# PROTECTING WHISTLEBLOWERS IN THE UK: A NEW BLUEPRINT

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blueprint for FREE SPEECH

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# BLUEPRINT FOR FREE SPEECH

Blueprint for Free Speech (Blueprint) is an internationally focused not-for-profit organisation concentrating on research into 'freedoms' law. Our areas of research include public interest disclosure (whistleblowing), defamation, censorship, right to publish, shield laws, media law, Internet freedom, intellectual property and freedom of information.

We have significant expertise in whistleblowing legislation around the world, and we provide expertise and support in this to grassroots organisations across a number of countries. We are regular policy contributors to international and domestic organisations. We provide a free library of papers analysing more than 30 countries' whistleblowing laws, protections and gaps.

Our activities also include supporting the development of free software that protects the freedoms listed above. We train journalists, civil society groups and their information technology support teams on how to use technology that enhances and guards these important freedoms.

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Her vision for Blueprint is to encourage informed public debate and outcomes about freedom of expression laws through meaningful research.

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## UK Law does not – and cannot – adequately protect whistleblowers


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# INTRODUCTION:

## UK law does not – and cannot – adequately protect whistleblowers

**"PIDA is dangerous for whistleblowers because people think they have stronger protection under it than they actually do. It is tired, frayed at the edges and needs to be thoroughly reviewed."**

– Lord Touhig, former UK Member of Parliament,
co-author of the UK Public Interest Disclosure Act[1]

The Public Interest Disclosure Act (PIDA) is broken and no longer able to adequately protect whistleblowers.

When the law passed in 1998 it was generally regarded as a leading light, a well-intentioned law that would serve to protect both public sector and private sector whistleblowers.[2] But like all pioneering laws, review and restructuring to account for growing pains and lessons learned is essential for the law to keep pace with increasingly advanced tactics for retaliation.[3] What was unusual about PIDA was the fact that at the time, it passed unopposed in the parliament. This resulted in too few debates and proper consideration of the depth of protection proposed. Since then iterative change has occurred but this report shows that because of those initial failings, and because inadequate steps have since been taken to improve the protections, whistleblowers remain under-protected.

[1] "Whistleblowing laws to be overhauled as new claims emerge over NHS trust," *The Guardian*, 15 Feb. 2013; http://www.theguardian.com/politics/2013/feb/15/whistleblowing-laws-overhauled-nhs-trust, accessed 5 February 2016.

[2] Guy Dehn, who previously headed the whistleblower-support NGO Public Concern at Work, told the BBC that passing PIDA was "unbelievably fortunate," and that "it must have been a whole sequence of stars and planets in happy alignment." Rodney Bickerstaffe, head of one of the UK's largest unions, UNISON, said PIDA "paves the way for a new climate of openness and partnership at work." And employment law specialist Sara Barrett said, "Now, if you follow the correct procedures, there are laws in place to protect you – and your job."

See: "Whistleblowing laws to be overhauled as new claims emerge over NHS trust," *The Guardian*, 15 Feb. 2013; http://www.theguardian.com/politics/2013/feb/15/whistleblowing-laws-overhauled-nhs-trust, accessed 5 February 2016.

"Time to stand up and be counted?," *BBC News*, 1 Dec. 1998; http://news.bbc.co.uk/1/hi/special_report/1998/10/98/office_life/224584.stm, accessed 5 February 2016.

"UK Politics Whistleblowers protected by law," *BBC News*, 2 Jul. 1999; http://news.bbc.co.uk/1/hi/uk_politics/383482.stm, accessed 5 February 2016.

"Little lies, big mistake," *The Guardian*, 13 Dec. 1999; http://www.theguardian.com/money/1999/dec/13/secretarial, accessed 5 February 2016.

[3] For example, the U.S. *Whistleblower Protection Act* is its fourth generation.

For a combination of reasons that include the passage of time, the development of better insight into how best to protect whistleblowers and the unintended consequences of the law as then drafted, it is clear that in 2016 PIDA cannot adequately fit its purpose without a substantial makeover.

Blueprint for Free Speech (**Blueprint**) will set out in this report how the law can be changed. This report is an outline of the key failings, and importantly, the solutions available to ensure that whistleblowers in the UK are protected and disclosures in the public interest are supported.

We note that we are not the first organisation to call for many of these changes. In particular, a number of UK-based Non-Governmental Organisations (NGOs) have consistently advocated for changes to the law or policies in this area to improve them. This has included efforts by Patients First, Whistleblowers UK, Compassion In Care, Action for a Safe and Accountable People's NHS in Scotland[4] and Public Concern at Work among others, and by individual advocates in the field, some of whom have been whistleblowers themselves. In a number of ways, they have succeeded in improving some protections for the benefit of whistleblowers. This report, and our advocacy, seeks to reinforce their important work, and together as a community we hope to properly protect whistleblowers.

Our recommendations and analysis are detailed throughout this report. In summary, our key criticisms are:

1. PIDA does not protect a whistleblower from retaliation before it occurs – it instead relies on compensation after the fact (which is usually inadequate, and too late.)
2. The Employment Tribunal (**ET**) system is neither an informal, nor low-cost solution to resolve PIDA disputes. Costs are high, waiting times are long and it remains a domain for expensive lawyers in this area.
3. There is no administrative (regulatory) alternative to the ET system, where a whistleblower can seek protection before retaliation occurs.
4. Legal principles have been imported to PIDA from other areas of law, leading to unintended consequences and interpretations that diminish protection and

fails to provide proper or adequate remedies for whistleblowers. The chief culprits are compensation reduction principles and confusing (contradictory) burdens of proof to establish liability.

5. PIDA contains no direct civil or criminal penalties to stop, prevent, or discourage bullying, victimisation or harassment.[5]

The basis for our recommendations is set out in our 'Methodology' section below. Our research has been comprehensive, and has included in-depth interviews with whistleblowers, detailed examination of PIDA cases, widespread consultation in the NGO community and quantitative /qualitative data analysis.

## NO PROTECTION FROM RETALIATION

PIDA's model is focused on guaranteeing the right to make a disclosure by 'protecting' a whistleblower with remedies available after the fact. Where a whistleblower has been unfairly dismissed[6] for the making of a disclosure, or where they have suffered detriment[7] (i.e. victimisation, harassment, bullying), they may then bring a claim against their employer.

The problem with this is that a whistleblower has to wait until after they have suffered retaliation before they can obtain 'protection' and their right to make a claim crystallises. By then, the emotional, financial and psychological damage has most likely occurred. A whistleblower can only seek protection once the damage has been done. Other whistleblower laws ban not only existing retaliation, but "threatened" retaliation,[8] or retaliation because a worker is "about to" blow the whistle.[9]

The one provision that has any chance of protecting a whistleblower immediately after being dismissed, and not necessarily before retaliation has – the 'Interim Measures' section 128 of the *Employment Rights Act* – only empowers the Employment Tribunal to maintain the status quo. It does not mean the Tribunal can order a stop to retaliation. It does not mean that the Tribunal can stop victimisation or harassment. It only maintains the contractual employment relationship pending the full determination of the whistleblower's claim.

In a best-case scenario, the whistleblower will hire a lawyer, rush to a Tribunal (as

[4] Issues in the NHS in Scotland are highlighted by this group, and former Scottish MP Dorothy Grace Elder. See http://www.heraldscotland.com/opinion/14231961.Dorothy_Grace_Elder__When_it_comes_to_protecting_patients__interests__health_boards_and_bureaucrats_dominate_by_diktat/ as an example.

[5] We wish to make the distinction between direct and indirect penalties here. Although there are no 'direct' penalties under PIDA, it is possible for an individual to be personally liable to the whistleblower under Section 47B(1A). This section concerns vicarious liability where, if an employer can show they took all reasonable measure to prevent retaliation by a worker against a whistleblower, then the liability for that retaliation will transfer to the individual worker. This is a roundabout manner in which to impose individual liability. Although not contained in PIDA, a whistleblower may also have recourse under the *Protection from Harassment Act* or if an employer fails to prevent retaliation they may breach the duty of trust and confidence that is implied in all employment contracts.

[6] Part X of the Employment Rights Act.

[7] Part V of the Employment Rights Act.

[8] See, e.g., the U.S. *Whistleblower Protection Act*, 5 USC 2302(b)(8).

they only have 7 days) and ask that the Tribunal order that they remain employed. The burden is on the whistleblower to prove that they were fired for making a disclosure,[10] the process is expensive, and it by no means forces an employer to allow them to continue going to work. Perhaps because of the difficulty in obtaining such an order, or the fact that it is ineffective, or both, it is rarely used.[11] This is the best-case scenario, and even the best case is wholly inadequate.

Once a worker blows the whistle, PIDA is powerless to stop managers and co-workers from retaliating against that person. From the perspective of the whistleblower, PIDA can enable and even institutionalise retaliation, rather than preventing, stopping or penalising it. This view is upheld in graphic detail by a review of dozens of cases heard in Employment Tribunals in recent years. In this way, a law that was intended to help whistleblowers ultimately can open the door to more suffering.

Typical ET **cases can take** 20 months to conclude, from the point retaliation commences to when a ruling is reached. Median compensation is £17,422.[12]

**See:** *'Early Intervention: Stopping retaliation before it is too late'* and *'Bosnia's pre-trial mechanism'* for more detail.


[9] See. e.g., nuclear whistleblower provisions in U.S. Energy Reorganization Act, 42 USC 5851(a).

[10] This is further complicated by the fact that there are different burdens of proof on the plaintiff depending on whether or not they seek to bring a claim for unfair dismissal or because they have suffered a detriment.

## THE EMPLOYMENT TRIBUNAL FAILS WHISTLEBLOWERS

The law only gives workers the opportunity to go to an Employment Tribunal (**ET**) (not a more powerful Court that could prevent retaliation) and apply for financial compensation after they have suffered retaliation – and *after* their jobs and perhaps also their careers have been ruined.

As we point out, the length of cases is extraordinary, the cost to run them is extremely high and even then these cases often fail to fully compensate whistleblowers for their financial and other losses.[13]

In addition to this, whistleblowers are often put on trial themselves, as the forum encourages a thorough examination of their work history, their character and their conduct at work – both so that an employer can try to avoid liability or to limit compensation. A lack of specific training for ET judges means that the sensitivities of a whistleblower case are often not taken into account.

Allowing the Civil Courts to hear such claims from the start (at 'first instance') might give a whistleblower more options, as a court has greater and more flexible powers to award, for example, interim measures and award costs that would surely assist a whistleblower. Further, court access could provide for jury trials,[14] in which justice could be provided by the citizens whom whistleblowers claim to be defending. However, such a path is more expensive and formalistic than the ET. An analysis of the PIDA cases (below) as well as our in-depth interviews reveal that costs for whistleblowers are already exceedingly high – especially when compared with the low amounts of compensation awarded.

**See:** *'Unfair Fights: How UK Employment Tribunals can turn winners into losers'* and *'Problems and Solutions: 10 urgently needed reforms'*

## NO ALTERNATIVE TO THE EMPLOYMENT TRIBUNAL

Due to the obvious limitations in remedies available at the ET, the absence of an alternative route for a whistleblower means that they have no choice but to engage in a broken system.

One option might be to introduce an administrative type system (modelled on the Bosnian Law for the Protection of Whistleblowers), which allows a whistleblower to approach an independent agency and essentially seek a 'whistleblower status'. This

[11] Supported by anecdotal evidence provided by UK legal practitioners.

[12] Figure derived from Blueprint's examination of the ET cases.

[13] In one particularly extreme case involving Dr Mattu, he began to suffer reprisals in 2001 and these continued until his dismissal in 2010. His Employment Tribunal claim was not heard until 2013. The Tribunal provided their decision on liability in 2014 and the compensation was not ordered until 2016. "Sacked doctor 'was unfairly dismissed', tribunal rules," *BBC News*, 18

could be done before retaliation has occurred, and appropriate protection measures could be put in place. This is discussed in greater detail in the report.

**See:** *'Early Intervention: Stopping retaliation before it is too late'* and *'Bosnia's pre-trial mechanism'*

## UNINTENDED CONSEQUENCES OF THE DEVELOPMENT OF THE LAW – REASON SHOPPING AND BURDENS OF PROOF

Unintended developments in the interpretation of PIDA have meant that it is often the whistleblower that is put on trial. ET permits respondents to examine a worker's complete work record. This opens the door to fishing expeditions, and employers leveling trumped-up allegations against whistleblowers, in the hope that they will lose credibility, their case or have their compensation amounts reduced. The key motivation behind this strategy is to persuade an ET to decide that even if a dismissal was 'unfair', the whistleblower was dismissed for a reason other than the making of the disclosure. Because there is a cap in compensation for 'regular' unfair dismissal, but not for unfair dismissal because of a public interest disclosure, there is clear incentive to persuade an ET a dismissal is not due to whistleblowing. This strategy, known informally in the UK legal community as 'reason shopping', has succeeded in many cases.

Burdens of proof also work against a whistleblower. Firstly, there is a different burden of proof for a whistleblower to establish a detriment[15] than there is to establish unfair dismissal.[16] Such confusions and difficulties make the law less accessible to whistleblowers, and of course more expensive and time consuming when at the ET. Second - and this feeds into the 'reason shopping' point (although on liability, not on compensation reduction) – for unfair dismissal, the burden of proof flips onto an employer to establish that the principal reason for the dismissal is *other* than the making of a public interest disclosure. If they can establish this, they may avoid liability. This is important, because it again creates a strong motivation for 'reason shopping'. We advocate for a simple fix to this burden – by making a dismissal unfair if just *one* of the reasons is the making of the public interest disclosure (even if it is not the 'principal' reason).

**See:** *'Unfair Fights: How UK Employment Tribunals can turn winners into losers'* and *'Problems and Solutions: 10 urgently needed reforms'*

Apr. 2014; http://www.bbc.co.uk/news/uk-england-coventry-warwickshire-27072779, accessed 5 February 2016.

[14] Blueprint notes that jury trials for civil cases in the UK are more rare than in other countries (such as the US).

## NO PENALTIES FOR THOSE INVOLVED IN RETALIATION

PIDA imposes no direct civil or criminal penalties on those who carry out retaliation against whistleblowers. This means that although a whistleblower may be bullied, harassed or victimised, PIDA will not punish the individual perpetrators. The law has no provision for accountability to deter retaliation.[17] The only provision that has the potential to punish other workers (section 47B as amended in 2013) can only do so in a roundabout way. 47B was amended in 2013 to make an employer vicariously liable for the actions (bullying, harassment etc.) of its employees. This closed a gap where employers were arguing that they were not responsible for the actions of individuals who they happened to employ. Further, if an employer can show that they have taken 'all reasonable steps' to prevent retaliation against a whistleblower, then they will avoid liability completely. If they can show this, only then may the individual responsible for the retaliation be financially liable to the whistleblower. However, this process is yet to be judicially determined.[18]

As is plain to see, this is certainly not a direct statement from PIDA that it wishes to punish those engaged in retaliatory actions. In fact, it is more an accident than anything else. Blueprint argues that all workers engaged in retaliation should be punished, with both civil and criminal penalties.

**See:** *'Problems and Solutions: 10 urgently needed reforms'*

## PIDA'S POOR SCORE AGAINST INTERNATIONAL STANDARDS

A comparison of PIDA against international standards, presented in this report, shows that it falls short of providing a complete whistleblower protection framework. PIDA contains less than half of the best practice legal elements as set out in international standards.

Our analysis shows that of 27 recognised international standards, 13 are completely missing from the law.[19] Overall, PIDA achieved a mark of 38 percent – well below what we would expect of a world-leading whistleblower protection law. While this is a serious problem for whistleblowers in the UK, it is even more problematic when other countries look to the UK law as a template for best practice, when it clearly has so many shortcomings.

**See:** *'Not Measuring Up: PIDA now rates poorly against international standards'*

[15] Employment Rights Act 1996, section 47B.

[16] Employment Rights Act, Section 103A.

[17] We also note that a worker may bring a claim under other Acts – such as the *Protection from Harassment Act*. Additionally, an employer who does not stop retaliation may breach the duty of trust and confidence that is implied to all employment contracts. However this right is not found in PIDA itself.

[18] Again, we note that protections may be found elsewhere. However, they are not in PIDA.

Today, more than 25 countries around the world – from Colombia to Finland, and from Taiwan to Tunisia – are improving or considering new whistleblower laws. It is critical that lawmakers, civil society and the media in these countries are made aware of PIDA's shortcomings. If not, workers there will risk falling into the same traps that have entangled people in the UK over the past 18 years.

This report provides a blueprint for change. It shows that the UK's Public Interest Disclosure Act falls short against many standards developed by international organisations and NGOs over the past five years.

PIDA must be significantly overhauled in order to meet these standards. If not, workers in the UK will continue to risk facing fierce retaliation – simply because they saw something wrong and reported it to someone to try and fix it.

The intense organisational and human impulses to retaliate against whistleblowers necessitate ironclad protections and full compensation. There is a need for clear steps and timelines for investigating whistleblower disclosures, both in government agencies and private companies. Too often, reports are ignored or downplayed, and the results of investigations are not made known to interested parties or, where appropriate, the public. Meanwhile, whistleblowers are cast aside.

Because of social forces that laws cannot control – such as reputational damage and boycotting – PIDA must be significantly strengthened to regulate and compensate for what it can:

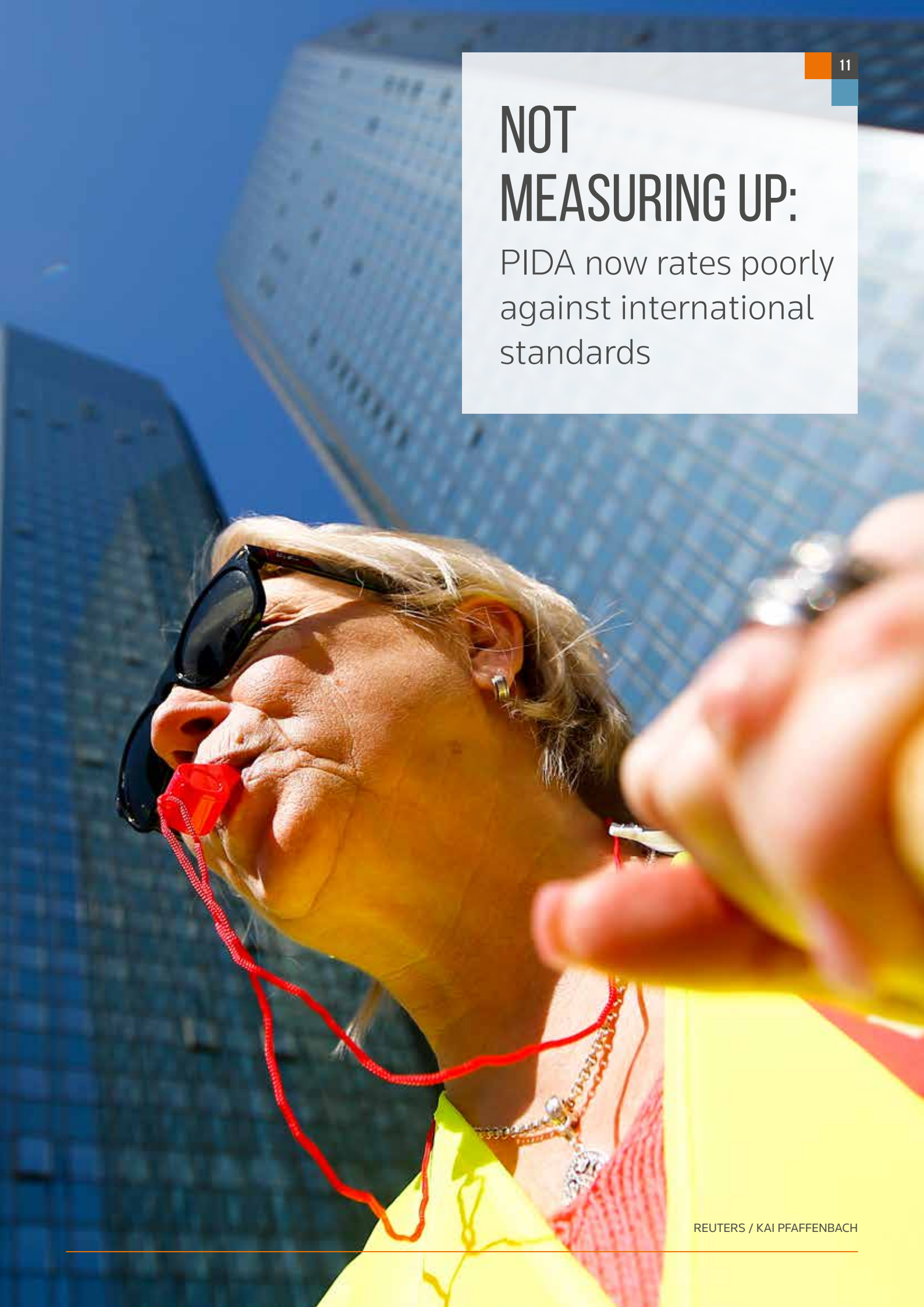
- preemptive protection from all forms of retaliation – before job or career ruin
- modern burdens of proof that provide fair odds for whistleblowers to defend their rights
- substantial penalties for those who retaliate against whistleblowers, and for those who ignore orders to cease retaliation
- full compensation to cover all costs and loss to whistleblowers
- mandatory independent investigations of bona fide reports of misconduct, and corrective action
- a requirement for employers to make a range of disclosure channels available to workers, including anonymous reporting

- training for managers in the public and private sectors
- an obligation on prescribed bodies to investigate allegations and provide a response with reasons for any action or inaction

Because it fails to adequately cover these areas, PIDA needs significant reform. This report identifies many points of improvement that policy-makers, commentators and whistleblower support NGOs should urgently consider.

