

IN THE COURT OF APPEAL

BETWEEN:

NHS MANCHESTER

Appellant

AND

JENNIE FECITT

ANNE WOODCOCK

FELICTY HUGHES

Respondents

PUBLIC CONCERN AT WORK

(A charity)

Proposed Intervenor

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APPLICATION TO INTERVENE

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I - Introduction

1. This is an application by Public Concern at Work ("PCaW") to intervene in the hearing of the appeal in the above matter listed in the Court of Appeal on 5 and 6 October 2011 by written submissions. This application sets out both the reasons why PCaW wishes to intervene and also the submissions it would wish to make. PCaW wrote to the parties on 28 July 2011 by email and post asking for consent to intervene, followed by a further email dated 8 August 2011. PCaW has spoken with the first respondent who has orally given consent to the intervention on 10 August 2011.

Public Concern at Work

2. PCaW was established as a charity in 1993 with the aim of addressing whistleblowing. It has a distinguished board of trustees chaired by Michael Smyth CBE (Chairman).¹

3. The scope of its work is set out on its website at www.pcaaw.org.uk; in summary PCaW has four main activities:
 - a. The provision of free, confidential advice to people concerned about crime, danger or wrongdoing at work;
 - b. Helping organisations to deliver and demonstrate good governance;
 - c. Informing public policy in this area; and
 - d. Promoting individual responsibility, organisational accountability and the public interest.

4. PCaW was instrumental in Parliament passing the Public Interest Disclosure Act 1998 ("PIDA"), which is the main legislation that provides protection for whistleblowing. Indeed PCaW's main work is advising on issues around that Act. It receives many requests for assistance each year

¹ Michael Smyth CBE was a partner at Clifford Chance for over 20 years. The Board includes Peter Connor (formerly head of the Fraud Squad's Public Sector Corruption Unit), Derek Elliott (a district auditor who has helped lead the work of the Audit Commission on organisational culture), , Martin Le Jeune (partner of Open Road, and former staff member at the Committee for Standards in Public Life), Carol Sergeant CBE (formerly Chief Risk Director at Lloyds Banking Group & Managing Director for Regulatory Process and Risk at the FSA), James Tickell (consultant to the Charity Commission and voluntary sector; formerly Assistant Chief Executive of the National Housing Federation), Joy Julien (consultant and previous Director of the Royal Courts of Justice Citizens Advice Bureau), Mandy Pursey (Head of PR at the Charities Aid Foundation); and Rachael Tiffen (Head of Public Sector Fraud, National Fraud Authority).

to assist employers and employees with whistleblowing and it has become very well respected for the work it does.²

5. PCaW is supported in this work by many very well known names in the field of law, law enforcement and the social responsibility. Thus its current Patrons are the former Director General of Fair Trading Lord Borrie QC, (who was the founding Chairman), and the former Director General of the Confederation of British Industry and first controller of the Audit Commission Sir John Banham and it is supported by an advisory Council, chaired by Michael Brindle QC.

II - Summary of the issues in this appeal and PCaW's reasons for wishing to intervene

6. This appeal concerns the nature of the responsibility of an employer to protect persons who have lawfully and correctly disclosed to their employer, genuine and substantial concerns about the behaviour of a fellow employee. In this application such persons are referred to as "whistleblowers".³ In law they have made a disclosure in the public interest in the correct way.
7. The issues in the appeal concern
 - a. the extent to which an employer is liable for the acts of its employees who have victimised a whistleblower;

² By way of example it gave evidence to the Shipman Inquiry under Dame Janet Smith and has assisted the British Standards Institute to write PAS 1998:2008 Whistleblowing Arrangements Code of Practice.

³ Thus as explained below the term "whistleblower" is used solely to define a person who has properly made a protected disclosure and is therefore entitled to protection in law.

- b. the test for determining when an employer who takes steps that are detrimental to the whistleblower will be liable to that person under the ERA as amended by PIDA; and
 - c. the procedure to be followed by the Employment Tribunal in determining complaints brought by such employees that they had not been adequately protected from victimisation for making those disclosures.
8. The determination of these specific issues are not only of interest to the parties but because of their general importance to whistleblowers raising concerns in the public interest and for PCaW, as a charity that promotes the issue of whistleblowing. The decision of the Court of Appeal (“CA”) in relation to them is likely to determine how these matters are dealt with in many other cases.
9. More specifically they are of interest and importance to PCaW because -
- a. PCaW, being in large part responsible for the presentation of PIDA to Parliament as a Bill, has a special interest in the proper construction of the PIDA;
 - b. PCaW, having worked continuously to make the protections contained in PIDA a success, is concerned to ensure that the interpretation of the relevant provisions of PIDA by the CA gives full effect to the intentions of Parliament and provides a working and effective protection where whistleblowing is properly undertaken; and
 - c. PCaW, having considered the judgments below (which appear to concern paradigm facts), believes that it can assist the CA by

making written submissions that will differ, but not be partisan in that they both agree with and disagree with part of the submissions that it is understood that each of the parties intend to make.

10. It is for all these reasons PCaW makes this application to intervene. It does so on the basis that it will be responsible for its own costs and will not seek costs from any other party. While it is proposed to make its submissions in writing PCaW would make itself available to answer any questions that the Court of Appeal may have in relation to those submissions.

III – Outline of the law

11. The law on whistleblowing is now contained in the Employment Rights Act 1996 (“ERA”) as amended by PIDA. The purposes of this law are now examined.

The aims of PIDA

12. As a Bill, PIDA received strong support from the Government. Indeed the new protection was put forward in the Fairness at Work White Paper, Cm. 3968 (May 1998) as one of the key new rights for individuals -

3.3 The Government is also promoting individual rights by supporting Richard Shepherd’s Private Member’s Bill on public interest disclosure, or “whistleblowing”. This is expected to gain Royal Assent by this summer. The Bill will provide protection against dismissal or victimisation for employees who responsibly raise concerns about criminal offences, failures to meet legal obligations, miscarriages of justice, health, safety and environmental dangers and “cover ups” of these matters. It will encourage resolution of concerns through proper workplace procedures, but it will protect those who, in the last resort, have to go public. The Bill has broad

support from employers and trade unions. (Emphasis added)

13. PIDA creates a framework for whistleblowing across the private, public and voluntary sectors. Lord Borrie QC when introducing the Bill in the House of Lords⁴ said⁵ that the following passage in the Report of the Committee on Standards in Public Life (the Nolan Committee)⁶ best summarised the purpose of the proposed legislation -

All organisations face the risks of things going wrong or of unknowingly harbouring malpractice. Part of the duty of identifying such a situation and taking remedial action may lie with the regulatory or funding body. But the regulator is usually in the role of detective, determining responsibility after the crime has been discovered. Encouraging a culture of openness within an organisation will help: prevention is better than cure. Yet it is striking that in the few cases where things have gone badly wrong in local public spending bodies, it has frequently been the tip-off to the press or the local Member of Parliament—sometimes anonymous, sometimes not—which has prompted the regulators into action. Placing staff in a position where they feel driven to approach the media to ventilate concerns is unsatisfactory both for the staff member and the organisation.

