Public Concern at Work
3rd Floor, Bank Chambers
6-10 Borough High Street
London SE1 9QQ
Tel: 020 7404 6609 (helpline)
Tel: 020 3117 2520 (other enquiries)
Fax: 020 7403 8823
Email: whistle@pcaw.org.uk
www.pcaw.org.uk

INTRODUCTION

We are providing this response to DBIS "Resolving workplace disputes" where it specifically relates to claimants pursuing a claim under the Public Interest Disclosure Act (PIDA) and/ or matters that affect those who may suffer detriment or dismissal for raising a concern about malpractice, wrongdoing or risk in the workplace. We set out below a brief introduction to Public Concern at Work (PCaW) to put this response in context. We start by suggesting that promotion of best practice in whistleblowing arrangements by the Government and regulators alike would result in fewer PIDA claims in the Employment Tribunal, as it is often an organisations response and attitude to whistleblowing that will dictate whether a claim is commenced under PIDA.

Background to Public Concern at Work

1. Public Concern at Work is an independent charity and legal advice centre[1]. Launched in 1993, we have helped lead developments on whistleblowing as a good governance and risk management tool in the UK and abroad. We provide a confidential advice line for individuals with whistleblowing dilemmas; professional support to organisations and policy advice to Government and Parliament. We also have a public education programme.

2. By way of brief background, PCaW was set up in response to a series of scandals and tragedies in the late 1980s and early 1990s which included the sinking of the Herald of Free Enterprise car ferry in which 192 people died in 1987, the Piper Alpha oil rig explosion and the collapse of the BCCI amidst widespread fraud in 1990. The various official inquiries after the disasters revealed that all too often staff had known of the danger but were too scared to speak up or, if they did, that they did so in the wrong way or to the wrong person, and so they were ignored and/or dismissed.

3. Our work to address whistleblowing effectively as a matter of accountability and good governance means that we have unrivalled practical experience in the field - both in operating a helpline service for individuals and in providing professional support to organisations on whistleblowing.

[1] PCaW is regulated by the Charity Commission and the Solicitors' Regulation Authority

Company registered in England 2849833 Registered charity number 1025557 VAT No 626 7725 17

The Public Interest Disclosure Act 1998

4. When enacted, PIDA was praised "for so skilfully achieving the essential but delicate balance … between the public interest and the interests of employers"[2]. The Act most readily protects concerns raised with an employer, but also gives protection to individuals to go outside their employer in certain circumstances when the concern has been covered up or not addressed. PIDA is ultimately about accountability and it follows that for this to work it must be possible for those responsible to be held to account for their conduct. This provides an incentive for organisations to deal openly and well with any potential wrongdoing when first raised by a worker.

RESPONSE TO THE CONSULTATION

Resolving disputes in the workplace

5. Best practice whistleblowing arrangements are a key part in driving down workplace disputes and avoiding the need for costly litigation. Even though we helped put PIDA onto the statute books, we continue to focus on early preventative advice, promoting whistleblowing as a deterrent to wrongdoing which also demonstrates good governance and competent risk management. In 2008, we worked in partnership with British Standards Institution to produce *PAS 1998 Whistleblowing Arrangements Code of Practice,* which sets out good practice for the introduction, revision, operation and review of effective whistleblowing arrangements. Importantly, we know from our helpline that 40% of cases are initially ignored by line management. If good policies and procedures are in place and staff are properly trained, the deterrent and detection effect of whistleblowing will drive up standards and confidence in the workplace. If good practice is followed then an organisation is better safeguarded against circumstances in which a PIDA claim might arise.

6. We would therefore recommend that guidance be promoted to all businesses on how to establish best practice whistleblowing arrangements.

