Rebutting the presumption: are whistleblowers really protected under PIDA and in the case of the UK banking industry

Article

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Rebutting the Presumption: Are Whistleblowers really protected under PIDA and in the case of the UK Banking Industry?

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Abstract

This article contributes to the ongoing discourse on whistleblower protection. Specifically, the article examines the important question of whether the protection provided for in the Public Interest Disclosure Act 1988 (PIDA) adequately protects the interests of whistleblowers in the UK. The article places a substantial emphasis on the current whistleblower architecture by focusing on (a) the challenges and paradoxes of the statutory provisions; (b) addressing why these are problematic; (c) and the interpretation of the court through case law. In its examination of these issues, the paper limits its scope specifically to the UK financial system and considers the approach adopted by the Financial Conduct Authority and the Prudential Regulation Authority. It is argued that while whistleblowing could and should be utilised as an active mechanism to support the traditional methods of regulation, it is important to ensure ample protection is given to the potential whistleblower and sufficient punishment is given to those who are found to be at fault. The paper utilises a critical analysis approach by reviewing the statutory provisions of PIDA in order to decipher the level of effectiveness of the protection itself. The paper concludes that PIDA has become obsolete and lacks the capability to offer adequate protection to whistleblowers who courageously disclose information which may uncover the sophisticated means in which wrongdoings may occur. It is argued that while the law itself requires urgent reform, there is also a pressing need to improve the cultural outlook around promoting whistleblowing. One of the methods of achieving this is may be the enactment of a new Whistleblower Act, rather than an amendment of the present. It is submitted that this would alleviate a large portion of the challenges as presented in this paper.

Keywords: **Whistleblowing, Protection, PIDA, Law, Financial Industry**

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Introduction

The ability of organisations to conceal bad practices, using the most sophisticated methods, has brought to the fore the importance of whistleblowing. In particular, the act of whistleblowing has continually demonstrated and projected itself as a highly useful tool in the ongoing battle to stamp out corruption and report wrongdoings. It would not be unusual therefore to view the act of whistleblowing itself as an important and effective regulatory mechanism, if sharpened appropriately. In the broad sense, the ability of a 'worker'[1] or an individual to function as a whistleblower usually stems from their position as an *employee* of the organisation/institution. By virtue of this proximity, they are privy to otherwise confidential information. The test of efficacy of a whistleblower as an anti-corruption tool is largely, if not mostly, contingent on protection, should a disclosure of any nature be made. The impact of the disclosure by a whistleblower may be timely in terms of preventing further bad practices or avoiding reputational damage. In more extreme examples, such as in medical related disclosures, it is possible that they may even play a vital role in the preservation of life.[2] However, as indicated previously, the willingness of the whistleblower to *disclose*, is substantially hinged on the statutory protection which is available. Arguably, the reality of the discourse is the legitimate expectation that a whistleblower will mainly be guided by a conscious analysis of this protection, and should it appear to be less than satisfactory or adequate, such persons are unlikely to come forward with information.

The legislative responses

In order to address the aforementioned issues and other considerations,[3] the Public Interest Disclosure Act was enacted in 1998. The Act was designed primarily as a response to the realisation that workers who in the public interest reported wrongdoings at work required statutory protection. The Act contains provisions which enable workers who suffer victimisation as a result of making disclosures to claim compensation.[4] There have been recent attempts to provide additional protection to whistleblowers, with the enactment of the

[1] A work is defined under s.230 (3) of the Employment Rights Act 1996**.** See also, *McTigue v University Hospital Bristol NHS Trust* [2016] IRLR 742.
[2] Such examples may include hospital staff.
[3] Such issues include Clapham Rail Crash and the Piper Alpha Explosion. See also, Hugh Pennington, 'The Public Inquiry into the September 2005 outbreak of E Coli 0157 in South Wales (Welsh Assembly Government 2009) 6.29ff.
[4] s .4 PIDA 1988.

Enterprise and Regulatory Reform Act 2013,[5] and the Small Business, Enterprise and Employment Act 2015.[6] While these efforts are plausible, it is arguable whether they do much to enhance the pre-existing position. This assertion is explored further in this paper.

This paper is instrumental to local and global policy makers and to legal practitioners. At the local level, the analysis in the paper identifies the fundamental gaps and issues within realms of whistleblower protection in the UK, that require urgent reform and rethinking. These include the understanding why there is a huge emphasis on protecting whistleblowers and how the exposure of their identity could have detrimental effects on them. On a global scale, the paper plugs the gaps in the cultivating the understanding of whistleblowing as an integral concept and core element of the overall management of risk. This paper demonstrates that while ensuring adequate protection is important, and indeed, it forms the basis of this paper, there is a need for a paradigm shift in the overall whistleblowing culture and attitudes towards whistleblowing. The paper attempts to plug some gaps in this field, which include the urgent shift towards encouraging disclosures, while appreciating and amplifying its important position of whistleblowing within the overall corporate governance and regulatory framework.

This paper is divided into five sections. Part one is this introduction which has provided a brief synopsis of the paper's overarching objectives and has touched on the areas to be discussed in subsequent sections. The second part examines whistleblowing in the UK and considers the objectives of PIDA. It closely looks at the protective measures within the provisions and analyses whether they remain fit for purpose. The third part is explicatory in its review of the current law. The paper then goes further to explore why there is a need for reform. The next section zooms in on the financial system and how the act of whistleblowing is necessary to improve the framework of the financial industry. The paper explores the position as it is presently and uses the previous discussions as a quantum of measure to judge whether the protections are, indeed, adequate. The final section concludes the paper and provides a number of suggestions and observations. The key findings of the paper are that (a); there is an overarching need to deconstruct the cultural and work attitudes against whistleblowing; (b) this may be achieved with the introduction of a new Act, rather than a proposal to amend the

[5] Enterprise and Regulatory Reform Act 2013, s. 17-20.
[6] Small Business, Enterprise and Employment Act 2015, s148 – 149.

existing provisions; (c) that there is scope, to proactively use the act of whistleblowing as a key regulatory tool within the overall corporate governance architecture.

