

The Public Interest Disclosure Act 1998: Nothing more than a “Cardboard Shield”¹

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Abstract

Whistleblowers are workers who make disclosures about wrongdoing in the workplace. The purpose of this article is to assess the adequacy of the UK's Public Interest Disclosure Act 1998 (PIDA) in protecting whistleblowers. Whistleblowers play an essential role in the campaign against corruption, yet they are met with much resistance. The concern is that PIDA's provisions may be contributing to the deterrence of whistleblowers. This discussion is structured around the main areas of concern arising from the provisions. Although multiple limitations have become evident, this article focuses on the most strikingly problematic limitations. The author concedes to the areas of strength in PIDA, but believes that the limitations tip the scales in favour of reform. It is concluded that PIDA's limitations create unforgivable gaps in the protection offered by the provisions, thereby having the adverse effect of discouraging whistleblowing.

I. Introduction

By exposing wrongdoing in the workplace, whistleblowers make important contributions to the campaign against corruption. Whistleblowers make disclosures in the public interest, but they do so at their own risk. In the past, they were at the mercy of the common law application of general employment principles. Now, PIDA has inserted Part IVA into the Employment Rights Act 1996 (ERA). Part IVA is comprised of sections 43A to 43L, which focus specifically on disclosures. These provisions form a guideline on how and to whom protected disclosures should be made. Guided by PIDA, whistleblowers can plan their disclosures, and the

¹ Council of Europe Parliamentary Assembly. Resolution 1729 (2010). Protection of “Whistleblowers”.
<<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm>>. 11 December 2011.

judiciary can be guided in their judgments. The certainty created by the provisions increases the confidence of whistleblowers in the protection afforded by PIDA. A closer analysis, however, reveals that the comprehensiveness of the provisions is questionable.

The factors which will be discussed in this article are those believed to discourage whistleblowing the most. Firstly, many workers are faced with an anti-whistleblowing culture in the workplace, but PIDA only indirectly instigates a change of this negativity. Secondly, PIDA's provisions do provide a useful guideline on protected disclosures, but they are riddled with uncertainty as much is left open to interpretation. Thirdly, the benefits to society which accrue from whistleblowing must be reflected in the protections offered by PIDA. While providing some leeway for whistleblowers, the strict requirements tend to be too harsh on whistleblowers. Fourthly, the recourse offered by PIDA in the face of reprisals is inadequate. Whistleblowers are neither protected from reprisals before disclosures have been made nor after dismissal from discrimination during the job search process. Lastly, PIDA is silent on the burden of proof. This evasive stance leads to uncertainty and possibly formidable conditions.

All these concerns would be at the forefront of the mind of any potential whistleblower. Whistleblowers need to be assured that they will be protected for making disclosures in the public interest. If whistleblowers are discouraged, they are more likely to choose silence, the least risky route.² This article will discuss the adequacy of the protection that PIDA affords to whistleblowers in light of the aforementioned concerns.

II. Indirectly tackling the anti-whistleblowing culture

PIDA faces an anti-whistleblowing culture that has to be altered if corruption is to be effectively exposed and tackled.

² Guy Dehn, Director, Public Concern at Work. "Whistleblowing: The New Perspective". <www.pcaaw.co.uk/policy/wbnewperspective.htm>. 9 December 2011.

It is a daunting task to oppose a culture which embraces “the unstated rule that dirty linen should not be washed in public”.³ It is a culture of “blind and unquestioning secrecy”.⁴ The opposing interests of fidelity of the employee to the employer and the public interest in the campaign against corruption must be balanced. The challenge is to ensure that the “duty of fidelity does not become an empty concept, but that a conspiracy of silence is not encouraged”.⁵ PIDA must provide workers with a “safe alternative to silence”.⁶ Workers often remain silent for fear of reprisals; with an alteration to the culture of whistleblowing, workers would be less fearful. Until this positive shift is achieved, the negative connotations held by colleagues and employers will continue to discourage workers from making disclosures. It is submitted that the implementation of internal disclosure procedures would lead to a more transparent and positive view of whistleblowing within the workplace.

PIDA has indirectly instigated a wider acceptance of internal disclosure procedures. PIDA highlights the potential for whistleblowing to be an internal check and balance system on the smooth operation of a company at all levels. It raises awareness of the benefits of whistleblowing by affording protection to whistleblowers for making specific external disclosures. In the case of *Bladon*, the whistleblower’s external disclosure was protected because the internal disclosure procedures of the employer were lacking.⁷ External disclosures, those made to sources outside the company, often tarnish the reputation of the employer.⁸ Wishing to avoid the possibility of a disclosure affecting

³ James Gobert, Maurice Punch, “Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998”. MLR 63:1, January, 27.