# NOT MEASURING UP:

## PIDA now rates poorly against international standards



REUTERS / KAI PFAFFENBACH

# NOT MEASURING UP:

## PIDA now rates poorly against international standards

When it was passed in 1998, the UK Public Interest Disclosure Act (PIDA) was held up as one of the best whistleblower protection laws in the world. It was a pioneering step forward in legislation for the protection of whistleblowers. Even almost 20 years later, Ethical Boardroom, a leading governance magazine, wrote last year: "Today, it is still one of the best in the world."[20]

The original sentiment surrounding the Act and statements such as these have created the impression among policy-makers, civil society and academia that PIDA is a model that should be replicated around the world.[21] Indeed, PIDA has been used as a template for whistleblower laws and policies in many regions. This is especially true of Anglophone and Commonwealth countries. Recently, Australia passed its own national Public Interest Disclosure Act in 2013, modelled on PIDA (albeit with some improvements such as the inclusion of the armed forces and national security sectors). Ireland also passed its Protected Disclosures Act in 2014 which again follows in the footsteps of PIDA.[22]

However, PIDA's widely publicised failings have begun to tarnish the law's reputation. The dangers faced by whistleblowers – from firing and harassment, to bullying and boycotting – can plainly be traced to major flaws and gaps in the law itself.

An analysis shows that when compared against a list of international standards, PIDA contains only 37 percent of these standards for whistleblower protection legislation.

The authors of this report measured PIDA against a set of 26 standards developed by international organisations and NGOs with expertise in whistleblower protection.

[19] Below, we set out the methodology for how we selected these principles. Essentially, they are an amalgamation of the key principles from each of the major international whistleblower protection laws. Against this select list of 26 criteria, the UK's PIDA was scored out of four for each.

[20] Armstrong, A. "Protecting The Whistleblower," Ethical Boardroom, 19 Jan. 2015; http://ethicalboardroom.com/regulatory/protecting-whistleblower/, accessed 5 February 2016.

[21] We qualify this statement by acknowledging that some have indeed previously criticised PIDA for its shortcomings. See, for example, Lewis "*Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected?*" *Journal of Business Ethics*, Vol. 82, No. 2, (Oct., 2008), pp. 497-507.

For each standard, we gave PIDA a score ranging from '0' to '4'. If PIDA contained no provisions meeting a particular standard, it received a '0'. If it contained complete coverage of the standard, it scored a '4'. Partial coverage in the law earned a range of points from '1' to '3.5', depending on the degree of coverage.

Out of maximum possible score of 104, PIDA received 38.5 points – or 37 percent.

We scored PIDA a '0' for 13 of the 26 standards – meaning these standards are completely missing from PIDA. Further, PIDA scored less than 50 percent in four of six legislative categories: protection, remedies and relief, administration, and whistleblower engagement.

The 26 standards are derived from publications and research from the following organisations:[23]

- Blueprint for Free Speech – "Blueprint Principles for Whistleblower Protection"
- Council of Europe – "Recommendation on the Protection of Whistleblowers"
- Government Accountability Project – "International Best Practices for Whistleblower Policies"
- OECD – "Compendium of Best Practices and Guiding Principles"
- Organization of American States (OAS) – "Model Law to Facilitate Reporting and Protect Whistleblowers"
- Transparency International – "International Principles for Whistleblower Legislation"

Based on the analysis, PIDA is significantly out-of-step with current recommended standards.

**26 international standards**
**Points per standard: 0-4**
**Maximum total score: 104**
**PIDA's score: 38.5 of 104 (37%)**

**Summary:**
**PIDA covers 37 percent of recognised international standards for whistleblower protection legislation. PIDA scores a '0' for 13 of the 26 standards – meaning these standards are completely missing from PIDA.**

[22] A great example of improvement between PIDA and the Irish Act is the Protected Disclosures Act's Section 23 which prevents the contracting out ('gagging clauses') against any part of the Act. This is a strong development from the partly ineffectual S43J in PIDA.

The 26 international standards are grouped into 6 legislative categories. PIDA's scores for these categories are:

- Coverage: 11 of 20 (55%)
- Protection: 8 of 28 (29%)
- Disclosure: 12 of 20 (60%)
- Remedies and relief: 7.5 of 16 (47%)
- Administration: 0 of 16 (0%)
- Engagement: 0 of 4 (0%)

In each category, the international standard is listed, followed by a rationale for why it is included as a standard, the rating that PIDA received in this category, and why this rating is given.

## A) COVERAGE

**(1)** Legislation should apply to the public, private and non-profit sectors, as well as the armed forces.

*Rationale:* To ensure protections it must cover all workers in all types of organisations, with no exceptions.

**RATING: 3.5**
**Reason: PIDA just misses out on a perfect score, as it does not apply to workers in the national security and armed services sectors, so they have no legal recourse if they are retaliated against for reporting crime or misconduct.[24] However, commendation is given due to its application to both public and private sectors.**

**(2)** Disclosures must explicitly concern or threaten the public interest in order to qualify as "whistleblowing."[25] In line with the principles, disclosures must be related to:[26]

- criminal offences
- corruption[27]
- fraud
- specific breaches of legal obligation
- specific dangers to public health, public safety or the environment

[23] Consideration was also given to '*The Global Principles on National Security and the Right to Information* (The Tshwane Principles)', published by the *Open Society Foundation*. These may be accessed at https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles, accessed on 5 February 2016.

[24] See Section 192 which does not make applicable Part IVA of the ERA (the PIDA provisions) to the armed forces.

- specific abuses of public authority
- unauthorised use of public funds, property or resources
- gross waste of public funds or property
- gross public mismanagement
- specific conflicts of interest
- miscarriage of justice
- human rights violations
- fraudulent financial disclosures by government agencies or regulated corporations
- acts to cover up of any of these

*Rationale:* To ensure that all forms of serious violations that concern or threaten the public interest may be reported.

**RATING: 2**

**Reason: PIDA excludes many of these types of wrongdoing, which means that workers who disclose offenses not listed in PIDA may not be legally protected from retaliation.**[28]

**(3)** A "whistleblower" is any person who reports or discloses information (meeting the criteria in Standard 2) in the context of their work-based relationship.[29] In addition to employees, whistleblowers may be people outside the traditional employee-employer relationship, irrespective of their work status and whether or not they are paid, including:

- consultants
- contractors
- trainees/interns
- volunteers
- student workers
- temporary workers
- former employees
- prospective workers/job applicants

[25] Grievances and complaints that are strictly employment-related are not considered whistleblowing.

[26] May include other categories of offenses and wrongdoing, given that they meet the public interest test.

[27] As defined by national laws.

[28] Those specifically not mentioned in Section 43B of the ERA include: corruption, fraud (although both are criminal offences), abuse of public authority, unauthorised use of public funds, gross waste of funds, gross public mismanagement, specific conflicts of interest, miscarriage of justice, human rights violations and any action taken to cover these up. Although it might be argued that many of these are caught up in the 'criminal' catch-all element of 43B, it is important to specifically list these in

*Rationale:* To ensure that all people who are subject to the management of an organisation (i.e. exposed to retaliation) may receive legal protection.

**RATING: 3.5**

**Reason: PIDA excludes several of these categories, including interns and volunteers, which means they may not be legally protected from retaliation.**[30]

**(4)** Protections should also cover people:

- who are mistakenly identified as whistleblowers
- who provide supporting information regarding a whistleblower's disclosure
- who assist or attempt to assist a whistleblower
- who are asking the hard questions or conducting the research necessary for credible, responsible disclosures

*Rationale:* To ensure that people considering or preparing to blow the whistle, linked to whistleblowers, or believed to be whistleblowers, may also receive full legal protection.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, meaning that people in these positions have no legal recourse against retaliation.**

**(5)** Whistleblowers shall be protected from all types of direct or indirect retaliation, punishment and disadvantage, including:

- dismissal
- demotion, probation, suspension, disciplinary measures and other employment sanctions
- negative performance assessments and employment references, or other reputational damage
- involuntary or punitive transfer, relocation or leave of absence
- harassment (i.e. "bullying" and "mobbing")
- reduced duties or hours
- withholding of promotions or training
- loss or reduction of status or benefits

the legislation as a whistleblower might not always be familiar with the types of wrongdoing that could be criminal.

[29] Some have in fact called for a complete separation of the concept of whistleblower from the employer/worker relationship.

- orders to undergo medical tests or examinations
- change in duties, responsibilities or working conditions
- failure by managers to prevent retaliation, punishment or disadvantage
- any acts that constitute an unwarranted modification of workplace or hierarchical relations
- recommended, threatened and attempted retaliation
- civil or criminal liability
- any other harassment that would chill the exercise of free speech rights

*Rationale:* To ensure that whistleblowers may be protected from all types of retaliation, including indirect and creative forms.

**RATING: 2**

**Reason: PIDA includes no list of retaliatory actions, though Employment Tribunals have considered some[31] of these measures taken against workers as retaliation.[32]**

## B) PROTECTION

**(6)** Protection shall be granted for those who make a disclosure with a reasonable [33] belief that the information is true at the time it is disclosed, and to those who report inaccurate information in honest error.

*Rationale:* To ensure the threshold for truth that whistleblowers must meet is not burdensome, and that they may not suffer for making an honest mistake.

**RATING: 3**

**Reason: There are no explicit protections for disclosures made in honest error, meaning that people who mistakenly report inaccurate information may not be protected from retaliation. However, the abolition of 'good faith' as a requirement (except for at remedies) has considerably improved this protection.**

Some laws extend protections beyond this traditional relationship (to varying extents), including Australia, Bosnia, Ghana, Hungary, India, Ireland, Jamaica, Liberia, Malaysia, New Zealand, Serbia, Uganda and Zambia.

[30] Those specifically not mentioned in 43K and the Act's definition of a 'worker' include volunteers, former workers, student workers and prospective workers.

[31] Including demotion, suspension, transfers, reduced duties, disciplinary measures, harassment, bullying and etc. This is a non-exhaustive list – the case law research undertaken revealed a startling array of methods of reprisal against whistleblowers. As this is an examination of PIDA as drafted, and not the case law (which is not binding at the tribunal level), we could not grant PIDA a higher score than 2.

**(7)** A person who makes a disclosure within the scope of the law shall be immune from any disciplinary proceedings and liability under criminal, civil, administrative and other laws and regulations in relation to that disclosure.[34]

*Rationale:* To ensure whistleblowers may not be sued, prosecuted, or face legal or other sanctions for making a public interest disclosure.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, meaning that legitimate whistleblowers could face criminal, civil or administrative penalties.**

**(8)** The identity of the whistleblower may not be disclosed without the individual's explicit consent.[35] Protections shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent.

*Rationale:* To ensure whistleblowers' names and other identifying information are not released to other parties or to the public without their permission.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, meaning that the names of whistleblowers could be released without their permission, and anonymous whistleblowers punished if their names are released.**

**(9)** An employer must clearly and convincingly demonstrate that any detrimental measure taken against a worker was in no sense connected with, or motivated by, their disclosure.[36]

*Rationale:* To ensure employers cannot use a case of whistleblowing as a pretext to discipline a worker, and to free whistleblowers of this burden of proof.

**RATING: 2**

**Reason: This standard is partially missing from PIDA, which allows employers to fire whistleblowers based on trumped-up allegations.**[37]

[32] Although the definition of 'detriment' is largely discussed in case law, in most cases ET judges have caught the above conduct as being included as a 'detriment'. However, it is not listed in PIDA / the ERA and this may work against the normative purpose of the law.

[33] We note that it is argued by some that this threshold should be further lowered to 'reasonable suspicion'.

[34] Including but not limited to libel, slander, confidentiality, trade/business secrets, copyright, and data protection.

[35] There may be exceptions if a person's identity is required to be known in the course of judicial proceedings, or if it is necessary to prevent specific dangers to public health, public safety or the environment.

[36] A worker must demonstrate only a *prima facie* case that he or she made a public interest report or disclosure and suffered a

**(10)** Employees and workers have the right to decline to participate in corrupt, illegal or fraudulent acts. They are legally protected from any form of retribution if they exercise this right.

*Rationale:* To ensure workers may refuse to be complicit in misconduct.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, meaning that workers can be legally fired if they refuse to participate in crime or misconduct.**[38]

**(11)** Whistleblower rights shall override worker "loyalty oaths" and confidentiality or nondisclosure agreements that restrict free expression rights or impose prior restraint on speech.[39]

*Rationale:* To ensure employment "gag orders" cannot be used to prevent workers from making public interest disclosures.

**RATING: 3**

**Reason: Although Section 43J of PIDA attempts to ensure that a provision of a contract cannot preclude a whistleblower from making a disclosure, it does not expressly prevent an employer from gagging a whistleblower in all respects.**[40]

**(12)** A whistleblower whose health, life or safety is in jeopardy, as well as his or her family members and affected friends/associates, is entitled to receive personal protection measures.[41]

*Rationale:* To ensure whistleblowers may receive any and all necessary protections, depending on the particulars of the case.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, meaning that whistleblowers and their families may not be protected from physical harm.**

detriment. The burden then shifts to the employer, who must prove any such action was fair and not linked in any way to the whistleblowing.

[37] The burden of proof for detriment, unfair dismissal and interim relief all vary and in any case, it is open that a whistleblower can suffer detriment or be unfairly dismissed even if they have made a protected disclosure. An employer must prove only that the disclosure wasn't the 'principal' reason for the dismissal.

[38] We note that the common law right to refuse an unlawful order is not affected, however, no mention is made of this in PIDA itself. It is important to set it out clearly in the PIDA legislation so that whistleblowers without legal training can more readily understand their rights. This is particularly so given that PIDA cases are heard in the Employment Tribunal where whistleblowers can, in theory, engage more actively in their own cases.

## C) DISCLOSURE

**(13)** Government agencies[42] and private companies[43] shall implement and maintain whistleblower policies / systems that meet prevailing standards. Failure to do so within a given time period after the law takes effect may result in civil penalties and other sanctions. These systems shall:

- be regularly promoted and in clear and understandable terms
- maintain confidentiality or anonymity (unless explicitly waived by the whistleblower)
- ensure thorough and timely investigations of whistleblowers' disclosures
- produce annual reports recording the numbers of disclosures, steps taken and remedial action taken
- have enforceable mechanisms requiring them to investigate whistleblowers' retaliation complaints within strict, short time frames (including a process for disciplining those who retaliate against them)
- have enforceable mechanisms to restore whistleblowers who faced retaliation to their previous position and status within strict, short time frames

*Rationale:* To ensure workers have the tools to make a public interest disclosure within a workplace setting.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, which means that employers are not legally required to put whistleblower procedures in place.**

**(14)** A suitably diverse range of disclosure channels and tools should be made available to workers, including but not limited to hotlines, online portals, advice lines, compliance officers, and internal or external ombudspersons. Mechanisms shall be provided for confidential or anonymous disclosures to be made safely and securely.[44]

*Rationale:* To ensure workers can choose the particular disclosure channel or channels that best serves them.

[39] No employment/work contract or settlement agreement may preclude someone from making a public interest report or disclosure. In this sense, no one can be "contracted out" of the right to be a whistleblower.

[40] For this deficiency, we downgraded the score for this criterion from a '4' to a '3'. As it is currently drafted, it is open for employers to insert creative 'gag clause' into settlement agreements that may get around this provision.

**RATING: 4**

**Reason: This standard is adequately incorporated into PIDA as it sets out clear disclosure channels inside an organisation (section 43C), to a relevant regulator, to government MPs and to any other person in relevant circumstances (including the media). See Sections 43C to 43H).**[45]

**(15)** If reporting at the workplace is demonstrably impractical or impossible, individuals may make disclosures to government regulatory or oversight agencies.

*Rationale:* To ensure workers in vulnerable or dangerous situations may report misconduct outside their organisation to the appropriate authorities.

**RATING: 4**

**Reason: This standard is adequately incorporated into PIDA.**

**(16)** In cases of urgent or grave public or personal danger, or persistently unaddressed wrongdoing that affects the public interest, individuals shall be protected for disclosures made to external parties such as elected officials, the media, civil society organisations, legal associations, labour unions and business/professional organisations.

*Rationale:* To ensure that imminent dangers may be prevented or reduced through public disclosures.

**RATING: 4**

**Reason: This standard is adequately incorporated into PIDA.**

**(17)** Where a disclosure concerns matters of national security, military secrets or classified information, special procedures and safeguards for reporting that take into account the sensitive nature of the subject matter may be adopted in order to promote successful internal follow-up and resolution, and to prevent unnecessary external exposure. These procedures should permit internal disclosures, disclosures to an autonomous oversight body that is institutionally and operationally independent from the security sector, or disclosures to authorities with the appropriate security clearance. External disclosure (see Standard 16) would be justified in demonstrable cases of urgent or grave threats to public health, safety or the environment; if an internal disclosure could lead to personal harm or the destruction of evidence; and if the disclosure was not intended or likely to significantly harm national security or individuals.[46]

[41] Such measures might include relocation, physical protection and any other order that ensures the safety of those affected.

[42] Including government-owned or managed companies, and public-private companies and partnerships.

[43] Companies that meet certain thresholds or criteria (e.g. publicly traded, subject to specific regulation, within certain industries or sectors, having a minimum annual revenue or workforce size).

[44] In accordance with relevant data protection laws and regulations.

*Rationale:* To ensure wrongdoing concerning sensitive issues can be disclosed to the proper authorities without jeopardising national security, and that in urgent cases the public may be informed in order to prevent or reduce public harm.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, meaning that people who work in the national security and military sectors lack legal recourse for retaliation.**[47]

## D) REMEDIES AND RELIEF

**(18)** A full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim of making the whistleblower whole. These include:

- interim and injunctive relief pending the outcome of administrative, judicial or other proceedings
- compensation for lost past, present and future earnings and status
- transfer to a new department or supervisor, without diminishing salary, status, duties and working conditions
- paid leave, with no negative repercussions
- compensation for pain and suffering
- legal and mediation fees
- education, retraining and other occupational/professional support[48]
- compensation and other damage from former employers who reveal whistleblowing conduct to future employers
- lengthier timeframes for claims against an employer where the detriment is not immediately apparent, manifests at a later time or worsens at a later time
- removal of any negative records that could be a "dossier" for blacklisting or later retaliation
- commendations or awards for blowing the whistle, to discredit even unwritten attempts to smear whistleblowers by bitter employers whose misconduct has been exposed
- any other relief necessary for the whistleblower to be "made whole"

[45] Although there are clear disclosure channels available to a whistleblower, some have criticised PIDA for impeding freedom of speech as it restricts either by scope or by operation the ability of a whistleblower to choose their disclosure channel freely (or at least not outside of a determined order). However, when compared with other laws that do not allow external disclosure at all, PIDA compares favourably.

[46] "Classified" material must be clearly marked as such, and cannot be retroactively declared Classified after a protected disclosure has been made.

[47] Although not directly PIDA related, consider also the potential threat of criminal sanction under the Official Secrets Act

*Rationale:* To ensure whistleblowers who suffer retaliation or reprisals have the opportunity to be compensated completely for their losses, and will not suffer permanent damage to their careers and livelihoods.

**RATING: 2.5**

**Reason: PIDA does not include a comprehensive list of remedies to which whistleblowers are legally entitled.**

**(19)** Whistleblowers who believe their rights have been violated are entitled to a fair hearing before an impartial forum,[49] with full right of appeal. Decisions shall be timely and transparent, and whistleblowers may confront accusers and cross-examine witnesses. The rules of procedure must be balanced and objective, with reasonable deadlines.

*Rationale:* To ensure whistleblowers have the same right and access to judicial remedies as all other aggrieved parties, and that they may have their "day in court."

**RATING: 4**

**Reason: This standard is adequately incorporated into PIDA.**

**(20)** Whistleblowers may receive a portion of any funds recovered, fines levied or other financial benefits achieved as a result of their disclosure.[50]

*Rationale:* To ensure whistleblowers obtain something in return for exposing themselves to retaliation, and to acknowledge their efforts.

**RATING: 0**

**Reason: This standard is completely missing from PIDA. This significantly reduces the ability of a whistleblower to be encouraged to come forward, and in turn be rewarded for the risk undertaken.**

**(21)** People who retaliate against whistleblowers, who are involved with or threaten retaliation, or who intentionally fail to protect a whistleblower shall be subject to employment sanctions and civil and potentially criminal penalties.[51]

*Rationale:* To ensure that retaliators are held to account for their actions, and to deter individuals and organisations from retaliating against whistleblowers.

for national security whistleblowers making public interest disclosures. This is a significant problem for PIDA and does not reconcile with its intention to reveal wrongdoing where only an insider (a whistleblower) will be aware of the wrongdoing. This is important in areas such as the armed forces and intelligence communities, where information is more closely guarded than elsewhere, and therefore the potential for unexamined wrongdoing is higher. As seen by disclosures from whistleblowers such as Edward Snowden, they may be the most significant for exposing the worst abuses of public trust.

