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Focus | Challenge



## After Wikileaks: The challenges for employers

In recent weeks, the whistleblowing website Wikileaks has hit the headlines, exposing and embarrassing world-leading companies and public figures with information meant to be kept confidential. **Shonali Routray** looks at the lessons to be learned from Wikileaks, the role of whistleblower protection in the UK, and what employers should do to make sure that their whistleblowing arrangements work and there is a safe alternative to silence.



**Shonali Routray**  
Public Concern  
at Work

In his recent interview for the American TV show '60 Minutes', Julian Assange, the founder of internet media organisation, Wikileaks, stated in the context of there not being any whistleblower protection that: "If [employees] who say that there is some abuse going on and there's not a proper mechanism for internal accountability and external accountability, they must have a conduit to get that out to the public. And we are the conduit". ▶

In amongst the drama of Wikileaks this statement focuses the mind on the question: Where there are dangers and real risks to the public, how do we ensure that those who spot them are able to raise a concern effectively and early with minimum risk to ourselves?

When we travel to work on the train, we rely on it being ok for the track engineer to raise a concern about a signal failure. We want to know that when we go to the hospital, the nurse who is looking after our mother or father is able to raise a concern about wrongdoing or malpractice early, even if they only have a suspicion. Most, if not all of us, would agree that we would rather that the nurse and the engineer raise their concerns than keep quiet. But how do we ensure that this is the case? And, when reflecting on our own workplaces, are we given messages that say that it is safe to speak up?

### The Public Interest Disclosure Act 1998

The Public Interest Disclosure Act 1998 (PIDA) has been in place in employment law for over a decade, providing an important backstop for workers who have raised a concern about wrongdoing or malpractice in the workplace, and have been victimised or dismissed for having done so. PIDA covers a wide range of wrongdoing, from breaches in health and safety, dangers to the environment, criminal offences, miscarriages of justice and a breach of a legal obligation. The wrongdoing could be about to occur, have occurred, or be recurring, and even extends to wrongdoing overseas.

PIDA is unusual for UK employment law, as it goes beyond the normal scope of

employees and covers workers, including temporary or agency workers, GPs, student nurses and doctors. There is no qualifying period for protection and this means that PIDA applies from the very start of employment. In addition, there is no cap in compensation under PIDA. The thinking behind this was that PIDA should apply to all workers, including city bankers and senior professionals at the top of the ladder. The highest compensation award to date in the private sector has been £5m, made to two city bankers in the case of *Backs and List v. Chesterton plc*, who raised concerns about a takeover.

PIDA readily protects individuals who raise their concern internally (Section 43C). For an individual to be protected for raising a concern internally they need to show they have a reasonable belief of information tending to show that wrongdoing is occurring and have raised this in good faith. Similarly, there is a low hurdle for protection for individuals who raise a concern in good faith with regulators such as the Financial Services Authority, National Audit Office, Serious Fraud Office and the Care Quality Commission (Section 43F). An individual need only show that they have reasonable belief and the information is substantially true.

Finally, PIDA provides protection for individuals who in good faith make a wider disclosure to the media, the police or even a MP (Section 43G). In order to be protected, individuals would have to show that they have a valid cause to go wider: they are not doing it for personal gain, they have raised their concern already either internally or with a regulator; or if they

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have not raised a concern they had reasonable grounds to believe that they would be victimised or there would be a cover up if raised internally or with a regulator. A Tribunal would also consider whether the disclosure is reasonable in the circumstances, such as the identity of the person disclosed to, whether there was breach of confidence, whether there was a whistleblowing policy and what the organisation's response was if the matter was raised with them at an earlier stage. Furthermore, an individual can be protected for raising a concern wider, if that concern is exceptionally serious (Section 43H).