⁴ Dehn (n2)

⁵ Committee of Independent Experts. Second Report on Reform of the Commission. Volume 2. 10 September 1999. <www.europa.eu/experts/pdf/rep2-2en.pdf>.

⁶ Parliamentary Assembly of the Council of Europe. Recommendation 1916. Paragraph 5. 29 April 2010.

⁷ *ALM v Bladon*(2002) IRLR, 807.

⁸ Terry Corbitt, “Employees’ Family Rights and the Public Interest Disclosure Act 1998”. Criminal Law and Justice Weekly. Issue 20, May 2003.

business, employers are encouraged to tackle disclosures internally. Thus, PIDA encourages employers to adopt internal whistleblowing procedures.

The Parliamentary Assembly of the Council of Europe rightly suggests that sections 43C (2) and 43G (3) (f) demonstrate that having internal disclosure procedures in place make it easier for employers to defend claims.⁹ When judging the reasonableness of a disclosure, both provisions require the tribunal or court to have regard to the whistleblower's compliance with any procedure authorised by the employer. Thus, both the employer and employee benefit from compliance with an internal procedure. Furthermore, in the case of *Azmi*, the whistleblower was dismissed after making numerous internal disclosures.¹⁰ The facts in *Azmi* reveal the uncertainty on the part of employees, the lack of transparency, and the dissatisfactory response to complaints, which arise when internal procedures are inadequate. Such situations are unfavourable for both the employer and employee. It is submitted that, by encouraging employers to implement internal disclosure procedures, PIDA enhances the overall protection afforded to employees and increases the transparency of the system.

There are, however, some limitations to PIDAs opposition of the anti-whistleblowing culture. PIDA does not make it mandatory for employers to introduce internal disclosure procedures in the workplace, and provides no outline of what an effective internal disclosure system should encompass. On reform, Lewis suggests making it mandatory for employers to implement internal disclosure procedures.¹¹ Such a reform would be a more direct approach in tackling the anti-whistleblowing culture. With effective provisions in place, PIDA could create a positive foundation for whistleblowers to feel more secure when making disclosures.

⁹ David Lewis, "European Developments: The Council of Europe Resolution and Recommendation on the Protection of Whistleblowers". *ILJ*, Vol 39, No. 4, December 2010, 434.

¹⁰ *Azmi v. ORBIS Charitable Trust* ET 4 May 2000 (2200624/99)

¹¹ David Lewis, "Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?". *JBE* (2008) 82, 500.

Admittedly, an internal disclosure system would not be a panacea for all the issues facing whistleblowing, and could even be problematic. For instance, internal procedures could foster cover-ups of corruption by employers and reduce the information released in the public interest.¹² It is submitted, however, that the possible costs must be balanced with the definite benefits. The lack of internal disclosure procedures is likely to discourage workers from making disclosures due to uncertainty. On the other hand, having procedures in place is likely to increase transparency and accountability; thereby increasing certainty for whistleblowers. Thus, internal procedures would not come without drawbacks, but they offer advantages especially to whistleblowers. Implementing these procedures would mark a shift in the anti-whistleblowing culture towards an acknowledgement of the benefits of disclosure. With reform, PIDA can play a pivotal role in this shift.

III. A lack of statutory certainty

Unlike the ad hoc nature of common law developments, PIDA entrenches guidelines on protected disclosures. ‘Protected disclosures’¹³ are ‘qualifying disclosures’¹⁴ made in accordance with the requirements set out in sections 43B to 43H of PIDA. These requirements include: the type of information that can be disclosed and to whom the disclosure can be made; other requirements will be discussed later in this article. The entrenchment of the common law rules offers a level of assurance to workers. For instance, the provisions enable workers to plan their disclosures beforehand. Yet, the effectiveness of the provisions in protecting whistleblowers is questionable.

Uncertainty arises in the drafting of the provisions. Much is left open to interpretation.¹⁵ For instance, PIDA protects

¹² Lewis (n11), 504.

¹³ Employment Rights Act 1996. Section 43A.

¹⁴ *ibid* section 43B-H.