**RATING: 1**

**Reason: This standard is almost completely missing from PIDA, meaning that there are no legal disincentives preventing people from retaliating against a worker who reports misconduct.**[52]

## E) ADMINISTRATION

**(22)** A dedicated government agency, or a dedicated division within an existing government agency, shall:

- receive and investigate complaints of retaliation and improper investigations of whistleblower disclosures
- collect all workplace whistleblower disclosures from the agencies to which they were reported, and monitor their investigation and any corrective action
- refer information regarding crimes or misconduct reported by whistleblowers to regulatory, investigative or prosecutorial authorities for follow-up, corrective actions and/or policy reforms; results of investigations should be made public, in accordance with current law
- have the authority to order an investigation if an internal investigation is inadequate or not conducted within a reasonable amount of time
- have the ability to issue penalties to agencies or organisations that do not promptly and adequately follow up on valid whistleblower disclosures
- have the authority to order any public, private or non-profit sector organisation to cease retaliation against a whistleblower, to order a victimised whistleblower to be fully compensated and reinstated to their position and status, and to otherwise order an organisation to make a whistleblower whole
- provide advice and support to whistleblowers, monitor and review whistleblower frameworks, raise public awareness about whistleblower provisions, and enhance the cultural acceptance of whistleblowing
- collect and regularly publish (at least annually) data and information regarding the functioning of whistleblower laws and frameworks

[48] May also include medical expenses, relocation costs and/or identity protection.

[49] Which is specialised in handling whistleblowing related cases.

[50] If appropriate within the national context or within a certain sector or industry.

[51] Depending on the national context, criminal penalties may also apply if the act of retaliation is grievous (e.g. intentionally placing the whistleblower's safety or life at risk).

[52] Note that there is potentially personal liability under section 4747B(1A). However, the only provision seeking to discourage individual workers from retaliating is the vicarious liability created by section 47B of the Employment Rights Act. Where the employer can establish

- report annually to the national legislative and executive branches the outcomes of all workplace whistleblower reports, including the results of all investigations, sanctions and prosecutions

*Rationale:* To ensure sufficient resources and expertise are devoted to the full range of whistleblower issues, that the dedicated agency operates with a degree of independence, whistleblower disclosures and retaliation complaints are followed up, victimised whistleblowers are made whole, and crime and wrongdoing are properly investigated and corrected.

**RATING: 0**

**Reason: This standard is completely missing from PIDA. The UK has no designated administrative agency to implement or enforce PIDA.**

**(23)** If an investigation based on a whistleblower's disclosure leads to prosecutions, sanctions, corrective actions, policy reforms or other measures, information on the investigation and any resulting measures shall be made public.

*Rationale:* To ensure that results of investigations based on whistleblower disclosures are transparent and not "swept under the carpet," and to incentivise other whistleblowers to come forward by virtue of the fact that the outcome and impact of disclosures are made public.

**RATING: 0**

**Reason: This standard is completely missing from PIDA. There is no assurance that whistleblower reports will be followed up with meaningful investigative and prosecutorial action.**[53]

**(24)** Whistleblower laws and regulations shall be regularly and formally reviewed (at least every five years). This review must involve key stakeholders, including employee organisations, business/employer associations, civil society organisations and academia. The process must be transparent and inclusive.

*Rationale:* To ensure the whistleblower framework is regularly updated and improved if needed, and that this process is transparent and involves a range of public representatives.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, meaning that there is no requirement for PIDA to be periodically reviewed and amended/improved if needed.**

they have taken all reasonable steps to prevent a worker victimising a whistleblower, the victimising worker may be personally liable for any damages or compensation. Yet, its intention was merely to prevent an employer from seeking to avoid liability, rather than an express intention to additionally punish workers involved in victimisation. These amendments came into force following the Court of Appeal's decision not to imply vicarious liability from elsewhere than the ERA in the decision of *NHS Manchester v Fecitt and others*

**(25)** Training shall be provided for public sector agencies and regulated corporations and their management and staff. Whistleblower laws and procedures shall be posted clearly in workplaces where their provisions apply.

*Rationale:* To ensure managers have adequate knowledge to administer whistleblower frameworks, and that workers are fully aware of their rights under the law.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, meaning there is no requirement for employers, workers or the general public to be made aware of the law.**

## F) ENGAGEMENT

**(26)** Whistleblowers shall have a meaningful opportunity – but are not required – to clarify their complaint or provide additional information or evidence. They have the right to be informed of the outcome of any investigation or finding, and to review and comment on any results. They should also have the right to appeal the result of any investigation or finding. Penalties may apply for agencies or organisations that do not inform whistleblowers of the outcome of investigations.

*Rationale:* To ensure whistleblowers become stakeholders in the process if they so choose, that results of investigations are transparent, and to incentivise other whistleblowers to come forward by virtue of the fact that they have the right to be informed of the outcome of cases.

**RATING: 0**

**Reason: This standard is completely missing from PIDA, meaning that whistleblowers may not learn the results of their disclosures.**

# UNFAIR FIGHTS:

## How UK Employment Tribunals can turn winners into losers

REUTERS / LUKE MACGREGOR

# UNFAIR FIGHTS:

## How UK Employment Tribunals can turn winners into losers

**"It is not for us to step into the [employer's] shoes and substitute our findings ... for those of the employer."**

– Leeds Employment Tribunal, 17 April 2013

Workers in the UK who believe they have been fired or otherwise retaliated against for reporting misconduct can take their case to an Employment Tribunal (ET) if they pay fees or qualify for fee remission.[54] The ET is a tribunal, independent from the government, where a judge or panel hears the evidence to determine whether a worker was treated unfairly and, if so, how much financial compensation it is "just and equitable" for them to receive.

Unlike typical civil courts, the UK's Employment Tribunals were originally designed to be informal and accessible. On the surface, the process appears to be uncomplicated.

Aggrieved workers, including whistleblowers who have suffered retaliation, can file an unfair dismissal or detriment claim with their local ET by filling out a simple online form that consists mainly of check-boxes. Myriad free advice and support – written in plainly worded language for laypeople – is available online. One does not need to hire a lawyer. Most hearings, if a case gets that far, last only one or two days.

Whistleblowers who read about Employment Tribunals and PIDA are presented with a straightforward, user-friendly system. They are told it is against the law to retaliate against a person for reporting misconduct in the public interest. They are told they will be adequately and fairly compensated for any harm they suffer. They are told the system has been set up for their benefit.

The reality, however, does not live up to this promise.

[2012] IRLR 64 (CA). The case may be found at http://www.bailii.org/ew/cases/EWCA/Civ/2011/1190.html. A further step might be that retaliators could or should be subject to sanction such as disciplinary measures or dismissal in certain cases.

[53] This may soon change. In 2015 the UK government passed the *Small Business and Enterprise Regulatory Reform Act*

## LEGAL TWISTS AND TURNS

Blueprint conducted in-depth reviews of 50 cases filed with Employment Tribunals since 2006 along with conducting 12 detailed formal interviews with whistleblowers. These cases were selected based on a method set out in an annexure to this report – 'Methodology'. The resulting analysis shows that many whistleblowers who seem to be in the position to win their cases and receive adequate compensation have had their actions and motives questioned by ET judges. Although this is of course the duty of a judge, a whistleblower's compensation is often chipped away by obscure legal technicalities that are tilted against whistleblowers.

We will first discuss the broad themes that were immediately apparent from analysing these cases, and then give specific examples from the cases which illustrate particular points.

Employers have the ability to raise with a tribunal a whistleblowers' work history and use virtually any blemish, regardless of how trivial, as a reason to ask a judge to rule against a whistleblower or lower their compensation amounts – even if a blemish is completely unrelated to the whistleblowing case, occurred in the distant past, is common to other workers who are not punished, or would not have been an issue in the absence of whistleblowing.

Some whistleblowers in the UK have lost their cases – and thus received no compensation for being retaliated against – for extraneous and sometimes irrelevant reasons, including not reporting wrongdoing quickly enough, and for copying or taking internal documents that were necessary to support their disclosures due to unreasonable claims that an employer "owns" and the whistleblower has "stolen" any evidence proving its own misconduct, not just proprietary information or trade secrets. This creates a classic 'catch 22' situation – a whistleblower must establish their reasonable belief in the wrongdoing but in trying to do so can be punished.

Many whistleblowers, especially those without legal representatives, are in the dark about these pitfalls. Many whistleblowers would have no way of knowing that ET judges and opposing lawyers can introduce embarrassing details about their work history, and use these details to assassinate their character in court and weaken their legal case.

Moreover, the Employment Tribunal website does not thoroughly explain what types of compensation whistleblowers can receive. Thus, many whistleblowers – especially those without legal representation – may not be aware of the full range of compensation to which they are entitled.

Under these conditions, going through the Employment Tribunal process can be a long and uncertain road for whistleblowers. Only 18.7 percent of PIDA claimants take their cases to a final Employment Tribunal hearing.[55] While an impressive percentage of 24 percent of those who do go to a hearing "win" their case, even those are often Pyrrhic victories of little practical value beyond vindication. And that's for the less than 20% who receive their day in 'court'.

Based on the Blueprint analysis, from the point that retaliation starts to when the ET reaches a verdict, the typical case in which a whistleblower prevails takes an average of 20 months. The median compensation for those who win their case is £17,422, based on our review of 96 ET rulings that awarded compensation.[56]

Even if a whistleblower wins in a Tribunal, there is a good chance that significant damage already has been done to the person's career, emotional condition, and professional and personal reputations. It is also likely that the compensation is not enough to make up for their actual financial losses.

## COSTS AND FEES

The length of an ET hearing from first filing the claim to ultimate resolution is considerable, and the impact that this has on a whistleblower is significant. However, to even get to that stage a whistleblower must have paid the considerable fees to have their case listed with the ET and in most instances (because of the complexities of running a case) they need to employ legal assistance. The longer a case drags on, the higher the fees. In some cases the lawyer's fees for whistleblowers can be enormous. There are two issues with this. First, the prospect of spending tens of thousands of pounds on legal fees up front can deter whistleblowers from coming forward in the first place. This comes at great cost to the community because matters which would otherwise be in the public domain remain hidden and wrongdoing persists.

*2015* which by its section 148 introduced the new section 43FA of the Employment Rights Act. This new section gives the government the power to pass regulations requiring certain persons to report annually on disclosures they receive. At the time of writing, these regulations have not passed.

Second, as was the experience of almost every whistleblower we interviewed for the purposes of this research, not only do whistleblowers face immediate retaliation for the making of a disclosure, they then have to face substantial bills just to exercise their basic right not to be unfairly dismissed or face detriment.


## OUTGUNNED AND OUTMANEUVERED

A closer look at the legal standards that Employment Tribunals use to decide PIDA cases makes it clear that whistleblowers in the UK are not standing on a level playing field. It is not enough that they have to go through a long, uncertain and potentially expensive legal battle, but the battle itself often is not a fair fight.

Blueprint's examination of the cases reveals that one of the tactics most commonly used by employers against whistleblowers is to concoct allegations of wrongdoing and initiate dubious disciplinary actions against them. Employers then say the worker was fired or demoted because of the alleged wrongdoing – and not because the person exposed misconduct. A review of Employment Tribunal cases reveals this tactic has led to whistleblowers losing their cases or having their compensation amounts reduced.[57]

[54] Later in this report Blueprint argues that fees should be removed for whistleblowers making an application to the tribunal. This is one of the first hurdles, and a very costly one for underfunded litigants (many of whom will not qualify for the fee remission).

## DUBIOUS ALLEGATIONS AGAINST WHISTLEBLOWERS ARE PERMITTED

One of the main intentions of PIDA was to automatically protect workers from dismissal and other workplace reprisals if they report misconduct. The UK's Employment Rights Act (ERA), within which PIDA is embedded, does not create airtight protections for whistleblowers.

The ERA does not clearly place the burden of proof on employers to show they fired a worker for reasons other than the worker's act of whistleblowing. This lack of clarity has created challenges for whistleblowers in their Employment Tribunal cases, and even a Supreme Court of Judicature has found the wording vague.[58] As an example, the lack of clarity is demonstrated by different burdens of proof for detriment and dismissal, the former being a lower threshold than the latter. Such a difference arises from the language of the legislation.

In addition to this lack of clarity, the ERA allows employers to introduce other reasons for having fired a worker – a tactic known in the UK legal community as "reason shopping." This is a timeless, universal, almost gut reaction that goes far beyond whistleblower laws. But PIDA needs to be tightened to neutralise the tactic. The problem with "reason shopping" is that it is a fishing expedition which would not have occurred in the absence of whistleblowing. Effective whistleblower laws disqualify smears unless the employer "would have" discovered and acted on the misconduct in the absence of whistleblowing. Otherwise, there is a blank check for pretexts. Unfortunately, PIDA is not structured to preclude this abuse.

In the case of whistleblowers, transcripts of Tribunal cases show these reasons are often dubious or even bogus. This forces whistleblowers to present evidence that their disclosures caused their firing, which employers can then challenge with often dubious claims that the worker was performing poorly. Often, Tribunal judges are left to make subjective rulings without clear evidence.[59] This problem is exacerbated because PIDA does not automatically guarantee protection if the making of a disclosure was just one of the reasons for a dismissal. The prerequisite for protection is that the disclosure must have been the principal reason for dismissal. This encourages employers to introduce alternative scenarios for the dismissal, such that these reasons might outweigh the making of the disclosure.

[55] Based on statistics from the UK Department of Business Innovation & Skills as analysed by Public Concern at Work.

[56] The explanation for how we arrived at 86 cases is set out in the methodology, annexed to this report.

[57] Anecdotal evidence has also been described to us that there is a growing trend to now include external HR agencies who are instructed to carry out the instructions of the employer (such as dismissing an employee or conducting disciplinary hearings) – creating distance - and thereby muddy the waters on establishing the "reason" for dismissal, making it harder for whistleblowers to be protected.

In this way, PIDA fails to adequately protect whistleblowers from unsubstantiated attacks on their work record, which can significantly harm their chances of winning their cases. This contradicts prevailing international standards, which places the full burden of proof on employers to show any action taken against a worker was not motivated by the person's whistleblowing.

The situation is even more difficult for workers in the UK who have been on the job for less than a year. The burden lies completely on them – *not* on the employer – to show the sole reason or principal reason for their dismissal was that they made a disclosure.

## ALLEGATIONS AGAINST WHISTLEBLOWERS DO NOT NEED TO BE PROVEN

Compounding this, a 1978 ruling by an Employment Appeal Tribunal frees employers from having to prove a worker committed wrongdoing before legally firing the person.[60] The ruling only requires the employer to have an honest belief on reasonable grounds after conducting as much investigation as was appropriate in the circumstances. This test allows much flexibility for an employer.

This 1978 ruling, known as the "Burchell test"[61] (from a case by that name) was handed down 21 years before PIDA took effect. This was long before the concept of whistleblowing was defined in UK legal culture, and long before the recent stream of aggressive retaliatory actions against whistleblowers emerged, particularly in the healthcare field.

Even though the ruling does not specifically apply to whistleblower cases, it has since become a bedrock principle in Employment Tribunals that has allowed employers to use character assassination to defeat whistleblowers in court.[62] This could not have been foreseen when the ruling was issued in 1978. It also encourages employers to seek to encourage complaints or criticisms from colleagues to strengthen their chances of preventing protection for whistleblowers.

[58] *"Nothing is said in section 103A or in the related provisions about who has to show that making a protected disclosure was the reason, or the principal reason, for the dismissal." Kuzel v Roche Products Ltd* [2008] EWCA Civ 380; www.bailii.org/ew/cases/EWCA/Civ/2008/380.html, accessed on 5 February 2016.

[59] This may be aided by the fact that Employment Tribunals do not have the same strict rules of evidence including the ability to admit hearsay evidence and that witness statements are usually taken at face value. For a useful overview of this, see the

## AN EMPLOYERS' LOOPHOLE FOR UNFAIR DISMISSAL

Another major ruling that pre-dates PIDA has been used to attack the credibility of whistleblowers in Employment Tribunals.

From the case of "Polkey",[63] wherein the UK House of Lords ruled in 1987 that even if an employer does not follow a fair procedure in firing someone, an Employment Tribunal can reduce or even deny compensation if the employer can show the worker would have been dismissed had a fair process been followed. This can permit an employer to fire a worker unfairly and then later seek to introduce a bogus reason for their dismissal.

As in the Burchell ruling (above), the Polkey ruling long precedes PIDA – by 11 years – and was not a whistleblower retaliation case. Yet, it has been applied – in a different setting - against whistleblowers to reduce or deny compensation.[64]

## CAPS ON COMPENSATION

Under PIDA, the total financial compensation whistleblowers may receive for being unfairly dismissed is not capped. However, two main categories of compensation that whistleblowers and other unfairly dismissed workers can receive are capped.

These categories – "injury to feelings" and the "basic award" – are capped at levels that may not fully compensate whistleblowers for their financial and other losses. And, like the Burchell and Polkey rulings (above), neither was specifically developed for whistleblower retaliation cases.

Compensation for injury to feelings is normally capped at £33,000. The 2003 ruling [65] that established this category of compensation was from a discrimination case – not a whistleblower case – so it does not factor in the unique circumstances faced by whistleblowers.

The basic award, which is designed to compensate workers for loss of job security, is currently capped at £14,370.[66] Similar to the Polkey ruling, the basic award can be reduced due to a worker's behaviour in the workplace, regardless of when it occurred.

LexisNexis note: https://www.lexisnexis.com/uk/lexispsl/employment/document/393758/55T3-KWP1-F18B-R1C6-00000-00/+Employment+Tribunals%E2%80%94overview, accessed on 5 February 2016.

[60] British Home Stores Ltd v Burchell [1978] ICR 303.

[61] ibid.

[62] For example, John-Charles v NHS Business Services Authority [2015] UKEAT/0105/15/BA, McCollum v Newport City Council

The Employment Rights Act gives ET judges the authority to reduce the basic award by any amount because of "any conduct" by the worker. This allows employers to mask their retaliation against a whistleblower in embellished or fabricated accusations and thus damage their case in an Employment Tribunal.

Importantly, all of the above problems with sliding PIDA into the Employment Rights Act, do not take into account the fact that whistleblowers reveal wrongdoing in the public interest. Often this is done at great personal cost and little to no personal benefit. This is entirely different from a standard employment dismissal case, which, while important, does not benefit a wider group in society the way that a whistleblower case does.

## THE CASE OF SARAH: WAS JUSTICE BLIND?

Sarah[67] had an exemplary employment record at a Leeds-area children's home where she had worked since 2008. In September 2011 she suspected two colleagues were abusing children. She told an assistant manager. But when two weeks went by without any response, she reported her concerns to the home's manager. The two colleagues were suspended but then cleared and reinstated.

Shortly thereafter, Sarah was disciplined for several minor issues – including using a household cleaning product to remove hair dye from a teenage resident. After a disciplinary hearing, she was fired in February 2012. She complained to the Employment Tribunal in Leeds, which ruled in March 2013 that she was fired for being a whistleblower and therefore protected under PIDA.

The ET ordered the home to pay Sarah for injury to feelings and unfair dismissal but reduced the unfair dismissal compensation by 25 percent because of the cleaning incident, criticising Sarah for a "*failure of common sense*" that contributed to her dismissal. The ET did not award her lost past or future wages, nor did it order aggravated damages despite finding she was subject to "*serious*" detriment.

**Sarah's waiting time for justice: 13 months**
**Total compensation: £19,350**

In Sarah's case, the Leeds Employment Tribunal fully acknowledged she was fired for being a whistleblower and was legally entitled to compensation. But two sentences

[2015] UKEAT 0172_15_0610, Soh v. Imperial College of Science, Technology and Medicine [2015] UKEAT 0350_14_0309.

[63] Polkey v AE Dayton Services Ltd [1987] UKHL 8.

[64] For example, *Schaathun v Executive & Business Aviation Support Ltd* [2015] UKEAT 0227_12_3006 is a recent example of the

in the UK's Employment Rights Act (ERA) did not work in her favour. The law allows an ET to reduce compensation if the judge thinks the worker was partially to blame for being fired. It is up to the judge to decide a "just and equitable" amount for the reduction.

The ERA provides no guidance to judges for whether or by how much to reduce a worker's compensation. This decision is subjective.

The Tribunal stated: "It is not for us to step into the [employer's] shoes and substitute our findings ... for those of the employer."

The Tribunal decided that because Sarah cleaned a teenager's hair, her compensation should be reduced by 25 percent. As a result, Sarah lost £3,450. This is despite the fact that she had tried to reveal serious wrongdoing about an issue clearly in the public interest. It is one of many examples of ET judges using legal instruments that are not well known or understood by the public.

## THE WHISTLEBLOWER FILES

Blueprint has included summaries of 20 other cases in which whistleblowers suffered serious reprisals at work and then had to wait a significant amount of time before their cases made their way through the Tribunal process. Many received inadequate compensation, or saw their compensation reduced by legal technicalities and loopholes. It is worth noting that the review of the sample cases concluded many of them concerned people in low to average wage occupations.[68]

## BACKGROUND CHECKS IN CARE FACILITIES

While working at a facility outside London caring for people with learning disabilities, Anne reported in January 2010 that rules for conducting criminal background checks on workers were not being followed. A manager responded by asking whether she wanted to continue working there and formally warning her to follow proper reporting procedures.

Anne filed a grievance over the warning and told solicitors about the situation. Her grievance was ignored, her desk was cleared out and her access to the computer system was blocked. She was fired in April 2010 and told she would be replaced by an unemployed person hired through a government job programme.

Polkey deduction's continued relevance to PIDA cases.

[65] Exceptions can be made to the *Vento* Tariff: *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102.

[66] As of April 2016.

[67] Some whistleblowers' names in this report have been changed to protect their identity, even if their identity is already public,

Anne filed a complaint with the Employment Tribunal in East London, which ruled in April 2012 that the warning was unjust and that she was fired for being a whistleblower. She was awarded compensation for injury to feelings, lost wages and loss of rights, but not for lost future wages.

**Anne's waiting time for justice: 24 months**
**Total compensation: £7,950**

## ABUSE IN CARE HOMES

Brigitte worked as a caregiver for vulnerable adults, assisting with washing, bathing, feeding and medicating them in their homes. In September 2009 she reported a colleague who was abusing and acting aggressively toward one of the adults. Two months later she was told she would be disciplined but there was no process to deal with the issue. In December she reported that another adult was being abused (16 months later he was murdered in his home), and she made further reports during the next few months.

