filed a grievance <sup>83</sup> within 90 days of when the employer’s adverse employment action occurred or was discovered by the employee. Given the

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<sup>78</sup> The HSE has no enforcement role under the whistleblowing legislation but is one of the bodies to which a ‘protected disclosure’ can be made.

<sup>79</sup> The Whistle Blower Protection Act 1989 (WPA) is a federal Act that protects most federal employees who work in the executive branch of the Government. It requires that federal agencies take appropriate action to protect whistleblowers. This Act created by the Office of Special Counsel (OSC) which is tasked with investigating complaints by the federal employees who claim they were punished for blowing the whistle on their employer. See also the False Claims Act 1863. This act was revised in 1986, which strengthened it and made it the prime federal whistleblower statute. It has become the single most effective tool for U.S. taxpayers to recover billions of dollars stolen through fraud every year.

<sup>80</sup> The US equivalent of victimisation see <http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx>

<sup>81</sup><http://statelaws.findlaw.com/employmentlaws/whistleblowerlaws.html#sthash.f2lXrfRD.dpuf>

<sup>82</sup> Patrick, P Be Prepared Before You Blow the Whistle, Protection Under State Whistle-blowing Laws Fraud Magazine, September/October 2010 [www.fraud-magazine.com](http://www.fraud-magazine.com)

<sup>83</sup> The employee must initiate action under the grievance or appeal process of the governmental employer before filing a lawsuit.



combination of federal and state laws that apply to whistleblowers it does mean that most employees that are victims of retaliation by their employer will be protected. The following quote highlights the complexity of the law and the fact it is primarily there to protect claimants who are whistleblowing to external agencies outside their employer's organisation: "..., in light of the number of statutes providing protection in the US (e.g. federal and state law) accessing the correct mechanism for a legal remedy may be difficult. America has a convoluted patchwork of whistleblower protections for private and public employees. Yet despite the incomprehensibility of much of American whistleblower law, it still clearly favors external reporting. "<sup>84</sup>

The combination of roles undertaken by the OSHA of enforcing health and safety and whistleblowing laws is valuable and effective. As identified the dual coverage of whistleblowing laws by Federal and State Law in the US can lead to confusion on the part of victims. In contrast in the UK the provision of a single act protecting most whistleblowers in an employment context makes bringing a claim considerably easier for UK claimants.<sup>85</sup>

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<sup>84</sup> Mendelshon, J (2009) Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing, Washington University Global Studies Law Review Vol. 8, Issue 4 pp 723-745 at p 724

<sup>85</sup> Having said that all; directors, officers or employees of firms authorised in the UK under the Financial Services and Markets Act 2000 (FSMA) has an obligation to submit suspicious transaction reports to the Financial Complaints Authority (FCA). In addition, any FSMA authorised firm that execute trades with or for clients in a qualifying investment admitted to trading on a prescribed market has an obligation to make suspicious transaction reports (STRs) to the FCA. <http://www.fca.org.uk/firms/markets/market-abuse/suspicious-transaction-reporting>

## **Whistleblowing and Convention Rights: Freedom of expression**

There are various articles of the European Convention of Human Rights <sup>86</sup> that could apply to whistleblowing but the most notable are articles 8 and 10. However consideration will be limited here to Article 10 which is undoubtedly the most relevant. <sup>87</sup> “Any worker victimised or dismissed for blowing the whistle could argue that an employment tribunal should decide their case with regard to their human right to freedom of expression and the right to disclose information in particular. “<sup>88</sup>

Under section 6 of the Human Rights Act 1998 (HRA) a duty is placed on all public authorities <sup>89</sup> to act compatibly with Convention rights and if it fails to do so it will be acting unlawfully. Public authorities are therefore expected to undertake all their activities, including the employment of its workers, with regard to human rights. A public sector whistleblower can argue that his employer should have regard to the right to freedom of expression in its treatment of their workers. If it fails to do so the public authority will be acting unlawfully and the worker can either take proceedings against it in the appropriate court or tribunal or rely on the right to freedom of expression in any proceedings under section 7 of the HRA.