The provision of information

7. Whistleblowing is vital in a functioning democracy. However, despite the reliance we place on whistleblowers to make life safer for all of us, there is not a widespread understanding of what is meant by whistleblowing and how the law operates to protect those who question wrongdoing, malpractice or risk . In a YouGov survey conducted in 2009, only 26% of those who responded knew that there was a law to protect whistleblowers. This is not a claimant specific problem. Respondents also struggle with the law. The problem is exacerbated by the chronic lack of information around PIDA. If, as is proposed by the consultation, claimants are to produce better particulars at an earlier stage to assist employers, earlier strike out or larger deposit orders are possible, and potentially hearings will be dealt with by a lone judge,

[2] Per Lord Nolan [date]

it is our strong recommendation that access to information about PIDA and public awareness of the key principles behind the legislation be improved. As stated in the consultation "Justice must be done, and seen to be done"

8. Given the decrease in legal support for litigants in person, it is vital that there is a fundamental change in the Government's approach to access to information about claims and judgments before any of the proposals in this consultation can be taken forward. The comments below are relevant to the overall thrust of the consultation but relate directly to question to 24, 37 and 38. Our view is the proposals outlined in questions 25 – 30, 33, 36 and 42 – 43 will when taken together be unnecessarily inhibitive and a bar to access to justice for claimants who may have valid claims but be of limited means and information. Our view is the recommendations below are already essential, however if many of the proposals in the consultation are to be implemented, our recommendations will become increasingly necessary.

9. **We have three key recommendations relating to the provision of information for claimants and respondents alike:**

   i. **In addition to guidance on statements of loss, there should be online guidance on how to draft an ET1 and an ET3 for each head of claim that is within the jurisdiction of the Employment Tribunal System and specifically in relation to PIDA claims.**

   ii. **An online database of employment tribunal judgments.**

   iii. **An open register of ET1s and ET3s, of PIDA claims specifically, be re-established, as exists within the civil courts.**

10. By providing better information at an early stage understanding will improve of what constitutes a particular claim, what information should be provided, how a good ET1 should be drafted - whether it is a claim for sex discrimination, unfair dismissal or whistleblowing. It will also help identify what a weaker claim may be or how to draft an accurate schedule of loss if an individual can track through from ET1 to judgment, to establish whether or not a claim was won or lost and what compensation or costs orders may have been made. Overall this will help parties make more informed decisions during the litigation process.

An open register of PIDA claims

11. Aside from the benefits to parties of better access to information, there is a greater public benefit to more information being provided about PIDA claims specifically. At present we are provided, at the cost of time and effort, with all judgments that follow a claim made under PIDA. We do our best to monitor how the Act is being used and whether or not it is fit for purpose. In 2008-09 there were 1761 PIDA claims made to tribunals. In the same year 77% of cases were settled or withdrawn and a further 5% did not reach a hearing.[3] The statistics for previous years show that over two thirds of PIDA claims are settled or withdrawn. Until and unless a tribunal claim is heard and a decision issued, no information about the claim is available on the public record. While the claim will be about the treatment of the worker who raised the concern the employee only has a claim because he says he has disclosed information in the public interest. It is worth noting that under the Civil Procedure Rules, both the claim and defence form are available for third parties to inspect.

12. This secrecy causes four problems:

    i. It enables an employer to 'buy off' a genuine whistleblower as the cheaper alternative to addressing the underlying wrongdoing and in this way it allows the public interest to be traded for private gain and the Act to be abused;

    ii. It means that there is little that deters an employee / adviser from using PIDA to initiate a nuisance claim;

    iii. It is not possible to monitor how PIDA is working in the tribunals system – in over three quarters of claims, there is no information about the nature of the concern, the disclosure or the reprisal; and

    iv. The enhanced transparency, accountability and awareness that an open justice approach would generate are not available.

How a lack of transparency undermines effective governance

13. Organisations are unlikely to victimise the messenger where the concern raised has been handled properly and the issue resolved. Organisations that choose to deal with the messenger rather than the message often have the greater vested interest in settling any claim in private to avoid having to answer any questions about the potential malpractice and if or how they are addressing the issue. It is likely that claimants can be bought off by an employer who is keen to ensure that their claim does not come out if the contents of the claim hold a risk of damage to their reputation. In a system strongly based on individual enforcement the inequality of bargaining power and the increased preference for conciliation to save costs on litigation may mean that an employee will settle and is under no obligation to raise that matter elsewhere, subverting the public interest purpose of PIDA.