In April 2010 Brigitte was called before a disciplinary hearing, though she was given no evidence about her alleged misconduct. She lost her disciplinary hearing and was told to improve her attitude. From then on her work was curtailed, and she was harassed, bullied, attacked twice and eventually suspended without pay. She resigned in September 2010.

The Employment Tribunal in Brighton ruled that management was trying to force Brigitte to quit because of her whistleblowing, and that she was essentially unfairly dismissed. She went on to suffer depression and post-traumatic stress disorder. The Tribunal awarded her lost past wages, unfair dismissal, injury to feelings and lost rights, but not for lost future wages or aggravated damages.

**Brigitte's waiting time for justice: 24 months**
**Total compensation: £27,738**

## DILIGENT PHARMACIST

While working as a pharmacist in August 2010, Claudia told a manager about problems with the safety and security of drugs, including the monitoring of refrigerator temperatures, the lack of an alarm system, recording drug stock balances and the security of keys. She was immediately retaliated against: she was refused time off, told she was cantankerous and belligerent, threatened with defamation and then fired in September. The Employment Tribunal found in June 2012 that Claudia was unfairly dismissed for making a protected disclosure.

**Claudia's waiting time for justice: 21 months**
**Total compensation: £17,500**

## MEDICATION ERRORS IN CARE HOME

In May 2010, Margaret was fired from a care home the same day she reported numerous mistakes by a nursing manager in dispensing medication to patients. She was fired after managers raised dubious allegations against her related to paperwork. The allegations were not given to her in writing, no investigation was conducted, she received no evidence before the disciplinary meeting, and her appeal was heard by the same person who ruled against her in the first instance.

**Margaret's waiting time for justice: 16 months**
**Total compensation: £15,550**

## POOR TREATMENT IN ELDERLY CARE

Laura had been working as a senior care assistant in a home for the elderly for two years when she began reporting that residents were being treated poorly. She said a staffer neglected people with dementia and did not want to carry out difficult tasks such as bathing residents. The home advertised itself as having a "good" rating from the Care Quality Commission when the actual rating was poor.

Managers took no action based on Laura's reports, rather blaming her for being a troublemaker and disciplining her three times for making inappropriate comments. The Tribunal found the disciplinary proceedings to be rigged against Laura, who was shown no evidence of her alleged misconduct and was given no opportunity to respond to the allegations.

**Laura's waiting time for justice: 15 months**
**Total compensation: £19,728 plus £5,000 for legal costs**

## NEGLIGENCE IN AGED CARE

Nancy had been working for seven years as a senior-level caregiver at a home for the elderly when, in February 2011, she told the manager that the deputy manager was leaving medication for residents without watching them take it, which was against the home's policy. She believed this endangered residents who were too old, frail or vision-impaired to take their medication. She also said paperwork incorrectly showed that residents had received their medication. Management did not take her complaint seriously and did not investigate it. Nancy was harassed, bullied and forced to resign.

**Nancy's waiting time for justice: 17 months**
**Total compensation: £19,976**

## CRIMINAL CHECKS IN CHILDREN'S HOME

Trudy and William, workers in a home for children, faced disciplinary actions after telling inspectors from the Commission for Social Care Inspection that some staffers were not subject to criminal background checks and about irregularities in record-keeping. Managers accused Trudy of "destabilising the working and economic viability of the company," and William with "undermining the smooth operation of the home." Following disciplinary proceedings for what the Tribunal later called questionable allegations, both were "sacked on the spot."

**Trudy's waiting time for justice: 15 months**
**Total compensation: £24,143**

**William's waiting time for justice: 15 months**
**Total compensation: £18,103**

## FRAUDULENT FOOD LABELLING

Craig was working as an assistant manager in a food warehouse in 2007 when he was ordered to backdate stock records in advance of an inspection by environmental health officials. When he objected, he was told he would be fired if he did not comply. Following this he was criticised for every aspect of his work and within two months he was fired, ironically, for not keeping stock records up to date. He was given one week's notice.

**Craig's waiting time for justice: 15 months**
**Total compensation: £7,536**

## CONCERNED NURSE IN NURSING HOME

David, a registered nurse in nursing home, told a manager in July 2012 that a resident's dressings were not being changed regularly or appropriately. He also called social services about medication and other issues. To document his concerns, he photocopied some papers and put them in his car.

When a manager ordered David to return the papers, which he declined to do, the manager said he would call the police and told David he would be fired for violating data protection laws. The manager told David to leave the home immediately, before completing his shift, and barred him from the building.

A subsequent inspection by the Care Quality Commission was critical of the home's functioning and confirmed that medication was not handled safely. An Employment Tribunal ruled David was unfairly constructively dismissed but did not grant him the highest level of compensation because, in the judge's opinion, the nursing home managers who threatened to call the police on David "acted badly but not maliciously or oppressively."

**David's waiting time for justice: 28 months**
**Total compensation: £29,887**

## CHEMICAL HAZARD IN HAEMATOLOGY

Paula worked as a nurse in a haematology unit where her job included administering chemotherapy. She raised a number of concerns, including the absence of protective gloves and the spillage of toxic chemotherapy materials. In October 2010 she filed a report with human resources, asking to work elsewhere until the hazard was cleaned up. When she learned that chemical waste was about to be incinerated, she called the UK's Health and Safety Executive because she thought evidence would be destroyed.

A series of retaliatory acts ensued. A complaint was filed against Paula for being disruptive and difficult to work with. She was not given full details of the allegations. She also faced allegations of committing a crime and making racist comments, and she was blocked from working and attending a course. Paula said the stress she suffered caused her to have an early menopause. She was fired in May 2012.

An Employment Tribunal found Paula was unfairly dismissed but she was denied personal injury and aggravated damages. The judge remarked that compensation in such a case should be akin to personal injury cases – despite the different challenges faced by these different claims. The judge also denied her compensation for legal costs.

**Paula's waiting time for justice: 28 months**
**Total compensation: £18,952**

## ABUSE IN RESIDENTIAL HOME

Francine and Donald were support workers in a residential home for people with disabilities. Over a period of time, they and some colleagues observed a co-worker abusing residents. In January 2013 a group of workers raised their concerns to their manager, who replied, "This had better not be a witch-hunt." Police found the co-worker had stolen more than £2,000 from residents, and he resigned.

Yet, Francine and Donald both faced disciplinary hearings for not reporting the issue soon enough. They experienced emotional difficulties, did not return to work, and resigned.

An Employment Tribunal found Francine and Donald essentially were unfairly dismissed. But the judge reduced both of their compensation amounts by 25 percent because the judge said they did not report the conduct to the authorities quickly enough.

**Francine's waiting time for justice: 8 months**
**Total compensation: £4,663**

**Donald's waiting time for justice: 8 months**
**Total compensation: £9,997**

## FINANCIAL MALPRACTICE IN SCHOOL

While working as a business manager at a school, in the summer of 2006 Wilma made allegations of financial malpractice and favouritism for trips. Following an investigation, the employer determined that the allegations were unfounded. Disciplinary proceedings were then launched against Wilma, and eventually she was

fired. She was ordered to leave the premises immediately. She had to plead to have an hour to gather her personal belongings, which a judge said was "harrowing."

An Employment Tribunal judge found Wilma had been "humiliated" and "undermined," that the situation was "extremely distressing" and "injured her feelings considerably," and that she experienced insomnia, anxiety, stress and depression. The judge found Wilma was unfairly dismissed yet nonetheless reduced some of her compensation by 90 percent because the judge said Wilma was 90 percent to blame for losing her job.

**Wilma's waiting time for justice: 30 months**
**Total compensation: £6,513**

## REGISTRATION OF STAFF IN RETIREMENT HOME

Lucia had been working as a manager in a retirement home for two months when she reported in January 2008 that a colleague was providing care to residents without being registered with the Commission for Social Care Inspection. After the report, colleagues began to treat Lucia with hostility, and a manager "launched a verbal attack on her." She resigned two days later, claiming she could not work in such a hostile climate.

The Employment Tribunal's ruling exposes critical gaps in the system, and the wide judicial subjectivity that can work against whistleblowers in the UK. The judge acknowledged there were "no problems" with Lucia's work until she made the report, after which she "suffered detriment" from managers who became "cold" and argumentative toward her. The judge blamed Lucia for resigning, even while acknowledging that her report led managers to treat her with hostility. She was compensated for injury to feelings as a result of the detrimental treatment but not for unfair dismissal.

**Lucia's waiting time for justice: 17 months**
**Total compensation: £4,290 plus £300 for legal costs**

## CONSTRUCTION SAFETY

Steven was a glass worker at a primary school when in September 2007 he reported concerns about the safety of children and adults entering the building amidst a construction site. He was promptly told he would be given no more work and to return the van that was provided to him.

**Steven's waiting time for justice: 18 months**
**Total compensation: £6,248**

## PRICE FIXING

Paul was a director and shareholder of a company that refurbishes hotels, schools and commercial buildings. In 2007 he believed a colleague was engaged in price-fixing on a project. Paul was suspended, barred from the premises and his bonus withheld. He faced allegations of gross misconduct, but an independent investigator concluded after a one-year inquiry that Paul made a protected disclosure and should not be disciplined. He was invited to return to work in December 2008 but was told he was at risk of redundancy. He was too ill to return to the company.

**Paul's waiting time for justice: approx. 26 months**
**Total compensation: £59,535**

## FALSIFYING FINANCIAL FIGURES

Phillip was a relationship manager for a UK subsidiary of an Indian bank. In January 2009 he and a colleague alleged a manager had falsified profit-and-loss figures. The bank investigated the allegation but said it was unfounded. Phillip and the colleague then reported the case to the UK Financial Services Authority. In April, Phillip was transferred to India and his colleague was made redundant (the only worker who was so treated.)

**Phillip's waiting time for justice: 24 months**
**Total compensation: £21,960, including £8,000 for "stigma loss"**

## UNSAFE DRIVING PRACTICES

Janet was working as a transport manager in charge of regulatory requirements in 2008 when she reported that some truck drivers were working beyond their permitted hours. Management promptly replaced her and transferred her to a driving position, against her wishes. An Employment Tribunal found that management ignored her report and that she was transferred because of her complaint. The Tribunal also rejected the company's allegations that Janet did not maintain records and equipment properly.

**Janet's waiting time for justice: approx. 18 months**
**Total compensation: £13,771**

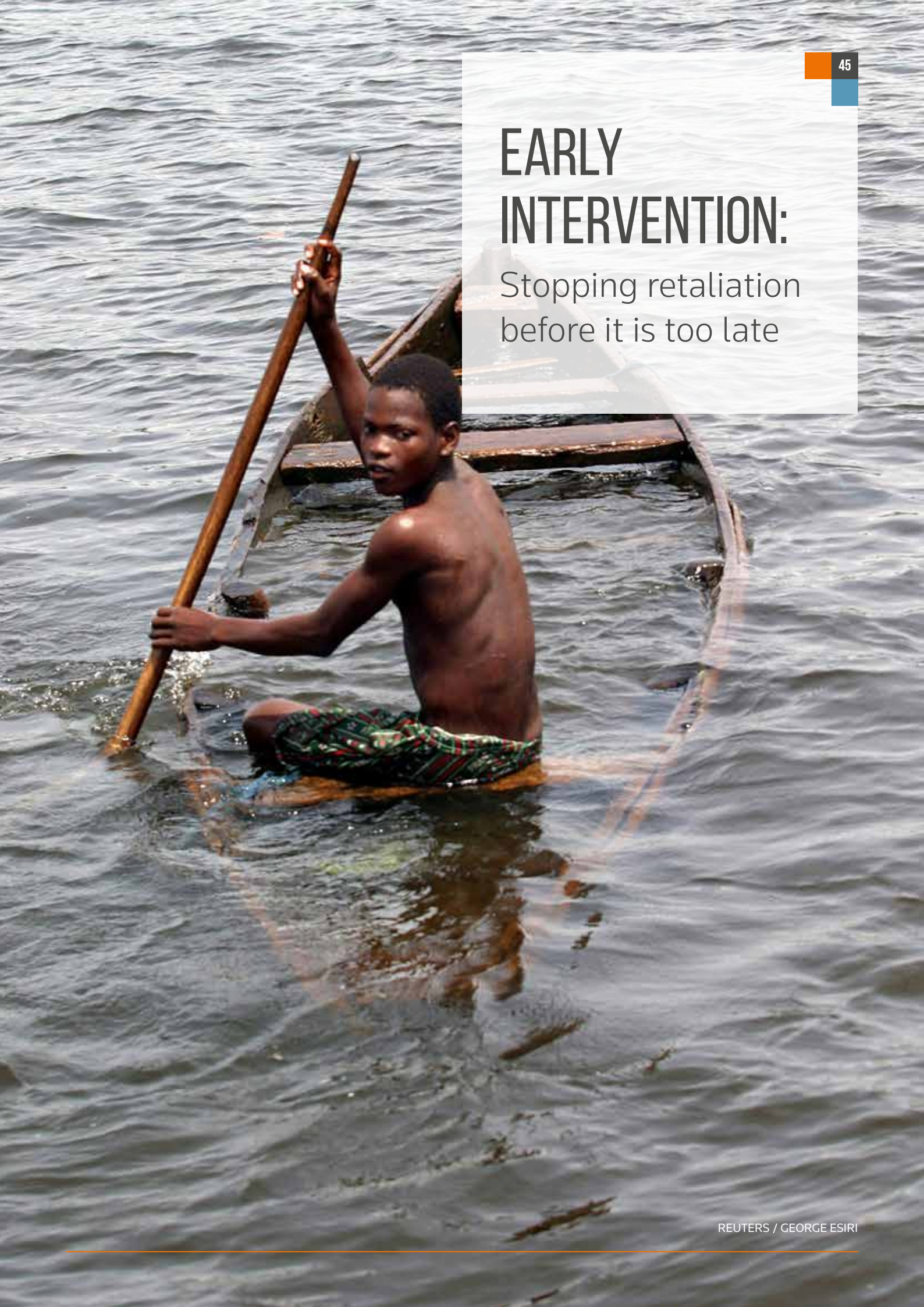
## SEXUAL VIOLENCE IN SUPPORTED LIVING FACILITY

Susanne was working in a supported living facility in 2010 when she reported that a resident had been raped by another resident during a weekend visit in another home. She said the victim was left alone contrary to a risk assessment. Susanne reported the incident in an e-mail, for which she was suspended for breaching confidentiality. What followed was a string of 37 acts of detriment, including a salary cut, false accusations of removing a patient's notes, isolation by her colleagues, being blocked from entering any NHS facility, having the details of allegations withheld from her, and delays in the hearing of her grievance. An Employment Tribunal found the retaliation was due to Susanne's report.

**Susanne's waiting time for justice: 40 months**
**Total compensation: £6,098**

# EARLY INTERVENTION:

## Stopping retaliation before it is too late



REUTERS / GEORGE ESIRI

# EARLY INTERVENTION:

## Stopping retaliation before it is too late

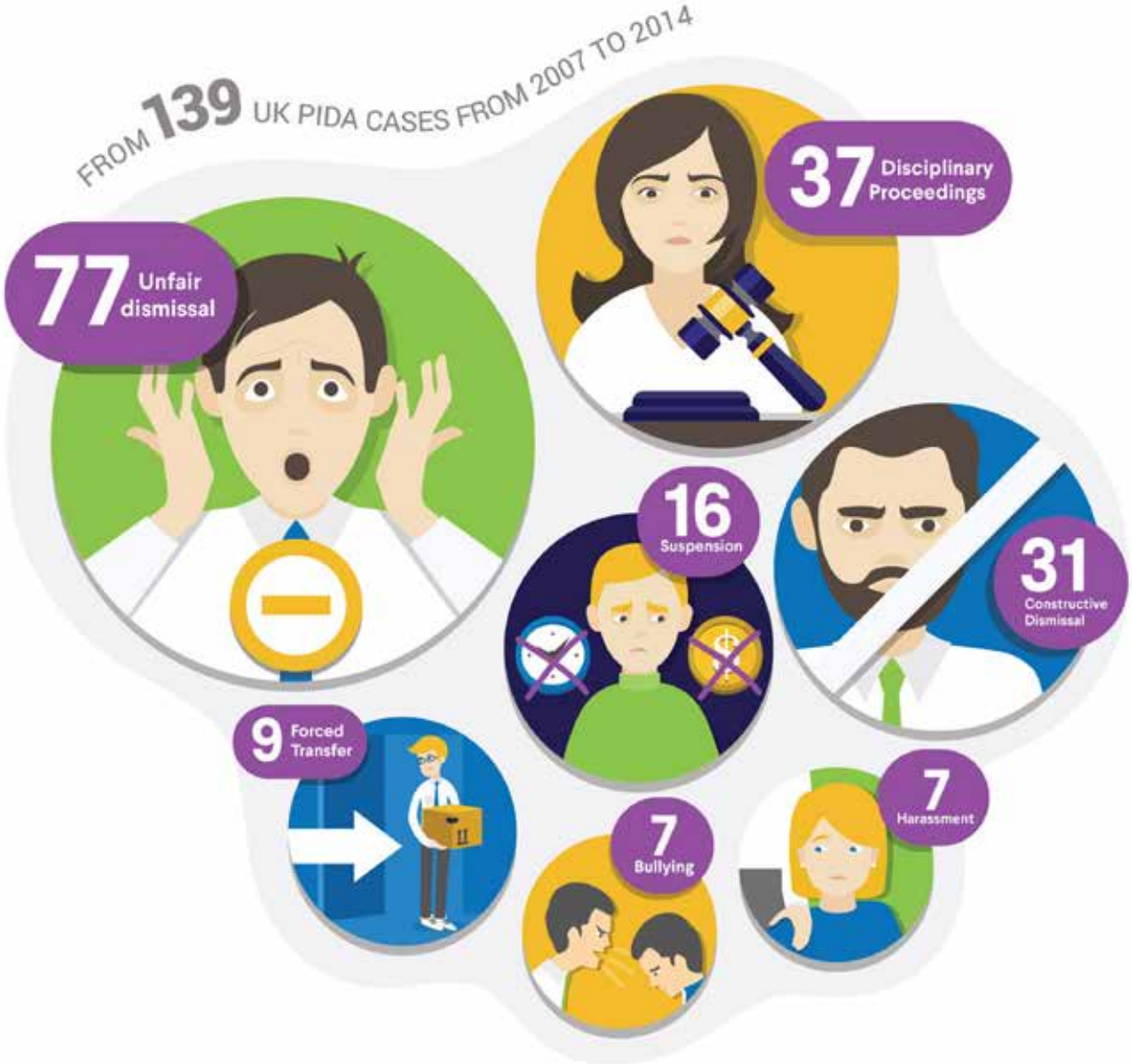
As this report shows, the UK Public Interest Disclosure Act (PIDA) provides inadequate protections to shield government and corporate workers from reprisals after they report misconduct. The law is silent in this regard.

Rather, PIDA allows an employer to retaliate – and to continue to retaliate – against whistleblowers with the awareness that the law has no provisions compelling them to stop, or to penalise them for failing to stop. The only mechanism is that once retaliation has started, a worker may present a claim. However the ET is not empowered to order employers or co-workers to stop retaliating against whistleblowers.[69]

in order to prevent further negative attention. Additionally, some may have provided confidential personal information in interviews with the authors.

[68] Consider, for example, this article that sets out the average wages in the UK. When compared and contrasted with the amounts of compensation awarded and the time taken to recover these costs (as well as the cost in attempting that recovery) – many whistleblowers are left with amounts that leave them well below the average annual wage. See: "Where do you rank in the official earnings list? Figures reveal huge pay gap between rich and poor," *The Mirror*, 9 Jan. 2014; http://www.mirror.

# TYPES OF **WORKPLACE RETALIATION** DIRECTED AT UK WHISTLEBLOWERS




**SOURCE**: Blueprint for Free Speech conducted analysis of 162 UK Employment Tribunal cases at the Public Register, Bury St. Edmunds, UK. Of these, 139 cases were selected because all went to full conclusion between 2007-2014. 23 cases were omitted because they did not go to final ruling.

**NOTE**: The total number of retaliations is greater than 139 because in some cases UK whistleblowers suffered more than one type of legal detriment.

To remedy this, a system should be set up to allow a worker to obtain a "Whistleblower Protection Certificate" that would immediately ban or stop retaliation. The certificate would also require employers to promptly reinstate workers who were dismissed, demoted, suspended or transferred if such decisions were influenced by the fact that they reported misconduct, or to otherwise restore them to their previous position and status.

To obtain a Certificate, workers would not have to file a lawsuit with an Employment Tribunal or other court. They would apply directly to a government agency, such as the Department for Business, Innovation & Skills or an independent agency. They would receive a reply within 30 days, or seven days in case of emergency.

Under this system, employers (and co-workers) who fail to comply with a Certificate would be subject to civil or (in appropriate circumstances) criminal penalties, and these penalties would increase for repeat offenders. The heads and other responsible individuals at government agencies and private companies would be personally subject to the penalties.

Companies, organisations and government agencies shown to have retaliated aggressively against whistleblowers or ignored a Certificate on three occasions would be required to appoint a "Whistleblower Monitor." The Monitor would be required to develop a plan to improve whistleblower protections in the workplace, subject to regulatory approval and oversight. The Monitor would submit an annual report to regulators showing how whistleblower disclosures have been handled and investigated, how whistleblowers have been shielded from reprisals, and how the organisation's whistleblower framework has been approved.

