4 September 2009

Public Concern at Work – briefing note on the Department of Business Innovation and Skills consultation: Employment tribunal claims and the Public Interest Disclosure Act (PIDA)

We understand that you have been sent the above consultation by the Department of Business, Innovation and Skills (The Department). The Department are proposing that, where appropriate, PIDA claims are forwarded to the relevant regulator by the Employment Tribunal Service (ETS). This will help you gather critical information and better discharge your regulatory functions.

As the leading and independent authority on whistleblowing, responding to thousands of requests for advice each year, Public Concern at Work has prepared this note setting out our emerging thinking on this proposal. We hope it will assist in the consideration and preparation of your own responses to the consultation and would welcome feedback on the matters we have raised.

We welcome this proposal as a means of increasing regulatory oversight and ensuring that important public interest issues or hazards are not buried in the settlement of PIDA claims. It is hoped that the proposal will act as a further incentive for employers to address any underlying wrongdoing at the earliest possible opportunity, knowing the matter could attract regulatory scrutiny. We hope the proposal, if implemented, will strengthen the regime of PIDA as employers should have a further incentive to promptly address a concern and ensure whistleblowers are not victimised, as failing in the latter could trigger a regulatory response. As such we hope this will encourage

employers to establish robust whistleblowing arrangements and recognise the valuable role whistleblowing can play in good governance and effective risk management.

Background

Public Concern at Work has campaigned about the reduction of transparency in employment tribunal claims since the register of claims was closed in 2000. The contribution of Lord Borrie in the Committee Stage of the Employment Bill 2008 in the House of Lords on 25 February 2008, outlines the dangers inherent in a closed register for PIDA claims (see Annex A).

Against this background, Ian McCartney MP put forward amendments at the Third Reading of the same Bill in the House of Commons on 4 November 2008. One of the amendments suggested a compromise position in which there would be some means to ensure the underlying concern in any PIDA claim is looked at by an appropriate body. The amendment aimed to allay fears raised by employer organisations that untested allegations would be aired publicly if the open register was reinstated. As a result the Department agreed to look into this suggestion in more detail to see how it could work in practice. The current proposal is a result of that undertaking.

Notwithstanding our support for this proposal and its capacity to introduce much-needed transparency into the handling of PIDA claims, we feel it is important to re-state our commitment to public access to PIDA claims as a preferable means of encouraging proper scrutiny of an underlying concern. Recognising the value of an open and transparent system in building public confidence in our justice system, the Government has made welcome advances in the application of transparency to other areas of the justice system. The opening-up of the Family Law courts, which involve matters of great sensitivity, is the most recent example of this trend. We continue to believe this approach is appropriate and necessary for PIDA claims in the employment tribunal as well. Nevertheless, this proposal makes a significant contribution to strengthening the operation of PIDA in its own right.

What the proposal can achieve

At present, over two thirds of PIDA claims are settled in private. This means that in the majority of cases where an individual claims they have suffered reprisal for raising a concern, there is no information about the underlying concern for regulators or in the wider public sphere. Be it financial malpractice, a child safety issue, malpractice in a hospital or abuse in a care home, an agreement to settle between parties leaves the public concern shrouded in secrecy with no one addressing the underlying risk. This raises a very real danger that a rogue employer could 'buy off' a genuine whistleblower as the cheaper alternative to addressing the underlying wrongdoing. Without transparency in the handling of these cases, it is not possible to ascertain the extent to which this may be occurring. Indeed, we note the findings of a recent survey of City firms in which avoidance of regulatory scrutiny was listed as a reason for settling whistleblower claims in 10% percent of cases.[1] These findings are cause for concern.

Of course, it is not just the respondent who may hope to benefit from reaching a settlement. There may well also be claimants who seek to exploit the information they have for a large settlement, thereby trading the public interest for private gain.