Understanding the practice of whistleblowing – a general overview

There is no universally accepted definition of whistleblowing.[7] Nadar defined the concept as similar to when a referee blows the whistle as a sign that some foul has occurred.[8] However, in a more general context, whistleblowing could be described as occurring in one of two circumstances. The first can be explained as when an individual exposes either improper or poor conduct. This may occur in a number of way and historically, such examples have revolved around the healthcare. More specific examples could be where a member of staff whistleblows on the way that patients are treated. Other examples could include when an individual exposes fraudulent activity or illegal behaviour which has either occurred or is impending.[9] The second is the efficacy of actually investigating and dealing with disclosures. Without a thorough and satisfactory outcome of these two factors, the concern remains that the likelihood of an individual coming forward to expose bad practices are slim. Despite the additional protective provisions in the ERRA Act,[10] and SBEE Act,[11] which seek to add credence to those in PIDA 1998, this paper will argue in the later sections, that there is sufficient ground to suggest that these provisions are not adequate or robust enough and require reform.

The position of whistleblowing at common law has previously been articulated by Lewis.[12] Historically, common law has not always provided workers with the general right to disclose information with regards to their employment. It is important to note that in regard to confidential information obtained during the course of employment, common law provides protection through express and implied terms.[13] The Act gives some direction in terms of what may permit a protection; the instances where a qualifying disclosure will be protected under

[7] Muel Kaptein 'From Inaction to External Whistleblowing: The Influence of the Ethical Culture of Organizations On Employee Responses to Observed Wrongdoing', [2011] 98 (3) *Journal of Business Ethics* 513; Folashade Adeyemo, 'Fifty Shades of Intrusion: A Critical Analysis of the Whistleblower Protection Bill 2011. *Journal of International Banking Law and Regulation* [2017] 32 (12).
[8] Roberta Ann Johnson *Whistleblowing: When it Works - and Why it* Works, (Lynne Rienner Publishers) 2002 4
[9] In some instances, the individual may have become aware of a situation prior to the act taking place.
[10] (n 6).
[11] (n 7).
[12] David Lewis, 'Nineteen Years of Whistleblowing in the UK: Is it Time for a More Comprehensive Approach? *Journal of Law and Management* [2017] 59 (6) 1126-1142.
[13] See also, *Attorney General v Guardian* [No 2] [1990] 1 AC.

PIDA; and to who the protection is applicable. The challenges which present themselves are the inaccuracy of the legislation and how the courts interpret these provisions.[14] The Court of Appeal's first decision on the Act was in the case of *Alm Medical Services v Bladon*[15] where the court made a number of observations, including:

> *..the self-evident aim of the provisions is to protect employees from unfair treatment (i.e. victimisation and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees. There are obvious tensions, private and public, between the legitimate interest in the confidentiality of the employer's affairs and in the exposure of wrong.*[16]

The court had another opportunity to interpret the statutory provisions of PIDA. In the case of *Azmi v ORBIS Charitable Trust*,[17] Ms Azmi had joined a registered charity. She had raised concerns internally in relation to financial irregularities and the consequences of potential breaches of charity commission regulations. As a result, she was dismissed from work. Orbis claimed that the dismissal was due to Azmi's poor performance at work, yet, the court held that her dismissal was as a result of her disclosure. In this instance, Azmi was given compensation, but the director was permitted to retain her position. The case of Azmi is important as it highlights the relevance of the initial judicial view of PIDA. Azmi's dismissal from work, which was later found to be as a result of her coming forward demonstrated that at the time at least, the protective mechanisms were, at best, ineffective. This disclosure should not have resulted in her dismissal, despite the court finding that this was the case. Further, the failure to remove the director from her position or investigating Azmi's allegations in further detail, indeed adds to the issue of failing to ensure that adequate punishment is given to those who are found to be abusing their position of trust.

Whistleblowing as an anti-corruption tool

The act of whistleblowing should arguably be viewed as a good approach to ensure accountability, culpability and as a good tool towards enhancing corporate governance.[18] An

[14] For an interesting discussion on this, see Lewis, (n 12).
[15] *Alm Medical Services v Blado* [2002] IRLR 807.
[16] As per Mummery LJ.
[17] *Azmi v. ORBIS Charitable Trust* ET 4 May (2000) (2200624/99).
[18] See also, Indira Carr and David Lewis, 'Combating Corruption through Employment Law and Whistleblower Protection, *Industrial Law Journal* [2010] 39 (1) 52 – 81.

individual who ‘whistleblows’, can only do this by virtue of their position within their employment, which grants them access to information which ordinarily would not be accessible. The current whistleblower architecture is built on three pillars.[19] The first is an expectation that there are internal procedures to address such matters in the first instance; this may be through an anonymous telephone number which is made available or through any other means of anonymous communication. The second is the expectation that there would be some regulatory oversight, with a view to monitoring the internal procedures; this may be through some sort of investigation into the alleged claim of misconduct. The third is accountability. While the objective was to create an effective and transparent system for whistleblowing which could be modelled on other countries, it is argued that the law in its current position works primarily in theory. The challenges within the law are magnified through the interpretation and findings of the courts, illustrating that the system in place is far from effective.