An illustration of how such a protection system is working can be taken from Bosnia and Herzegovina. The country's Law on Whistleblower Protection, which took effect in December 2013, allows government workers to apply for whistleblower status from the Agency for Prevention of Corruption (APC).

The law, which was broadly supported by policy-makers and NGOs alike, showed signs of having the intended effect from the outset. Within six months, two government workers who exposed large-scale corruption cases in state institutions applied for and received whistleblower status from the APC. With this legally binding protection in hand, neither has lost their job. In both cases, evidence from the whistleblowers was passed on to prosecutors, and one case led to several arrests related to improper tax refunds.

In another case, a government whistleblower who had been fired after exposing tax-related corruption was reinstated in summer 2015 almost immediately after the institution's director was threatened with fines under the Law on Whistleblower Protection. The law is still in its infancy but these early indications point to an effective use of this pre-trial mechanism. It follows another successful interim relief provision that was passed in Serbia (which is available instead from a court rather than administratively). Early indications of the Serbian law are that interim relief has been granted in 27 out of the 36 decisions in which it had been requested, although some were interim rulings on motions in the same cases.[70] Moreover, these requests were granted within 8 days, rather than the 30 days prescribed by the law. Such quick turnarounds are also looking promising (from the very small data sample) in Bosnia.

Bosnia's system works as follows. After a worker applies for whistleblower status with the APC, the agency conducts an investigation and reaches a decision within 30 days – although in the cases mentioned this proved to be shorter. A worker can apply whether retaliation has actually occurred or is only suspected.

The APC interviews staff and reviews documents within the government institution where the whistleblower works. If the APC finds evidence of retaliation or threats of retaliation, it issues an "instruction" ordering the institution's director to take corrective action to stop the detriment within three days. Directors who fail comply with such an order are personally subject to a fine of €5,000 to €10,000.

We should stress that we do not seek to argue that Bosnia's law is superior to PIDA. In many important respects, there are issues with the Bosnian law, including its scope of application and its lack of due process remedies. Instead, we identify this mechanism as a positive take-away from the law and encourage the UK to consider its inclusion in PIDA.

co.uk/news/uk-news/uk-average-salary-26500-figures-3002995, accessed 4 February 2016.

[69]The best case for a whistleblower is to be successfully granted interim relief under Section 128 of the ERA. However, this must be applied for within 7 days and the only relief that can be ordered is the maintenance of the employment contract. In

We should also note that this system should be introduced in addition to, rather than instead of, the due process system examining a whistleblower's disclosure. Further, it is not meant to give a worker *carte blanche* to engage in misconduct themselves – it should not extricate them from all liability. This system is designed to re-balance the wider system to encourage whistleblowers to come forward as well as to ensure that they are actually protected from reprisal before it occurs.

If a whistleblower is fired or is subject to other negative actions, the burden of proof is on the employer to show these actions were independent of the worker's act of whistleblowing.

# A NEW BLUEPRINT:

## Building a stronger structure to protect whistleblowers

REUTERS / ROMEO RANOCO

# A NEW BLUEPRINT:

## Building a stronger structure to protect whistleblowers

The major shortcomings in the Public Interest Disclosure Act (PIDA) detailed in this report, combined with the inadequacy of Employment Tribunals to compensate whistleblowers for their true losses, demands a new approach for protecting whistleblowers in the UK.

Up until now, the UK's system has focused primarily on two things: providing channels for whistleblowers to disclose misconduct; and financially compensating whistleblowers who have suffered retaliation. Ironically, the most critical element of any whistleblower protection framework –preventing or quickly stopping the full scope of retaliation is the weak link in the UK's system or protection.

Pre-retaliation protection mechanisms were not included in PIDA when it was being drafted and debated at its introduction in 1998. The law was passed mainly in response to disasters and scandals that could have been prevented or lessened if insiders came forward with useful information. The main concern was providing disclosure channels – *not* retaliation protection. Therefore, PIDA contains no measures to protect a whistleblower from reprisals *before* they occur: there are no mechanisms in it to order an employer to stop retaliation, or to punish an employer or a particular person who retaliates against a whistleblower or repeat offenders.[71] Although interim relief is available to a whistleblower, it is very restrictive. First, it is only available within 7 days of the dismissal. The Tribunal only has the power to order that the *status quo* be maintained. This means that they can only order the continuation of employment. It does not meant that they can order an employer or any other person to stop retaliating against the whistleblower or any other order that

other words, the ET can only order that the worker continue to be paid. They cannot order that retaliation cease. The provisions for interim relief must be expanded and strengthened so that – 1) it is available whenever needed, not just for the first seven days; 2) the decision is governed by relaxed standards that apply to emergencies rather than final resolution; and 3) protection

can protect the worker (except, perhaps for the continued receipt of their salary). Secondly, the burden of proof is skewed against the whistleblower as they have to establish the merits of their case, which is a distortion of the normal course of events at a regular merits hearing.

Here, a new blueprint is presented to establish a legally binding system that, if properly enforced, would swiftly stop workplace retaliation before it has a chance to cause severe harm to a whistleblower. If a worker already has been fired or demoted, this new system would allow the person to be reinstated in rapid order – within 30 days, or 7 days in emergency cases.

A whistleblower would not have to file a lawsuit with an Employment Tribunal or other court. Rather, protections and corrective actions ordered by an independent agency, or possibly, in the alternate, a relevant government department such as the UK Department for Business, Innovation & Skills. The independent agency option must be additive or at worst an alternative rather than a substitute for the due process available with a court or tribunal. That agency cannot have the discretionary authority to prejudice the rights of those seeking help, there must be strict accountability controls against abuses of power, and there must be the right for a due process appeal if the agency fails to act or rules against the whistleblower.

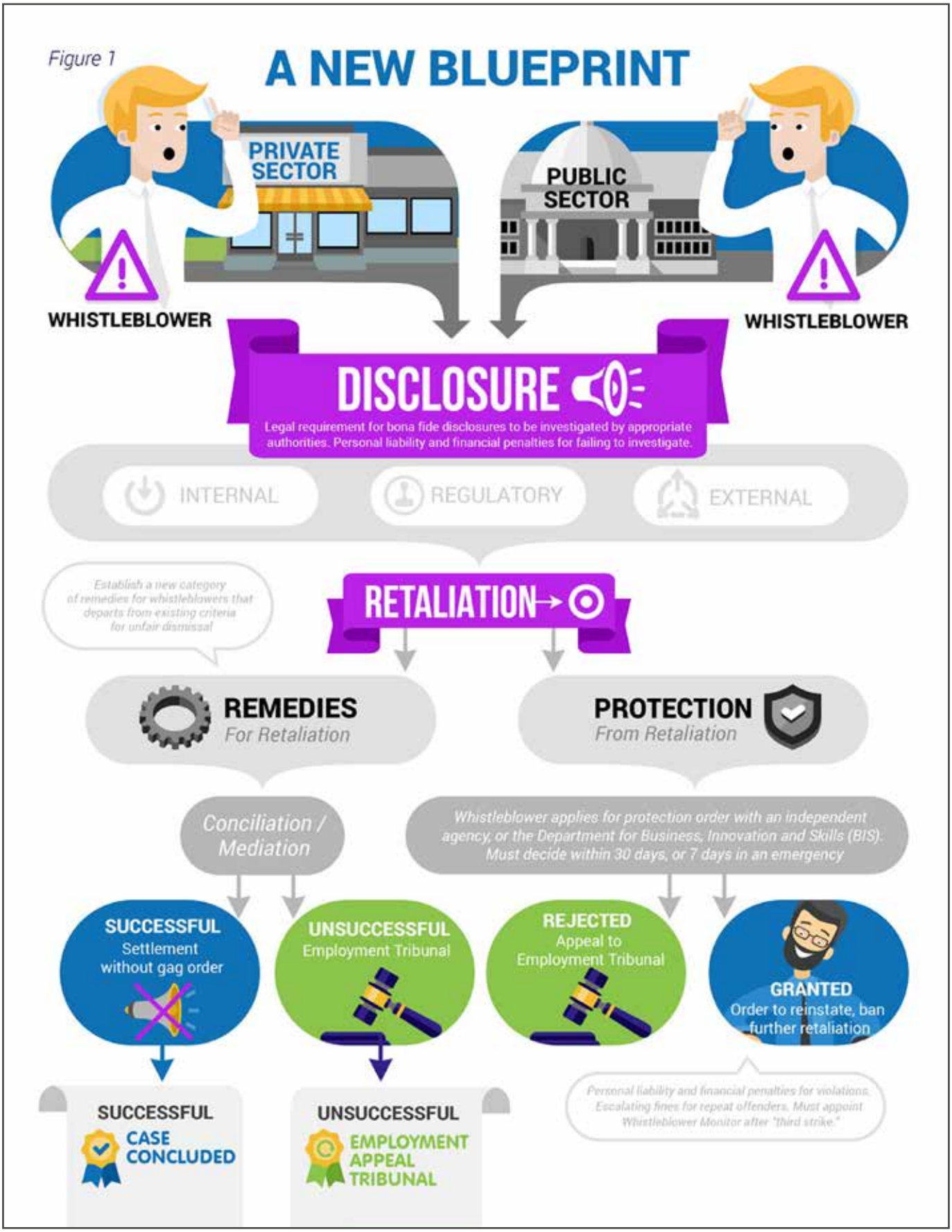


Figure 1
A NEW BLUEPRINT
PRIVATE SECTOR
PUBLIC SECTOR
WHISTLEBLOWER
WHISTLEBLOWER
DISCLOSURE
Legal requirement for bona fide disclosures to be investigated by appropriate authorities. Personal liability and financial penalties for failing to investigate.
INTERNAL
REGULATORY
EXTERNAL
Establish a new category of remedies for whistleblowers that departs from existing criteria for unfair dismissal
RETALIATION
REMEDIES
For Retaliation
PROTECTION
From Retaliation
Conciliation / Mediation
Whistleblower applies for protection order with an independent agency, or the Department for Business, Innovation and Skills (BIS). Must decide within 30 days, or 7 days in an emergency
SUCCESSFUL
Settlement without gag order
UNSUCCESSFUL
Employment Tribunal
REJECTED
Appeal to Employment Tribunal
GRANTED
Order to reinstate, ban further retaliation
Personal liability and financial penalties for violations. Escalating fines for repeat offenders. Must appoint Whistleblower Monitor after "third strike."
SUCCESSFUL
CASE CONCLUDED
UNSUCCESSFUL
EMPLOYMENT APPEAL TRIBUNAL

# PROBLEMS AND SOLUTIONS:

## 10 urgently needed reforms

REUTERS / OGNEN TEOFILOVSKI

# PROBLEMS AND SOLUTIONS:

## 10 urgently needed reforms

# (1)

**Problem:**
**PIDA minimally protects whistleblowers from retaliation in the workplace**

**Solution:**
**Establish a rapid-response system to protect whistleblowers**

Contrary to how it is commonly viewed, PIDA does not – and cannot – adequately protect workers from reprisals before they occur, if they report misconduct to managers, regulators or the public. There are no mechanisms in it to order managers or co-workers to stop retaliating against a whistleblower. Instead, workers must go through potentially lengthy and expensive legal disputes to save or regain their jobs – after they have already suffered reprisals. None of this focuses on the wrongdoing disclosed, but only upon the motivation behind any detriment or dismissal.

Although an application for an interim remedy is possible (section 128 of the ERA)[72] – where a whistleblower can request a Tribunal to order that they remain employed – the Tribunal does not have any power to actually stop retaliation from occurring. As mentioned above, this is grossly inadequate to protect the interests and safety of a whistleblower. Even if they are able to obtain interim relief to preserve their employment, they must wait until after retaliation occurs before they can seek redress and only in the form of compensation / damages. The ET is powerless to prevent victimisation and harassment metered against a worker.

against the full scope of illegal retaliation, not just the threat to a paycheck.

[70] Presentation by Snezana Andrejevic, Vice President, Serbia Supreme Court of Cassation, Roundtable: Implementation of

A system could be set up to allow a whistleblower to obtain a "protection order" from government (i.e. the Department for Business, Innovation & Skills), an independent agency and the ET or any superior due process alternative. The worker should be able to obtain the order within 30 days, or 7 days in emergency cases. The worker should not have to pay any fee or administrative charge to make such an application. The order would legally ban or stop any form of retaliation in the workplace, and restore the worker to their position if he or she had been fired, demoted, transferred or otherwise had their position or status changed against their will. This solution would maintain the existing powers available under Section 128, but would both extend them to allow an ET to stop retaliation, and would also make such an application more accessible and cost effective to a whistleblower.

(2)

**Problem:**
**The UK has no designated government agency to protect and support whistleblowers, and oversee whistleblower issues**

**Solution:**
**Establish a specialised government or independent agency or department to protect whistleblowers**

A new or existing government or independent agency could be empowered to:

- protect workers from retaliation and adverse consequences
- investigate disclosures of crime and misconduct
- ensure that a full range of disclosure channels are safe and reliable
- raise public awareness of the value of whistleblowing in combating corruption

The agency should maintain a registry to track retaliation cases and disclosures, and identify pockets of government and corporate misconduct. Relevant regulatory authorities should be notified if additional investigations are needed. The agency could also serve as an ombudsman to advise and support whistleblowers, following the model in place in Australia.

The independence of the agency is paramount to ensuring that its powers remain effective. This means that appointments made to the agency should be for fixed terms, appointed by the government, with representation from former whistleblowers, employer organisations, trade unions and legal experts. The agency should be appropriately funded to conduct its investigations and exercise its powers, and it should report directly to the parliament of the UK. Each year, the head of the agency should report directly to the parliament on the exercise of its duties, and the result of any investigations conducted.

(3)

**Problem:**

**The UK PIDA has no penalties for people who retaliate against whistleblowers**

**Solution:**

**Establish civil, and potentially criminal, penalties for retaliators and for those who violate PIDA and other laws related to the reporting of misconduct**

Managers, co-workers and others in the workplace who retaliate, or threaten or attempt to retaliate, against whistleblowers could face financial penalties at a level that would serve as a sufficient deterrent. Those who retaliate against people considering making a disclosure and whistleblowers could also face these civil or criminal penalties.[73] In certain cases, where the nature or scope of the retaliation is particularly bad, criminal penalties might be levelled against a retaliator.

A new whistleblower agency (see Solution 2, above) could monitor all violations and penalties. Repeat offenders could face escalating fines, and after three violations should be formally monitored by the whistleblower agency and required to establish a comprehensive whistleblower protection system. All fines could be devoted to a fund to provide advice and support to whistleblowers.

Additionally, Employment Tribunals should be encouraged by the legislation to order employers to pay aggravated damages to whistleblowers who have suffered egregious, repeated or systematic retaliation. The Tribunal already has the ability to

the Law on the Protection of Whistleblowers, Judicial Reform and Government Accountability Project, 9 Cara Urosa, Belgrade (March 18, 2016)

[71] As set out above, this is qualified by section 47B and the potential for those who victimise workers to be individually liable.

grant such damages in discrimination claims. The extension of this power more readily to whistleblower cases is necessary. The ban on punitive damages should be lifted, so that employers who severely retaliated against a whistleblower are punished for their actions and deterred from future acts of reprisal. Aggravated and punitive damages should apply to all forms of retaliation, including repeated and indirect reprisals.

(4)

**Problem:**
**UK Employment Tribunals use criteria that are not designed for appropriate whistleblower remedies**

**Solution:**
**Establish new standards and formulae specifically geared for whistleblower cases and the needs of whistleblowers**

Employment Tribunals rely on legal principles and precedents that were not specifically designed to provide guidance on whistleblower cases. Much of this guidance pre-dates the Public Interest Disclosure Act, which took effect in 1999. Designed for generic unfair dismissal cases, these principles limit some forms of compensation to low levels and allow employers to introduce extraneous evidence that can result in whistleblowers losing their case or having their compensation slashed.

Moreover, these principles are not published on the Employment Tribunal website and are not easily understood by laypersons. This exposes whistleblowers to hidden hurdles and defeats the purpose of having a judicial system that was not intended to require workers to hire a lawyer.

PIDA should be amended to guarantee that whistleblowers are amply compensated for all past and future lost wages, injury to feelings, reputational and career damage, and for severe or repeated retaliation. Such protection is consistent with a disclosure made for the public benefit.[74]

There is also the possibility of seeking a remedy under the *Protection from Harassment Act*.

[72] As highlighted earlier in this report, due to the reversed burden and the short time frame, interim measures are difficult to obtain for a whistleblower.

# (5)

**Problem:**

**PIDA does not require workplaces to set up hotlines and whistleblower protection systems**

**Solution:**

**Require government agencies and medium to large companies[75] to establish whistleblower disclosure channels and frameworks**

Organisations that are directly accountable to the public – government agencies and publicly traded companies, as well as companies over a certain size – should be required to provide access to internal and external channels for workers to report wrongdoing, and a legally enforceable system to protect them from retaliation. Confidentiality must be maintained, workers must have the option to report anonymously,[76] and valid reports must be investigated and feedback given to the whistleblower within a reasonable time period.

All workers should be informed on how to use the channels and how the system functions, and be made aware of their legal and organisational rights. It is important also that a whistleblower be made aware of independent channels, and the right to seek use of those channels in relevant circumstances. Where not made aware of this, a whistleblower might unintentionally (and inappropriately) give advance notice to an employer who might use this information to facilitate a cover-up. We note that there is already an incentive system in place via the ACAS code.[77] Although a breach of this code does not of itself give rise to a claim against an employer, a failure by either the employer or the worker to follow the code (where the other follows it) may result in the increase or reduction of damages by a measure of 25%. One possibility might be to make this or a similar code mandatory, and not just become relevant when an ET considers damages.

Whistleblower systems should comply with prevailing guidelines.[78]

[73] This would be an extension to the current regime in 47B of the ERA. This section implies vicarious liability of a worker to a company. As highlighted earlier in this report, the retaliator may be personally liable to the whistleblower. As we have pointed out earlier in this report, whether or not individual liability can be attributed to a co-worker has not been judicially tested.

[74] Despite the removal of "good faith" as a pre-requisite to a claim, the "good faith" test for the disclosure itself can still reduce compensation by 25%. This continues the focus on the motives of the whistleblower as opposed to the employer and continues the trend of using outdated principles in whistleblower cases.

[75] Companies with 20 or more workers.

[76] It is obviously logically flawed that someone who discloses anonymously (with success) can suffer detriment. However, it is of course possible to attempt unsuccessfully to disclose anonymously. In both cases, anonymity should be catered for, and if in the circumstances it cannot be maintained then that person identity was revealed still enjoys the protections.

# (6)

**Problem:**
**PIDA does not require the prescribed persons to investigate bona fide whistleblower disclosures**

**Solution:**
**Require regulators and investigative agencies to follow up on disclosures**

Although many regulators are empowered and in the position to receive disclosures from whistleblowers, we are not aware of any that are obligated to investigate the alleged wrongdoing. This means that needed investigations may not be carried out, and that potential whistleblowers may be discouraged from taking the risk to report misconduct if they believe nothing will come as a result.

Regulators that receive a valid report should be obliged to investigate the alleged wrongdoing; if they believe an investigation is not warranted, regulators should inform whistleblowers of the reasons. Results of investigations that lead to enforcement actions should be made public, while maintaining whistleblowers' confidentiality if requested. The independent whistleblower agency otherwise advocated for in this report should also have the power to order these regulatory agencies to conduct an investigation even in circumstances where the regulator does not believe this to be necessary.[79]

Regulators must report each year on their work with whistleblowers, specifically recording how many disclosures they have dealt with, how many were investigated and the conclusions reached and action taken together with the measures they have introduced to encourage workers to communicate with them and any codes of practice specific to that sector.[80]

[77] See: "Discipline and grievance - Acas *Code of Practice*," ACAS; http://www.acas.org.uk/index.aspx?articleid=2174, accessed 5 February 2016.

[78] Such as British Standards' *Whistleblowing Arrangements Codes of Practice*, Public Concern at Work's *Code of Practice*, or provisions of Australia's Public Interest Disclosure Act. Also, See the Statutory Guidance in Ireland for the public sector. See

# (7)

**Problem:**
**PIDA does not cover intelligence or military staff**

**Solution:**
**Extend whistleblower protections and provisions to intelligence and military workers**

Currently, PIDA does not apply to people working in the Ministry of Defence, armed forces or intelligence agencies. This means they have no legal recourse if they report misconduct and are retaliated against. This is particularly alarming, given the recent string of major disclosures regarding national security and mass surveillance. This is also contrary to The Global Principles on National Security and the Right to Information (The Tshwane Principles).[81]

A system should be put in place to allow intelligence and military staff to report crime and misconduct to designated channels and, in cases of grave public health or safety hazards, to the media and the public. The system should be balanced, comprehensive and fair, and clearly state which types of information can be reported and to whom.

# (8)

**Problem:**
**PIDA does not explicitly require employers to prove that adverse actions taken against a worker were not motivated by the worker's whistleblowing**

**Solution:**
**Place the full burden of proof on employers to demonstrate that adverse consequences were not related to a worker's act of whistleblowing**

Employers should no longer have the ability to introduce to Employment Tribunals extraneous issues and "trumped-up" allegations against whistleblowers in order to justify firing or taking other reprisal actions against them. Currently, employers engage in "reason shopping" to find reasons to fire a worker other than an act of whistleblowing. This has caused whistleblowers to lose their cases or have their

http://www.irishstatutebook.ie/eli/2015/si/464/made/en/pdf.

[79] This 'screening' power is similar to the power that the US Office of Special Counsel has in its US *Whistleblower Protection Act*.