14. During the Bill's passage, Lord Nolan stated that his Committee had been persuaded of the urgent need for protection for public interest whistleblowers and he commended those behind the Bill -

“for so skilfully achieving the essential but delicate balance in this measure between the public interest and the interests of employers”.⁷

PIDA and the NHS

⁴ The Bill was a private members' Bill and was introduced by Richard Shepherd MP in the Commons and Lord Borrie QC in the Lords; both worked closely with PCaW in drafting the Bill.

⁵ See Hansard, H.L. Vol. 589, Lord Borrie QC, col. 889

⁶ See Second Report, Cm. 3270—1 (May 1996) p.21

⁷ See Hansard, H.L. Vol. 590, col. 614

15. It was plain from the outset that PIDA would be of real importance in the National Health Service where it was recognised that disclosure could be very much in the public interest. Indeed even before the Act was finally passed, ministerial guidance was given to the NHS on the importance of enabling proper whistleblowing and the obligation to make such disclosures.⁸

16. When the Bill became an Act, it was immediately followed up by Health Service Circular 1999/198 of the 27th August 1999 which stated⁹ at p. 3 -

Action

Every NHS Trust and Health Authority should:

- Have in place local policies and procedures which comply with the provisions of the Public Interest Disclosure Act 1998. The minimum requirements of local policies should include:

...
(iv) an unequivocal guarantee that staff who raise concerns responsibly and reasonably will be protected against victimisation.
...(Emphasis added)

17. There have been a number of high profile occasions since PIDA became law when the public interest in ensuring whistleblowing within the NHS takes place has again been emphasised.

18. One very recent example is the report of the Mid Staffordshire NHS-Foundation Trust Inquiry (chaired by Robert Francis QC) into the standard of care in Mid-Staffordshire NHS Trust.¹⁰

⁸ See the letter from the Health Minister to NHS Trust Chairs, dated the 25th September 25 1997, entitled "Freedom of Speech in the NHS".

⁹ It also included a resource pack drafted by PCaW.

¹⁰ It will be recalled that the Inquiry was into concerns about mortality and the standard of care provided at the Mid Staffordshire NHS Foundation Trust. There had been an investigation by the Healthcare Commission (HCC) which published a highly critical report in March 2009. This was followed by two reviews commissioned by the Department of Health. These investigations gave rise to widespread public concern and a loss of confidence in the Trust, its services and management. Subsequently the Rt Hon Andy

19. The Report noted the very few occasions when there had been whistleblowing and added at [62] -

“The few instances of reports by whistleblowers of which the Inquiry was made aware suggest that the Trust has not offered the support and respect due to those brave enough to take this step.”

20. The CA may find it helpful to be aware of the huge importance that the Francis Inquiry placed on protecting whistleblowers to make it safe for them to act. This is discussed at length at [151] - [193] of Section E Governance which is attached as an Appendix to this document. The report concluded this section with this comment -

A study of the experiences of those involved in these three episodes arising out of raising serious concerns is not encouraging. It must not be forgotten what pressures can be applied to deter staff from coming forward, and how little it can take to dissuade nervous individuals from pursuing matters. Any failure to go the extra mile to protect and respect those who raise genuine concerns has to be seen against a national background, in which there are frequent reports of injustices being perpetrated against whistle-blowers. How many such reports are correct is not in point: staff locally will see in every failure to take the appropriate and expected steps internally as reinforcement of what they read happening elsewhere.

21. The Inquiry concluded at [43] in its Conclusions and recommendations -

No employee should suffer any adverse consequences from management or colleagues for raising or reporting, whether internally or externally, concerns relating to the standard and safety of care provided to patients based on a reasonably held belief, even if an investigation subsequently concludes that there are no grounds for such a concern. It should be a

Burnham MP, Secretary of State for Health, set up the Inquiry primarily to give those most affected by poor care an opportunity to tell their stories and to ensure that the lessons to be learned from those experiences were fully taken into account in the rebuilding of confidence in the Trust. The period reviewed by the Inquiry was principally January 2005 to March 2009.

See

http://www.dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_113447.pdf

disciplinary offence for any member of management or a colleague to act in a way which is prejudicial to the continued employment of that employee or detrimental to his/her wellbeing because of the raising or reporting of such concerns. Where any member of management or staff acts in such a way knowing that the affected employee has raised such concerns, it should be presumed for the purpose of the disciplinary procedure that such action was because of the raising or reporting of those concerns, unless the contrary is proved.

22. In PCaW's view these points absolutely underline the importance of this case.

23. The Department of Health accepted the comments of the Francis Inquiry¹¹ and recognised that there is a mismatch between what the public interest requires and what is actually happening in NHS Trusts. For those reasons, the Department Health and Social Partnership Forum which includes NHS Employers and staff side unions produced guidance for all NHS organisations¹². Amendments have also been made to the standard terms and conditions of employment of NHS staff. These are discussed below. The Department of Health has also started a consultation on the NHS Constitution on the 12th October 2010 to strengthen the rights and indeed obligations to disclose wrongdoing.¹³

How PIDA works

¹¹ See the letter from Sir David Nicholson, Chief Executive of the NHS, dated the 24th February 2010 at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_113094.pdf

¹² See <http://www.socialpartnershipforum.org/PressReleases/Pages/SecretaryofStatelaunchesnewwhistleblowingguide.aspx>

¹³ See The NHS Constitution and Whistleblowing at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_113094.pdf

24. PIDA works by inserting a new Part IVA into ERA which provides public interest whistleblowers with protection against victimisation. The importance of the protection is emphasised by its comprehensive nature. PIDA provides almost every individual in the workplace with full protection from victimisation where they raise genuine concerns about malpractice in accordance with the Act's provisions. Though the Act is part of employment legislation, no qualifying periods or age limits were imposed so as to restrict the application of its protection.
25. Only a disclosure that relates to specified types of malpractice may qualify for protection under the Act. These include concerns about actual or apprehended breaches of civil, criminal, regulatory or administrative law; miscarriages of justice; dangers to health, safety and the environment; and the cover-up of any such malpractice: see section 43B of ERA as inserted by section 1 of PIDA.
26. The most readily available protection under the Act is where a worker, who is concerned about malpractice, raises the matter within the organisation or with the person responsible for the malpractice: see section 43C of ERA as inserted by section 1.
27. The protection is in two forms against victimisation for making such a disclosure: against suffering any detriment other than dismissal and, against dismissal.