¹⁵ Lewis (n11), 498.

disclosures of ‘exceptionally serious failures’.¹⁶ It would be counterproductive to provide a specific list of disclosures of ‘exceptionally serious failures’.¹⁷ So, PIDA includes a “catch all” provision, which an employment tribunal or court is left to interpret and apply. What disclosures will be caught under this provision will be established retrospectively. Additionally, PIDA provides that protection is not afforded where a worker “commits an offence by making it”.¹⁸ For instance, a worker commits an offence if a disclosure is made in breach of the Official Secrets Act 1989.¹⁹ A worker would not be aware that he has committed such an offence when making a disclosure as PIDA provides no guidance on this limitation. These shortcomings make workers less certain of the protection they will be afforded in the less clear cut circumstances. Potential whistleblowers would be more likely to remain silent.

Additionally, in both sections 43G and 43H, PIDA makes no indication as to whom protected disclosures should be made. Yet, it is required that “regard shall be had to the identity of the person to whom the disclosure is made”.²⁰ The identity of the receiver of a disclosure can reduce the reasonableness of a disclosure. Effectively, justification is based on a condition about which the provisions give no direct guidance. This uncertainty leaves a gap in the protection afforded to whistleblowers, creating a risk workers would not be willing to take.

Lastly, where whistleblowers are denied the protection of PIDA, they are left vulnerable to litigation. Employers can bring civil and criminal claims, such as defamation charges, against unprotected whistleblowers.²¹ The possibility of being burdened with liability for disclosures against an employer has a chilling effect on workers. Many would choose silence over the possibility of facing these repercussions.

¹⁶ Employment Rights Act 1996. section 43H.

¹⁷ Lewis (n11), 502.

¹⁸ Employment Rights Act 1996. Section 43B(3).

¹⁹ Lewis (n11), 499.

²⁰ Employment Rights Act 1996. Section 43G(3)(a).

²¹ Lewis (n11), 504.

Entrenchment is undoubtedly a step forward for whistleblowers. Yet many gaps and uncertainties are clear from an analysis of the provisions. Without imminent reform, the fate of whistleblowers will remain to a large extent in the hands of the judiciary. A stronger, more comprehensive statute would provide greater protection to whistleblowers.

IV. The largely counteractive disclosure requirements

Protected disclosures are subject to additional requirements than those mentioned above. These requirements include: that a whistleblower has a reasonable belief in the content and truth of the disclosure²², that the disclosure be made in good faith²³, that the disclosures not be made for personal gain,²⁴ and that the making of the disclosure be reasonable²⁵. These requirements are repeated throughout the act. They clearly focus PIDAs protection on those instances of whistleblowing that are most reasonable and justifiable. PIDA targets its protection to instances where it will be most effective in impeding corruption.

Firstly, the test for reasonable belief was established by the Court of Appeal in the case of *Babula*.²⁶ Reasonable belief is “based on the workers understanding of the disclosed information and not on the actual facts”.²⁷ This allows PIDAs protection to extend even to a whistleblower who has made an erroneous disclosure. This is important because workers are not protected under PIDA when subjected to detriments for investigating corruption.²⁸ In removing the fear of repercussions based on the validity of the assertion, a potential whistleblower would feel more at ease to make a disclosure where they have a reasonable belief in the

²² Employment Rights Act 1996. Sections 43B, C, F, G and H.

²³ *ibid* sections 43C, and E - H.

²⁴ *ibid* sections 43G and H.

²⁵ *ibid* sections 43G and H.

²⁶ *Babula v Waltham Forest College* [2007] IRLR 346 (CA).

²⁷ Indira Carr, David Lewis, “Combating Corruption through Employment Law and Whistleblower Protection”. *ILJ* Vol 39, No 1, March 2010, 73.

²⁸ *Bolton School v Evans* [2006] IRLR 500.

disclosure but are not completely certain of the validity. Workers would be less likely to be subjected to detriments or dismissal for investigating corruption because this test relieves the pressure to investigate. So the requirement of reasonable belief encourages disclosure. The remaining requirements of PIDA are less encouraging.

Secondly, the requirement of good faith was considered by the Court of Appeal in the case of *Street*, where it was established that PIDA does not protect malicious disclosures.²⁹ This would mean that a whistleblower with an unethical objective would not be protected. PIDA offers no guidance on unethical objectives; it is left to the discretion of the employment tribunal or court. This is not an easy task as it is difficult to discern an individual's true motives. Lewis rightly commented that a whistleblower normally has no second thoughts about their motives prior to disclosure, and would be taken aback by a finding that their objective was unethical.³⁰ Whistleblowers are often discouraged by even the possibility of having their motives questioned in this way.