Under article 10 (1) of the European Convention on Human Rights it states that: “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” There is a limit to this freedom set out in

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<sup>86</sup> Implemented into UK law by the Human Rights Act 1998

<sup>87</sup> For analysis of the application of Article 8 and 10 to whistleblowing see Hobby, C Article 10: the Right to Freedom of Expression & Whistleblowing 28 November 2014 The Institute for Employment Rights <http://www.ier.org.uk/blog/article-10-right-freedom-expression-whistleblowing>

<sup>88</sup> Hobby C Article 10: the Right to Freedom of Expression & Whistleblowing, 28 November 2014, Institute of Employment Rights <http://www.ier.org.uk/blog/article-10-right-freedom-expression-whistleblowing>

<sup>89</sup> Although the HRA does not provide a definition of a public authority it extends to Government ministers, civil service the police, the army and local authorities.

article 10 (2) as follows: the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The case of *Guja v Moldova*<sup>90</sup> concerned the head of the press department of the Prosecutor General's office in Moldova. He sent copies of two letters to a newspaper that resulted in an article alleging the Deputy Speaker of Parliament had attempted to influence the Prosecutor General in respect of the prosecution of four police officers with the result that the criminal proceedings were discontinued.<sup>91</sup> The European Court of Human Rights (ECtHR) reiterated that the right to freedom of expression applied to the workplace and so could be relied on by whistleblowers and found there had been a violation of the applicant's right to freedom of expression when he was dismissed. The ECtHR were clearly of the view that the disclosure of illegal conduct or wrongdoing in the workplace by a civil servant or public sector employee<sup>92</sup> should, in certain circumstances, enjoy protection. In determining the proportionality of an interference with a right to freedom of expression the court established a number of factors which the court must have regard to: whether the applicant had alternative channels for making the disclosure; the public interest involved in the disclosed information; the authenticity of the disclosed information; whether applicant acted in good faith; detriment to the employer and the severity of the sanction. Unfortunately

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<sup>90</sup> Application No. 14277/04 12 February 2008

<sup>91</sup> It was found that the applicant did not have any effective channel through which to make his disclosure as neither Moldovan legislation nor the internal regulations of the Prosecutor General's office provided for employee reporting.

<sup>92</sup> *Heinisch v Germany* (2011) IRLR 922

there is no case law to date concerning victimisation in the form of subjecting to a detriment but, the principle is firmly established that freedom of expression issues can arise in these cases as well as dismissal cases.

## **Conclusion**

The UK is not alone in providing protection for whistleblowers however, it is at the forefront of victim protection. Legal provisions for the protection of whistleblowers can be found in dedicated legislation on whistleblower protection in other countries.<sup>93</sup> Interestingly, a report in 2012 on the state of whistleblower protection in some of the world's richest countries found that Germany ranks amongst the worst at protecting whistleblowers alongside Argentina, Brazil, India, Indonesia, Italy, Mexico, Russia, Saudi Arabia and Turkey.<sup>94</sup> As the following quote suggests there is a long way to go before there is a universal protection applying: "currently, only six countries in Europe have any type of dedicated whistleblower legislation United Kingdom (UK), Norway, Netherlands, Hungary, Romania, and Switzerland. Of these six countries, only two, UK and Norway, have dedicated whistleblower protection laws that extend to all workers, in both the public and private sectors, including contractors and consultants."<sup>95</sup>

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<sup>93</sup> Civil protection under South Africa's Protected Disclosures Act (PDA), or Japan's Whistleblower Protection Act (WPA), Whistleblower protections may also be provided by the criminal law e.g. the Canadian Criminal Code prohibits retaliation against an employee who provides information about a crime.

<sup>94</sup> G20 Anti-Corruption Action Plan, Protection of Whistleblowers whistleblower protection frameworks, compendium of best practices and guiding principles for legislation (2012) OECD

<sup>95</sup> Guyer T M. Peterson N F (2013) The Current State of Whistleblower Law in Europe: a report by the Government Accountability Project pp 1-37 at p 7  
<http://whistleblower.org/sites/default/files/TheCurrentStateofWhistleblowerLawinEurope.pdf>

It is not clear how much protection is provided by Article 10 (of ECHR) to persons blowing the whistle within employment in the UK however, the following quote suggests not much. “It has been argued that the employment protections afforded by the right to freedom of expression are ‘slim’... The focus in the protection of whistleblowers appears to be on the statutory rights provided by PIDA rather than human rights incorporated into domestic law by the HRA 1998.”<sup>96</sup>

The following quote emphasises the differences between UK and US whistleblowing law: “...the American and British models of whistleblower law are very different with respect to what they protect, how they protect it, and the preferred avenue of reporting.”<sup>97</sup> It is interesting to note that protection for whistleblowers in the US is dependent on one or more of a number of federal statutes and state law applying.<sup>98</sup> In contrast in the UK the law is largely contained in one statute.