Protection from detriment

28. This case principally concerns the first form of protection. The protection is set out in the following terms-

47B.— Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “worker” “worker's contract”, “employment” and “employer” have the extended meaning given by section 43K.

29. The text of this protection mirrors language already in ERA.

30. On its original enactment (that is to say before its amendment by PIDA) ERA had included rights for employees not to suffer a detriment for asserting certain important rights. Those rights were related to acting in relation to Health and Safety: section 44, asserting rights in respect of Sunday working: section 45, acting as a trustee of an occupational pension scheme: section 46, and being involved in work as an employee representative: section 47.

31. It is perhaps self-evident that in each of these capacities an employee might be vulnerable and in need of protection. To assist an employee to secure protection for those rights from the outset ERA put the onus on an

employer to explain why action had been taken. Thus section 48 of ERA as enacted stated -

48.— Complaints to [employment]¹⁴ tribunals.

(1) An employee may present a complaint ... that he has been subjected to a detriment in contravention of, 44, 45, 46, or 47.

(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

...

32. By section 3 of PIDA this list was amended to include a complaint of a breach of section 47B.

33. A tribunal or court applying section 48 obviously needs to consider what amounts to a “deliberate failure to act”. When section 48(1) is taken with section 47B or indeed any of the pre-existing protections, a connected question arises what amounts to a “deliberate failure to act, ... done on the ground that the worker has made a protected disclosure” or acted in a protected capacity etc.

34. PCaW submits that where an employer takes steps which only partially address the consequences suffered by a person who has made a protected disclosure but those steps are ineffective to give protection the failure to take more proactive and effective steps amounts to a deliberate failure.

¹⁴ At the time of enactment these were called Industrial Tribunals.

35. In this respect PCaW submits that the qualifying clause “done on the ground that the worker has made a protected disclosure” must be read as qualifying the general treatment of the person who has made the disclosure.
36. PCaW further submits that the “on ground that” connection is properly understood as a control introduced by Parliament to ensure that the detriment of which complaint is made is not too remotely caused by the disclosure in the public interest.
37. Thus a tribunal or court testing whether or not the detriment of which complaint is made, is too remote, must consider whether if the detriment were not protected there would be a substantive risk that the proper and timely disclosure of wrongs, which the Act was intended to facilitate, would be undermined because employees would consider themselves inadequately protected.
38. No other construction would recognise and give appropriate weight to the public interest in proper disclosures and the need to provide protection to employees to give them the confidence to make such disclosures.
39. It is submitted that this is the necessary corollary of the purpose of PIDA as explained by the government, Lord Borrie and Lord Nolan, and as indeed evident from the long and short titles of PIDA and the evident purpose of section 48 and sections 44 – 47 as enacted.

40. Thus overall it is submitted that it is clear that the intended effect of these provisions is in the case of section 47B and 48 to reassure workers that it is safe and acceptable for them to raise such concerns internally.
41. This approach is obviously consistent with sections 44 – 47 and 48 since it is plain that an employee should be able to act as a Health and Safety representative, or Occupational Pension Trustee or employee representative or claim Sunday working rights, with confidence and without fear of repercussion.
42. The point can be developed in relation to section 47B. The construction that PCaW gives will make it is more likely that those in charge of the organisation will be forewarned of potential malpractice, will investigate it, and will take such steps as are reasonable to remove any unwarranted danger, and thus the public interest is served. It is in this way, the Act aims to deter and facilitate its early detection of malpractice.
43. This approach also furthers the obvious public interest in proper accountability. Should the concern raised by the whistleblower subsequently prove to be well founded, the persons and bodies concerned will be more readily held to account for their actions because they will have had actual (as opposed to constructive or implied) notice of the malpractice.

The “on the ground of” formula

44. The “on the ground of” formula is used to answer a question about causation and so determine both responsibility and liability. The question

for the CA in this appeal is what approach to causation it should take in the context of this specific legislation.

45. Both parties have approached the construction of the phrase “on the ground of” by reference to discrimination law. PCaW recognises that there is a close connection between some of the jurisprudence in discrimination law on the use of that phrase and the problem in this appeal. However PCaW does not consider that detrimental action towards an employee who has properly made a public interest disclosure, though victimisation, is adequately seen as a form of discrimination.
46. PCaW submits that the CA must examine the necessity for protection of whistleblowers, (i.e. persons who makes disclosures in accordance with PIDA) from victimisation. If this is done it will readily be seen that the context is wider than that in anti-discrimination law which merely gives individuals rights which it is for them to choose whether they may wish to use. By contrast, the intention of PIDA is to encourage such disclosures because they are in the public interest.
47. Historically the law of contempt provided some protection for those who asserted rights or participated in legal process. Now it is recognised that the rule of law requires effective judicial protection of all those who have and choose to exercise rights.
48. Here the CA must recognise that the effective judicial protection that is necessary is not merely the effective judicial protection of the employee’s right to make a disclosure but the state’s interest that a person who has

relevant information that ought to be disclosed, does in fact do so. Thus in this class of right the protection from victimisation is not merely to give effective judicial protection but to advance a public interest in preventing malpractice and enhancing accountability.

49. These points can obviously also be made in relation to acting as a Health and Safety representative, (and possibly the other original rights in ERA), where a plain public interest is engaged.

The provenance of this legislation

50. In any event the provision in section 48 by which the onus is placed on the employer to show a permitted ground for the detriment suffered by an employee and the provision in 47B a “deliberate failure to act, ... done on the ground that the worker has made a protected disclosure” does not derive from discrimination law. To explain this it is necessary to recall first that the ERA was a consolidating measure.

