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Public Concern at work

the Whistleblower

New Law, New Opportunity

The new Employment Act introduces statutory disciplinary and grievance procedures for every organisation across the country. Employees who ignore them may be barred from bringing tribunal claims and employers who don't meet their minimum standards will be liable for a 50% uplift on compensation awards.

While the whole aim of the Act is to try to get disputes sorted out in the workplace, its full impact remains unclear as some important details are still to be decided. One example that troubled Public Concern at Work was that there was no definition in the legislation of a grievance. Our particular concern was that the new regime should not undermine the statutory whistleblowing scheme.

Restating their commitment to the Public Interest Disclosure Act (PIDA), Government and Parliament amended the Bill. As a result, the new Act now provides that the new rules on grievance procedures will not apply to any whistleblowing concern unless the employee did - and intended to - raise the matter as a grievance.

As organisations now need to review all employment contracts, they should take this opportunity to revise, refresh and promote their whistleblowing policy so that a legitimate concern is less likely to become a grievance.

This is one of a series of new colour posters to help organisations effectively promote their whistleblowing policy. The posters are available to PCaW helpline subscribers. For further information, please call us on 020 7404 6609.

A judicial word

"There are obvious tensions, public and private, between the legitimate interest in the confidentiality of the employer's affairs and in the exposure of wrong. The enactment, implementation and application of the "whistleblowing" measures and the need for properly thought out policies in the workplace, have over the last three years, received considerable publicity from various quarters, including the valuable activities of an independent charity, Public Concern at Work, established in 1993 and experienced in providing assistance to both employers and employees."

July 2002

Lord Justice Mummery - giving the judgement of the Court of Appeal in its first decision under the Public Interest Disclosure Act.

Where the whistle blows?

In her autobiography *Open Secret,* Stella Rimington, the former head of M15, says in her experience whistleblowers are disaffected people who tend to rush headlong to the media. However, the preface to the new edition of her book reveals just how outdated and mistaken this definition is. The reason Ms Rimington is now able to question the failure of the FBI to act on warnings before September 11 is because Congress discovered that the concerns of agent Coleen Rowley about one of the terrorists got lost in the FBI's bureaucracy.

The Head of the FBI accepts that Rowley was a whistleblower and has praised her loyalty. As with Enron and WorldCom, the American public accepts that people who sound the alarm internally are whistleblowers. Judging from Public Concern at Work's helpline, this is also the standard view in the UK. Ninety-eight percent of the cases we handle are about internal whistleblowing and only 2% of clients said they had gone direct to a regulator.

While Ms Rimington is right to point out that whistleblowing to the media is likely to damage the employer, it must also be remembered that such disclosures are rarely in the whistleblower's interest. The public know this from too many high profile cases where media disclosures have ended up focusing on the messenger and damaging the whistleblower. From our point of view, it is only in exceptional cases that the media can be an option as the first port of call. Common sense and the common law make this clear, as does the UK whistleblowing law.

The fundamental issue is how organisations should provide for staff with genuine concerns about wrongdoing. Unless there is a safe alternative to silence, one real option is a media leak. Making progress in this area, however, depends not just on the conduct of organisations but on public perception. When people realise that the FBI, Enron and WorldCom whistleblowers were as a result more secure in their jobs than their silent colleagues, then there will be a real shift in culture.

Whistleblower awarded £805,000 damages

In its first 3 years, there have been some 1200 claims under the Public Interest Disclosure Act (PIDA). The largest award has been £805,000 for a director who was sacked after blowing the whistle about a misleading prospectus for a launch on the New York Stock Exchange. Two people who blew the whistle to the media have won PIDA protection – both working in the NHS. And the Employment Appeal Tribunal has ruled that a disclosure to a telephone support line run as part of an Employment Assistance Programme was PIDA protected. (For further details on these and other decisions, please ask for our updated annotations to the Act).

Inevitably, with official publicity focusing on the Act as a means to sue an employer - rather than as a governance measure – it has attracted the attention of a fair number of dismissed employees. The good news is that tribunals are applying the Act as Parliament intended and are taking care it does not become a tool for disaffected staff to pursue a private dispute.

The bad news is that it is now impossible to get a clear idea of how PIDA is working as a legal vehicle. This is because 70% of PIDA claims are settled, and under new employment tribunal rules information about the gist of any such claim is now secret. This does not sit easily with legislation designed to protect public interest disclosures. We think it also increases the risk that the Act will be used by someone for their private advantage, rather than for the public good.