[3] Source: Department of Business, Innovation and Skills

14. Conversely an employee with potentially damaging or embarrassing information on their employer is provided with a useful cover to effectively extort as large a settlement as possible from their employer. This is likely to happen in organisations that have an anxiety about information being placed in the public arena.

15. The absence of a public register prevents wider scrutiny of organisational failures, whether in relation to the wrongdoing itself or attempted cover up and in turn provides little incentive for organisations to keep their house in order. This lack of scrutiny has also created a situation in which information is being held on a register maintained by a public body that is not accessible by regulators, MPs, the media or any third party and which potentially contains information about serious wrongdoing or malpractice that could be a risk to the wider public. The inability to access and review any relevant information in these claims reduces the chance for regulators or government to address any outstanding risk at an early stage to prevent or limit any ensuing damage.

16. Any information about such a risk will only enter the public domain in the 18% of cases that reach a full hearing at an employment tribunal. These are likely to be the weaker cases. The tribunal does not rule on whether or not the concern raised was right – only whether or not the employee had suffered a detriment. Reporting and access to decisions has not caused an issue. However a number of decisions have contained information that would be of interest to the wider public that may not have come to light were it not for the PIDA claim. These have included: hospital hygiene, airline safety, procurement and abuse in care.

Monitoring PIDA claims

17. In response to the concerns raised during the passage of the Employment Bill 2008, new regulations were drawn up to give the employment tribunals the power to forward an ET1 to the relevant regulator or "prescribed person" under the Public Interest Disclosure Act, provided the claimant ticked a box in 5.3 of the ET1 giving their consent to do so. We hope this at the very least raises awareness of the regulatory system and the role of regulators in PIDA itself. However the measure was a compromise position by no means fully addresses our concern regarding the lack of oversight and access to PIDA claims information. Given the Coalition Government's commitment to transparency and open justice, we see the current consultation as an ideal opportunity to revisit this issue.

Compromise agreements and aggressive litigation (Questions 8, 10, 11, 31 and 32)

18. We are of the view that compromise agreements are a good means by which to effectively settle a claim. However, as outlined above our key concern in relation to compromise agreements is they can be used as a tool by respondents to suppress the public interest information underlying a PIDA claim. s43J of PIDA states:

> **(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.**

19. However the law is not well known and from the information we receive on our helpline, this has not deterred lawyers from using clauses that purport to "gag" a worker in compromise agreements. This may be due to a lack of information or lawyers abusing a claimant's low knowledge of the law. Either way, it is clear that s43J should be promoted widely and we are supportive of tribunals taking a very dim view of any attempts to obviate its provisions (see paragraph 27 below). It is worth noting we had a peak of queries relating to gagging clauses from the financial services sector in 2009.

20. Beyond individuals being offered compromise agreements containing a gag, we have had numerous cases on our helpline where an offer to settle has been given to an advice line client alongside threats of pursuing full costs if it is not accepted. Very rarely is the current cap of £10,000 mentioned in these scenarios. Even when no offer is given, we have seen examples of very heavy handed threats of costs if the claimant will not withdraw a valid claim. This has included threats that if an offer is not accepted, even if it is very low, all future offers will be subject to the respondent's costs. The claimant usually capitulates in such circumstances. Below is a quote from a letter sent from the respondent's solicitors to a caller on our advice line. Please note the offer equated to 70% of the total amount of compensation sought in the schedule of loss:

> *"If the Respondent's offer of *** is not accepted and in circumstances in which the Respondent succeeds, we will show a copy of this letter to the tribunal and ask that they award the Respondent its costs incurred in defending the case. We will do so on the basis that you have failed to accept an extremely good offer made by the Respondent and your unreasonable conduct has lead (sic) to the Respondent unnecessarily incurring legal costs"*

Formalise offers to settle and costs– questions 30, 42 and 43

21. We think in the present environment assessing the reasonableness of an offer is too difficult for most litigants in person, particularly in light of the limited availability of legal advice. Therefore, we do not view it as appropriate that individuals' compensation should be affected by a refusal of a reasonable monetary offer, nor should it be factored into the question of costs (see paragraph 23). Additionally, in relation to PIDA claims specifically, a public hearing may be the only means by which to air a public interest concern – often a heavy handed approach in litigation will have been preceded by a similar approach to how the concern was dealt with originally. In our view it would be highly inappropriate for such an individual to be penalised for bringing public interest information to light in a public hearing as the current closed nature of the employment tribunal system has not provided an alternative. Just as with compromise agreements we are concerned that increased pressure to accept formal offers to settle may also result in onerous gagging clauses.