To fully understand the myriad of issues within the key provisions of PIDA, it is important to deal with each potential or identified challenge on its merits. The Act in its current state makes specific provisions for an action in respect of victimisation and connected purposes.[20] It may be deduced therefore that the Act follows a step-by-step process to provide this protection. In order to successfully be protected by these provisions, the worker must ensure that (1) the disclosure made falls within the spectrum of a qualifying disclosure;[21] (2) it is in good faith;[22] and (3) the conditions, as prescribed are met.[23] These requirements are interdependent on each other.

Public interest?

The first consideration is determining whether a disclosure is in the public interest. The Enterprise and Regulatory Reform Act 2013 (ERRA) now includes a section just after ‘in the reasonable belief of the worker making the disclosure' stating ‘is made in the public interest’.[24] This insertion addresses the issues which were expounded in the case of *Parkins v Sodeho Ltd.*[25] In this case, the Employment Appeal Tribunal decided that it was possible for breaches

[19] Stelios Andreadakis, 'Whistleblowers under the Spotlight: The cases of Japan and the UK', *European Journal of Comparative Law and Governance*, [2017], 3 (4), pp. 353 – 384.
[20] s. 47 B PIDA, 1998.
[21] s. 43 B (1) PIDA, 1998.
[22] s. 43 D PIDA, 1998.
[23] s. 43 B (1) (b) PIDA, 1998.
[24] s. 43 B ERA 1996.
[25] [2002] IRLR 109 (EAT).

of a personal contract of employment to fall within the scope of section 43(1) (b).[26] In some ways, this could be seen as reaffirming the original objective of the law, as opposed to being a tool to bypass the length of service requirement.[27]

The concept of 'public interest' also plays a substantial role in terms of deciphering the *nature* of the disclosure itself. In the case of *Chesterton*,[28] the Court of Appeal shed further light on factors which may be relevant in determining this public interest element. Such factors include the identity of the wrongdoer, the nature of the wrongdoing disclosed, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. Notwithstanding this illumination, there may be factors which are not enumerated here and of course, there is the workers' own interpretation or understanding of what may be considered as in the 'public interest'.

Qualifying disclosure

The next important issue is the term 'qualifying disclosure', which is difficult to define. The initial challenge presented here is that although there is a category under which disclosures may fall, it is possible for information to fall outside of this scope. The second issue that arises when a whistleblower makes a disclosure is that it must be demonstrated that they did so because it was in the public interest,[29] thus clearly placing the onus on worker. This could be problematic, as the public interest requirement is clearly subjective in nature.

Prescribed person

In order to offer protection, the person must be a 'prescribed person' and the information pertaining to the disclosure must be substantially true. Clearly, this places the onus on the worker and this task is subjective in nature. It is important to note that this is a sharp juxtaposition against the provisions of s 43C[30] where a worker need only show that he or she believes the disclosure to be true. The final step in this third part is for the worker to demonstrate one of two potential instances. The first is that at the time of disclosure, the worker reasonably believed that they would be subjected to victimisation from their employer.[31]

[26] 'that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject'.
[27] This was increased in April 2012 in private employment claims.
[28] *Chesterton Global Ltd* v. *Nurmohammed* [2017] EWCA Civ 979.
[29] s. 43 B ERA 1996.
[30] s. 31 ERA 1996.
[31] See also, *Abertawe University Health Board* v. *Ferguson* [2014] IRLR 14.

Second, and either as an addition or alternative to the first, the worker must believe that it is reasonable to make the disclosure.

The provisions of PIDA 1998 aim to strike an equilibrium between managing the 'public interest', (although not clearly defined) and the interest of the employer. However, it may be argued that given the complexities which may arise in each of these aforementioned steps, including balancing the disclosure which may, or may not be in the public interest, the objective of the Act itself discourages whistleblowing. This is apparent since it may be concluded that it is a great burden on the worker to adduce that he or she reasonably believes that the disclosure sought is true.

The very concept of whistleblowing raises a number of important questions. The first is the consideration of what may fit within the scope of transparency and the freedom of speech, although there is further scope to explore this particular issue under the dimension of human rights law.[32] The added factor in considering this specific issue is deciphering how far the law should protect individuals who go further to expose information, which may be detrimental to the organisation or institutions concerned.

The second matter is determining the information that the public have a right to know, in other words, the public interest test. The issue here is to explore the internal mechanisms available to deal with these queries at the internal level and then to assess the efficacy of these methods. The sub-issue from this is determining how far the public interest extends as it relates to employment law. The courts have focused on this in the case of *Chesterton,* discussed above.[33] With this in mind, it is argued that the law needs to be reformed and revisited for a number of reasons. The first task is examining whether the law in its current state is still fit for purpose, 20 years after its enactment.

Problems with PIDA

[32] The notion of balancing freedom of speech as a fundamental human right and whistleblowing is well discussed in Jeanette Ashton, '15 Years of Whistleblowing Protection Under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?', *Industrial Law Journal* [2015] 44 32–52 at 33.
[33] *Chesterton Global Ltd* v. *Nurmohammed* [2017] EWCA Civ 979.

Prior to the enactment of PIDA, legal protection for whistleblowers was ineffective and generally dealt with under the common law.[34] While the law was previously incompetent in dealing with these issues, there were other contributing factors that should have been considered. For example, it is a challenging task to contest any culture, which actively adopts the approach of *not* discussing poor practices. In such an instance, it would be difficult to create laws to provide for those willing to speak out. In other words, the challenge in the UK was managing a poise between not encouraging poor practice through silence, and harsh punishments when disclosures are actually made.