As explained on the facing page, we have now put this issue to the Parliamentary Ombudsman.

Faith and hope in charity

While some 5% of workers are employed in the voluntary sector, 14% of whistleblowing cases raised with our helpline lawyers come from the sector. Before you bin that begging letter, the underlying message is not as worrying as it may initially appear.

First, calls to our helpline are evidence of concerns, not of malpractice. Secondly, in a sector guided by the public benefit, some employees will feel their view is every bit as valid as their employer's. Thirdly, we think levels of awareness of our helpline may be higher in the voluntary sector than in others.

As to promoting the value of whistleblowing across the sector, the Charity Commission has been giving out a clear and welcome message. This recognises the fact that unless the sector can show itself to be transparent and accountable, public confidence will be fragile.

One issue we see on our helpline is that often management committees are not well able to deal with crises that do occur. This is because having committed time and effort to the cause, many have little extra capacity to move into full crisis management mode, as may be necessary where senior staff are involved. This is an issue we hope to consider over the next year and would welcome any views readers have.

Schools against scandal

As part of our public education work, Public Concern at Work is keen to get our message out through schools. If you can help us to do this, please contact Evelyn Oakley at eo@pcaw.co.uk.

This photo shows some of the 175 sixth-form students at Wellington College we trained this autumn. The school's response was "At a time when they are thinking quite hard about themselves and their future, we feel it important that the boys and girls be confronted with issues such as whistleblowing which they probably haven't thought very much about. The feedback from our pupils has been very positive."

Public Concern at Work

PCaW is an independent charity and receives no state aid.

Our helpline and public education work are funded by charitable donations and the income we earn from our training and consultancy services.

If you or your organisation can support our activities or want expert and practical help on how to make whistleblowing work, please contact us on 020 7404 6609.

whistle@pcaw.co.uk

Reg Charity 1025557
VAT 626 7725 17

Mailing

If your details are incorrect or you would like *The Whistleblower* by email or sent to a friend please email updates@pcaw.co.uk or phone 020 7404 6609.

Wizard's guide to the road ahead

Sir John Bourn, who heads the National Audit Office, addressed the first of a series of annual PCaW lectures on Ethics and Accountability. Drawing on the fable of the Wizard of Oz, Sir John graphically portrayed the road along which debates about ethics and accountability must be trodden.

Sir John set out three distinct methods for assessing ethical decision making – complying with rules, meeting outcomes and the bona fides of the motive. Cautioning against any simple solution, Sir John's judgement was that a floating balance of all three was appropriate for the road ahead.

The lecture was followed by a lively discussion, which also stressed the utility of a set of principles - such as the Seven Principles of Public Life, developed by the Nolan Committee – as a ready guide to individual conduct. This prompted Sir John to close the lecture with a rallying cry on the key role whistleblowing can play in promoting accountability.

Sir John Bourn & PCaW Chair **Michael Smyth** at the annual lecture which Clifford Chance kindly hosted.

Whistleblowing helpline

In the first six months of 2002, PCaW's helpline handled some 300 whistleblowing cases. These included concerns about:

- A CEO of a charity attending a one day working conference in the USA, turned it into a two week break with his fiance, apparently at the charity's expense.
- A bank manager who instructed staff to open two accounts each time a customer joined, so that his team met its targets.
- An insurance company using funds in client accounts to fund acquisitions.
- A building contractor excavating a protected archaeological site without clearance.
- A manager of a local authority housing department who got staff to requisition building materials for use on his home.
- Staff in a care home bought dresses for themselves with the money of a man with learning difficulties.

The feedback survey for this period showed that:

- 64% of clients said our advice helped them separate the public concern from their private position;
- 79% found the advice was helpful; and
- 91% recommend our helpline.

Misconceptions, misunderstandings & mistakes

Public Concern at Work has asked the Parliamentary Ombudsman to investigate "the catalogue of misconceptions, misunderstandings and mistakes" which bedevilled the DTI's response to a High Court ruling that PCaW obtained on open justice.

The Court ruled that the public was entitled to know the gist of claims brought under the whistleblowing law – information which PCaW needed to see how the Act was being used. But then the DTI decided in secret to change the law so that the public would be denied this information. The effect of the change, which was not announced publicly, has been to help ambulance chasers contact litigants, while denying PCaW the information it still needs.