Whatever the motivation of the parties to settle, the end result of the current system is that the chance to address the public concern may be lost. Who knows whether the next HBOS, Lehman Brothers[2] or Mid Staffordshire NHS Trust[3] claim is lurking within a settlement? We simply do not know, so the opportunity to save millions of pounds or, more significantly, to save lives may be missed.

It is for this reason that we broadly welcome the current proposal as it provides the chance for regulators to consider the information contained within PIDA claims and to act if necessary. The information provided can then be incorporated into existing regulatory information management systems and can provide a means to pick up problems and monitor trends. It may be that the information within such a claim

[1] "Whistleblowing – Sword or Shield?" Osbourne Clarke Survey of employers 2008
[2] "Lehman analyst told to suppress negative research" The Times, 22 July 2009.
[3] "Failing hospital caused deaths "About 400 more people died at Stafford Hospital between 2005 and 2008 than would be expected, the Healthcare Commission said."" BBC, 17 March 2009

provides a vital piece of the jigsaw in prompting or informing regulatory action. Thus this proposal may help achieve joined up regulatory oversight and may add a vital safety net that can ensure public interest issues are not lost in employment disputes.

This proposal is not new and it should not be controversial. It is simply a matter of good regulatory housekeeping – claims contain matters which should be brought to the attention of regulators and the proposal is merely instituting a process to ensure that will occur.

This should not increase the burden on employers: it should support well-run, safe and successful businesses. If an employer recognises that a PIDA claim may involve the regulator looking into the concern, there should be a strong incentive to ensure they have addressed any underlying concern.

Express Consent

The Department is suggesting that claim forms should only be sent to the relevant regulator with the express consent of the claimant and suggests this is also necessary to comply with data protection guidance.[4] We do not consider this to be the correct approach in practice and law and such a move could undermine the value of this proposal: (i) it is open to abuse as it could place a bargaining chip, that this proposal sought to remove, back in the hands of an individual who might seek to gain a larger settlement from their employer by agreeing to withhold important information that would be of interest to a regulator; (ii) the suggested wording in Annex A of the consultation may well be misunderstood by individuals due to its complexity: the result could be that the opportunity for oversight is lost through misunderstanding.

We suggest an explanation of the purpose of forwarding their form is important for the claimant and suggest the following:

> *"if your claim includes a claim that you have made protected disclosures under the Employment Rights Act 1996, a copy of this form will be forwarded to a relevant regulator(s) who will assess if any regulatory action is required in relation to matters raised by your disclosures."*

[4] Page 9 and q2 of the consultation

In our view, a provision requiring express consent is not necessary to comply with data protection guidance, s.35 (1) of the Data Protection Act (DPA) provides:

> Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.

In light of the fact that the current proposal will require secondary legislation such an exemption could be specifically included in the statutory instrument in Annex B of the consultation.

Alternatively, if consent of the individual must be sought it should be on the basis that an individual can tick the box if they *do not* want the claim form shared with a relevant regulator or the relevant regulator has already been informed.

We would urge you to consider in your response if the decision of whether or not critical information should be passed to a regulator should be left in the hands of an individual.

Should you wish to discuss any of the issues raised please do not hesitate to contact Francesca West, Senior Policy Officer on 020 7404 6609 or via email at fw@pcaw.co.uk.

PUBLIC CONCERN AT WORK

ANNEX A

Excerpt from Hansard 25 Feb 2008 : Column GC94

Lord Borrie moved Amendment No. 22:

After Clause 6, insert the following new Clause—

"Proceedings in public interest disclosure cases

In the Employment Tribunals Act 1996 (c. 17), after section 8 (procedure), there is inserted—

"8A Publication of information

(1) Where proceedings include a claim under the Public Interest Disclosure Act 1998, the President shall, within 28 days of the conclusion of the proceedings, publish the relevant papers electronically and without charge.

(2) The duty in this section is subject to—

(a) sections 10B, 11 and 12 (restrictions of publicity in cases involving national security, sexual misconduct and disability), and(b) a decision by a tribunal or the President that particular information should be omitted or deleted from the relevant papers in that case.