The culture and environment could be improved if potential whistleblowers are provided with a safe substitute for remaining silent. Without a change in the current position of the law, and the comfort that there is a safe haven for whistleblowers, the law as it stands will continue to discourage whistleblowers from coming forward. It is the thesis of this paper that a review of the law is necessary. PIDA has done well to encourage the idea of internal procedures for institutions. It brings to the fore the opportunity for whistleblowing to serve as a mechanism for mainstreaming procedural regularities.[35] The primary aim is for companies to tackle these issues at an internal level before addressing it at the legislative level.

One factor to take into consideration when a worker makes a disclosure is the reasonableness of the disclosure itself. Section 43C (2) and 43G (3) (f) determine that these internal procedures are instrumental when employers are looking to defend any claims.[36] This suggests that the court or tribunal (as the case may be) will have taken into consideration acquiescence on the part of the whistleblower with any procedures.

It is important to note that there are no provisions within PIDA which make it mandatory for institutions to introduce internal procedures, nor does the Act provide any guidance what an efficient internal disclosure framework would resemble. There have been arguments that internal procedures should be implemented,[37] however, it is argued that this may not be enough

[34] Hugh Collins, Keith D Ewing and Aileen McColgan *Labour Law and Materials,* (2nd Ed Oxford: Hart Publishing, 2005) 636.
[35] Kelly Bouloy, 'The Public Interest Disclosure Act 1998: Nothing More than a Cardboard Shield' [2012] 1 *Manchester Review of Law,* Crime and Ethics 1; See also, Ashley Savage, *Leaks, Whistleblowing and the Public Interest: The Law of the Unauthorised* Edward Elgar, 2016.
[36] David Lewis, 'European Developments the Council of Europe Resolution and Recommendation on the Protection of Whistleblowers', *Industrial Law Journal* [2010] 39 (4), 434.
[37] David Lewis, 'Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?' *Journal of Business Ethics* [2008] 82, 500.

to remedy the overarching issue which whistleblowing presents. One perspective is that when a worker makes a disclosure which is dealt with internally, an opportunity is created for institutions to a) deal with it in a manner which serves it best, i.e cover up; or b) keeps the matter away from other potentially interested or necessary parties. It seems that the advantages of having the internal disclosure and the absence of it must be weighed to project a balanced overview. On the one hand, one benefit of having an internal disclosure framework is to project the custom of consistency, accountability and confidence. This system provides a whistleblower with the confidence that any disclosures, at the first instance would at the very least be addressed. The absence of this procedure is however problematic, as it creates an element of uncertainty. Additionally, the absence of internal mechanisms is not beneficial for the employer. An internal mechanism would aid employers in curtailing and managing reputational damage. On the other hand, the absence of this disclosure, gives a potential whistleblower the scope to access the provisions under PIDA.

The statutory problem

The main consideration of the paper is to evaluate the legislative framework so as to decipher its effectiveness. This is closely connected to assessing the effectiveness of the drafting of these provisions. The outcome of this assessment would either suggest that the framework is fit for purpose and there is no need for reform, or, that there are evident gaps which are problematic both practically and in court. PIDA leaves room for interpretation, some of which could be both problematic for the courts and the employee/whistleblower. In an attempt to encompass a substantial number of potential failures which may fall into the bracket of poor practice/corruption, the ERA 1996[38] provides a sweep all provision.

There is no suggestion of ***who*** any protected disclosures should be made to within PIDA,[39] however, there is a requirement that 'regard shall be had to the identity of the person whom the disclosure is made.'[40] It is important to note that confidentiality remains the cornerstone of a disclosure, and thus, the inability to ensure the anonymity of the whistleblower poses a challenge. This does not encourage a whistleblower to come forward with information.

[38] s. 43 H, ERA 1996.
[39] s. 43 G (B) and s. 43 H, ERA 1996.
[40] s. 43 G (3) (a), ERA 1996.

It should be noted that protected disclosures are subject to additional requirements which are repeatedly canvassed within PIDA. Such requirements include, but are not limited to the reasonable belief that the information sought to be disclosed is true;[41] the disclosure itself is made on the basis of good faith;[42] the disclosure itself, is reasonable;[43] and finally, that the person seeking to make the disclosure is not doing so in bad faith.[44] These provisions clearly demonstrate that while PIDA offers some protection, it is hinged on the presumption that the information disclosed is reasonable and can be justified. It is therefore a reasonable presumption that in its current state, PIDA directs its protection to instances that address impending corruption.

The test of 'reasonable belief' was first conceived in the case of *Babula v Waltham Forest College*,[45] where the court found that it was significant that the legislation uses the phrase 'tends to show', as opposed to requiring reasonable belief that the actual information 'shows' the relevant failure.[46] It may therefore be argued that this particular test provides a level of flexibility in that in making the disclosure, the worker may only have a piece of the puzzle.

The issue of reasonable belief has been revisited more recently in the case of *Kilraine v Wandsworth LBC,*[47] where further emphasis was placed on the actual need to specify what was disclosed. Notwithstanding, the law still remains unclear in terms of what fits within the scope of 'information'. Bearing these two cases in mind, it is clear therefore, that the problem with the law in its current form is that it fails to provide the protection it was designed for. The revisiting of this important issue in *Kilraine* simply articulates a displeasing application of the question of whether the reasonable belief has a correlation with the disclosure being made in the public interest, or whether the information *tends* to show a failure.