[80] As noted above, the new section 43FA of the Employment Rights Act grants the government the power to enact regulations

compensation amounts reduced. This loophole in PIDA should be closed to require employers to prove that any adverse action was in no way related to a worker's whistleblowing. This does not mean that a whistleblower can act with impunity – but rather the burden must be on the employer to show that any detriment (including dismissal) was for a reason completely independent of the disclosure. If the disclosure was any of the reasons for dismissal, it should be found to be unfair. This is a departure from the current system, where the employer must only show that the disclosure was not the 'principal reason' (but it still can be one of the reasons). This should be unequivocal, and among other matters, resolve the absurd current situation where there is a different burden for unfair dismissal and detriment claims.

(9)

**Problem:**

**Many whistleblowers are pressured to sign "gag orders" in settlement agreements that seek to prevent them from discussing their cases with the public**

**Solution:**

**Ban the inclusion of "gag orders" in settlement agreements**

Some settlement agreements signed between whistleblowers and employers have contained confidentiality agreements or "gag orders" that seek to ban whistleblowers from talking about their cases in public.[82] These orders can include bans on discussing their disclosures of misconduct, thus withholding important information from the public. The prevalence of gag orders within the UK healthcare sector drew sharp criticism in the 2013 Francis Report, which exposed failings in the Mid-Staffordshire NHS Foundation Trust.[83]

UK law should ban the use of these confidentiality clauses in PIDA settlements agreements, at least with regard to the information in whistleblower disclosures. Further, the government (for example, the Department of Business Innovation & Skills) should screen and record settlement agreements more efficiently, be more transparent in reporting on them and improve low cost, easy access to these records for research. This would help to identify unusually high numbers of agreements in certain sectors or industries.

to require a certain person to report on the investigations of disclosures. At the time of writing these regulations have not yet passed.

[81] See "*The Global Principles on National Security and the Right to Information* (The Tshwane Principles)," *Open Society Foundation*, 12 Jun. 2013; https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles, accessed 5 February 2016.

# (10)

**Problem:**
**Workers face high legal and financial barriers when filing a claim with an Employment Tribunal**

**Solution:**
**Significantly lower Employment Tribunal fees and simplify the hearing process**

In July 2013, filing fees were introduced at the Employment Tribunal: for whistleblowers, £250 to file a claim under PIDA, and £950 to request a hearing. This has led to a 20 percent decrease in PIDA claims,[84] meaning that some whistleblowers who may have had a strong case against their employers chose not, or were not financially able, to file a claim. Further, court costs often are not awarded to whistleblowers who win their cases.

Moreover, many whistleblowers view Employment Tribunals as formalistic and obscure, and places where lawyers engage in tactical games. This is compounded by the lack of legal aid – making it easier for a whistleblower to be 'out-gunned'. This is despite the original and best-intentioned hope that the ET would serve as an informal forum for the handling of such cases.

These barriers have measurable effects. Workers with lawyers win more often than those without representation, and workers who bring claims increasingly are being ordered to pay court costs.[85]

Filing and hearing fees for whistleblowers should be significantly reduced or eliminated, and all court costs automatically should be awarded to whistleblowers who win their cases. Employment Tribunal proceedings should be greatly simplified, to the point that a legally qualified representative is not required for workers to have a fair chance of prevailing. However, the ET judges themselves should be lawyers – with specialist training in how to explain the complicated legal concepts, and to work through them with unrepresented litigants. All relevant information, including legal concepts and standards, should be made available to the public in plain language, online and without cost.

[82] Mention should be made of section 43J of the ERA which makes void any contractual provision or agreement that seeks to prevent someone from making a disclosure. The distinction should be drawn that it doesn't void a contract that prevents someone from discussing a disclosure already made, the substance of the disclosure and other matters.

# TEN ADDITIONAL REFORMS

## (1)

**Problem:**
**The UK does not provide financial rewards to workers who report or expose wrongdoing in the public interest**

**Solution:**
**Establish financial rewards for whistleblowers whose disclosures lead to the recovery or saving of funds or resources, or the fining of guilty parties**

The UK should offer monetary rewards to encourage whistleblowers to report misconduct and allow them to share in the financial proceeds from enforcement actions taken against guilty parties. All fines levied and funds recovered due to whistleblowers' disclosures could be divided as follows:

- 50% to the government
- 30% to a "Whistleblower Fund"
- 20% to the whistleblower

The Whistleblower Fund would support a range of programmes for whistleblowers, including advice and support services, legal expenses, lost wages and career retraining. It is worth noting that some whistleblowing concerns wrongdoing that does not involve financial fraud or other lucrative cost savings for the government – in a percentage of which a whistleblower would be able to share. The "Whistleblower Fund" would be available in these sorts of cases to cover the often considerable expenses incurred by such whistleblowers. Although this will leave some imbalance between whistleblowers depending on the nature of their case, we hope to have struck a balance where at least everyone will be supported by the redistribution of the rewards even if some whistleblowers will seek to receive more money as a percentage than others.

Countries that offer financial rewards to whistleblowers include Malaysia, South Korea and the US. The UK Office of Fair Trading is empowered to pay rewards up to £100,000

for information leading to the detection of illegal cartels. We note the difference between rewards, which should be an entitlement, and awards, which should be discretionary. This places the whistleblower in a much stronger position, as they do not need to prove the merits of their disclosure for the obtaining of a discretionary award (as opposed to an automatic, non-discretionary 'reward'). Rewards should be in addition to any damages/compensatory rights that a whistleblower might otherwise have. The difficulty in obtaining a reward, say for example in the US, means that a hybrid system where both compensation and rewards are available to a whistleblower should be in place.[86]

(2)

**Problem:**
**PIDA does not cover the full range of workers**

**Solution:**
**Expand list of workers who are protected from retaliation**

The categories of workers covered by PIDA should be expanded to include:[87]

- volunteers and interns
- non-executive directors
- board members appointed by public commissions
- job applicants[88]
- general practitioners in the health service, regardless of their contractual arrangements
- clergy members
- foster caregivers
- people wrongly believed to be whistleblowers (i.e. "perceived whistleblowers")
- people who assist or support whistleblowers
- all categories of workers listed under the Equality Act 2010

[83] "The Mid Staffordshire NHS Foundation Trust Public Inquiry: Final Report," *National Archives*, 6 Feb. 2013; http://webarchive.nationalarchives.gov.uk/20150407084003/http://www.midstaffspublicinquiry.com/, accessed 4 February 2016.

[84] Public Concern at Work, "Is the Law Protecting Whistleblowers: A Review of PIDA Cases" 2015.

[85] ibid.

[86] Blueprint recognises that the suggestion of the introduction of 'rewards' to the UK is controversial. There are notable and significant side effects of such a system. Of the most concern is the fact that it can potentially change the motivation of a whistleblower to disclose at the most financially viable point, rather than the point at which damage from the wrongdoing can be best limited. This in turn can have a negative effect on the public perception of whistleblowers. Anecdotal evidence from the US also suggests that reprisals and career damage can increase where the monetary amounts in question are higher. Options include introducing rewards on a trial basis, for a limited period of time to test whether they are in keeping with public values, or to apply rewards in limited industries, such as to financial services.

# (3)

**Problem:**
**PIDA does not include all types of crime and misconduct that whistleblowers should be permitted to report**

**Solution:**
**Expand the list of crimes and misconduct that workers are permitted to disclose to regulators or the public**[89]

The categories of crimes and misconduct the disclosure of which is considered to be whistleblowing should be expanded to include:

- corruption
- fraud
- specific dangers to public health or public safety
- specific abuses of public authority
- unauthorised use of public funds, property or resources
- gross waste of public funds or property
- gross public mismanagement
- specific conflicts of interest
- human rights violations
- fraudulent financial disclosures by government agencies or regulated corporations
- acts to cover up of any of the above

[87] Ideally, any legal person should be able to present as a whistleblower so long as they are making a public interest disclosure. This expanded list goes further to achieving this.

# (4)

**Problem:**
**Whistleblowers whose careers are damaged are not adequately compensated by Employment Tribunals**

**Solution:**
**Establish criteria for "stigma" compensation for whistleblowers**

The criteria used by Employment Tribunals to determine compensation for whistleblowers do not account for damage to a person's professional reputation. In at least one instance, a judge awarded "stigma" compensation to a whistleblower, due to damage to the person's career. This type of compensation should be awarded more readily, as even whistleblowers whose names do not become public suffer reputational harm because of boycotting and industry gossip. Additionally, as mentioned earlier, in circumstances where a former employer alerts a potential new employer to the fact that the whistleblower had made a disclosure they should be at least partially liable for any damage to the whistleblower's reputation or employability. In other words, not only should a prospective employer be prevented from discriminating against a whistleblower on the basis that they are a whistleblower, but liability should also apply to the former employer who has sought to tarnish the whistleblower's reputation by alerting the prospective employer to the fact that they made a disclosure.

The goal of any damages or compensation awarded should be to take into account all loss both actual and potential that has been suffered by a whistleblower. It should place them in a position that they would otherwise be in, but for the making of the disclosure. This should take into account their potential career damage, lost opportunities, actual or potential cost increases (such as higher mortgage rates), emotional distress, long-term medical expenses and any other consideration to return the whistleblower to the position they were in before the disclosure.

(5)

**Problem:**
**Many workers and much of the general public are not aware of PIDA or the importance of whistleblowing**

**Solution:**
**Establish a government fund to support public awareness-raising campaigns by NGOs and advocates**

Many public opinion polls show that a large percentage of UK citizens and workers are under-informed about PIDA. The government should financially support on-going public education and awareness-raising campaigns about PIDA, as well as promote the value of whistleblowing in exposing and combating corruption. The campaigns should seek to de-stigmatise whistleblowing in order to reduce retaliation in the workplace and elevate public perceptions of whistleblowers.

At the very least, the information should be provided in a much clearer and more comprehensive manner. Importantly, public information resources such as those online at https://www.gov.uk/whistleblowing/what-is-a-whistleblower[90] should set out the realistic prospects of a whistleblower making a disclosure and protecting themselves against retaliation.

(6)

**Problem:**
**Employment Tribunals do not assign specialised judges [or panels] to preside over PIDA cases**

**Solution:**
**Designated judges certified with specialised training and expertise in whistleblower issues should hear PIDA cases**

All employment cases, including those involving PIDA, are heard by generalist Employment Tribunal judges. PIDA cases, which comprise about 1 percent of cases,

[88] One whistleblower interviewed complained that he was subject to onerous background checks and employers regarded him as "dangerous." Another said her former organisation had written to clients with its version of events and as a result clients

are not heard by specialist judges. This is also revealed by the inconsistent approach to ET PIDA decisions, which vary greatly in their format and delivery. A dedicated roster of judges with specialist training should be developed to hear whistleblower cases. Certification in this training should be a prerequisite to the hearing of PIDA cases. Inconsistencies in PIDA rulings by Tribunal judges, particularly in terms of compensation, demonstrate the need for this.

(7)

**Problem:**
**Information on Employment Tribunal cases is not available online**

**Solution:**
**Establish an online registry of Employment Tribunal cases, while protecting the identity of whistleblowers**

Employment Tribunal decisions and hearing transcripts are not available online, making it difficult to gauge the scope of whistleblowing, retaliation and compensation levels. Although the decisions of the Tribunal are not binding, they can be instructive for future whistleblowers. A centralised, publicly available, free database of PIDA cases and decisions should be created. Consideration should be given toward maintaining the confidentiality of whistleblowers, as an online registry would expose them to boycotting and other forms of reputational and professional harm.

Currently, all Tribunal case files are stored in a courthouse in Bury St Edmunds. The files are in paper form, and electronic search tools are rudimentary. This is made more confusing by the fact that Employment Appeal Tribunal cases are published online. This significantly impedes the ability of researchers in the field to access data for evidence-based analysis, as well as making it unnecessarily difficult for lawyers' research to prepare cases on behalf of their clients.

# (8)

**Problem:**
**Private sector economic incentives towards implementing whistleblower protection policies are lacking. Insurance contracts are not used effectively to create this incentive**

**Solution:**
**First, further research examining how the insurance industry might make use of whistleblowing protocols to benefit business more generally would be beneficial. Second, further development of practical templates is desirable.**

Insurance contracts in respect of worker liability might include terms that any liability covered under the insurance contract would be conditional on the insured having an appropriate whistleblowing policy and procedure. This would serve the public interest as an overall reduction of risk to both the insurer and insured (as it would lead to an earlier identification of wrongdoing). Section 7(2) of the Bribery Act 2010 demonstrates a good example of a statutory incentive for a private company to have a whistleblower policy – as such a policy may serve as evidence to a defence against prosecution.

Additionally or alternatively, an analysis should be conducted annually to ensure that insurers are aware of the cost saving benefits of the early identification of wrongdoing, and relevantly how they might work this into insurance contracts with their clients to reduce risk and ultimately save money for both parties. Given the importance of the British insurance industry internationally, such changes might serve to broaden whistleblower protection not only inside the UK but further afield as well.

# (9)

**Problem:**
**Whistleblowing in the public interest is often confused with employment grievances**

**Solution:**
**Distinguish whistleblowing cases from workplace complaints**

PIDA was amended in June 2013 to restrict claims only to disclosures made in the "public interest." Prior to this change in the law, workers could file claims over workplace grievances that were not necessarily "whistleblowing" in the strict sense,[91] such as disputes over salaries and promotions. Even with this change, whistleblowing is still often confused with worker grievances. This tends to diminish the value of whistleblowing in the public's eye, by wrongly associating it with individual grievances.

Public officials, journalists and NGOs should be made aware of the distinction between these two categories of claims. Further, Employment Tribunal rulings should be reviewed to ensure judges are correctly interpreting PIDA's new provision.

## (10)

**Problem:**
**Trade unions are not a designated disclosure channel for workers**

**Solution:**
**Trade unions should be included as a recipient of worker disclosures qualifying for protection**

For many workers, a trade union representative will be their first port of call for any concerns about possible misconduct in the workplace. However, unions are not a designated disclosure channel. This means that workers who are retaliated against for reporting wrongdoing to a union have no legal recourse. This is particularly problematic where there is a health and safety issue, affecting the public interest. Protection should arise once a disclosure has been made to a union (or official thereof) and the employer has been made aware of this disclosure.

Trade unions should be added as a recognised disclosure channel, and union representatives should receive training on how best to deal with reports and retaliation complaints.

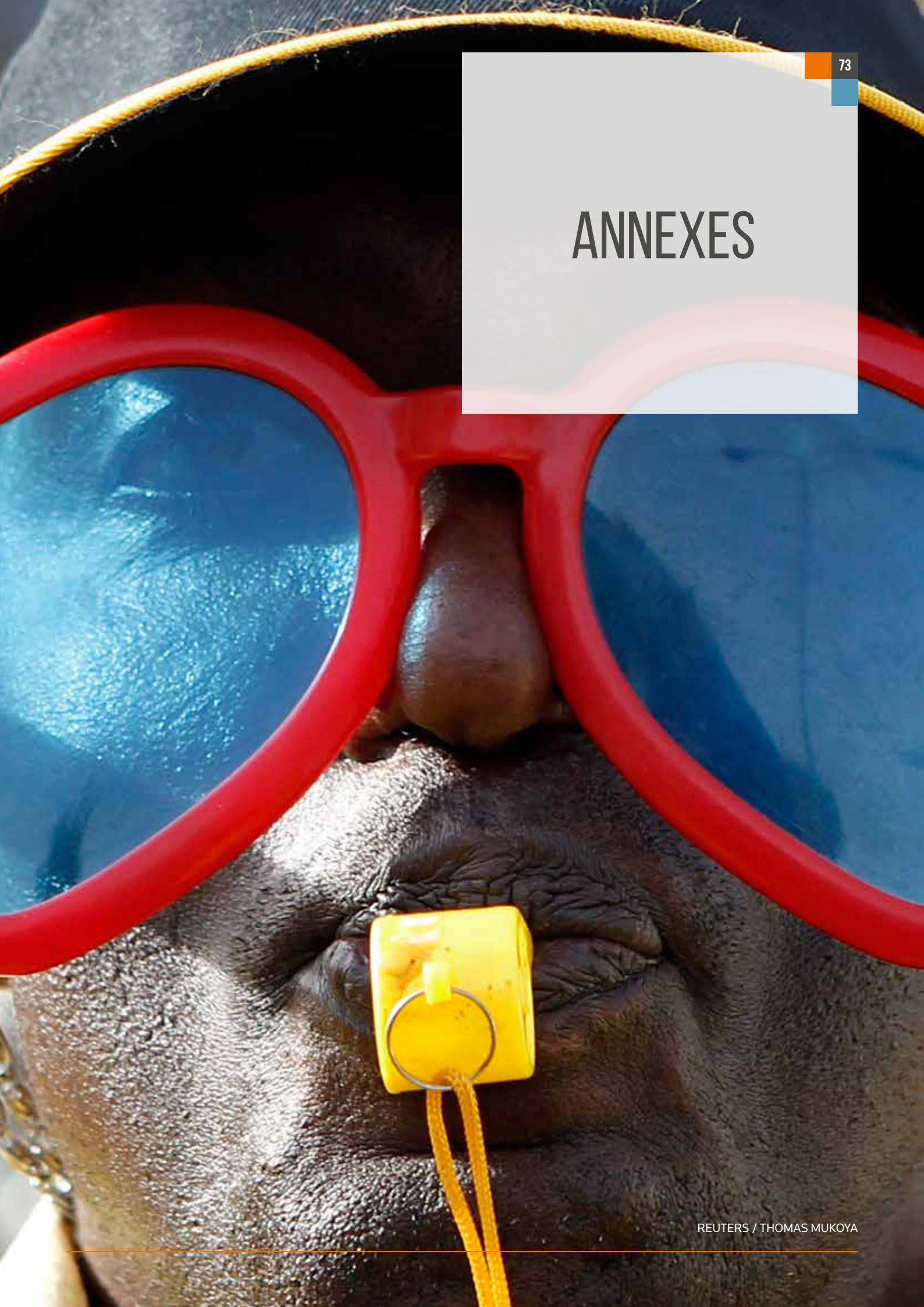
viewed her as "too dangerous" to work with.

[89] Although there is a catch-all provision which allows a disclosure for any crime, a list included in the legislation is useful because it provides an excellent guide to the sorts of crimes that a whistleblower might disclose in the public interest.

[90] Accessed 5 February 2016.

[91] A distinction between a grievance and a public interest disclosure can be at times difficult to make. For example, the first Employment Appeal Tribunal case to discuss the meaning of 'public interest' found that 'the public' could in fact just be a

# ANNEXES



REUTERS / THOMAS MUKOYA

# ANNEXES

## ANNEX I: BOSNIA'S PRE-TRIAL MECHANISM

In January 2014 a whistleblower law took effect in Bosnia and Herzegovina that provides legal protection to state workers who report crime and corruption. While it is too soon to evaluate the long-term effectiveness of the new law, which has limitations, there is one element of particular interest. It allows whistleblowers in certain limited circumstances to be protected almost immediately after he or she reports misconduct – without needing to suffer long periods of retaliation before seeking compensation through the courts.

Under the Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina,[92] state workers who face or fear retaliation can apply for whistleblower protection status directly to a government institution, the Agency for Prevention of Corruption. The Agency has up to 30 days to grant or deny the request. If the application is approved, the Agency can order the whistleblower's employer to immediately stop retaliating against the worker, or to reinstate the person if he or she has already been fired or demoted.

Covered workers can request whistleblower status even if they only suspect retaliation could occur. And, state workers are protected from disciplinary and criminal liability for disclosing official secrets in the course of reporting corruption to the proper authority.

After receiving an order from the Agency for Prevention of Corruption, the employer must take steps to stop detrimental actions against the whistleblower within three

section of the public – not the public as a whole. An example of this might be several people within an organisation who wish to make a disclosure about a bullying culture – perhaps if one person was bullied this would be a grievance. Where the set of those affected is larger, it may become a 'section of the public'. Chesterton Global Ltd v Nurmohamed UKEAT/0335/14/DM [2015] found at http://www.employmentappeals.gov.uk/Public/results.aspx, accessed 11 February 2016.

days. Directors who fail to follow an Agency order to stop retaliation or reinstate a whistleblower may be fined €5,000 to €10,000.

The head of a public institution can be *personally* fined for ignoring a whistleblower protection order from the Agency. This personal liability introduces human culpability and responsibility to help ensure whistleblowers are protected from reprisals. The threat of such a fine was instrumental in the reinstatement of Danko Bogdanović in June 2015 (see below).

Bosnia's law recognises that the person to whom the disclosure is made is also sometimes the person who is engaged in the retaliation. While Bosnia's law lacks important components as a comprehensive whistleblower protection law, this particular provision is a development worth watching as it begins to be applied in practice.

Methods of protecting whistleblowers from firing, demotion, and reprisals in the first instance, rather than only compensating them for their financial and personal losses, should be studied and considered.

Protections should be as quick, adaptive and agile as the inevitable retaliation metered against a whistleblower. For countries that already have anti-corruption agencies and frameworks, adding a streamlined, non-court-based protection system would potentially create a new standard in protection.

### Bosnia: The reinstatement of Danko Bogdanović

Danko Bogdanović had worked as a lawyer for 18 years in various positions within Bosnia's customs service. Among his posts was chief of the Misdemeanor Offences and Legal Affairs departments. Since 2007 he managed a field office in the border city of Brčko for the Indirect Taxation Authority (ITA), the government institution responsible for value-added taxes, customs duties and other taxes.[93]

In March 2013 Bogdanović revealed a large-scale bribery scheme within the ITA. Dozens of ITA officers were taking bribes from large companies to improperly classify the amounts and types of imports and exports in order to reduce the companies' tax burden. Part of the scheme involved one of Bogdanović's superiors requesting payments on behalf of the ITA's third-ranking official.

