Whistleblowing: Protecting people who uncover bad practice.

Catherine Hobby

The area of whistleblowing is complex and there is a difficulty in defining acts of public interest disclosure that uncover malpractice and wrongdoing. This in part explains the convoluted structure of the 'whistleblowing' legislation: the Public Interest Disclosure Act (PIDA) that was enacted in 1998 and came into force a year later. For the purposes of this paper whistleblowing is regarded as the deliberate non-obligatory disclosure of public interest information by a worker, whether internally or externally, by voicing concerns or making an allegation of serious malpractice or wrongdoing. Whistleblowing is no longer a pejorative term and widely recognised as an individual act in the public interest on the part of a worker. Recent events such as issues raised by the publication of leaked US Embassy cables on the Wikileaks.org website, the investigation into the Gulf of Mexico oil spill disaster in 2010 and the Mid-Staffordshire Inquiry 2010 all demonstrate that bad practice can occur within any workplace. If malpractice or wrongdoing is occurring within an organisation, its workers will be aware of it. One in four employees is aware of misconduct in the workplace, but more than half of them (52%) keep silent[1]. Illegality, dangerous practice and malpractice will thrive in an organisation that suppresses dissent.

Despite 12 years of PIDA it appears that workers are still discouraged from raising concerns for fear of reprisals. At the beginning of 2010 an inquiry reported into concerns about mortality rates and standards of care provided by Mid-Staffordshire NHS Foundation Trust between 2005 and 2009 at two of its hospitals. The complaints about care to the inquiry mainly concerned Stafford Hospital. The Inquiry found a systematic failure to provide a standard of good care that resulted in patient injury, unnecessary suffering and loss of dignity. It records that staff operated within an 'atmosphere of fear of adverse repercussions'[2]. The report also highlights the fact that a repressive work culture can both prevent workers from speaking up and also ignore and punish those who do. During the Inquiry it was revealed that many staff, during the period under investigation, did express concerns regarding the standard of care being provided, but the 'tragedy was that they were ignored'[3]. Concerns were raised, individually and collectively, but none experienced a satisfactory response. This then 'discouraged persistent reporting of concerns'.[4]

Three companies were involved in the Gulf of Mexico oil spill disaster on 20th April 2010 that killed 11 men and leaked 4.9 billion barrels of oil into the sea. BP who owned the well and its contractors, Transocean and Halliburton, were responsible

[1] British Standards Institute, *Whistleblowing Arrangements Code of Practice*, PAS 1998: 2008, paragraph 0.2 p 1.
[2] Independent Inquiry into the care provided by Mid-Staffordshire NHS Foundation Trust January 2005-March 2009, 2010, Volume 1, p 15.
[3] Ibid p 3.
[4] Ibid, p 186.

for the fatal blow out at the Deepwater Horizon drilling rig. A report by the US National Oil Spill Commission in January 2011 found that the disaster was 'avoidable' and the consequence of a series of decisions to cut costs and time by BP and the other two companies. The report claims 'systematic management failure'[5] at the companies resulted in the blow-out. The Commission reported that proper controls were not put in place at BP to manage the increased risks to ensure that key decisions were safe or sound from an engineering perspective. Workers in all the companies would have been aware of the inherent risks of the short cuts. It has been claimed that:

> "This disaster likely would not have happened had the companies involved been guided by an unrelenting commitment to safety first."[6]

Transocean also operates oil rigs in the North Sea and was been accused by a Health and Safety Report in 2010 of bullying, harassing and intimidating rig workers 'with potential safety implications'.[7] The RMT has also argued that abusive behaviour and racism towards a multinational workforce is 'widespread in the North Sea industry[8]. Jake Molloy, the General Secretary of the Offshore Industry Liaison Committee, claims North Sea workers are reluctant to raise concerns. In evidence to a committee of MPs he stated:

> 'If you are constantly a thorn in the side of management then you very quickly find yourself branded as having the wrong attitude.'

The increased status of whistleblowing is shown by the number of websites that allow the posting of anonymous concerns or facilitate the sale of allegations. A topical example is the website Wikileaks.org which accepts the placement of anonymous information. In November 2010 Wikileaks started to publish information from over 250,000 leaked US Embassy cables that reveal possible iniquity and information embarrassing to a number of states. Cables published in December 2010 report that BP suffered a blow out in Azerbaijan in 2008 similar to that in the Gulf and that it was lucky to evacuate its 212 workers safely after the incident[9].