51. Section 44 re-enacted provisions in the Trade Union Reform and Employment Rights Act 1993 (“1993 Act”) which had been passed to transpose into domestic law certain requirements of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (“Directive 89/391/EEC”). Thus Directive 89/391/EEC required member states to introduce health and safety representatives and imposed obligations on employers and employees to prevent them suffering disadvantage.

52. This is evident from Articles 7(2) and 11(4) thus -

Article 7 Protective and preventive services

1. Without prejudice to the obligations referred to in Articles 5 and 6, the employer shall designate one or more workers to carry out activities related to the protection and prevention of occupational risks for the undertaking and/or establishment.

2. Designated workers may not be placed at any disadvantage because of their activities related to the protection and prevention of occupational risks.

Designated workers shall be allowed adequate time to enable them to fulfil their obligations arising from this Directive.

...

Article 11 Consultation and participation of workers

1. Employers shall consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work.

This presupposes:

- the consultation of workers,
- the right of workers and/or their representatives to make proposals,
- balanced participation in accordance with national laws and/or practices.

2. Workers or workers' representatives with specific responsibility for the safety and health of workers shall take part in a balanced way, in accordance with national laws and/or practices, or shall be consulted in advance and in good time by the employer with regard to:

- (a) any measure which may substantially affect safety and health;
- (b) the designation of workers referred to in Articles 7 (1) and 8 (2) and the activities referred to in Article 7 (1);
- (c) the information referred to in Articles 9 (1) and 10;

(d) the enlistment, where appropriate, of the competent services or persons outside the undertaking and/or establishment, as referred to in Article 7 (3);

(e) the planning and organization of the training referred to in Article 12.

3. Workers' representatives with specific responsibility for the safety and health of workers shall have the right to ask the employer to take appropriate measures and to submit proposals to him to that end to mitigate hazards for workers and/or to remove sources of danger.

4. The workers referred to in paragraph 2 and the workers' representatives referred to in paragraphs 2 and 3 may not be placed at a disadvantage because of their respective activities referred to in paragraphs 2 and 3.

... (Emphasis added)

53. Article 7(2) and 11(4) of Directive 89/391/EEC were originally transposed by paragraph 1 of schedule 5 to the 1993 Act which interpolated sections 22A and 22B into the Employment Protection (Consolidation) Act 1978¹⁵ in terms that are essentially identical to those later enacted in the consolidated legislation in ERA as sections 44 and 48.¹⁶

¹⁵ See section 48 for the definition of the 1978 Act as used in the 1993 Act.

¹⁶ Those provisions stated “22A.— Right not to suffer detriment in health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer **done on the ground** that— (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, he carried out, or proposed to carry out, any such activities, (b) being a representative of workers on matters of health and safety at work, or a member of a safety committee—(i) in accordance with arrangements established under or by virtue of any enactment, or (ii) by reason of being acknowledged as such by the employer, he performed, or proposed to perform, any functions as such a representative or a member of such a committee, (c) being an employee at a place where— (i) there was no such representative or safety committee, or (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety, (d) in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left, or proposed to leave, or (while the danger persisted) refused to return to, his place of work or any dangerous part of his place of work, or (e) in circumstances of danger which he reasonably believed to be serious and imminent, he took,

54. It will be noted from the underlined text in footnote 13 that this is the true provenance of the phrases “any deliberate act” and “on grounds of” in ERA.

55. Accordingly sections 44 and 48 of ERA have to be understood to have been enacted to give effect to Directive 89/391/EEC.

56. This begs the question how stringent is the obligation on a member state to ensure that it has legislation which in the words of Article 11(4) secures that workers are not placed at “a disadvantage” because of their lawful activities.

or proposed to take, appropriate steps to protect himself or other persons from the danger. (2) For the purposes of subsection (1)(e) whether steps which an employee took, or proposed to take, were appropriate shall be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time. (3) An employee shall not be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was, or would have been, so negligent for the employee to take the steps which he took, or proposed to take, that a reasonable employer might have treated him as the employer did. (4) Except where an employee is dismissed in circumstances in which, by virtue of section 142, section 54 does not apply to the dismissal, this section shall not apply where the detriment in question amounts to dismissal.

22B.— Proceedings for contravention of section 22A.

(1) An employee may present a complaint to an industrial tribunal on the ground that he has been subjected to a detriment in contravention of section 22A. (2) On such a complaint it shall be for the employer to show the ground on which any act, or deliberate failure to act, was done. (3) An industrial tribunal shall not consider a complaint under this section unless it is presented—(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable. (4) For the purposes of subsection (3)—(a) where an act extends over a period, the “date of the act” means the last day of that period, and (b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.” (Emphasis added)

57. Put another way it may be asked: what does the principle of effective judicial protection of the public interest of making this Health and Safety legislation work require?

58. The answer to that question can be seen in Case C-425/01, *Commission of the European Communities v. Portuguese Republic* [2003] ECR I-6025. In that case the European Commission had alleged that Portugal had failed in a number of respects to transpose Directive 89/391/EEC properly. One alleged failure was in relation to the protection from disadvantage in Article 11(4).

59. However the European Court of Justice dismissed that allegation because it noted at [24] (and accepted at [25]) that -

As regards the system of protection of workers' representatives, the Portuguese Government states that the Portuguese national legislation prohibits employers preventing, in any way whatever, the exercise by workers of their rights, or dismissing them or subjecting them to penalties by reason of such exercise...(emphasis added)

Protection from unfair dismissal

60. The provisions in relation to unfair dismissal are to the like effect both in the absolute nature of the protection and the onus on the employer to explain what has been done.

61. Thus section 5 of PIDA interposed a new section 103A into ERA -

103A. Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

IV – The judgments below

The facts

62. As noted above, PCaW considers that facts in this case provide a paradigm of some of the problems that PCaW most frequently encounters in it's work.

63. The headnote to the official law report of the judgment of the Employment Appeal Tribunal ("EAT") explains the facts in summary at [2011] I.C.R. 476 as follows -

The claimants were nurses working at a walk-in centre operated by the respondent employer. They expressed doubts to their manager about the qualifications of a colleague and, though their concern was found to be justified, the employer decided no action should be taken. Thereafter relations among staff at the centre deteriorated, and the employer, while accepting that the claimants had acted properly, redeployed two of them and decided to give no more work to the third, who was a bank nurse. The claimants made claims that, contrary to section 47B of the Employment Rights Act 1996, they had suffered detriment as a result of making a protected disclosure as defined by section 43B(1)(d), complaining that, in addition to the change in their employment, they had been subjected to unpleasant treatment by staff at the centre. The employment tribunal found that the claimants had been subjected to unpleasant and unwarranted behaviour by other staff at the centre as a direct result of the disclosure, in respect of which more could have been done by the employer, and that they had suffered the significant detriment of being removed against their will from working at the walk-in centre. ...