(3) A decision may only be made under subsection (2)(b) where the tribunal or the President is satisfied that the publication of that information would be contrary to the public interest.

(4) A decision made under subsection (2)(b) shall be in writing and shall include reasons.

25 Feb 2008 : Column GC95

(5) In this section—

"conclusion" means determination, withdrawal or settlement of the case or the time when no party has for the previous six months notified the tribunal of action to progress the case to hearing;

"relevant papers" means any claim, response, further particulars, decision, determination, notice of withdrawal or settlement and any decision under subsection (2)(b); and

"President" has the same meaning as in section 7A(3).""

The noble Lord said:

First, I declare an interest as patron of Public Concern at Work, commonly known as the whistleblowers' charity. This charity took the initiative in promoting the Public Interest Disclosure Act 1998, which has its 10th anniversary this year. That Act encourages responsible whistleblowing by employees. It was introduced in the other place by Richard Shepherd, a Conservative Member of Parliament, and in this House by me. It protects employees who express concerns about wrongdoing that threatens the public interest and, in particular, it gives a remedy to a whistleblower who is sacked or otherwise disadvantaged in the workplace. It provides protection most readily where the concern is raised with the employer, but it also protects disclosures made to regulators and wider disclosures where they are justified and reasonable.

When the Act was passed 10 years ago, the legal position was that information about claims made under it would be on the public record. This was important because openness would help to discourage specious claims by employees and encourage employers to deal and cope properly with any significant public-interest risk raised with them.

However, in 2000, after the DTI lost a High Court case and the judge, Mr Justice Jackson, had confirmed that claims were properly on the public record, the DTI—without consultation or announcement—introduced temporary regulations during the parliamentary recess to reverse this legal position of the claims being on the public record. Later, more permanent regulations were made to remove all information

about Public Interest Disclosure Act and other employment claims from the public record. I am afraid that the DTI—I am so glad it is under different management now—had a rather bad record there because, in 2005, the Parliamentary Ombudsman strongly criticised the DTI for its handling of the matter, finding that it had failed to consider the public interest, had repeatedly misled Public Concern at Work to avoid public criticism and had blocked parliamentary scrutiny.

The purpose of my amendment is to provide, from now on, open justice and transparency in proceedings under the Public Interest Disclosure Act. At present, no information about any whistleblowing claim brought under the Act is available on the public record unless the claim results in a tribunal hearing and judgment, in which case the decision is available for inspection by the public.

What do the employment tribunal statistics tell us? In 2005-06, 1,015 claims made under the Public Interest Disclosure Act were disposed of, but only 283 of them after a tribunal hearing. Information about those cases is on the record, but all the rest—roughly

70 per cent of whistleblowing claims—remain shrouded in secrecy. No information is available about the nature of the wrongdoing alleged, nor about who was at risk; depending on where the employment is, it might be consumers, patients in a hospital, taxpayers, shareholders or fellow employees. No information is available about who the concern was raised with, or the employer's response to the claim made by the employee whistleblower. Of course, no information is available about any alleged reprisal made by others, whether employees of some rank—a manager or whatever—or the employer himself.

One of the most serious consequences of this secrecy is that it enables and encourages an unscrupulous employer to buy off a genuine whistleblower and cover up any wrongdoing by the employer himself or his senior staff. An employer may settle the

claim so as to avoid the case going to a hearing with the consequent publicity that, as I have already described, a hearing and judgment in the tribunal would entail.

Given that the Public Interest Disclosure Act expressly encourages employees to raise concerns about wrongdoing in the workplace internally so that responsible employers can deal with these concerns properly and without delay, the current secrecy surrounding the great majority of Public Interest Disclosure Act claims undermines the purposes of the Act. The present secrecy means that crime, company fraud, health and safety problems and tax evasions can be readily hushed up, contrary, I suggest, to the public interest.