Deciphering what may comprise protected disclosure was also addressed by the Employment Appeal Tribunal in the decision in *Cavendish*.[48] A variance was drawn between the idea of 'information' and an 'allegation', which were derived from a reference to these terms in s

[41] s. 43 B, C F and G, ERA 1996.
[42] s. 43 C and E- H, 1996.
[43] s. 43 G and H, ERA 1996.
[44] s. 43 C and E, H ERA 1996.
[45] *Babula v Waltham Forest College* [2007] IRLR 346 (CA).
[46] See also Jeremy Lewis and John Bow, 'Whistling to No Avail: Protected Disclosures Post *Kilraine v Wandworth LBC'* Case Comment, *Industrial Law Journal* [2018] 567.
[47] *Kilraine v Wandsworth LBC* [2018] IRLR 846.
[48] *Cavendish Munro Professional Risk Management Ltd v Geduld* [2010] ICR 325.

43F,[49] given there is no statutory definition. It was the court's interpretation that the letter in the case did not 'convey information' as intended in the legislation. In addition, it was held that there was no disclosure, even when considering the provisions of s 43L (3).[50]

In the above case, it was alleged in a letter that Mr Geduld was an oppressed minority shareholder, and referred to a number of issues, vis-à-vis the shareholder agreement which had backdated and unfair prejudice to Geduld. The court concluded that the contents of the letter contained a statement of Geduld's position that he was an oppressed minority shareholder, and a summary on the basis of that status. However, in the case of *Milbank Financial Services,*[51] the court held that a letter by an accountant to the senior management regarding what had and what had not been done contained 'information' for the purposes of s 43B.[52] The Employment Appeal Tribunal however commented that the contrast which exists between 'allegation' and 'information' is not easily found in the statute. These terms are often intertwined and therefore difficult to separate.[53]

Good faith

The good faith requirement is reiterated through PIDA,[54] however, it has been challenging for the courts. The case of *Street v Derbyshire*[55] is instrumental here, as it considered where a public disclosure had been made[56] and the Court of Appeal had to examine the nature of both of these requirements, together with the 'declared public interest purpose[57] and the provisions enumerated in PIDA.[58]The court held that it is possible for an employee to fail the good faith test in spite of a reasonable belief in the substantive truth of the disclosure. It is therefore possible to lose the automatic protections provided by the Act if on reviewing the facts, the employment tribunal was 'of the view that the dominant and or predominant purpose of making it was for an ulterior motive'.[59]

[49] ERA 1996.
[50] ERA 1996.
[51] *Milbank Financial Services v Crawford* [2014] IRLR 18.
[52] ERA 1996.
[53] *Eiger Securities LLP v Korshunova* [2017] IRLR 115; *Kilraine v Wandsworth LBC* [2018] IRLR 846.
[54] 43C, F, G and H, ERA 1996.
[55] *Street v Derbyshire Unemployed Workers Centre* [2004] 4 ALL ER 839 (CA).
[56] Under the requirements of s 43G (3).
[57] *Street v Derbyshire* 56.
[58] *Street v Derbyshire* 48.
[59] *Street v Derbyshire* 56.

This case provoked a number of concerns, given that it shifts the focus from the actual disclosure to the motives of the individual making it. The Court in the case of *Lucas*[60] addressed the issues raised in *Street*. There were other concerns with the judgment in *Street* where the fear was articulated that 'some lawyers will be tempted to use the decision as a licence to argue over motives in every whistleblower case'[61] and it was in support of recommendations[62] that the good faith test be expunged from PIDA. The ERRA does not completely remove this element, however, it transposed to the assessment of remedy.[63] The tribunal has a discretionary power to reduce compensation if it 'appears to the tribunal that the disclosure was not made in good faith'.[64]

Understanding the protection available

Given the difficulties of the provisions above, it is important to understand the nature of protection given to whistleblowers, in order to achieve the objective of this paper. PIDA provides that an individual will not be subjected to any detriment by the employer, 'on the ground that the worker has made a protected disclosure'.[65] However, the Employment Rights Act (ERA)[66] also provides a defence, if the employer is able to demonstrate that it took all reasonable steps to prevent a worker from imposing an unlawful detriment. It should be noted that this provision does not address a detriment imposed by a person who is not acting on the permission of the employer, but there is scope for a grievance if the employer fails to protect them against a third party.[67] While not an actual ground for a claim to be successful, there is a general requirement that claims are presented within three months of 'the date of the failure to act' or 'where the act or failure is part of a series of similar acts or failures, the last of them'.[68]

The ERA also makes provisions for interim relief where the claimant can demonstrate that it is likely that the reason for the dismissal was because of a protected disclosure.[69] The challenge

[60] *Lucas v Chichester Diocesan Housing Association Ltd* [2005] WL 460717 [EAT).
[61] J Bowers QC, et al, '*Whistleblowing: Law and Practice* (New York: Oxford University Press, 2007) 131.
[62] Fifth Report of the Shipman Inquiry by Dame Janet Smith (9 December 2004, Cm 6394) at 11.106.
[63] s. 18 (4) - (5) ERRA 2013 amends s.49 PIDA.
[64] Part 2 18(4).
[65] s. 47B (1). Note that this has come into force, by way of the ERRA Act 2013.
[66] Ibid.
[67] Examples of this may include the third party being another employer.
[68] s. 48 (3) ERA. See also the case of *Arthur v London and South East Railway* [2007] IRLR 58, where the Court of Appeal decided that it was necessary to consider the circumstances in its entirety in order to decipher whether they were part of a series. See also *Roberts v Wilsons LLP* [2016] IRLR 586.
[69] See also the case of *Azmi* as discussed previously.