64. Additionally it may be noted that the ET said -

18. ...the Tribunal is entirely satisfied that it was appropriate for Mrs. Fecitt and the other claimants to feel real concern over the issue [of Mr Swift wrongly holding out his nursing qualifications], since the simple fact is that

Mr Swift, a Registered Nurse with professional obligations and standards was stating untruths about his qualifications and experience.

...

21. ... the atmosphere at the Walk – In Centre [became] increasingly fraught...It is correct that efforts were made by senior management to persuade all staff at the Centre to behave “professionally” towards each other in difficult circumstances. However, in the Tribunal’s view, no real attempt was made to identify what types of unfriendly behaviour the claimants were being subject to, by whom, and whether the threat of or actual disciplinary process was required to control an escalating situation.

...

23. ...Professor Madhok [the Medical Director] ...on 30 July 2008 ... concluded that there had been a lack of robust management to deal with the unfortunate incident that had arisen.

...

26....Mrs Nixon [Director of Commissioning] ... conclude[d] that Mrs Hughes had been subjected to treatment which had resulted in her being isolated and thereby prejudiced and that management could have done more to prevent this. The Tribunal is satisfied Mrs Nixon would have come to the same conclusions in relation to the other two claimants. In her evidence to the Tribunal Mrs Nixon said the following:

“What was clear to me was that there was not a proactive management response to deal with what was an emerging set of behaviours and relationships. It seemed to me too little, too late.”

...

29. (e) Management could and should have done more than it did to prevent the claimants from being subjected to the unpleasant and unwarranted behaviour on the part of other members of staff at the Centre who were supportive of Mr Swift.

65. In PCaW’s experience it is not at all unusual for men or women who have justifiably made an entirely proper and justified disclosure to find that
- a. their disclosure is not treated as seriously as it should be,
 - b. they suffer victimisation by colleagues for having made the disclosure,

- c. the behaviour of colleagues is not appropriately addressed, and
- d. they – the persons making the disclosure – and often not those about whom the disclosure is made or those who support such a person, suffer a detriment as a result.

66. That is why PCaW believes that unless the law is apt to ensure that whistleblowers are properly protected from such outcomes the public interest in proper disclosure of wrongdoing will be undermined. Persons who might otherwise assist the public interest by making appropriate disclosure will not have confidence in the law's protection and will consider that the risk of victimisation is simply too great. Such an outcome would not be in the public interest and not what Parliament intended.

The ET's Conclusions

67. It is therefore very significant to PCaW that, notwithstanding the above, the ET held that there was **no** breach of the provisions of ERA that give effect to PIDA; thus the ET said -

Conclusions

37. The Tribunal has found that these claimants were subjected to detriment by the actions of members of staff at the Wythenshawe Walk-In Centre who were supportive of Mr Swift following protected disclosures having been made by the claimants to the respondent.

38. Had the respondent deliberately failed to take steps to protect the claimants following such disclosures, then they could have been liable under section 47B not only under the principle of vicarious liability but also by reason of the failure to act itself. The Tribunal also agrees with the findings of the Investigations that senior management could have done more sooner

to prevent such detriment occurring. However, having considered the totality of the evidence, the Tribunal finds that management did in fact seek to take steps to resolve the tensions between the various parties at the Centre and to encourage all members of staff to act professionally towards each other. It is not sufficient, in the Tribunal's judgment, to establish liability on the respondent simply because management either did not do as much as it perhaps could have done or was simply unsuccessful in its attempts to resolve matters. However hard management might try there are sometimes situations that arise in the workforce following a protected disclosure having been made which are extremely difficult to control and prevent. Whilst a reasonable level of proactive engagement with a view to prevent such situations continuing can be expected, any failings by management in this case to secure the desired result were not sufficient, in the Tribunal's judgment, to amount to a deliberate failure to act.

39. It is, of course, correct that, had the claimants not made the protected disclosures in question, they would not have been subjected to the detriment of which they complain. Having considered the submissions of Counsel and the relevant authorities, however, the unanimous judgment of the Tribunal is that the "but for" test is not the correct test to apply in order to establish liability under section 47B of the Employment Rights Act 1996. There must be a causal connection between the protected act and the respondent's acts or omission to act.

40. In the Tribunal's judgment, any failure on the part of the respondent to take sufficient steps to protect the claimants from being subjected to a detriment was not "because" they had made protected disclosures and was not, therefore, "on the ground that" they had made the protected disclosures.

41. Equally, when the decision was made by management to redeploy Mrs Fecitt and Mrs Woodcock in June 2008 away from the Wythenshawe Walk-In Centre, that was because the situation at the Centre had rendered it "dysfunctional" such that their removal appeared to management to be the only feasible method of resolving the problem. It was not "because" the claimants had made protected disclosures, and was therefore not done "on the ground that" such protected disclosures had been made.

42. So far as the claimant Mrs Hughes is concerned, notwithstanding the

email from Sarah Lake to HR dated 9 June 2008, the Tribunal was satisfied from the evidence that it was not “because” of Mrs Hughes’s involvement in making the protected disclosures that Sarah Lake wished to reduce her bank shifts to nil but principally because of a negative view she held of Mrs Hughes which pre-dated the making of the disclosures and partly for the same reason that Mrs Feccit (sic) and Mrs Woodcock were redeployed, namely to resolve the “dysfunctional” problem at the Centre. Accordingly, the failure to provide Mrs Hughes with further shifts was not “on the ground that” she had made a protected disclosure.

43. In respect of all three claimants, the necessary causal connection between the protected acts and the detriment suffered by them does not exist.

44. Accordingly, the unanimous judgment of the Tribunal is that the claimants’ claims are dismissed.

68. It will be seen that at [37] – [38] the ET considered that there was a pre-condition to liability for the victimising acts of fellow employees that the employer had deliberately failed to act to prevent such victimisation. It does not distinguish between a deliberate failure to take any steps and a deliberate failure to take adequate steps.

69. At [40] – [42] the ET considered that there was insufficient causal connection between the acts or omissions of the employer and the detriments suffered by these employees.