On top of the original errors, the DTI then failed to consult on the issue in the fair, reasonable and informed way that it had promised. The result was that even though the CBI, IoD, TUC and Council on Tribunals all agreed that there should be such access to PIDA claims, the DTI is planning to leave the new rules in place.

PCaW is making a complaint to the Ombudsman of maladministration and also that the DTI failed to disclose internal papers that explained how these mistakes occurred.

Doing the business - A view from Abbey National

"Abbey National first worked with PCaW in 1999 when we introduced a set of whistleblowing principles. The principles were based on our belief that honesty and openness is good for the business and ultimately good for our customers. Although our principles have remained unchanged, in 2001 we identified that the Abbey National Group would benefit from having a discrete Whistleblowing Policy.

We approached PCaW to seek advice and to scope out Abbey National's requirements. PCaW provided a comprehensive pack to support policy development and communication - the case studies were fascinating and their 'blueprint' of best practice guidelines particularly useful for policy development. PCaW also provided constructive, and timely feedback as the policy developed; their blend of legal advice, pragmatism and knowledge of our business was refreshing and invaluable. The end result is a policy that incorporates best practice principles within a framework that meets the needs of our business.

Abbey National recognised the importance of supplementing the introduction of the policy with training. PCaW organised and ran training sessions for senior management and HR professionals from across the Group. These powerful and thought-provoking sessions gave participants an opportunity to understand whistle-blowing law and practice, consider how to handle concerns, and learn how things can go wrong.

PCAW also supported me in the communication of the policy to our staff. Firstly, they critiqued a draft of a booklet due to be sent to all staff explaining the new policy, and, secondly, they designed a briefing tool that is now available on our intranet for managers to use at team meetings or as part of an induction programme.

While the essence of our policy is to encourage staff to raise concerns within the Company, we recognise this might be difficult for some. To address this, we encourage staff to contact PCaW's helpline if they would like confidential advice from independent experts. In this way we hope to demonstrate internally and externally that we offer staff concerned about wrongdoing an effective alternative to silence."

Stephanie Morton
HR, Abbey National

PCaW News

Summer:

- Parliament extends PIDA protection for whistleblowers to the police
- New Employment Act amended to safeguard PIDA
- Court of Appeal gives first judgement on PIDA
- *"Whistleblowing - the new perspective"* article

Autumn:

- Response to DTI on NEDs
- Paper on role of auditors
- PCaW *Ethics & Accountability* lecture by Sir John Bourn
- PCaW lodges complaint with Ombudsman (see page 3)
- PCaW trains advisers for South Africa's new whistleblowing helpline
- PIDA regulators' seminar
- Radio 4, *Big Bad Business?*
- KPMG *Fraud Club* seminar

Winter:

- TI *Corruption* seminar, London
- *Integrity in Science* Conference, Brussels
- *Trust in Government* seminar
- ICEAW training
- Radio 4's Shoptalk, *Whistleblowing*
- *Hot Topics in the NHS* workshop
- Release of 2003 compliance toolkit on CDRom

THE LAST WORD

Enron's little secret

The US legislative response to Enron and WorldCom is attracting some criticism in the UK and Europe as a hasty overreaction. These concerns have been given real edge because the US Act also impacts directly on the way UK and EU companies listed in the USA operate.

While the Act contains strong, much-needed protection for corporate whistleblowers in the US, one little-noticed provision is the requirement that every audit committee must establish procedures for "confidential, anonymous" reports from employees about questionable accounting practices.

From our experience we question the sense of this emphasis on anonymous reporting. Anonymity makes it difficult to investigate the concern and give feedback to the whistleblower. As it will always be the preferred cloak of a malicious person, anonymity can undermine trust in the workplace. Equally, as anonymity can only operate if the person has not hitherto raised his concerns with his managers, this emphasis threatens to subvert – rather than assert - management accountability.

From the whistleblower's point of view, anonymity is a rather hollow promise as it can be no guarantee that the person's identity will not be deduced. Where this happens and the whistleblower is then victimised, there can be no whistleblower protection unless it is established in law that the victimisers knew he had made the anonymous report.

For all these reasons, we maintain that a good law and a responsible organisation should encourage and facilitate open whistleblowing. We find support for this view in what happened at Enron, which operated a best-in-class anonymous reporting facility. This was not some little known procedure, as Enron reminded employees quarterly that they could use it to raise concerns about wrongdoing and suspected criminal activity.

While the whistleblowing protection is welcome, it is not clear why Congress has also required all companies to adopt the anonymous reporting practice that kept Enron's problems hidden for so long.