Under the common law, an unethical disclosure is justifiable if it is in the public interest.³¹ Both public interest and malice operate symbiotically under common law. Therefore, there is no absolute need for the 'good faith' requirement in PIDA; protection should be awarded regardless of motive.³² This is a valid consideration. The removal of this requirement would enable more workers to fall under the scope of PIDA so long as their disclosure was in the public interest. The reasons for including the good faith requirement must be examined. If this requirement aims to sanction malicious disclosures, there are less burdensome alternatives to achieve the same aim. Lewis and Homewood suitably suggest entrenching a hefty sanction for

²⁹ *Street v Derbyshire Unemployed Workers Centre* [2004] IRLR 687 (CA).

³⁰ Lewis (n9), 433.

³¹ David Lewis, "Whistleblowers and the Law of Defamation: Time for Statutory Privilege?," [2005] 3 WebJCLI. <http://webjcli.ncl.ac.uk/2005/issue3/lewis3.html>. 11 October 2011, 6.

³² Lewis (n11), 500.

the making of completely baseless allegations.³³ This would discourage workers from making malicious disclosures. The good faith requirement is a limitation that would discourage workers from making disclosures. The protection of workers would be better advanced if the inclusion of the good faith requirement was reconsidered.

Lastly, opposing disclosures which are made for 'personal gain' should also be reconsidered. Whistleblowers make disclosures at their own risk and, under PIDA, they are not to receive any compensation for taking this risk. The public has an interest in disclosures of corrupt practices, yet whistleblowers are offered no incentives or direct rewards by PIDA for making disclosures. Dehn rightly suggests that a useful analogy can be drawn in the comparison of a whistleblower to a criminal testifying against an accomplice.³⁴ Whistleblowers risk being faced with reprisals, but gain protection to a certain extent from PIDA and can get no personal gain from the disclosures. Conversely, the criminal often receives protection under the law plus a reward for the testimony to a crime in which he/she was involved. Criminals are rewarded because their testimony enables justice to be served. In the campaign against corruption, whistleblowing can be said to do the same thing. Offering rewards to whistleblowers would increase disclosures thereby allowing justice to be served.³⁵ As a precedent, the UK could follow the example set by the US Dodd-Frank Act.³⁶ This Act offers compensation to whistleblowers for disclosures made on corrupt practices in firms. Thus far, no rewards have been made, but it has sparked an influx of disclosures which have exposed acts of "fraud, bribery and other corporate crimes".³⁷ Such a reward system within the UK could also have a

³³ David Lewis, Stephen Homewood, "Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected?". [2004] 5 WebJCLI, 4.

³⁴ Dehn (n2)

³⁵ Lewis (n31), 2.

³⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act. <http://www.sec.gov/about/laws/wallstreet_reform-cpa.pdf>. 13 March 2012.

³⁷ Kara Scannell. Whistleblowers drawn by tip-off payouts. Financial Times. 12 March 2012.

positive impact on tackling corruption. PIDAs disfavor of rewards can be argued to encourage silence. In this way, this requirement undermines the purpose of the legislation.

Although the requirement of reasonable belief allows some leeway in the protection of a whistleblower, much of the requirements of PIDA can be criticized for discouraging whistleblowers. If the objective of PIDA is mainly to protect whistleblowers, reform of these requirements would allow for more whistleblowers to fall under the scope of PIDA. Even if the objective is otherwise, reforms are still needed to increase the willingness of workers to make disclosures in the public interest.

V. Inadequate recourse for reprisals

PIDAs provisions on the recourse offered for reprisals can be interpreted to significantly limit the scope of PIDA. Dismissal³⁸ and redundancy³⁹ based on the making of a protected disclosure is automatically unfair. The protected disclosure must be the principal reason for dismissal; thus, if a protected disclosure was “important but not the principal reason, the dismissal would be fair”, leaving the employee without recourse.⁴⁰ It may be difficult to prove what the principal reason was where there were numerous contributing factors. This very specific requirement increases the likelihood of a whistleblower losing a claim.