The enactment of PIDA acknowledged the fact that all organisations 'face the risk of things going wrong or unknowingly harbouring malpractice'[10]. The 1998 Act recognises that there is a value to whistleblowing and workers are often the first to be aware of malpractice or wrongdoing within an organisation.
PIDA amends the Employment Rights Act 1996 by inserting a Part IVA providing workers with statutory protection against dismissal and detrimental treatment in respect of certain protected 'disclosures'. This is important as for workers

[5] The *Guardian*, 6th January 2011.
[6] Bob Graham, Co-Chair of the Commission, quoted in the *Guardian,* 6th January 2011.
[7] The *Guardian*, 8th September 2010.
[8] The *Guardian,* 9th September 2010.
[9] The *Guardian,* 16th December 2010.
[10] Nolan 'Second Report of the Committee on Standards in Public Life', 1996, Cm 3270-1, paragraph 41.

'whistleblowing may become a form of professional suicide that can effectively end a career'[11]. The Act establishes an intricate three-tiered statutory regime that relies on the term 'disclosure' rather than whistleblowing. The complexity of the concept of public interest is reflected in the convoluted structure of the legislation that creates an increased burden on a potential whistleblower with each tier of protection. A distinction is made between internal and external disclosures. An emphasis is placed on internal disclosure to an employer, but external disclosures to certain prescribed organisations are permitted provided a number of conditions are met. Disclosures to other external persons or bodies have to meet substantial additional requirements. As stated above PIDA protects certain disclosures and the use of this term is significant. The legislative use of the term 'disclosure' proved to be important in the recent cases of *Cavendish Munro Professional Risks Management Ltd v Geuld*[12] and *Goode v Marks & Spencer plc*[13]. In these cases the word 'disclosure' of information was expressed to be distinct of and therefore exclude the making of an allegation. Overall, considerable legislative hurdles are placed in the path of a worker who wishes to raise concerns of bad or even dangerous practice. Such complexities impede the raising of legitimate concerns as workers are unable to understand the legislation and its application to them. Given widespread acceptance that whistleblowing is a valuable resource any protective provisions should be simple and accessible.

Trade unions can be a valuable source of information regarding the legislative provisions. Officials should be made aware of the detail of the Act and developments under PIDA so they can make an informed decision as to the concerns workers may raise with them. They should also be able to direct members on how to obtain the best advice possible. The internet is a useful tool and members should be able to access the union website to obtain clear assistance by searching a number of terms including 'whistleblowing', and 'whistleblower', as well as 'confidential reporting' and legislative terms such as 'disclosure'. Information should be updated regularly so that it is contemporary and accurate. Unions who do not communicate through this resource, which costs very little to provide, miss an opportunity to fully inform its members. If the relevant information was publicly available it could also be a valuable method of recruitment.

Trade unions have an important role in protecting those who uncover bad practice by supporting workers with concerns and facilitating the conveyance of information to employers. A union can also provide informed advice to members who are considering blowing the whistle. There is no recognition of this role in PIDA. A worker may first raise an issue concerning malpractice with their trade union before taking it to their employer. A disclosure to a third party in accordance with a whistleblowing procedure established by an employer would only extend to a trade union representative if this was expressly stated in the procedure. If a workplace does not recognise a trade union or a procedure does not include a role for officials

[11] Gobert J & Punch, M (2000) 'Whistleblowers, the Public Interest and the Public Interest Act 1998', (2000) 63 MLR 25.
[12] UKEAT/0195/09/DM.
[13] UKEAT/0442/09/DM.

then a disclosure will not be covered by PIDA The definition of a prescribed person within the protective provisions does not include a trade union and so a worker voicing fears to a union official will make an external disclosure and have to satisfy the onerous conditions in respect of such disclosures. Further in relation to disclosures made by a worker in the course of obtaining legal advice protection may not extend to advice given by a trade union. The legal professional privilege provisions may only extend to trade union officials who are legally qualified. Before the enactment of PIDA in 1998 the TUC recommended the section should cover both 'legal and professional advice' and so extend to advice by a union representative. This simple amendment would protect trade union officials and members. The part trade unions play in the raising of worker concerns should also be acknowledged with an express right against victimisation for officials who voice concerns on behalf of their members

PIDA has given some assistance to workers raising public interest concerns, but amendments need to be made to develop the area of whistleblowing further.
Campaigning for the reform of PIDA may not be a priority for trade unions in the present economic climate of recession. Sweeping public spending cuts are leading to job loses and the imposition of changes to terms and conditions upon members still employed. However in such a difficult environment bad practice and illegality are more likely to occur and the worker who is willing to voice dissent in such challenging economic times deserves the recognition of a campaign for reform.

The need to prevent malpractice and corruption was recognised by the previous Government who enacted the Bribery Act 2010 that received royal assent on 8th April 2010. The Act requires British businesses to be proactive in dealing with bribery[14]. The legislative provisions introduce an offence of corporate failure to prevent bribery in section 7, but it is a defence if a company has an 'adequate procedure' in place to prevent such offences[15]. The implementation of such a policy is an opportunity for trade unions to negotiate effective whistleblowing procedures with management and campaign for further reform. The imposition by employers of an obligation to report allegations of bribery should resisted by trade unions.