Bogdanović refused to participate in the plot and reported it to authorities. Investigations known as "Master" and "Pandora" led to the arrest of about 50 ITA staffers. The ITA's director reinstated all of the suspects to their jobs as they awaited

[92] See: "Law On Whistleblower Protection In The Institutions Of Bosnia-Herzegovina," *Regional Anti-Corruption Initiative*, Aug. 2015; http://rai-see.org/wp-content/uploads/2015/08/LAW-ON-WHISTLEBLOWER-PROTECTION-IN-THE-INSTITUTIONS-OF-BiH-en.pdf, accessed 5 February 2016

trial. Bogdanović was then targeted with professional pressures and personal threats. He was disciplined, suspended in July 2013 and ultimately fired in December 2014.

In March 2015 the Agency for Prevention of Corruption ordered ITA to reinstate Bogdanović to his position. Additionally, prosecutors threatened to levy a fine against the ITA's director if he did not reinstate Bogdanović. On 3 June the Center for Responsible Democracy-Luna, a whistleblower support NGO based in Sarajevo, issued a statement calling for his reinstatement. The next day, 4 June, Bogdanović was granted his job back – ending his 23-month ordeal.[94]

## ANNEX II: GAGGING THE MESSENGERS: UK WHISTLEBLOWERS PRESSURED TO REMAIN SILENT

The essential purpose of whistleblowing is to alert employers and then if necessary the authorities, the media and, if still necessary, the general public about threats to government accountability, financial integrity, the environment, and public health and safety. Once a whistleblower exposes crime or corruption, there is an expectation that this information will remain in the public sphere – and be used productively to achieve corrective action and prevent future misconduct.

In the UK, however, many whistleblowers have been pressured to keep quiet – even *after* they reported misconduct. One of the tools used by employers and government institutions to silence whistleblowers are confidentiality clauses, or "gag orders." Often, these gag orders are inserted into settlement agreements reached between employers and whistleblowers to settle retaliation cases. As mentioned above the 'protection' in section 43J of the ERA offers limited relief for a whistleblower – it only voids any contractual provision seeking to prevent a whistleblower from making a disclosure. It does not, for example, prevent a clause which prevents a whistleblower from discussing a disclosure already made, the details of that disclosure or the people involved. In all other material respects, it silences a whistleblower. This, in turn, has the potential to limit any necessary investigation into the wrongdoing.

Many whistleblowers therefore face two obstacles: the initial barriers to report wrongdoing, then a second clampdown to remain silent.

In recent years, government institutions in the UK – especially in the scandal-ridden National Health Service (NHS) – have spent tens of millions of pounds in order to block former workers who have already blown the whistle from continuing to speak

[93] "Europe's Unexpected Whistle-blowing Capital," Yahoo News, 1 Feb. 2016; http://news.yahoo.com/europe-unexpected-whistle-blowing-capital-000000209.html, accessed 5 February 2016

out. In one case, the NHS spent an estimate of over £10 million in legal and other fees to go after a whistleblower, who was eventually awarded £1.2 million.[95] This cost, and culpability, is ultimately at the cost of the taxpayer.

Two-thirds of all whistleblower cases are settled before reaching Employment Tribunals, and details of these cases are never disclosed to the public.[96] In most of these settlements, whistleblowers sign confidentiality clauses in exchange for receiving financial compensation for being unfairly dismissed or otherwise retaliated against.[97]

The UK's Bureau of Investigative Journalism reported in 2010 that 19 NHS staffers who exposed problems in hospitals settled their cases before the allegations went public.[98]

The National Audit Office estimated in 2014 that gag orders are inserted into 88 percent of compromise agreements. These clauses, the agency said, "have been used inappropriately to deter former workers from speaking out about serious and systematic failures within the public sector." The Public Accounts Committee said that from 2010-13, at least £28.4 million was paid to government workers in 1,053 special severance agreements.[99]

Gary Walker was a senior manager with the United Lincolnshire NHS Trust whose disclosures were widely credited with helping to save the highly indebted organisation. Out of retaliation, he was fired in 2010 for using inappropriate language in the workplace. He accepted a £320,000 settlement that included a gag order so strict that Walker was forbidden to discuss the existence of the order itself. Walker later defied the agreement and spoke publicly of problems within the NHS, for which he was threatened with legal action.[100, 101]

Dr Peter Bousfield was a gynaecologist at the Liverpool Women's NHS Foundation Trust who said insufficient staffing levels and patient safety problems had been ignored for years. In 2007 he was pressured into accepting early retirement and a

[94] "Handbook for Enforcing the Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina," Center for Responsible Democracy-Luna, Sarajevo, October 2015.

[95] See "Vindicated: Sacked whistleblower backed by the Mail wins £1.2m payout after NHS spent £10m trying to crush him after he exposed shocking failings in care," *Mail Online*, 4 Feb. 2016; http://www.dailymail.co.uk/news/article-3432523/NHS-whistleblower-receives-1-2-million-payout-12-year-witch-hunt-doctor-highlighted-fears-patient-safety.html, accessed 11 February 2016.

[96] Statistics from the Department of Trade and Industry, as provided to Public Concern at Work. See http://www.pcaw.org.uk/pida-statistics for more information, accessed 5 February 2016.

[97] "NHS is paying millions to gag whistleblowers," *Independent*, 22 Oct. 2011; www.*Independent*.co.uk/life-style/health-and-families/health-news/nhs-is-paying-millions-to-gag-whistleblowers-1812914.html, accessed 5 February 2016.

[98] "Millions spent on doctor 'gagging orders' by NHS, investigation finds," *Independent*, 23 Oct. 2011; www.*Independent*.co.uk/life-style/health-and-families/health-news/millions-spent-on-doctor-gagging-orders-by-nhs-investigation-finds-2041209.html, accessed 5 February 2016.

[99] "Public sector using gagging clauses and payoffs to hide failure, say MPs," *The Guardian*, 24 Jan. 2014; www.theguardian.com/society/2014/jan/24/public-sector-compensatio-payments-payoffs, accessed 5 February 2016.

[100] "Ex-NHS chief Gary Walker 'being gagged'," BBC, 29 June 2012; www.bbc.com/news/uk-18639088, accessed 5 February 2016.

payoff. A gag order blocked him from raising concerns with anyone other than the hospital board and the UK Secretary of State for Health.[102]

In some cases, whistleblowers have refused to sign gag orders in order to maintain their right of free speech.

Lucy Dawson was an emergency care doctor in a hospital in Abergavenny who raised concerns about how a colleague was treating a seriously injured young patient. She feared the patient might die if she remained silent. But rather than investigating her concerns and treating her disclosure confidentially, Dawson said managers conducted no interviews, told the colleague about the allegations, and eventually appointed the other doctor to be Dawson's line manager. In 2009 the NHS offered her a £90,000 settlement that included a confidentiality clause, which she declined. Dawson found a job in a different hospital.[103]

In 2006 paediatrician Kim Holt said conditions at a clinic in north London were "falling apart" and warned of coming disaster. To buy her silence and allow her to keep her job, she was offered £120,000. After she refused to sign the gag order, she was placed on leave. A short while later, Holt's fears became reality when an infant known as "Baby Peter" died after serious injuries went undetected. Holt, who had 25 years of experience and three medical degrees, was blocked from returning to the clinic. "I am not going to be gagged," she said. "I must speak about this because it is so wrong."[104, 105]

The NHS announced in 2013 that future settlement agreements will exclude gag orders. This followed a three-year period during which about £15 million was spent on compromise agreements with staff leaving the NHS, of which 90 percent contained confidentiality clauses. Said Health Secretary Jeremy Hunt, "The era of gagging NHS staff from raising their real worries about patient care must come to an end."[106]

Lessons learnt from the NHS whistleblower protection failings should be applied to all sectors. In this example, gag orders should be banned for all whistleblowers, irrespective of their sector.

[101] Ex-NHS trust chief defies legal gag to tell of safety concerns," Birmingham Mail, 14 Feb. 2013; www.birminghammail.co.uk/news/uk-news/ex-nhs-trust-chief-gary-walker-1317927, accessed 5 February 2016.

[102] "Tenfold rise in whistleblower cases taken to tribunal," *The Guardian*, 10 March 2010; www.theguardian.com/money/2010/mar/22/tenfold-rise-whistleblower-cases-tribunal, accessed 5 February 2016.

[103] ibid.

[104] "Millions spent on doctor 'gagging orders' by NHS, investigation finds," *Independent*, 23 Oct. 2011; www.*Independent*.co.uk/life-style/health-and-families/health-news/millions-spent-on-doctor-gagging-orders-by-nhs-investigation-finds-2041209.html, accessed 5 February 2016.

[105] "If Great Ormond Street had listened to me, Baby Peter would still be alive', says consultant," *The Telegraph*, 6 Dec. 2009; www.telegraph.co.uk/news/uknews/baby-p/6739202/If-Great-Ormond-Street-had-listened-to-me-Baby-Peter-would-still-be-alive-says-consultant.html, accessed 5 February 2016.

## ANNEX III: UNHEALTHY CARE: NHS WHISTLEBLOWERS SUFFER AN EPIDEMIC OF RETALIATION

In no other industry in the UK is the case for stronger whistleblower protections clearer than the healthcare field.

Dozens of doctors, nurses, specialists and other medical professionals who are part of the National Health Service (NHS) have been sacked, demoted, harassed and blacklisted for reporting – sometimes simply to their supervisors – unsafe conditions in hospitals and clinics that have endangered the health and even the lives of patients.

These stories, which have become commonplace since the PIDA passed in 1998, provide evidence that the law lacks the basic elements to protect workers from suffering often vindictive retaliation at the hands of managers and colleagues – before it occurs.

Egregious reprisals have befallen healthcare workers who, in the course of fulfilling their professional responsibility, have tried to save lives and heal the ill. NHS workers have suffered extended periods of reprisals, in part, because PIDA has no provisions to order employers to stop retaliation, punish those responsible for it and to ensure it will not be repeated in the future.

Investigations into poor conditions within the UK's health system – many of which were raised by whistleblowers – climaxed in February 2013 with the release of a major report on poor care and high mortality rates at the NHS' Stafford Hospital.

The two-year inquiry, headed by barrister Sir Robert Francis QC, detailed the suffering of many patients within a culture of secrecy and defensiveness. Francis concluded there had been a "whole system failure." The 1,800-page report put forth 290 major recommendations for all levels of the country's health service. They include clear mechanisms for patients and their families to raise concerns and complaints, and quarterly reports by the NHS on complaints data and lessons learned.[107]

Following this, in February 2015 Sir Robert Francis released the 'Freedom to Speak Up' Report[108] – an independent report looking into creating an open and honest reporting culture in the NHS. The results of an empirical study[109] underpinning the recommendations of that report revealed:

[106] "Ban on NHS gagging orders," *The Guardian*, 14 March 2013; www.theguardian.com/society/2013/mar/14/ban-on-nhs-gagging-orders, accessed 5 February 2016.

[107] "*Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry*," Chaired by Robert Francis QC, February 2013.

[108] See "Freedom to Speak Up: An *Independent* review into creating an open and honest reporting culture in the NHS," *National Archives*, 11 Feb. 2015; http://webarchive.nationalarchives.gov.uk/20150218150343/https://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf, accessed 22 March 2016.

[109] In August and September 2014 surveys were conducted of workers in NHS primary and secondary care settings and NHS

- 15% of trust staff said that they suffered detriment as a result of assisting a colleague in raising a concern
- 35% of the respondents to the survey stated that they had raised a concern about suspected wrongdoing in the NHS. As a reason for not raising a concern, 18% of those surveyed said that they did not trust the system, 15% said that they feared victimisation and 5% did not know how to raise a concern
- After raising concerns, 20% of those surveyed said that they were ignored by management, 17% were victimised by management and only 16% were praised by co-workers
- 88% of the trusts indicated that 'it may not be possible to maintain confidentiality' in all circumstances

### Forced out for discovering neglected blood-test results

While working as a nurse at a health centre in Oxford in 2010, Annabelle Blackburn warned managers about hundreds of e-mails and more than 300 blood test results dating back more than six months – many of them urgent – that the doctor at that surgery apparently had not yet dealt with. The neglected results included those of a 23-year-old woman with a probable leukaemia diagnosis, a man in his 70s with prostate cancer, and a man in his 60s with advanced bowel cancer. Blackburn also said a man had a fatal heart attack that could have been prevented if his symptoms had been accurately diagnosed.[110, 111]

Her concerns were taken so seriously the regulator stepped in and suspended the doctor. Despite this, they refused to inform patients of their inadequate care and Blackburn was forced out of her job for "*making trouble*". Blackburn filed an unfair dismissal claim with an Employment Tribunal. The judge acknowledged Blackburn "*did suffer detriment*" but rejected her compensation claim in January 2013 because, in the judge's opinion, there was no link between her disclosures and her forced resignation. Rather, the judge blamed the situation on a "*lack of mutual respect*."

Following Blackburn's reports, the centre's doctor was suspended for 18 months and eventually he resigned.[112, 113]

In the end, the doctor accused of negligence was disciplined, and the Tribunal found Blackburn had suffered negative consequences. Yet, she lost her whistleblower

Trusts. 15,120 people responded to the survey of trust staff and 4,644 responded to the survey of those working in GP practices and community pharmacies. Professor David Lewis provided excellent statistics on the empirical review.

[110] "NHS forced me out for blowing the whistle on GP," *The Telegraph*, 6 Oct. 2013; www.telegraph.co.uk/news/nhs/10356978/NHS-forced-me-out-for-blowing-the-whistle-on-GP.html, accessed 5 February 2016.

[111] "TV whistle blower nurse sues employer," *The Telegraph*, 15 Aug. 2012; www.telegraph.co.uk/news/health/news/9477039/TV-whistle-blower-nurse-sues-employer.html, accessed 5 February 2016.

[112] "NHS forced me out for blowing the whistle on GP," *The Telegraph*, 6 Oct. 2013; www.telegraph.co.uk/news/nhs/10356978/NHS-forced-me-out-for-blowing-the-whistle-on-GP.html, accessed 5 February 2016.

retaliation case and received no compensation – a process that took more than two years.

### More NHS retaliation victims

These are among the many other NHS whistleblowers who have been similarly mistreated for reporting unsafe or substandard conditions in UK medical facilities:

- **Gary Walker** headed the United Lincolnshire Hospitals Trust until he was fired in 2010, allegedly for swearing in meetings. Just prior, Walker had reported concerns over patient safety, including high death rates and cancelled surgeries. He also complained of a culture of "sheer bullying" in the NHS. He accepted a £320,000 settlement that included a gag order that he later refused to honour. As of 2013 the hospital was one of 14 in the UK being investigated for high death rates.[114]
- Three days before Christmas in 2010, **Dr David Drew** was fired from his job as clinical director at Walsall Manor Hospital after reporting the hospital was allowing "terrible deaths" in order to save money. In one case a 16-month-old toddler was killed by his stepfather a week after being discharged from the hospital with "suspicious injuries" and without being referred to social services. Drew was dismissed for writing an e-mail that contained a prayer.[115] Two years later an Employment Tribunal rejected his unfair dismissal claim.
- **Narinder Kapur** was fired in 2010 from his job as a neuropsychologist at Addenbrooke's Hospital after reporting underqualified and unsupervised staffers were treating patients at the renowned teaching hospital in Cambridge. An Employment Tribunal ruled in 2012 that he was unfairly dismissed – but not for being a whistleblower, but rather because of an "irredeemable breakdown in trust, confidence and communication." The Tribunal said he would have been fired anyway, within six months. It found him 75 percent responsible for his own dismissal and awarded him £7,500 in compensation. After the hearing Kapur went on a five-day hunger strike to protest NHS' treatment of whistleblowers.[116, 117]
- Following a campaign of harassment and bogus allegations by "jealous" colleagues, nurse **Jean Haydr** was fired from Tameside General Hospital in

[113] "TV whistle blower nurse sues employer," *The Telegraph*, 15 Aug. 2012; www.telegraph.co.uk/news/health/news/9477039/TV-whistle-blower-nurse-sues-employer.html, accessed 5 February 2016.

[114] "NHS whistleblower Gary Walker 'faced bullying culture'," BBC, 19 March 2013; www.bbc.com/news/uk-england-lincolnshire-21842668, accessed 5 February 2016.

[115] "'Whistleblower' doctor challenges Walsall Hospital sacking," BBC, 27 March 2012; www.bbc.com/news/uk-england-birmingham-17528123, accessed 5 February 2016.

[116] "Doctor stages hunger strike to protest NHS," Cambridge Post, 2 Oct. 2012; www.cambridge-news.co.uk/Doctor-stages-hunger-strike-protest-NHS/story-22750108-detail/story.html, accessed 5 February 2016.

2013 after reporting concerns of poor patient care. These included leaving a teenaged overdose patient without suitable medical attention, and poor care of a "dehydrated, lethargic and floppy" 10-month-old baby. After reporting her concerns, colleagues concocted allegations against Haydr, such as working while drunk and threatening physical violence. In 2014 an Employment Tribunal found she was unfairly dismissed – but not for being a whistleblower, rather because of the harassment.[118, 119]

- **Jennie Fecitt** and two other nurses working in Manchester in 2008 were bullied, harassed and transferred after reporting a colleague had exaggerated his qualifications. Fecitt's daughter received a threatening phone call. Fecitt lost her case in an Employment Tribunal because at the time, UK law did not protect whistleblowers from retaliation by colleagues (Amendments to PIDA closed this loophole in 2013). The Tribunal acknowledged the NHS did not do enough to stop the retaliation but said the transfer was not because of the nurses' whistleblowing, but because the team was not working well together. The three nurses were ordered to pay £21,000 of the NHS' legal costs. They were offered a settlement agreement of £160,000 that included a gag order, which they declined to sign.[120, 121]
- **Edwin Jesudason** was an award-winning paediatric surgeon at the renowned Alder Hey Children's Hospital in Liverpool. In 2009 he began telling managers about poor care and standards that he said led to the death of two children and threatened the health of other patients. He was discredited, and managers tried to force him to resign. Following a series of legal actions, Jesudason lost his case in 2012, resigned and was ordered to pay £100,000 of the hospital's legal costs. He and the NHS reached an undisclosed settlement in January 2015, according to Employment Tribunal records. Jesudason since has been unable to find a position in the UK.[122, 123]
- **Kevin Beatt** had been working as a cardiologist at Croydon University Hospital for five years when, in 2010, he began raising concerns about

[117] "*Statement on Narinder Kapur employment decision*," Cambridge University Hospitals NHS Foundation Trust, 10 July 2012;www.cuh.org.uk/news/statement-narinder-kapur-employment-decision, accessed 5 February 2016.

[118] "'Whistleblower' nurse claims she was sacked for making complaints about patient care at Tameside Hospital," Manchester Evening News, 29 July 2014; www.manchestereveningnews.co.uk/news/greater-manchester-news/whistleblower-nurse-sacked-tameside-hospital-7529795, accessed 5 February 2016.

[119] "Jealous colleagues forced top nurse out of job at failing Tameside Hospital, rules tribunal," Manchester Evening News, 31 Oct. 2014; www.manchestereveningnews.co.uk/news/greater-manchester-news/jealous-nurses-exposed-forcing-top-8025165, accessed 5 February 2016.

[120] "Whistleblowers not protected from bullying, court rules," *Independent*, 31 Oct. 2011; www.*Independent*.co.uk/news/uk/home-news/whistleblowers-not-protected-from-bullying-court-rules-6255015.html, accessed 5 February 2016.

[121] "Whistleblower forced to pay trust's legal bills backs Nursing Times campaign," Nursing Times, 5 March 2013; www.nursingtimes.net/nursing-practice/specialisms/management/whistleblower-forced-to-pay-trusts-legal-bills-backs-nursing-times-campaign/5055674.article, accessed 5 February 2016.

[122] "This brilliant surgeon can't find work in the NHS. Is it because he blew the whistle on child deaths at a leading hospital?" Mail, 14 March 2013; www.dailymail.co.uk/news/article-2293567/This-brilliant-surgeon-work-NHS-Is-blew-whistle-child-deaths-leading-hospital.html, accessed 5 February 2016.

inadequate equipment, poor investigations of serious incidents, removal of key staff, lack of competent nurses, bullying and harassment. In one instance in June 2011, a 63-year-old man died during an angioplasty being performed in an understaffed operating room. The hospital retaliated with dubious allegations against Beatt. An Employment Tribunal rejected the hospital's allegations and ruled in October 2014 that Beatt's firing two years earlier was unfair and due to his whistleblowing.[124]

## ANNEX IV: REASON SHOPPING: HOW EMPLOYERS SIDESTEP WHISTLEBLOWER RETALIATION CLAIMS

Some workers in the UK who have been fired after reporting misconduct have lost their whistleblower retaliation cases due to legal loopholes that employers are able to exploit to their advantage in court. As a result, victimised whistleblowers may be deprived of financial compensation to which they are legally entitled.

PIDA was written with the goal of automatically protecting workers who face reprisals at work for reporting wrongdoing. In practice, however, employers have great leeway to introduce other reasons to justify why a worker is punished. In Tribunal cases, this serves to draw attention away from the worker's act of whistleblowing and onto his or her professional or personal conduct.

The essential reason that this is allowed to occur is because in order to argue that a whistleblower was unfairly dismissed, it must be shown that the making of the disclosure was the principal reason for the worker's firing (Section 103A of the ERA). Although the burden of proof is on the employer to show that the principal reason was something other than the making of the disclosure, the Section encourages the introduction of other reasons, whether real or manufactured, so that the employer can avoid liability for unfairly dismissing a worker.

Within UK legal circles, this tactic is known as "reason shopping." Skilled lawyers can use this strategy to defeat whistleblowers in court – even when it is obvious a worker was fired for reporting misconduct.

