WHISTLEBLOWING IN THE UK AND US:
A COMPARATIVE ANALYSIS

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1. The purpose of this note is to identify areas for discussion in the breakout session on whistleblowing at the ELA Annual Conference 2007. This note is confined to the UK's approach.

PIDA and its background

The statutory scheme

2. UK whistleblowing law was introduced by the Public Interest Disclosure Act 1998 (PIDA), which came into force in July 1999. It took effect by way of amendments to the Employment Rights Act 1996 (ERA).

3. The main whistleblowing provisions in ERA are as follows:

   3.1. Part IV A (Protected Disclosures), ss 43A-43L;

   3.2. Part V (Protection from suffering detriment in employment), ss 47B-49;

   3.3. Part X (Unfair Dismissal), s 103A.

4. In addition, the Public Interest Disclosure (Prescribed Persons) Order 1999 prescribes persons for the purposes of s 43F, ERA.

Background to PIDA

5. The principal trigger for PIDA was a series of human disasters (rather than financial scandals) in the 1980s and1990s. These included Zeebrugge (1987, when a ferry capsized having sailed with its bow doors open), Piper Alpha (1988, the explosion on an oil platform), and the Clapham rail disaster (1988). It was thought that these might have been avoided, or their tragic consequences minimised, had employees felt able to speak up, or (when

they spoke) had their concerns been acted upon. In contrast, the Sarbanes-Oxley Act (SOX) in the US originated in a number of financial scandals (eg Enron).

6. In 1993, Public Concern at Work (PCaW) was launched "to tackle whistleblowing". It promoted a model of whistleblowing based on employees raising concerns internally in the first instance, relying on employers' self-interest in identifying and tackling wrongdoing before it is caught in the media spotlight. PCaW provides very useful information on whistleblowing policy, legislation and caselaw at www.pcaw.co.uk

7. PIDA started life as a private member's bill sponsored by Richard Shepherd MP in the House of Commons and Lord Borrie QC in the House of Lords. It enjoyed governmental support.

8. Broadly speaking, the statutory structure has 3 elements:

   8.1. *the "what" of whistleblowing*: which defines what can be disclosed;

   8.2. *the "how" of whistleblowing*: which identifies how disclosures are to be made (to employers, to regulators and to others);

   8.3. *protection from victimisation for whistleblowing*: in the form of detriment and dismissal.

9. ERA uses the term "protected disclosure" to describe the "what" and "how" of whistleblowing. A "protected disclosure" means a qualifying disclosure (the "what") made in accordance with the statutory provisions (the "how"): s 43A, ERA.

Questions

10. Possible questions for discussion:

   10.1. What significance, if any, is to be attached to the mischief at which the legislation was aimed in construing the statutory provisions?

10.2. In relation to PIDA, what does the phrase "public interest" connote? Is this a useful aid to construction?

10.3. Is the term "whistleblowing" helpful or unhelpful shorthand in this context?

Qualifying disclosure: the "what" of whistleblowing

11. The "what" of whistleblowing, a "qualifying disclosure", is defined in s 43B, ERA. There are a number of features to note, with corresponding questions.

Disclosure of information

12. There must be a "disclosure of information": s 43B(1). *Bolton School v Evans* [2007] IRLR 140 (CA) makes clear that the legislation uses a common word "disclosure". There is no reason to think that Parliament intended to add to the statutory machinery by introducing some special meaning of the word disclosure. Hence, the question of whether the employee's conduct in question amounts to a "disclosure" is a question for the normal meaning of that word.

Reasonable belief

13. It is well settled that the worker must believe that the information disclosed tends to show specified wrongdoing (subjective), and that belief must be reasonable (objective): *Babula v Waltham Forest College* [2007] IRLR 346 (CA). This formula of "reasonably believes" appears to be common to both the UK and US systems.

Types of wrongdoing and the public interest

14. s 43(B)(1) lists six types of wrongdoing ("relevant failures"). The one most often relied on is non-compliance with a "legal obligation" to which the employer is subject: s 43B(1)(b). For example, a worker complains to his employer about his treatment, and this is said to amount to a qualifying disclosure in that the worker is complaining about a breach of his own contract of employment (specifically, the employer's contractual duty of trust and confidence).

15. *Parkins v Sodexho* [2002] IRLR 109 (EAT) lends some support to this approach.

Questions

16. Possible questions for discussion:

    16.1. What is required for there to be a "disclosure of information" for this purpose? Does a concern raised by a worker necessarily amount to a disclosure of information?

    16.2. Can there be a "disclosure of information" when the worker knows that the recipient is already aware of the information? See s 43L(3) but cf. *Everett Financial Management Ltd v Murrell* (EAT).

    16.3. How is the genuineness of the employee's belief to be tested?

    16.4. How is the requirement of reasonableness to be applied to an employee's belief?

    16.5. How can a complaint by an employee about his own treatment amount to "public interest" whistleblowing?

    16.6. Is *Parkins v Sodexho* distinguishable? Is it wrong?

Protected disclosure: the "how" of whistleblowing

Three tiers

17. There are three tiers of disclosure: (i) to employers or other responsible persons (s 43C), (ii) to prescribed persons (s 43D, 43E, 43F), and (iii) other cases (s 43G, 43H).