22. Overall we agree with the thrust of question 43 – that a reasonable offer should not be viewed only as a reasonable offer of money. Additionally and alternatively, if the measure is

to be brought in, the tribunal should have regard to any attempts to circumvent s43J when assessing the reasonableness of an offer.

23. The proposal that the costs cap should be raised to £20,000 is particularly alarming in these circumstances. This is a large amount of money to an unemployed person considering representing themselves. We re-iterate our earlier points, that to do this in the current environment is a hurdle too many even for a claimant with good prospects of success.

24. Given a public interest concern is likely to underlie any PIDA claim and a public hearing may be an effective means by which to air a public concern, we would recommend that PIDA be seen as an exempt area from any proposal regarding costs or settlement offer provisions.

Extending the period for unfair dismissal - questions 57 - 60

25. The Government believes this will encourage growth by giving business the confidence to recruit staff. However, a recent Pannone survey cited in Workplace Law, found that only 17% of employers said the proposal would encourage them to take on more staff.[4]

26. There is also the potential that this will mean more claims lodged under heads of claim which do not have a minimum service requirement ('day one rights'), including PIDA claims. We can see that an unintended consequence of an extension of the qualifying period of employment may mean that frivolous and unwarranted claims are lodged under PIDA – an abuse of the Act which would no doubt lead to criticism. Further, the rise in frivolous claims will result in a higher number of PIDA claims losing at tribunal, thereby damaging confidence that PIDA is adequately protecting whistleblowers. If this Proposal is to proceed then it may be worth considering the inclusion of a public interest test in PIDA to prevent the use of the Act by those with limited employment rights[5]. We would be happy to discuss this in more detail should such a proposal be of interest as part of this consultation (or otherwise).

Financial penalties - question 61

27. Good whistleblowing arrangements are part of any good risk management system. If organisations have not set up the internal systems they should do so. At present a PIDA claim will only look at whether there was a protected disclosure and whether or not the claimant suffered a detriment because they raised a concern. The tribunal does not at present look at whether the concern was addressed or how it was handled by the organisation. We would suggest giving the employment tribunal the power to make recommendations in this area when an organisation has not dealt with a concern adequately and/ or does not have a whistleblowing policy. The tribunal could have a set of recommendations in this regard, including establishment of good whistleblowing arrangements, clear staff awareness and training on the issue and staff having been trained

[4] http://www.workplacelaw.net/news/display/id/33267
[5] Parkins v Sodhexo 2001, EAT /1239 /00

on how to handle whistleblowing concerns. We would also suggest this is an area suitable for financial penalties if an organisation has flouted their own whistleblowing policy or failed to provide safe procedures for staff. In addition, if an organisation has attempted to circumvent s43J of PIDA the tribunal should be able to impose a penalty (see paragraph 19 above).

SUMMARY OF RECOMMENDATIONS

1. **Promotion of what constitutes good practice whistleblowing arrangements to ensure workplace disputes are avoided or handled well.**
2. **In addition to guidance on statements of loss, online guidance on how to draft an ET1 and an ET3 for each head of claim that is within the jurisdiction of the Employment Tribunal System.**
3. **An online database of employment tribunal judgments.**
4. **An open register of ET1s and ET3s, of PIDA claims specifically, be re-established, as exists within the civil courts.**
5. **Exclude PIDA claims from the cost and settlement offer provisions proposed by this consultation.**
6. **Consider revision of PIDA to include a public interest test.**
7. **Consider tribunal powers for recommendations for whistleblowing arrangements and for financial penalties in PIDA claims where such arrangements have been obviously flouted.**
8. **In relation to PIDA claims further promotion of the principles behind s43J PIDA.**

PUBLIC CONCERN AT WORK

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