The most important developments the UK in recent times are firstly, the Government introducing, for the first time, a public interest test into the PIDA. A worker will now have to show that he reasonably believed that the disclosure he/she was making was in the public interest. However, the courts have shown they will take a broad view of this term. The impact of the public interest test as an additional layer of complexity in these cases will be limited by the transfer of the requirement of good faith from the liability to the remedy stage of whistleblowing hearings.<sup>99</sup> Secondly, another important development is the increase in the protection for whistleblowers from bullying and harassment (particularly when perpetrated by co-workers) including the

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<sup>96</sup> McColgan, A, ‘Article 10 and the right to freedom of expression: workers ungagged?’ in Ewing, K D, (ed) Human Rights at Work, 2000, Institute of Employment Rights, p 73

<sup>97</sup> Supra 91 p 744

<sup>98</sup> Callahan E S, Morehead Dworkin, T Lewis, D Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest (2003-2004) Vancouver Journal of International Law Vol. 44 p 879

<sup>99</sup> Under the Enterprise and Regulatory Reform Act 2013 there is now a maximum reduction of 25% in the compensation payable to a claimant where bad faith is found in his actions.

personal liability of harassers and the potential vicarious liability of employers for this kind of behaviour.

The research featured earlier undertaken by Public Concern at Work highlighted a number of valuable points.<sup>100</sup> There is clearly an argument for expanding the categories of persons who are entitled to make a protected disclosure. Also there is a need for the access to inexpensive legal advice for legal claims to be expanded and for the legal fees recently introduced<sup>101</sup> to be substantially reduced or removed. This change is necessary to offset the reduction in; actions being brought to tribunals and successful claims after a hearing. Public Concern at Work in February 2013 launched the Whistleblowing Commission which had a remit to review the effectiveness of whistleblowing in UK workplaces and to make recommendations for change.<sup>102</sup> The Commission<sup>103</sup> has made various recommendations for improving whistleblowing across UK workplaces. Its primary recommendation is for the Secretary of State to adopt a Code of Practice that can be taken into account in whistleblowing cases before courts and tribunals.<sup>104</sup> Picking up on the point made earlier they also recommended broadening the definition of worker to include: student nurses; doctors; social workers; health care workers; volunteers; interns; priests; foster carers; non-executive directors; public appointments; LLP members and all categories of workers listed under the Equality Act 2010.<sup>105</sup> Considerable improvements have taken place in this area underpinned by legislative changes which should mean that most workers subjected to victimisation in the future will have sufficient protection.

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<sup>100</sup> Supra 71

<sup>101</sup> The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013

<sup>102</sup> Supra 71 Research into 1,000 whistleblowing cases by Public Concern at Work and the University of Greenwich, "Whistleblowing: the inside story", published May 2013.

<sup>103</sup> This is s an independent body made up of industry and academic experts

<sup>104</sup> <http://www.pcaaw.org.uk/whistleblowing-commission-public-consultation>

<sup>105</sup> Recommendation 10

It was recently suggested that the adjudication of disputes in tribunals and courts is not the appropriate mechanism and alternative dispute resolution methods (particularly mediation) should be used.<sup>106</sup> Unfortunately while this is a sensible idea it is notoriously difficult for parties in dispute in an employment context to agree to ADR.<sup>107</sup>

To underline the importance of a reliable legal framework for resolving disputes the final word should go to Cathy Jamieson, CEO at Public Concern at Work: “public inquiries and scandals across many sectors have highlighted the vital role that whistleblowing can play in the early detection and prevention of harm. But too often questions are asked after the damage is done. From the LIBOR banking scandal, the Mid-Staffordshire hospital inquiry and the Leveson inquiry into phone hacking, it is clear that staff did express concern that wrongdoing or malpractice was taking place. The worrying truth is that they are often ignored or worse, discouraged, ostracised or victimised.”<sup>108</sup>

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<sup>106</sup> Lewis D Resolving Whistleblowing Disputes in the Public Interest: Is Tribunal Adjudication the best that can be offered? *Industrial Law Journal* Vol. 42 No. 1 pp 35-53

<sup>107</sup> The Acas Arbitration Scheme: An evaluation of parties' views (2004) Prepared for Acas by DVL Smith Research Ltd

<sup>108</sup> *Supra* 71