here is decrypting 'likely' and 'more likely than not' given the requirement for a higher degree of likelihood.[70]

It seems that the Employment Appeal Tribunal views that subjecting a whistleblower to an instance which may be 'detrimental' is capable of being a grave breach of discrimination laws. In the case of *Virgo Fidelis School v Boyle*,[71] the claimant was awarded £25,000 for injury to his feelings, and in addition, £1000 for aggravated damages. It would seem that the distinction is not so clear on the issue of injury to feelings and aggravated damages, although the Tribunal has noted that the main purpose of aggravated damages is compensatory in nature.[72]

The UK financial system

The use of the financial industry to answer the important question posed here is a pragmatic choice. This particular area broadly addresses the issues as they relate to transparency, moving forward the important discourse on improving good governance, and analysing the practical methods of improving regulation in the financial system. The notion of using whistleblowing as a regulatory tool has arguably been overlooked severally. This may be primarily because of inadequate protection, compounded by unclear investigative processes.

Secondly, the use of the financial system as a blueprint for answering this question also identifies and clarifies some of the gaps within the main structure. It illustrates some of the cultural, local, practical and other challenges attached to people's attitudes to whistleblowing. It then juxtaposes this with the popular notion of remaining loyal to an institution and managing the potential trepidation of retaliations from an employer. The subsequent sections show instances of how whistleblowing has been addressed within the financial industry by the chief regulators, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA). The cases discussed below demonstrate that while there is *some* attempt to discharge the role of regulating financial institution through the supervision of whistleblowing disclosures, this is less than satisfactory.[73]

[70] *Ministry of Justice v Sarfraz* [2011] IRLR 562.
[71] *Virgo Fidelis School v Boyle* [2004] IRLR 268.
[72] *Commissioner for Police of the Metropolis v Shaw* [2012] IRLR 291.
[73] See also, Ashley Savage and Richard Hyde, 'The Response to Whistleblowing by Regulators: A Practical Perspective' *Society of Legal Scholars* [2015] 35 (3) 208- 429.

It is the finding of this paper that the fundamental barrier to an effective whistleblowing framework is the absence of a proactive and pragmatic culture of promoting whistleblowing. The inadequacy of the law, the FCA and the PRA collectively, continue to be a thorn in the flesh.[74]

The global financial crisis was contributory in revealing the large regulatory gaps and the lack of efficacy within the scope of traditional banking regulation.[75] More specifically, it was instrumental in demonstrating that the conventional style of regulation did not work in preventing the crisis. Globally, there have been attempts to address the issue of using different tools to improve regulation,[76] however, a proactive emphasis of a whistleblowing culture, supported by a strong framework, would have been and may be instrumental in assuaging some of these issues.[77] The well documented financial crisis[78] exposed several regulatory weaknesses within the system, demonstrating that the framework itself was not as firmly regulated as it ought to have been. In addition, the crisis exposed concepts such as Too Big to Fail[79] and the challenge of inadequate liquidity, which were substantial contributions to the banking crisis.[80]

The current architecture of whistleblowing, if revisited and remodelled, could serve as an effective regulatory tool, designed to encourage organisations to ensure that they adhere to regulations and legislation. While PIDA provides a generic outline, there seems to be no specific regulatory body[81] which addresses whistleblowing in the financial industry. This may be addressed with the introduction of a specific whistleblower institution/commission,

[74] See also, GC Rapp 'Beyond protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers' [2007] 87 *Boston University Law Review* 91; Herbert Kawadza. 'Revisiting Financial Services Sector Transparency Through Whistleblowing: The Case of South Africa and Switzerland', *Journal of African Law* [2017] 83.

[75] Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' [2003] *Public Law* 63, 70, where Black identifies different types of regulatory actors, using the financial sector as an example.

[76] Emilios Avgouleas, 'The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation: The Case for Reform (October 2009). *European Company and Financial Law Review* [2009] 6(4).

[77] Alison Lui, 'Protecting Whistleblowers in the UK Financial Industry', *International Journal of Disclosure and Governance*, [2014] 11 (3) 195-210.

[78] Gary Gorton, Slapped in the Face by the Invisible Hand: Banking and Panic of 2007, *Yale School of Management: National Bureau of Economic Research* 2009; Roman Tomasic and Folarin Akinbami, Towards a New Corporate Governance after the Global Financial Crisis International *Company and Commercial Law Review* [2011] 8 237 -249, 2011.

[79] This is the theory that institutions become so large and interconnected that they are too large to fail.

[80] The Tuner Review 'A Regulatory Response to the Global Financial Crisis', March 2019. Available at : <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/18_03_09_turner_review.pdf> Accessed 19 July 2019; Timothy Fryre and Andrei Shleifer ' The Invisible Hand and the Grabbing Hand' *NBER Working Paper* No 5856 1996

[81] This is separate from the Financial Conduct Authority, which limits its involvement to firms within the area that it regulates.

supported with adequate governing regulations. Notwithstanding the provisions which have been specifically devised to offer such protection, there are a number of areas where this continues to fall short. The first issue is dealing with the complaints of whistleblowers in a more thorough and effective manner, particularly in the absence of a specific whistleblower body. The inability to conduct investigations effectively, calls into question the level at which such concerns are monitored, investigated and concluded.

The second area is confidentiality, which as alluded to previously, is the cornerstone of the whistleblowing framework. This remains an area which needs to be improved, as the likelihood that disclosures will not be taken seriously will substantially diminish the prospects of whistleblowers coming forward with information. The provisions of PIDA are no longer an adequate representation and do not embody international best standards. Furthermore, the interpretation of some of the sections should be enhanced to accommodate different *types* of poor practices which could prompt a person to whistleblow.