70. At [42] the ET addressed Mrs Hughes’ claim. From the perspective of PCaW the first finding on causation in relation to Mrs Hughes looks perverse given the disclosed documents referred to elsewhere in the ET’s

decision: see in particular [27].¹⁷ Whether or not that is right is a matter for the employee concerned and not for PCaW.

71. The second finding in [42] links to the ET's conclusion in [41] where it had addressed the claims of the other two claimants. This conclusion is based on the following reasoning

- a. Management considered the Walk in Centre dysfunctional, and
- b. Management considered that the only feasible method of making it functional was the removal of the claimants.

72. It should be emphasised that nowhere is there any finding that, objectively considered, the only feasible way of making the centre functional, was in fact the removal of the claimants. Indeed the findings of the ET are to the opposite effect since it has recorded that Manchester NHS own internal staff concluded that there was a lack of robust management. There is no assessment of the reason why the necessary robust management was not exercised nor whether the omission to provide the necessary robust management was "deliberate".

73. PCaW does not accept that it could ever be the case that the only feasible way to address a dysfunctional unit where the dysfunction is a

¹⁷ It will be recalled that the ET at [27] – [28] recorded "27. [Counsel for Mrs Hughes] relies very heavily on an email from Mrs Lake [District Nursing Clinical Lead] dated 9 June 2008 to Bev Harper in HR which reads as follows:- "Bev, we have a bank nurse at the WIC. She works at weekends and has worked at the [the walk in centre] for six years but has always declined permanent hours. I would like to reduce her bank to virtually nothing (trouble causer) but she has already complained that we have reduced her hours and she has employment rights! Where do I stand? Thanks, Sarah" 28 The reference to Mrs Hughes as being a "trouble causer", argues [counsel], makes it clear that Mrs Lake was seeking to cancel her shifts because she had "caused trouble" by making the protected disclosure. He also urges the Tribunal to accept that as this occurred at about the same time as the other two claimants were removed from the Wythenshawe Walk-In Centre, this is evidence from which it can be inferred by the Tribunal that all three claimants were being subjected to detriment on the ground that they had made protected disclosures."

consequence of a proper disclosure in the public interest would be to remove the whistleblower.

74. PCaW submits that it has to be recalled that every contract of employment has a default term that an employee will co-operate with the organisation, and maintain trust and confidence: see *Malik Appellant v Bank of Credit and Commerce International* [1998] A.C. 20, per Lord Steyn at pp. 45C - 46B.

75. That term enables all employers to discipline staff who do not co-operate as is now very well recognised throughout the case – law and indeed by statute. A refusal to co-operate with a person who has acted in the public interest because they have done so is plainly unjustified.

76. Indeed the ET's reasoning at this point omits to address, what in PCaW's view are, the following very important points set out elsewhere in the judgment, as to why the centre was dysfunctional

- a. Mr Swift had wrongly claimed nursing qualifications he did not have: [18];
- b. The Claimants had made a proper disclosure about this: [18];
- c. The Claimants were consequentially the subject of victimisation by fellow staff at their workplace: *passim*;
- d. The management had made no real attempt to identify what types of unfriendly behaviour the claimants were being subject to, by whom, and whether the threat of or actual disciplinary process was required to control an escalating situation: [21] and *passim*

- e. The NHS Trust's own review of its dealing with this issue concluded that there was a lack of robust management: [23] and see [26].

77. The only passage in the ET's judgment which goes anywhere near addressing this deficit in its reasoning is at [38] -

... However hard management might try there are sometimes situations that arise in the workforce following a protected disclosure having been made which are extremely difficult to control and prevent. Whilst a reasonable level of proactive engagement with a view to prevent such situations continuing can be expected, any failings by management in this case to secure the desired result were not sufficient, in the Tribunal's judgment, to amount to a deliberate failure to act.

78. PCaW comments that the point is not whether it is difficult to protect whistleblowers. If it were not difficult to do so legislation would hardly have been necessary. The point is that Parliament having decreed that whistleblowers act in the public interest, as explained above and as the title of PIDA indicates, they *must* have *effective* protection.

79. It is thus in this passage that the objectionable consequences of the ET's approach are evident. The ET considered that employers may lawfully fail to control and prevent victimisation following a protected disclosure, if they have exercised "a reasonable level of proactive engagement with a view to prevent such situations [of victimisation by fellow employees] continuing" but there are two objections to this approach. PIDA certainly does not state that whistleblowers are entitled to "a reasonable level of proactive engagement" and the ET's view of what was reasonable proactive engagement was in any event obviously low. On both counts

the standard set by the ET was obviously much less than the “unequivocal guarantee that the Department of Health expected in Circular 1999/198.

80. For instance it is not clear at all from the rest of its reasoning, why the ET did not premise its conclusion in this passage on the view of NHS Manchester’s own staff that it had not acted appropriately. Thus Medical Director Professor Madhok and Director of Commissioning, Mrs Nixon were both of the view that there was a failure of “robust” and “proactive” management. Moreover it has itself recognised at [21] that no real attempt was made to identify what types of unfriendly behaviour the claimants were being subject to, by whom, and whether the threat of or actual disciplinary process was required to control an escalating situation.
81. Given those comments and those findings the standard of “a reasonable level of proactive engagement” which the ET set must be seen to be very low in deed and inconsistent with protecting the wider public interest.
82. It may be added that this failure by the ET to follow through its self-direction (assuming it to be correct) and apply it to all its findings and so reach that ultimate conclusion that NHS Manchester were not at fault appears to PCaW to be perverse.
83. In summary, in PCaW’s view, there is not only a self-evident deficit in the logic of ET’s reasoning at this point but it also disregards the essential point about PIDA: that the public interest requires disclosures of wrongdoing to be made and that those who make those disclosures must be properly protected since otherwise they will not make those

disclosures. In short the ET's reasoning seems to PCaW to be entirely inconsistent with the policy of PIDA. That means identifying and disciplining those who victimise whistleblowers.

84. PCaW emphasise that there is nothing controversial about these submissions from the point of view of the NHS as a whole.¹⁸ Thus the upto-date position of the NHS may be compared with the texts already noted. For instance following the Francis Inquiry, on the 13th September 2010 NHS Employers sent a Circular¹⁹ to all employers to inform them of agreed changes to the NHS Terms and Conditions of Service Handbook to include a new Section 21: Right to Raise Concerns in the Public Interest (Whistleblowing).