Also, PIDA provides for the right not to be subjected to any detriment, short of dismissal, by an employer on the ground that the worker has made a protected disclosure.⁴¹ In *Knight*, the Employment Appeals Tribunal (**EAT**) held that it was not sufficient to show that ‘but for’ the disclosure the employer would not have subjected the worker to the

³⁸ Employment Rights Act 1996. Section 103A.

³⁹ *ibid* section 105(6A).

⁴⁰ Rad Kohanzad, “The Burden of Proof in Whistleblowing: *Fecit and others v NHS Manchester* [2011] IRLR 111”. *Industrial Law Journal*. Volume 40. June 2011: 218.

⁴¹ Employment Rights Act 1996. Section 47B(1).

detriment⁴²; instead, the requirement is the stricter test of demonstrating that the disclosure “has caused or influenced the employer to act in the way complained of”.⁴³ This test makes it more difficult to prove the connection between the disclosure and the dismissal. Mr. Recorder Underhill QC notes that this test requires the court to have regard to the deliberations of the employer.⁴⁴ Employers often have a vested interest in not revealing their true motives when they are actually based on protected disclosures. As with judging the motives of a whistleblower, it is equally difficult to assess the true motivation of an employer. Knowledge of these difficulties would have discouraging effects on whistleblowers. It would be discouraging not only in choosing to make a disclosure, but also coming forward after suffering a reprisal.

Note also that protection does not extend to harassment of whistleblowers by colleagues.⁴⁵ Employers can, however, incur vicarious liability for their employees’ actions towards the whistleblower.⁴⁶ It can be argued that securing personal liability against colleagues would be more effective. Holding colleagues personally liable for any harassment would reduce the negative treatment of whistleblowers; thus, this would also tackle the anti-whistleblowing culture in the workplace.

Lastly, PIDA does not protect workers that are attempting to make a disclosure.⁴⁷ If a worker suffers reprisals for investigating corrupt practices, PIDA does not protect that worker because no disclosure has been made at the time. Lewis befittingly suggests that the introduction of a victimization provision into PIDA would afford better protection from reprisals at this stage.⁴⁸ Furthermore, PIDA

⁴² Lewis (n11), 502.

⁴³ *London Borough of Harrow v Knight* [2003] IRLR 140, para 16.

⁴⁴ *ibid* para 15.

⁴⁵ Harden I, “Protecting the Whistleblowers – Asian and European Perspectives”. 13th International Anti-Corruption Conference. Workshop Session II. 31 October 2008, 4.

⁴⁶ *Cumbria County Council v Carlisle-Morgan* [2007] IRLR, 314.

⁴⁷ *Bolton School v Evans* [2006] IRLR, 500.

⁴⁸ David Lewis, “Providing Rights for Whistleblowers: Would an Anti-Discrimination Model be More Effective?”. *ILJ*, Vol. 34, No. 3, September 2005: 247.

does not protect whistleblowers from being blacklisted during the job search and hiring process following dismissal.⁴⁹ Here, Lewis suggests introducing an anti-discrimination provision to enhance protection in this respect.⁵⁰ Thus, PIDAs protection is narrowly focused on protecting workers who have already made protected disclosures from reprisals imposed only by current employers.⁵¹ Reform is needed to protect whistleblowers at all stages of the disclosure process. Although viable, both Lewis's suggestions would take very careful drafting, so as not to extend PIDA beyond recognition. PIDA's focus must be maintained. If an act tries to do too much, it may end up doing nothing at all.

VI. An evasive stance on the burden of proof

Within PIDA, there are no express provisions on the burden of proof. Guidance has come from the general legal principle and the rest of ERA. The legal principle on the burden of proof provides that once the fact of dismissal has been demonstrated, the burden is on the employer to prove the reason for dismissal.⁵² If the whistleblower disagrees with the reason proposed by the employer, the whistleblower must simply raise doubt and the onus returns to the employer to prove otherwise.⁵³ This was verified in *Maund*, where the Court of Appeal agreed that the burden of proof was on the employer, but clarified that, where the whistleblower disagrees, the 'evidential' burden and not the 'legal' burden would be on the whistleblower.⁵⁴ An 'evidential' burden is admittedly lighter than a 'legal' burden. Griffiths LJ rightly stated, however, that the weight of the 'evidential' burden is directly proportional to the seriousness of the allegation.⁵⁵

⁴⁹ Harry Templeton: Maxwell Pensions Scandal. Minutes of Evidence Taken before the Social Security Committee. 25 February 1992. p380-388.