Some empirical studies have investigated the value and legal protection of whistleblowers[82] in selected banks using a comparative social legal analysis. The findings confirmed that these banks, although a sample size,[83] did not have ample whistleblower policies or frameworks. The research also revealed that the main form of protection is PIDA. In addition, however, under the UK Corporate Governance Code, companies which are listed in the UK must have an arrangement for potential whistleblowers or provide an explanation as to why they do not. The FCA and the PRA are the two main regulatory bodies which ensure that corporate governance standards are upheld within financial institutions.

In 2018, the Financial Conduct Authority and the Bank of England's Prudential Regulation Authority fined the Barclays Bank CEO at total of £642,430 for attempting to unmask a Whistleblower two years prior. Interestingly, while the CEO was fined and permitted to retain his job,[84] the bank was not subject to any fines or sanctions.[85] This case shows that both the FCA and PRA adopt a light touch approach to the culture of regulating Whistleblowers and the

[82] Lui, (n 77).
[83]These banks were: Northern Rock; The Royal Bank of Scotland; Lloyds Banking Group; Barclays and HSBC.
[84] Similar to the case of Azim, discussed previously.
[85] See also Compliance & Risk 2018 7 (3), 19

protections given. It sets a dangerous precedent for management staff who may find themselves in similar positions.

A second case faced by the FCA in recent times is that of *Flower*, a former CEO of Cooperative Bank. While not directly related to the actual issue of whistleblowing, this case does provide some insight into the sanctionary nature of the FCA. *Flower* was prohibited from executing any functions in a regulated firm, on the grounds that he was not fit and proper to do so. This stemmed from his inappropriate behaviour during his tenure as the acting chair, during which time he had used his work email to send and receive messages, which in some instances were of an explicit sexual nature. Additionally, other messages contained discussions of offering and consuming cocaine and other illicit drugs. The FCA accepted that the exchange of these messages and the use of the bank's computer were a direct breach of the Bank's code of conduct, which mandated directors to uphold the banks values. Flowers was convicted in a magistrate's court and subsequently resigned as the chair of the bank.

The cases of Staley and Flowers indicate that the PRA and the FCA are making some attempts to shift their concentration to senior management staff of financial institutions, to promote elevated standards of responsibility and encourage others below to do the same. While the case of Flowers touches mostly on the conduct of the individual and highlights the position of the FCA in terms of maintaining its guidance for those who are considered fit and proper, the decision in the case of *Staley* is of more interest. The outcome is a credit to management staff in positions similar to *Staley*, yet a discredit to employees and other individuals who may be in a position to blow the whistle on poor practices and misconduct. The decision emphasises that both regulatory bodies will continue to be viewed as toothless tiger. This does nothing to alleviate similar instances that may present itself in the future.

It is submitted therefore that not only does the law have to be reformed, but the culture of reporting wrongdoings needs to be heightened. Whistleblowing policies will remain meaningless if there is no engagement with staff and a proactive attempt to create an environment where the message is communicated that staff will be listened to if they come forward. There needs a system in place which recognises people for doing the right thing, and this can be created through an 'open door' culture which permits people to speak up and raise concerns.

The case of Staley has brought the evident failings in the sanctions given by both the FCA and the PRA to the fore. Where the law has failed to protect, it is evident that in the financial context at least, there is no guarantee of a satisfactory outcome in the eyes of a reasonable majority, even after an investigation. Quite plainly, as in the *Azmi case*, the fact that Staley was able to keep his position is evidence that there is still more work to be done in this area.

The link between the financial system and the current whistleblower architecture

The law generally does not provide a satisfactory answer to the issue of whistleblower protection. The numerous contributing factors have been highlighted as important elements in this paper. One solution may be tackling the issue from within, by addressing the internal mechanisms in place and promoting whistleblowing. Whistleblowing should be seen as an act of integrity and uprightness, upholding the values of institutions.

Another method of achieving this may be through the introduction of a reward system. This could serve as an incentive to encourage potential whistleblowers to come forward with information. On the one hand, it may prove to be an effective means as fraudulent or improper acts may save an institution in the long run and assist in ensuring a more effective regulatory approach. It may also address the issue of how much information needs to be released into the public domain, thus dealing with the public interest element of PIDA. It may also have the effect of giving whistleblowers some incentive in the event that they lose their job or suffer victimisation. The decision to whistleblow should be based on a moral obligation to do the right thing,[86] however, a financial reward cannot be excluded as a necessary encouragement.[87]

The second method is improving the culture and practice of whistleblowing in the workplace. As argued previously, whistleblowing should serve as a necessary and important tool to strengthen the architecture and construction of the overall regulatory and corporate governance framework. It is important to note however that people will not have confidence in this system if there is no realisation and appreciation for the *lack* of framework, or active culture to improve

[86] Stelios Andreadakis, 'Enhancing Whistleblower Protection: It's All About the Culture', *Selected Papers from the International Whistleblowing Research Network Conference OSLO* [2017]: Samuel Bowles and Sandra Polania – Reynes, 'Economic Incentives and Social Preferences: Substitutes or Complements? *Journal of Economic Literature* [2012] 50 (2) 368 -425.

[87] Adeyemo (n 7). It should be noted that Ghana's Whistleblower Act 2006 has a section which provides for financial rewards for potential whistleblowers.

this from within. Whistleblowing needs to be viewed as an integral element to the institution/business model and not an intentional act of spreading dirty linen in public.