There are two main arguments for why the reason for firing a worker is important. The first is obvious – if the employer can successfully argue that the worker was terminated

[123] "*How blowing the whistle cost two men their NHS careers*," 4 News, 26 Oct. 2013; http://blogs.channel4.com/victoria-macdonald-on-health-and-social-care/blowing-whistle-cost-men-nhs-careers/1580, accessed 5 February 2016.

[124] "Whistle-blowing heart consultant was unfairly dismissed by hospital trust in bid to damage his reputation, tribunal finds,"

for some legitimate reason, they will not be found to have unfairly dismissed the worker. However, even if the dismissal was deemed to be unfair (but unfair for a reason other than the making of a disclosure), this too will have a significant impact. Financial compensation for whistleblower retaliation in the UK is not capped: there is no limit on how much judges can award workers for injury to feelings, aggravated damages, loss of future wages and other types of damages. There is a limit, however, on compensation for workers unfairly dismissed for other reasons – £78,335.[125] There is clear incentive here to an employer.

By swapping one type of unfair dismissal for another, employers can escape the risk of paying hundreds of thousands or even millions of pounds in damages to a whistleblower. In actual Tribunal cases, these other rationales have included contriving false allegations against a worker, conducting unfair disciplinary actions, and as a consequence, firing a worker with insufficient notice.

If a Tribunal judge decides that a worker was fired for a different unfair reason, and not because of blowing the whistle, then the worker would not be entitled to unlimited compensation. An employer that loses such a case still would have to compensate the aggrieved worker, but no more than £78,962.

"Reason shopping" can be so effective that in some cases, Tribunal judges have ruled the official reason for a whistleblower's suffering was being fired through an internal investigation or disciplinary process and not because of whistleblowing retaliation – even if the act of whistleblowing was the very cause of the investigation or disciplinary process in the first place.

In some other cases, unscrupulous employers try to disguise their improper motivation for disciplining and dismissing workers by using external investigators or external people to conduct the disciplinary hearings. By using them, the "smoke and mirrors" situation created by others being involved is used to try and break the chain of causation and disguise the real reason for a dismissal. These are now being regularly used by firms who are routinely instructed to work for the NHS and who even employ or use their own HR businesses, despite the clear conflict of interest, such mechanisms have not received criticism from Tribunals. The use of "reason shopping" to disguise the real motivation has reached an industrial level in the NHS sector in particular.[126]

Daily Mail, 3 Dec. 2014; www.dailymail.co.uk/news/article-2858783/Tribunal-finds-whistle-blowing-heart-consultant unfairly-dismissed.html, accessed 5 February 2016

[125] Or, if less, one year's wage.

Moreover, some workers have lost whistleblower retaliation cases because employers successfully argued in court that they had a poor relationship with managers and colleagues. Judges have agreed with this argument, even if the poor relationship was caused by the act of whistleblowing. This is another example of a subjective decision judges can make with little guidance.

The perverse result is that in order to avoid the risk of paying uncapped damages to whistleblowers, employers are tempted to orchestrate elaborate, long-term retaliation campaigns against workers in order to manufacture alternative unfair dismissal scenarios. So rather than being fired swiftly for being a whistleblower, campaigns are orchestrated to ensure that whistleblowers suffer extended retaliation which if it does not break them will lead to their dismissal.

Additionally, Tribunal judges can reduce compensation if they determine the worker was partly responsible for being fired.

A number of recent Employment Tribunal cases show how whistleblowers can have a strong case for retaliation, only to see it fall apart.

*To protect the privacy of individual whistleblowers, names have been changed except where they have already been made public through media reports.*

- Sarah[127] was fired from her job at a children's home after suspecting two colleagues of abusing children. She lost her whistleblower retaliation case in 2013. A Tribunal judge ruled she was unfairly dismissed – not because of her whistleblowing, but because the employer unfairly fired her for a minor allegation. Moreover, Sarah's compensation was reduced by 25 percent because the judge said her firing – even though unreasonable – was partially her fault.
- Wilma[128] was fired from her job at a school after alleging financial malpractice and favouritism for trips. Soon after making the report, she faced disciplinary actions, was fired and ordered off the property immediately. A Tribunal judge said in 2009 that Wilma was "humiliated" and "undermined," and that the situation "injured her feelings considerably." Yet the judge agreed with the school's lawyer, who said that the "real reason" for the firing was "a breakdown in trust and confidence."[129] The judge placed much of the blame on Wilma and cut portions of her compensation by 90 percent. This decision cost her £4,621,50.

[126] This anecdotal evidence was provided to us in a discussion with one barrister familiar with the running of whistleblowing cases against the NHS

[127] Name withheld.

[128] Name withheld.

[129] "Green School head branded bully," Get West London, 10 Oct. 2008; http://www.getwestlondon.co.uk/news/local-news/green-school-head-branded-bully-6014511, accessed 5 February 2016.

- Lucia[130] was harassed into quitting her job at a retirement home after reporting that a colleague was not properly registered. Soon after making the report, her supervisors became "cold" and argumentative. A Tribunal judge found in 2009 that Lucia had "suffered detriment" because of her report, but said the "chain of causation" between her disclosure and the unpleasant treatment was broken. The judge attributed the retaliation to Lucia's whistleblowing but blamed her for resigning and denied her compensation for unfair dismissal.
- Narinder Kapur was fired from his job as a neuropsychologist at a hospital after reporting patients were being treated by under qualified and unsupervised staff. An Employment Tribunal ruled in 2012 that he was unfairly dismissed – not because of his report, but due to an "irredeemable breakdown in trust, confidence and communication." The Tribunal found him 75 percent responsible for the firing and cut his compensation accordingly.
- Jean Haydr was systematically harassed, falsely accused and fired from a hospital after raising concerns of poor patient care. A Tribunal found in 2014 that she was unfairly dismissed – not for being a whistleblower, but because of the harassment.
- Jenny Fecitt and two other nurses were bullied, harassed and transferred in 2008 after reporting a colleague had exaggerated his qualifications. A Tribunal ruled the transfers were not because of the nurses' whistleblowing, but because the team was not working well together.

## ANNEX V: METHODOLOGY OF OUR RESEARCH

In arriving at our conclusions and consequent recommendations in this report, we relied upon a number of sources and research tools.

- Initial research by our team identified 139 UK Employment Tribunal (ET) cases that went to final conclusion and thus could have potentially constituted an appropriate sample data set for the review of whistleblower protection legislation in the UK. Of the 139 cases, 96 cases included awards for compensation. We used these to determine the median compensation amount of £17,422.

- The ET cases were reviewed as illustrative examples. In many cases the Employment Appeals Tribunal support the conclusions from this data set, but for comparative purposes these were not included as the base data set underpinning our conclusions. Although regard was had to Employment Appeal Tribunal (EAT) cases in the desk research, especially in their application of the law, a fundamental issue with PIDA is how claimants are consistently spending vast sums of money for paltry compensation. The factual matrices of the ET cases (as opposed to the EAT cases) was sufficient for this purpose, and including EAT cases with ET cases would possibly skew the data set.
- Over two separate trips, two of the authors of this report attended at the Employment Tribunal Public Register at Bury St Edmunds, UK over the course of nearly a week. On these visits they were able to more closely examine and select illustrative cases that met the criteria (set out below) from the wider data set. Applying these criteria, 50 hard copy cases were selected, researched and analysed in great detail. These cases were dated from 2007 - 2015. The criteria were:
    - » the case fell within the PIDA provisions of the *Employment Rights Act*
    - » the case went to a final hearing
    - » there was a final ruling available on the case
    - » there was a complete file available for the case, including all documents from both the merits and remedy hearings and if applicable any interim hearing
    - » the subject matter of the disclosure was 'in the public interest' – a test we retroactively applied even before it was a legislative requirement (from 2013 onwards). The purpose of this was to eliminate worker grievance cases
- From these cases, we extracted key data including:
    - » the legal rationale for Tribunal rulings in favour or against workers
    - » the time from the onset of retaliation or detriment to resolution of the case
    - » the amounts awarded
    - » costs orders where relevant
    - » how compensation was limited/reduced
    - » sectoral, gender and geographical information

- Each of the cases was read in hard copy as there is no reliable electronic search capability of the full case documents physically at the site. The cases are only stored in paper form, shelved in an archive facility. This is why it was necessary to physically attend at the site. Some cases either did not proceed to a final hearing, or did not contain full documentation.
- In order to build a holistic picture of the typical experience of whistleblowers, we selected whistleblower 'example cases' via referrals from other NGOs working in the whistleblower protection area in the UK and media reports. We commissioned a barrister to conduct 12 separate in-depth case interviews. These are separate cases to the 50 cases in the investigated data set. The experiences and suggestions of all the 12 cases provided useful guidance for our research.
- In order to build a picture of the amount of costs an average whistleblower would incur to enforce their rights, we also contacted and informally interviewed over 10 separate solicitors / barristers who specialise in the area in the UK. The conversations were conducted on an anonymous basis to prevent revelation of private details in any specific case they may have handled in this area.
- Legal consultation on this report was extensive. We circulated this report, in final draft form, to leading experts in whistleblower protection law both in the UK and internationally. These people are mentioned in the acknowledgements section of this report.
- A significant amount of desk research, including legislative interpretation, secondary sources examination (personal whistleblower accounts, media reports, parliamentary enquiries etc.) were also considered by our team. For example, 30 cases were also identified from media reports. These cases built a stronger picture of the context of the cases examined at Bury St. Edmunds.

## ANNEX VI: THE CASE FOR A SEPARATE WHISTLEBLOWER LAW

One of the recurring issues with whistleblower protection in the UK is that the 'shoe-horning' of protections into the existing employment law – the *Employment Rights Act* - has created unintended consequences and problems for potential and existing whistleblowers. Many of these problems have been discussed throughout the above report, but some of the most compelling issues include:

a. the ease with which an employer may 'reason shop' for the termination of a worker so as to avoid the finding that they dismissed a worker on the grounds of the making of a disclosure

b. using principles from discrimination or other employment cases in an inappropriate manner to limit protections or compensation for whistleblowers

c. relying on an employment tribunal system that is not designed to protect whistleblowers or ensure the investigation of wrongdoing for which they have exposed

Many experts and organisations recommend a stand-alone law.[131] The reasons for this vary, but include the fact that the 'higher visibility' of a stand-alone law makes it easier to promote amongst governments and companies. Other reasons include the enhanced certainty that comes with a stand-alone law, the enhanced ease of public education and the benefit of a more seamless application of the legislative framework. In the UK, the argument that the right to blow the whistle is a human right – an extension of the right to freedom of expression per Article 10 of the European Charter of Human Rights - rather than an employment right, is growing. This would mean that the right attaches to a 'citizen' rather than a 'worker'. This would further support the case for a separate whistleblower protection law.

In the UK's case, the issue with publicity is perhaps not so prominent, judged especially by the number of cases that are brought under the PIDA provisions of the *Employment Rights Act*. However, there is certainly an issue (as identified above) with the conflation of general, irrelevant and outdated employment law principles with whistleblower protection. It needs to be emphasised that a separate whistleblower law must start with PIDA as a 'floor' – in other words, a replacement law should not create additional problems or hurdles for whistleblowers. It should make clearer the existing protections and improve on them, rather than replace them entirely.

Ultimately, a policy decision needs to be affirmed that whistleblowers are a special class of people. They are a special class of people because they are subject to unique detriment, and suffer that detriment at a proportionally much higher rate. Additionally, we must not forget that when they blow the whistle, the wrongdoing which they expose benefits the public interest. Accordingly, it is in the interest of all of us that they be protected – both as reward for the bravery they have demonstrated, but also to act as normative encouragement for future would-be whistleblowers.

[130] Name withheld.

[131] See, for example, *Transparency International, Recommended Principles for Whistleblowing Legislation*, Recommendation 23: "Dedicated legislation - in order to ensure certainty, clarity and seamless application of the framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach", D. Banisar, *Whistleblowing: International Standards and Developments*, (2009), pp.19-21 and the *OECD G20 Anti-Corruption Plan Protection of Whistleblowers* at Principle 13.

### Reason shopping

As we highlighted above in the report, the difference in compensation amounts for a person unfairly dismissed for whistleblowing or any other reason is stark. The reason for this is that where a whistleblower has been unfairly terminated for making a disclosure, there is no cap on the compensation to which they are entitled. Where unfair termination has occurred for another reason, the cap (at present) is £78,962. Clearly, this creates an incentive to 'reason shop' prior to the planned dismissal of a worker – as it can save the employer significant amounts in potential compensation.

A contributing factor to the ability to 'reason shop' is that the unfair dismissal provisions sit within the *Employment Rights Act*. If the unfair dismissal provisions were in a separate and stand-alone law, an employer would not so easily be able to contrive another reason for a worker's dismissal. As was made clear in the example above in the report, in certain cases where a whistleblower made a disclosure, the employer went through a concerted process to discipline or suspend a whistleblower for a reason contrived to be anything but the making of the disclosure. Following the disciplinary process, ending in the dismissal of the worker, the employer would then argue that the whistleblower was dismissed for this reason. Section 98 of the *Employment Rights Act* does put the burden of proving the reason (or where there is more than one, the principal reason) on the employer. However, in those cases where there is more than one reason (such as where an employer has determined to 'reason shop'), a whistleblower will be forced to counter argue against an employer's argument that the principal reason was something other than the whistleblowing. Ultimately, the cost and factual complexity of this works against a whistleblower.

Separating the provisions which seek to protect a whistleblower from the *Employment Rights Act* may diminish an employer's ability to 'reason shop' and therefore improve real protections for a whistleblower.

### Principles from discrimination and other employment law

Similar to the issue raised above, just as whistleblower cases should not be treated as regular employment cases, the import of principles from discrimination cases only seeks to confuse the protection that should be afforded to whistleblowers. The reason for this is that a claimant in a whistleblower protection matter is fundamentally different to a discrimination case. The protections for whistleblowing fundamentally seek to protect public policy dissent – i.e. revealing matters in the public interest, for the benefit of the public. Protection from discrimination is an individual right that attaches to a person, and not an idea. This is further complicated by the possibility

that the 'right to blow the whistle' is seen more and more as a human right. Whichever way one looks at it, the key conclusion is that the difference between whistleblower protection and discrimination protection means that using the principles from one for the other is unhelpful.

Importing compensation principles from discrimination to whistleblower protection improperly characterises the remedy being sought, and also the type of person seeking the remedy. Highlighted above in the report, the use of these principles can serve to diminish the protections or compensation to which a whistleblower might otherwise be entitled. Having a stand-alone law, separate from the discrimination principles imported through the case law under the *Employment Rights Act*, will prevent this from happening, as a Tribunal judge will be less inclined to borrow from a different law as they would be from the same piece of legislation.

The use of such principles not only conflates the intent of a whistleblower protection law with principles from other areas, it has the practical effect of offering more tools to a better-funded litigant (which in most cases will be the employer). Narrowing the intent of the law will serve to produce a fairer and more efficient result whilst still allowing for the revelation of wrongdoing.

### The Tribunal system is not designed to deal with whistleblower cases

The Tribunal system was designed for the quick and efficient disposition of employment cases. This design was to ensure that sufficient expertise was built up within the system among judges who understood the ins and outs of unfair dismissal, labour rights and to balance a fair relationship between an employer and a worker. When PIDA passed, the whistleblower protection framework was shoe-horned into a system not possessed of that expertise.

Whistleblower protections are very different to the general rights afforded to a worker. Put simply, the reason for this is that where a normal employment case will determine the rights of both parties, the worker and the employer, in whistleblower protection cases there is a third party – the public interest.

There are two issues – the tribunals themselves do not have the express power to dispose of matters related to the disclosure. In other words, the revelation of the wrongdoing is really just a hurdle upon which a tribunal can determine whether or not someone is entitled to compensation. Second, the tribunal has no power of investigation or duty to determine whether the scale or type of wrongdoing should be taken into account. The result of this is that the wrongdoing itself becomes secondary to the issues at hand.

The solution is likely to be one of three options. The first is to endow the ET with additional powers that allow it to order the cessation of retaliation, to narrow and clarify the burdens of proof on which it is to rule and to allow greater flexibility to award holistic compensation. The second option is to remove PIDA cases from the ET altogether and instead have regular courts hear such cases. The courts already have very flexible powers to order a range of injunctive measures (such as ordering the cessation of retaliation). The problem with this option of course is that the court system is well known to be even less accessible to a litigant on account of its formalistic structure, waiting times, and ultimate cost. However, this option would also present the possibility for jury trials – where a whistleblower can seek a remedy in front of his or her peers. The third option would be the creation of a separate tribunal or administrative authority specially charged with the handling of PIDA cases. For any of these three options, rigorous training and certification of such must be undertaken for those who hear the cases. This is vital if the particular needs and challenges of whistleblower litigants are to be properly understood, as well as ensuring the investigation of the wrongdoing exposed by the disclosure.

A whistleblower protection law needs to be separate for these reasons – because the exposure of the wrongdoing, along with the protection of the whistleblower him or herself, should be front and centre.

## ANNEX VII: NATIONAL SECURITY WHISTLEBLOWING

Under current UK legislation, PIDA does not cover individuals working in the Ministry of Defence, the UK armed forces and the intelligence agencies (the "Service Members"). Blueprint sees no reason why Service Members should be denied legal protection for disclosing serious wrongdoing that takes place within those institutions. We note that under the Australian Public Interest Disclosure Act (APIDA), internal disclosure by all officers or workers, including those who work in the armed forces and also the intelligence agencies, is protected. The APIDA also provides for limited external disclosure by the armed forces, and introduces the concept of a separate ombudsman that would deal exclusively with matters of intelligence. We propose that a similar bi-focal structure is adopted in the UK.

The purpose of whistleblower protection is to ensure that wrongdoing is exposed where only those 'in the know' are privy to the nature of that wrongdoing. It follows that in the most secretive of government functions, the national security sector, the knowledge of those 'in the know' is increasingly important. Some of the worst abuses

against human rights and civil liberties have been shielded by national security secrecy, including war crimes, all pervasive state surveillance and the misleading of elected government officials by intelligence agencies. For this reason, it is perhaps even more important that workers in this sector are covered by the legislation.

### Recommendation

Ultimately, Blueprint envisions a balanced, comprehensive and fair disclosure regime to protect Service Members in respect of wrongdoing committed within such institutions. We understand that the disclosure regime must be balanced. There is a legitimate public interest in protecting sensitive information, such as the identities of Service Members, and the challenge is in establishing the right 'balance' whereby wrongdoing can be disclosed without inadvertently revealing information of a highly sensitive nature. To that end, any realistic disclosure regime must also be comprehensive; legislation must spell out exactly what can and cannot be disclosed. A wide range of scenarios and categories of information (similar to those found in Section 43B of the ERA) must be contemplated, with each scenario/category specifying the conditions to be met before a Service Member can qualify for protection. Moreover, the regime should allow for Service Members to make disclosure to a range of individuals and authorities both inside and outside the institutions (e.g. Parliament). Finally, the disclosure regime must also be fair to Service Members. Any disclosure regime is only effective to the extent that individuals are willing to trust the process; Service Members must therefore be afforded genuine avenues to disclose wrongdoing internally and externally, without fear of reprisal, in the knowledge that any potential wrongdoing discovered will be redressed in a timely manner.

Such a regime would be more comprehensive than the APIDA, and would be closely aligned to the template set out under the Public Interest Disclosure Bill 2012 (Australia (Cth)) (the "**Wilkie Bill**") in Australia. The Wilkie Bill offers an excellent starting template for how the UK can establish a balanced, comprehensive and fair disclosure regime. We encourage you to read through the key sections of the Bill,[132] which include:

- Part 2, Section 8: This section lays out the meaning of a public interest disclosure, which is a disclosure of information by a public official (as defined in Section 11) about disclosable conduct (as defined in Section 9). We note that it is possible for a public official to make a disclosure of disclosable conduct regardless of whether the public official honestly believes on reasonable

[132] We note the significant contribution of Australian Professor AJ Brown to both this bill and APIDA.

grounds that the information would tend to show disclosable conduct (Section 8(1)(a)(ii)). However, at the same time a public official cannot make a disclosure that the official knows is false or misleading, or which relates entirely to a disagreement in relation to a policy about amounts, purposes or priorities of public expenditure (Section 8(2)(a) and (b)).

- Part 2, Section 9: This section set out and defines the categories of information that can be disclosed by a public official, which include: (i) corruption; (ii) maladministration; (iii) a substantial misuse of public money or public property; (iv) a substantial and specific danger to the environment; or (v) detrimental action towards, or victimisation of, any person relating to a public interest disclosure, by any agency or public official (Section 9). We note that most of the disclosable conduct identified in the Wilkie Bill relates to wrongdoing occurring within an institution.
- Part 2, Section 10: This section sets out the meaning of an agency, which includes the Australian defence force and the Australian intelligence agencies.
- Part 2, Section 11: This section sets out the meaning of a public official, which includes a worker of the agency or a contractor performing the function of an agency.
- Part 3: This part deals with who can make a public interest disclosure and how such a disclosure can be made. Section 17 sets out the individuals and institutions to which a public interest disclosure can be made. We also note that Section 20 deals with how disclosures containing sensitive defence, intelligence, or law enforcement information (defined in Section 15) can be dealt with.
- Part 4: This part deals with the investigation of a public interest disclosure. We note that pursuant to Section 29, the discloser must be kept informed by the investigating entity.
- Part 5: This part deals specifically with a public interest disclosure being made to third parties, which includes the media. We note that a disclosure can only be made to a third party if disclosure has already been made in accordance with Section 17. We also note that Section 33 imposes limitations on making disclosures to journalists.

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