⁵⁰ Lewis (n48)

⁵¹ Ward LJ. *Woodward v Abbey National plc* [2006] EWCA Civ 822, Para 43.

⁵² Employment Rights Act 1996. Section 98(1).

⁵³ Halsbury's Laws of England. Employment. Volume 40 (2009) 5th ed. Section 6(2)(ii), Para 726.

⁵⁴ Griffiths IJ. *Maund v Penwith District Council* [1984] IRLR 24, Para 12.

⁵⁵ *ibid* para 11.

Thus, even the evidential burden, the raising of doubt, could be a daunting task for whistleblowers.

Post-PIDA, in the case of *Kuzel*, Mummery LJ suggested, since section 103A makes no declaration on the burden of proof, it is left open to interpretation.⁵⁶ There was much uncertainty and discussion on the burden of proof in *Kuzel*. The Court of Appeal, in *Kuzel*, accepted the finding on the burden of proof in *Maud*.⁵⁷ This was decided not only based on the provisions of section 98(1), which says that it is for the employer to show the reason for dismissal, but also on the basis that the employer was in the best position to prove the reason for dismissal.⁵⁸ Mummery LJ befittingly noted that in cases of such uncertainty, “the sound exercise of common sense may be inhibited”.⁵⁹ Lewis justifiably suggests that a more definite statutory provision on the burden of proof for whistleblowing claims would have helped to avoid the confusion in *Kuzel*.⁶⁰ Taking a more definite stance on the burden of proof would create a greater sense of certainty for whistleblowers.

On the other hand, where a whistleblower does not meet the qualifying period of one year’s employment,⁶¹ the position of the burden of proof is debatable. Halsbury’s Laws of England states that, where a whistleblower, who does not meet the qualifying period, disagrees with the reason proposed by the employer, the burden of proof shifts to the employee.⁶² Note that Halsbury’s is suggesting not that the whistleblower must raise doubt as is noted above, but must prove the actual reason for the dismissal. PIDA is silent on the position of the burden of proof in relation to whistleblowers who do not meet the qualifying period. Where the employee did not meet the qualifying period in *Smith*, the burden was on the employee to prove the reason

⁵⁶ Mummery LJ. *Kuzel v Roche Products Ltd* [2008] IRLR 530, Para 14.

⁵⁷ *ibid*.

⁵⁸ *ibid* para 61.

⁵⁹ *ibid* para 46.

⁶⁰ Lewis (n9), 435.

⁶¹ Employment Rights Act 1996. Section 108(3)(ff).

⁶² Halsbury’s (n57), Para 726.

for dismissal.⁶³ *Smith* is pre-PIDA and does not involve whistleblowing, but serves as precedent for the positioning of the burden of proof in unfair dismissal claims where the qualifying period is not met. As such, the reasoning is likely to be applied if such a case were to arise since PIDA has left this area open to interpretation. There are several criticisms of this stance as it would place a heavy burden on whistleblowers.

This positioning of the burden would instigate a challenge of credibility between an organization and an individual.⁶⁴ Organizations are in a different weight class from individuals. The individual would experience great difficulty in establishing the true basis for dismissal.⁶⁵ It is very likely that whistleblowers would not have access to material evidence or to adequate legal representation to be able to satisfy this burden. On the other hand, Kohanzad argues, where an employer is allocated the burden of proof and fails to prove his allegation, this could open a can of worms since the employee could claim against the employer under the anti-victimization provisions.⁶⁶ The weight carried by this concern is questionable, however, when balanced with the effects of placing the burden on a whistleblower. Placing the burden of proof on whistleblowers engages them in a formidable situation. Potential whistleblowers would be discouraged to make any disclosures if they do not meet the qualifying period. As such, the release to the public of potential disclosures on corruption would be delayed or possibly completely frustrated. By remaining silent on the burden of proof, PIDA leaves an unforgiving gap in the protection offered to whistleblowers.

⁶³ *Smith v Hayle Town Council* [1978] ICR 996.

⁶⁴ Gobert (n3)

⁶⁵ Corbitt (n8)

⁶⁶ Recorder Underhill QC. *London Borough of Harrow v Knight* [2003] IRLR 140. Rad Kohanzad, "The Burden of Proof in Whistleblowing: *Fecitt and others v NHS Manchester* [2011] IRLR 111". Industrial Law Journal. Volume 40. June 2011, 220.