By default, institutions need to ensure that they have a cohesive internal procedure which emboldens employees to come forward with information. It is submitted that it is impossible to efficiently regulate an institution which does not have this approach. Regulators such as the FCA and PRA should be actively creating a culture which prompts individuals to come forward with information. Most importantly, they need to assure potential whistleblowers that they will be adequately protected. Regulators need to set the appropriate message from the top[88] and the onus is on them to ensure that the institutions they regulate follow and uphold values, unlike in the case of *Staley*.

Plans for the future?

The EU Whistleblowing Directive is to be passed in 2019. Previously, the law on whistleblowing was managed by individual member states, which meant that there were a number of discrepancies across the EU. On review, it was found that only 10 of the member states had 'comprehensive law' that protected whistleblowers.[89] The remaining countries protection were only partial or applicable to specific sectors, or applicable to specific categories of employees. It is expected that the new Directive will impact the approach of EU countries in this area. It is expected that this new directive will lead to cases that will assist in interpreting the law. Separate from the EU, it is still argued that whistleblowing could be a highly effective tool to regulate insider dealing, poor practices and corrupt activities. It is expected that given acknowledged sophisticated means of corruption on a global scale, many countries are rethinking their whistleblower architecture. It is hoped that this paper will be instrumental in moving the discussion forward.

Towards a new whistleblower Act

It is the core submission of this paper that there is a need to create a new Whistleblower Act in the UK. PIDA exists in a complex space; the problematic provisions and legal challenges which arise from the provisions, are detrimental to the objective of the Act. The core issue with the public interest test, is rooted in the fact that it is only *after* the test, that a potential whistleblower

[88]Oliver Laasch and Roger Conaway, Principles of Responsible Management: Global Sustainability, Responsibility and Ethics (CRME, 2015).

[89] These 10 countries include: Franc, Ireland, Malta, the Netherlands, Hungary, Italy, Sweden, UK, Slovakia and Lithuania. See also European Parliament News: http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved Accessed 19 July 2019.

will only know whether they are protected. Effective legislation should seek to answer one question, which is 'whether the person making the report reasonably believed that the issue they were reporting was a wrongdoing?' The affirmative answer to this question should set aside any further doubt and should eliminate further probing.

It is also submitted that a new Act may be the way forward as it will draw all the recently included provisions into PIDA into one Act. It may be argued that amending the Act could be easier, but it is contended in this paper that this has already been attempted, and the same challenges continue to present themselves as issues. This is evidenced through case law as discussed in this paper. The creation of a new Act will bring it at par with other erudite statutes globally, and at the same time, it presents an opportunity to demonstrate a firm commitment to improving the whistleblower architecture, utilising whistleblowers as an effective regulatory tool, and improving the representation and protection of whistleblowers on a local and global scale.

One key feature of this newly proposed Act would be to broaden the definition of worker and to bring the line with contemporary working arrangements.[90] Additionally, a new Act will tighten the gap in terms of discrimination protection which are available under the Equality Act 2010. This would mean that the protection would extend to workers who are viewed by their employers to be whistleblowers and are treated unfairly or dismissed as result of disclosing poor or bad practices.

Conclusion

The only way that reform can be effective within the regulatory regime for whistleblowing in the UK is an understanding and acceptance that in its current form, the whistleblower framework/law fails to fulfil its main aims and objectives. More interestingly, given the case of *Staley,* it is clear from empirical research that there are gaps in the protection of whistleblowers and the interpretation of the provisions, the FCA and PRA have also failed to bridge these gaps. Given the refined methods of concealing poor practices, and the current global economic environment, there has never been a more important time to contribute to the ongoing discourse on whistleblower protection in the UK and a timelier period to critically

[90] For example, contractors etc. It should be noted that self-employed persons, those seeking work and those who are volunteering are not protected by whistleblowing laws. The definition of worker has been introduced in the earlier sections of this paper.

evaluate whether the provisions remain satisfactory. Thus, it is necessary to rethink, revisit and revaluate the pre-existing relationship with whistleblower protection and the relationship with the financial industry.

By offering an objective reflection on the statutory protection given to whistleblowers, the paper presents analytical evidence which shows that in fact, such individuals are not adequately protected and there is a need for a shift in the law. A plethora of the provisions are open to interpretation, especially at the different stages of disclosure. Caselaw has been instrumental in some instances, however, it has raised uncertainties as to crucial and important legal issues which have arisen. Furthermore, the absence of where the burden of proof rests leaves further room for doubt and uncertainty.

While attempts to balance the interests of the public, employers and the whistleblower is commendable, it could be argued that in fact, the interests of the employers have been ranking higher. It may also be argued that the use of internal mechanisms or procedures enable organisations and institutions to keep important information out of the public domain. In light of this, it is submitted that in its current state, PIDA remains highly unsatisfactory in its protection for whistleblowers and needs to be replaced.

This paper has laid the foundation for the arguments to replace PIDA. In its present state, the paper has established that it does not directly or actively confront the anti – whistleblowing culture. Given the length of time since the enactment of PIDA, the paper argues that the time has come to introduce a new Whistleblowing Act in the UK to address these concerns..[91] It is the submission of this paper that rather than adjusting the current provisions, a Whistleblower Act would be more helpful in making available rights to only workers and employers. A new Act would be instrumental in deconstructing the cultural attitudes against whistleblowing and ensure a clear exploratory and defined process in addressing how whistleblowing is handled. It would also serve as a key regulatory tool for both the banking and financial industries and build a stronger pillar within the corporate governance framework.

[91] Lewis (n 37).

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