Good faith

18. Good faith is a requirement in all cases: s 43C(1), 43F(1)(a), 43G(1)(a), 43H(1)(a).

19. The leading case on good faith in this context is *Street v Derbyshire Unemployed Workers' Centre* [2005] ICR 97 (CA). The ulterior motive for the disclosure there was personal antagonism. But what is the *ratio* of the case?

20. The headnote of the ICR report reads:

> "where the person making the disclosure might well have mixed motives, a tribunal should only find that the disclosure was not made in good faith when the dominant or predominant purpose of making it was for some ulterior motive unrelated to the statutory objectives"

21. But, what are the statutory objectives?

22. Auld LJ (with whom Jacob LJ agreed) referred to the "public interest purpose" of the legislation:

> **"56** On further reflection, it seems more in keeping with the declared public interest purpose of this legislation, fair and a more useful guide to employment tribunals in conducting this sometimes difficult, sometimes straightforward, exercise-depending on the facts-to hold that they should only find that a disclosure was not made in good faith when they are of the view that the dominant or predominant purpose of making it was for some ulterior motive, not that purpose."

23. Wall LJ expressed himself thus:

> **"71** Part IVA of the 1996 Act protects the disclosure of information relating to the issues identified in section 43B. The primary purpose for the disclosure of such information by an employee must, I think, be to remedy the wrong which is occurring or has occurred; or, at the very least, to bring the section 43B information to the attention of a third party in an attempt to ensure that steps are taken to remedy the wrong. The employee making the disclosure for this purpose needs to be protected against being victimised for doing so; and that is the protection the statute provides."

Questions

24. Possible questions for discussion:

    24.1. What does the requirement of good faith add to the requirement of a reasonable belief?

    24.2. Is the requirement of good faith an impediment to responsible whistleblowing?

24.3. Other than personal antagonism (as in *Street*), what other circumstances might negate good faith? For example, is there an absence of good faith if a disclosure is made in furtherance of a personal, rather than the public, interest?

Protection from victimisation

Causation

25. A worker is protected from suffering any detriment "on the ground that" he made a protected disclosure: s 47B.

26. The dismissal of an employee is automatically unfair where the reason or principal reason for the dismissal is that he made a protected disclosure: s103A.

Burden of proof

27. Who has the burden of proof, especially in a constructive dismissal case? See *Kuzel v Roche Products Ltd* [2007] IRLR 309 (EAT).

Compensation

28. Whilst compensation for a whistleblowing dismissal is uncapped, there is no financial incentive to whistleblow in the UK, unlike the US. Indeed, making a protected disclosure for purposes of personal gain is outwith third tier disclosures in the UK: ss 43G(1)(c), 43H(1)(c).

Interim relief

29. An employee may be able to obtain interim relief in the case of a whistleblowing dismissal provided he applies to the tribunal within 7 days of the effective date of termination: ss 128-132.

30. Interim relief may be granted where it appears to the tribunal that it is likely that it will find there was a whistleblowing dismissal: s 129(1).

31. The tribunal may order that the contract of employment continue in force for the purpose of pay and other benefits pending determination or settlement of the complaint: s 130(1).

Questions

32. Possible questions for discussion:

    32.1. Is the causation test different as between (i) dismissal, and (ii) action short of dismissal? If so, is that justified?

    32.2. To what extent is the burden of proof on the employee? Is there a useful analogy with the burden of proof in (sex, race etc) discrimination cases?

    32.3. Why does the motive of personal gain remove protection from an employee in the UK? Is the financial incentive model in US law preferable?

    32.4. How useful are the interim relief provisions?

Extraterritoriality

UK law issues

33. For the purpose of the UK statutory provisions on whistleblowing, it is immaterial whether the relevant failure (wrongdoing) occurred, occurs or would occur in the UK or elsewhere, and whether the law applying to it is that of the UK or of any other country or territory: s 43B(2). See *Lawson v Serco* (HL).

SOX

34. Section 301(4) SOX requires procedures for "the confidential, anonymous submission by employees…of concerns regarding questionable accounting or auditing matters".

35. This provision in SOX for anonymous helplines has given rise to some controversy within the EU, in so far as it affects European subsidiaries of US companies subject to SOX, in relation to data protection.

36. The EC, in the form of the Article 29 Data Protection Working Party, adopted a report on 1 February 2006, and thereby issued guidance, on this issue. It concluded that the principles of data protection, as laid down in Directive 95/46/EC, must be applied in full to whistleblowing schemes, in particular with regard to the rights of the accused person to information, access, rectification and erasure of data. However, the working party recognised that application of these rights may be the object of restriction in very specific cases, in order to strike a balance between the right to privacy and the interests pursued by the whistleblowing schemes.

37. On 16 February 2006, the Chairman of the working party wrote to the Chairman of the SEC emphasising its conclusions as to the compatibility of EU data protection law with SOX, including anonymous helplines, subject to conditions. The letter also invited the SEC inviting it to consider this issue further in order to reach a common understanding between the EU and the SEC.

Question

38. Possible questions for discussion:

    38.1. What is the experience, if any, of UK employment tribunal claims relying on protected disclosures relating to wrongdoing outside the UK?

    38.2. What difficulties are faced by European-based subsidiaries of EU companies in complying with SOX and EU data protection principles?

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