When PIDA was first enacted, Lord Nolan, one of its prominent supporters, praised it for “so skilfully achieving the essential but delicate balance between the public interest and the interest of the employers”. It is this balance that will be effective in the post-Wikileaks age, for it promotes open and confidential whistleblowing. In order to be protected, an individual must show that they have raised a concern and then been victimised, and if someone raises a concern anonymously it will be extremely hard to gain protection. PIDA also emphasises internally accountability and regulatory

oversight, by enabling an individual to be readily protected should they raise a concern either internally or with a regulator. Additionally, PIDA acknowledges the role of wider public accountability and provides protection. Moreover, the PIDA framework encourages employers and organisations to deal with a concern responsibly and if they do not, it means that the individual is more likely to be protected. Despite its balancing framework, many individuals do not know about the protection offered in the UK. Nor do they realise that the protection in the UK is considered one of the best in the world. In a survey conducted by YouGov for our ten year review of whistleblowing protection in the UK, only 22% of adults knew that there was protection for people raising concerns.

The USA has a piecemeal approach to whistleblower protections, offering only limited protections for federal employees and employees of listed companies. It is in this environment, where there is no clear whistleblower protection or routes for individuals to raise a concern either internally or externally, that individuals are more likely to turn to raising a concern anonymously with an organisation such as Wikileaks.

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### What can employers do?

Employers may be concerned about whether in the post-Wikileaks age employees will start to leak information anonymously. It is highly unlikely that there would be floods of information leaked to outside organisations. From our analysis of Employment Tribunal judgments, we found that eight out of ten claimants have raised a concern internally. Therefore employers have a big opportunity to capture information at an early stage.

From the perspective of giving advice day in and day out to whistleblowers across all sectors, we would recommend that employers need to give their workers clear routes and options for raising a concern. Employers also have to understand that there are times, where in the public interest, a worker will go outside an organisation and perhaps raise their concern with a regulator. In addition, while PIDA does

not prescribe whistleblowing arrangements, it is clear when considering wider disclosures to the media, Tribunals will consider the arrangements of the organisation. PIDA also makes it clear that any confidentiality agreements that prevent individuals from raising a concern that is covered by PIDA (aka a public interest concern) will be void in law (Section 43J).

Employers need to be hitting best practice principles in terms of their policy and arrangements. A good source of guidance is the BSI Code of Practice on Whistleblowing Arrangements. Most organisations have whistleblowing policies, and the following are some principles that employers can use to sense check their policies against:

- The organisation takes malpractice seriously, giving examples of the

- type of concerns to be raised, so distinguishing a whistleblowing concern from a grievance.
- Staff have the option to raise concerns outside of line management.
- Staff are enabled to access confidential advice from an independent body.
- The organisation will, when requested, respect 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 both to victimise a bona fide whistleblower and for someone to maliciously make a false allegation.

Even with the best policy in the world, employers still need to continually look at how the arrangements are promoted and whether staff have trust and confidence in the system. Employers should therefore identify and continue to do some of the following:

- Ensure that staff are aware of and trust the whistleblowing avenues;
- Make provision for realistic advice about what the whistleblowing process

- means for confidentiality, openness, and anonymity;
- Continually review how the procedures work in practice; and
- Regularly communicate to staff about the avenues open to them.

Thus employers would be well advised to consider their arrangements and in particular the messages that they are giving to staff. The PIDA framework balances the interests of both employers and their workers, and despite being drafted before Wikileaks, it will continue to provide protection to whistleblowers throughout the UK who have acted honestly and reasonably. Wikileaks has changed the debate on transparency, highlighting the internet as a source for publishing information. Even if Wikileaks does not survive the complexities of Assange's extradition, there are more internet-based organisations that are coming on the scene and offering to publish information. Employers would be encouraged to take this opportunity to consider what realistic alternatives exist for their workers and how public interest concerns can best be raised.

### ABOUT PUBLIC CONCERN AT WORK



Public Concern at Work is an independent, self-funding whistleblowing charity. It runs a free confidential helpline on 020 7404 6609 for people with whistleblowing concerns; promotes the public interest through its policy work; and advises public bodies, business, regulators and unions on how to create more open and accountable cultures. For more information please visit [www.pcaw.org.uk](http://www.pcaw.org.uk).

### FURTHER INFORMATION

For further information about PIDA, visit [www.pcaw.org.uk/law/pida.htm](http://www.pcaw.org.uk/law/pida.htm).

Download the British Standards Institution Code of Practice on Whistleblowing Arrangements from [www.pcaw.org.uk/bsi/index.php](http://www.pcaw.org.uk/bsi/index.php)