85. This stated -

The NHS Staff Council has agreed all employees working in the NHS have a contractual right and duty to raise genuine concerns with their employer about malpractice, patient safety, financial impropriety or any other serious risks they consider to be in the public interest.

Action

1. Employers should review their local policies to ensure that they emphasise that it is safe and acceptable for staff to raise concerns and set out clear arrangements for doing so.

2. This new agreement makes recommendations on the content of local policies to enable employers, working in partnership with the trades unions, to achieve best practice when developing or reviewing their local 'whistleblowing' or 'open practice' arrangements.

¹⁸ PCaW does not know what was submitted to the ET as to the obligation to discover and discipline whistleblowers or what it is proposed to be submitted to the CA by NHS Manchester on this point.

¹⁹ See NHS Terms and Conditions of Service Handbook Pay Circular (AforC) 4/2010.

Effect of this amendment

3. Details of the changes made effective by this circular are in the Appendix attached.

...

Appendix

...

Section 21: Right to raise concerns in the public interest (Whistleblowing)

21.1 All employees working in the NHS have a contractual right and a duty to raise genuine concerns they have with their employer about malpractice, patient safety, financial impropriety or any other serious risks they consider to be in the public interest.

21.2 NHS organisations must have local policies that emphasise that it is safe and acceptable for staff to raise concerns and set out clear arrangements for doing so. Such policies are often referred to as 'whistleblowing' or 'open practice' policies

21.3 The NHS Staff Council recommends that local policies should include the following points:

- the organisation takes malpractice or wrongdoing seriously, giving examples of the types of concerns that should be raised;
- employees have the option to raise concerns outside of line management, including ultimately with the Secretary of State or relevant Minister in the Devolved Administrations, or with any body they designate for these purposes;
- employees are able to access confidential advice from their trades union or their professional organisation. They may in addition seek confidential advice from an independent body e.g. Public Concern at Work;
- the organisation will handle all concerns sensitively with, respect to the confidentiality of a member of staff raising a concern;
- when and how concerns may properly be raised outside the organisation (e.g. with a regulator);
- it is a disciplinary matter either to victimise a genuine "whistleblower" or for someone to maliciously make a false allegation. However, every concern should be treated as made in good faith, unless it is subsequently found out not to be;
- the policy covers all staff, not just clinical professionals.

... (Emphasis added)

86. While this document aims to formalise the position in all NHS contracts of employment, PCaW submits that it accurately represents the logic and intention of PIDA. It stands in stark contrast to the apparent treatment of these claimants by NHS Manchester and the ET.

The judgment of the EAT

87. The EAT too was concerned about these points. It allowed the appeal and remitted the matter to the ET. It held in summary (see headnote to the report) -

(1) that an employer could be vicariously liable for acts of victimisation by an employee if the conduct was so closely connected with acts the employee was authorised to do that it could fairly and properly be regarded as done by the employee acting in the course of his employment; and that the employment tribunal had simply not dealt with the possibility of the vicarious liability of the employer, and the matter would be remitted for the tribunal to make appropriate findings as to whether there were acts by the claimants' fellow employees that were carried out by reason of the claimants having made a qualifying disclosure, if so what those acts were, whether the unwanted treatment amounted to a detriment, and, if so, whether the acts were so closely connected with the employment of those responsible as to make the employer vicariously liable (post, paras 45, 63).

(2) That, in determining whether a claimant had been subjected to a detriment "on the ground that" he had made a protected disclosure, for the purposes of section 47B of the Employment Rights Act 1996, the test to be applied was the same as that applied in cases of victimisation in the context of other areas of discrimination; that, once a detriment had been suffered following a protected act, section 48(2) of the Act placed the burden on the employer to show the ground on which any act or deliberate failure to act was done and that the protected act had played no more than a trivial part in the application of the detriment; that, put another way, the employer was required to prove on the balance of probabilities that the treatment

complained of was in no sense whatever (sic) on the ground of the protected act; and that the issue of causation would also be remitted to the employment tribunal to reconsider its decision (post, paras 47, 64, 66, 69).

Igen Ltd (formerly Leeds Careers Guidance) v Wong [2005] ICR 931, CA followed.

Harrow London Borough Council v Knight [2003] IRLR 140, EAT not followed.

88. Its first holding was based on an application of the judgment of HHJ Reid QC in *Cumbria County Council v Carlisle-Morgan* [2007] IRLR 314 cited by the EAT at [46] and also [60].

89. In that case HHJ Reid had held at [39] – [40] -

39. An employer may be liable for the acts of his employee done in the course of his employment whether or not what the employee has done would be actionable against him. The principle of vicarious liability exists not because the employee is liable but because of what he has done: see per Lord Nicholls in *Majrowski* para 14 when considering the Australian case of *Darling Island Stevedoring & Lighterage v Long* (1957) 97 CLR 36.

40. The liability imposed by section 47B is imposed on the employer not on the employee. It is analogous to an implied contractual term in that the person on whom the liability is imposed is the employer, but it does not seem to us to matter whether the section is regarded as creating a statutory tort or some form of implied contractual term. The claimant might or might not have had a claim against Mrs Horsman under the Harassment Act 1977 but she had no claim against her under section 47B. The question is whether what Mrs Horsman did can properly be classified as an act of the employer for the purpose of section 47B.

90. PCaW regrettably considers that this passage in *Majrowski* does not bear the weight which HHJ Reid QC gave it and is not directly applicable to the facts of this case, though it does not disagree with the outcome which the EAT reached.

91. The second holding was based as made clear in the headnote on an application of case law in relation to discrimination and a conclusion that *Igen Ltd (formerly Leeds Careers Guidance) v Wong* (“Igen”) was binding on the EAT: see [66].

92. Again PCaW does not consider that *Igen* was binding on the EAT in the sense that it *had* to be applied in this case. It does consider however that there was a very strong obligation on the employer to show that there was no significant causal connection between the detriment that the employer subjects a whistleblower to and the act of making the protected disclosure, which on these facts it has plainly failed to do.