VII. Conclusion

Although designed to encourage workers to break the silence against corruption, this article has argued that PIDA offers only wavering protection to whistleblowers. As we have seen, PIDA does not directly challenge the anti-whistleblowing culture. Much of the provisions are left open to interpretation, and the disclosure requirements are in dire need of reform. The protection from reprisals is inadequate to truly protect a whistleblower at every stage of the disclosure process. The lack of provision on the burden of proof creates much uncertainty. Due to the uncertainty and gaps in PIDA, the protection offered is nothing more than a “cardboard shield”⁶⁷. Instead of quelling the fears of potential whistleblowers, the limitations discussed would discourage potential whistleblowers for fear of inadequate protection.

PIDA now has to cope with the large scale industries and the powerful employers which have developed in modern times. PIDA needs to be recalibrated to account for the caliber of risks taken by whistleblowers and the increasing inequality of the bargaining power between employers and employees. Fourteen years after the drafting of PIDA, the need for reform has become clearer than ever.

⁶⁷ Council of Europe Parliamentary Assembly (n1)

BIBLIOGRAPHY**Articles**

- Carr I, Lewis D, "Combating Corruption through Employment Law and Whistleblower Protection". *ILJ*, Vol 39, No 1, March 2010.
- Corbitt T, "Employees' Family Rights and the Public Interest Disclosure Act 1998". *Criminal Law and Justice Weekly*. Issue 20, May 2003.
- Dehn G, Director. Public Concern at Work. "Whistleblowing: The New Perspective". <www.pcaw.co.uk/policy/wbnewperspective.htm>. 9 December 2011.
- Gobert J, Punch M, "Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998". *MLR* 63:1, January.
- Harden I, "Protecting the Whistleblowers - Asian and European Perspectives". 13th International Anti-Corruption Conference. Workshop Session II. 31 October 2008.
- Homewood S, Lewis D, "Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected?". [2004] 5 *WebJCLI*.
- Kohanzad R, "The Burden of Proof in Whistleblowing: *Fecitt and others v NHS Manchester* [2011] IRLR 111". *Industrial Law Journal*. Volume 40. June 2011. p220. Recorder Underhill QC. *London Borough of Harrow v Knight* [2003] IRLR 140.
- Lewis D, "Providing Rights for Whistleblowers: Would an Anti-Discrimination Model be More Effective?". *ILJ*, Vol. 34, No. 3, September 2005.
- Lewis D, "Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?". *JBE* (2008) 82: 497-507.
- Lewis D, "European Developments: The Council of Europe Resolution and Recommendation on the Protection of Whistleblowers". *ILJ*, Vol 39, No. 4, December 2010.

Lewis D, "Ten Years of Public Interest Disclosure Act 1998 Claims: What Can We Learn from the Statistics and Recent Research?". *ILJ*, Vol 39, No. 4, September 2010.

Lewis D, "Whistleblowers and the Law of Defamation: Time for Statutory Privilege?". [2005] 3 *Web JCLI*. <<http://webjcli.ncl.ac.uk/2005/issue3/lewis3.html>>. 11 October 2011.

Scannell K, Whistleblowers drawn by tip-off payouts. *Financial Times*. 12 March 2012.

Statute

Employment Rights Act 1996.

Dodd-Frank Wall Street Reform and Consumer Protection Act. <<http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>>. 13 March 2012.

Cases

ALM v Bladon (2002) IRLR 807.

Azmi v. ORBIS Charitable Trust ET 4 May 2000 (2200624/99).

Babula v Waltham Forest College [2007] IRLR 346.

Bolton School v Evans [2006] IRLR 500.

Cumbria County Council v Carlisle-Morgan [2007] IRLR 314.

Kuzel v Roche Products Ltd [2008] IRLR 530.

London Borough of Harrow v Knight [2003] IRLR 140.

Maund v Penwith District Council [1984] IRLR 24.

Smith v Hayle Town Council [1978] ICR 996.

Street v Derbyshire Unemployed Workers Centre [2004] IRLR 687.

Woodward v Abbey National plc [2006] EWCA Civ 822.

Other

Templeton H, Maxwell Pensions Scandal. Minutes of Evidence Taken before the Social Security Committee. 25 February 1992. p380-388.

Halsbury's Laws of England. Employment. Volume 40 (2009) 5th ed. Section 6(2) (ii) Para 726.

Council of Europe Parliamentary Assembly. Resolution 1729 (2010). Protection of “Whistleblowers”. <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES 1729.htm>>. 11 December 2011.