V - NHS Manchester’s grounds of appeal and skeleton argument

93. The skeleton argument for NHS Manchester somewhat recasts the grounds of appeal in the notice of appeal. It is assumed that the statement in the skeleton is that which will be pursued on appeal. This asserts that the issues in the appeal are as follows -

5.1. Whether the ET erred in law in its approach to the question whether the ground for any detriments suffered by the Claimants was the fact that they had made protected disclosures. In this regard the Appellant contends that the approach of the ET was correct in law and that the “read across” by the EAT from the approach in anti-discrimination law went too far. In any event, it will be submitted, the ET plainly found as a fact that the redeployment decisions in the cases of Mrs Fecitt and Mrs Woodcock were not “done on the ground that” they had made protected disclosures. Nor was the withdrawal of Ms. Hughes’ hours. Accordingly, at the very least, these findings should have been upheld and should not have been remitted to the ET. (“the reason why issue”)

5.2. Whether the ET erred in law in its approach to the detriments

complained of by the Claimants *other than the redeployment of Mrs Fecitt and Mrs Woodcock and withdrawal of Mrs Hughes' Bank work*. The Appellant submits that the ET dealt adequately with the other aspects of the case and that, in any event it cannot as a matter of principle be held vicariously liable for the actions of junior colleagues of the Claimants. ("the vicarious liability issue')

The reason why issue

94. NHS Manchester's appeal on the reason why issue has essentially two aspects.

95. This issue is concerned firstly with the question how much – i.e. to what extent - it must be proved that the disclosure made by the whistleblower caused the employer to act detrimentally towards the employee, and secondly why the EAT allowed the appeal on this point given the findings of the ET.

96. These are of course linked questions which essentially address a larger question as to how effective is PIDA? If the judgment and reasoning of the ET are correct – as asserted by the NHS Trust – then the plain answer is: "Not very". Paradigm situations of victimisation where whistleblowers plainly need protection are outwith the legislation.

97. Of course for the reasons already given, PCaW does accept that the approach taken in *Igen* is not directly applicable.²⁰ It accepts that the "no

²⁰ Counsel for PCaW had originally made the submission on "no discrimination whatsoever" when acting for the Appellant in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT. The EAT adopted this submission as did the CA in *Igen*. The submission was based precisely on the text of the relevant directives.

discrimination whatsoever” formula used in that case derives from the text of the anti-discrimination Directives.

98. However equally for the reasons already given, it is submitted that a very high level of protection was intended by Parliament, indeed so as to mirror the high level of protection that the European law required in relation to Health and Safety.

99. PCaW therefore considers the overall thrust of NHS Manchester’s submissions on this issue to be quite wrong. Thus on analysis the argument for NHS Manchester amounts to no more than this -

Provided an employer acts with some goodwill by first taking some steps to seek to stop or prevent a reaction by fellow employees to an act of whistleblowing, if those steps are inadequate and/or ineffective, the employer may then lawfully act detrimentally toward the employee concerned, where the reason for the detriment, is to remedy the deficiency in effectiveness of the employers’ steps.

100. PCaW submits that PIDA cannot be construed so as to give so little protection without depriving it of its essential purpose. PCaW repeats its submissions above and asks the CA to recall the long title to PIDA is not based on a measure of goodwill but is-

“An Act to *protect* individuals who make certain disclosures of information in the public interest...”

101. The victimisation of whistleblowers by fellow employees is entirely foreseeable. If the Act does not provide protection for whistleblowers from such employees it does not serve its purpose and will - in many

instances – be a dead letter. A construction that led to that outcome is one that the CA must avoid if at all possible.

102. PCaW submits that it would be entirely contrary to the proper understanding of the purposes of PIDA, if an employer, who fails to provide the necessary robust management to prevent victimisation of a whistleblower by fellow employees, can escape liability by asserting that it was not the fact of the disclosure that led to the ultimate detriment of being moved from the place of work, but the fact that there was (admittedly consequential) unpleasant treatment by colleagues.

103. PCaW submits that this is not the case and the Court of Appeal should be astute to say so clearly.

104. If PCaW is right then the question whether an employer may be vicariously liable for the acts of his employees in victimising a whistleblower will be of only legal rather than practical significance. The strength of the obligation on the employer to protect the employee will render it unnecessary to require the employer to be vicariously liable.

105. PCaW recognises that sometimes management may be unable to secure harmony between a member of staff that has made a legitimate and justified disclosure, but it does not accept that if so, it is consistent with PIDA for the employer to act detrimentally toward the whistleblower.

106. In such circumstances – unless it can be demonstrated that subsequent to the disclosure the whistleblower has acted improperly

which was not this case - it is for those who have victimised the whistleblower to be penalised and not the whistleblower. Nothing less will secure the public interest.

The vicarious liability point

107. There is no doubt at all that an employer may be liable for the acts of his employee done in the course of his employment whether or not the employer could be sued personally (and not vicariously) for those acts or omissions. However that does not mean that an employer can be made vicariously responsible for acts or omissions of his employees for which he is not personally responsible and which acts or omissions do not amount to actionable wrongs for which the employee could be made personally liable.

108. This is the key point in this part of the appeal and it is different from the point in *Majrowski* where the issue was whether an employer could be made vicariously liable for acts of harassment for which his employee might have been made personally liable by relying on the statutory provisions in the Prevention of Harassment Act 1997 ("PHA").²¹

109. In *Majrowski* the appeal being from a strike out application it had to be assumed that the employer's employee had indeed broken the PHA. There was no issue between the parties that Mr. Majrowski could in principle have sued her personally.

²¹ Counsel for PCaW in this matter was also counsel for Mr Majrowski.

110. By contrast in this case there is no right in the ERA as amended by PIDA for these women to obtain a remedy against their fellow employees for victimisation following their whistleblowing.
111. It is agreed that if there was no way in which these Claimants could sue their fellow employees under the ERA as it gives effect to PIDA then Manchester NHS can not be made vicariously liable for the fellow employees acts under that legislation.
112. If the fellow employees' acts amounted to harassment that was actionable under the PHA (as they may well have done) then of course *Majrowski* is authority for the proposition that NHS Manchester could be made vicariously liable for that harassment. Such a claim would have to be made in the County Court and not the ET.
113. The points made by NHS Manchester in their skeleton by way of comparison with discrimination legislation which, by contrast, does make a fellow employee liable for acts of discrimination and the employer vicariously liable for those acts are therefore to that extent well made.
114. However the fact that PIDA does not contemplate litigation in the ET against an employer on the basis of the vicarious liability of his employees only serves to emphasise what has been submitted before as to the construction of sections 47B and 48. Unless they are construed to mean that a high obligation is imposed on an employer to take effective action to protect a person who has made a disclosure this legislation is not effective to secure the public interest by providing the necessary protection to employees to have the confidence to make such disclosures.

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Cloisters

8 August 2011