PIDA needs to be amended to include a positive 'right to report' rather than offering protection in respect of a protected disclosure. This may address the difficulty witnessed in the interpretation of the 'disclosure of information' by recent judgments of *Cavendish Munro Professional Risks Management Ltd v Geuld* and *Goode v Marks & Spencer plc* by the Employment Appeals Tribunal. The Conservative party made a manifesto commitment in the 2010 General Election to introduce both a right and duty to report, but only in respect of patient concerns. In May 2010 the Coalition promised to introduce new protection for public sector whistleblowers in its 'programme for government' as part of its aim to make government more 'transparent'.[16] The commitment disappeared from a final business plan in November 2010 and it is not clear whether the Coalition

[14] *The Guardian*, 12th April 2010.
[15] Section 7(2) of the Bribery Act 2010.
[16] Cabinet Office, 'The Coalition: our programme for government', May 2010, p 21.

Government now has any plans to reform PIDA. Mark Serwotka, the General Secretary of the Public and Commercial Services Union stated with regard to the omission that:

> 'It might be convenient for the Coalition to ditch this commitment at the same time as stirring … anger among public sector worker, but it would be morally indefensible'[17]

A right to report would be a positive step in the recognition and promotion of the benefits of whistleblowing. Any attempt to introduce a duty to report is misguided and fails to recognise whistleblowing as a deliberate non-obligatory act in the public interest.

The notion of a duty to report has some support, as well as being a requirement of certain legislation[18], but such an obligation has serious implications for workers. Despite 12 years of protection afforded to workers by PIDA and an increased acceptance of whistleblowing by society, the attitude of management continues to 'be at the very least ambivalent'[19]. The raising of concerns requires substantial moral courage when the adverse consequences of whistleblowing are well known. Whistleblowing is clearly an activity in the public interest and for the collective good. However, in order to effect change it is not enough for the Government to reform the law. Institutions need to foster a culture of openness and self awareness. The focus should not be on the whistleblower, but the relevant organisation for in cases of whistleblowing, 'the party in need of moral guidance is not the employee but the employer.'[20] Loyalty cannot be used as an institutional tool to stifle concerns that are in the public interest to disclose. Any obligation of fidelity has a lower priority than the right to report iniquity. Whistleblowing should be regarded as an act of citizenship along the same lines as reporting suspicions regarding terrorist related activities.

Blowing the whistle can have significant financial as well as personal consequences. The treatment of a leading surgeon, Ramon Niekrash, highlights the particular difficulties NHS workers face in an increasingly target driven sector which may stifle staff concerns. Niekrash is an urologist surgeon at Queen Elizabeth Hospital, Woolwich. In 2005 the hospital closed the urology ward as part of cuts to address substantial financial difficulties. In the same year Niekrash began to raise concerns about patient care as a result of the ward closure to which he received no response. His reporting eventually received official action. He was suspended in 2008 for 'excessive' letter writing, and because of a complaint by two senior managers regarding his attitude and clinical competence. Although he had an unblemished

[17] Quoted in the *Guardian*, 23rd November 2010.
[18] For example, sections 330 to 332 of the Proceeds of Crime Act 2002 make it an offence not to disclose information about money laundering which is acquired 'in the course of a business in the regulated sector'.
[19] Park, H et al, 'Cultural Orientation and Attitudes Toward Different Forms of Whistleblowing: A Comparison of South Korea, Turkey and the UK', (2008) 82 Journal of Business Ethics 929, p 929.
[20] Lindblom, L, 'Dissolving the Moral Dilemma of Whistleblowing', (2007) 76 Journal of Business Ethics 413, p 424.

career he was suspended for 10 weeks while he was investigated. Niekrash was only reinstated after a vote of no confidence was threatened by senior doctors. On his return he received no apology and considered there to be a management campaign to force his resignation. He took his case to an employment tribunal claiming victimisation and won. Despite winning his PIDA claim, Niekrash, warned people to think very carefully before blowing the whistle: 'Your employer won't thank you, the law won't protect you. You're on your own'.[21] Without a trade union, or union support for those who are, whistleblowers will be isolated figures who can be easily dismissed.

If workers are not fully legally protected they will fear blowing the whistle and allegations of malpractice, illegality, abuse and misdeeds will be lost. The destructive element of fear, particularly of losing work, can be evident from the top to the bottom of an organisation. As shown at Mid-Staffordshire, such a culture is significant in the development of particular wrongdoing. Without its workers raising concerns an organisation will go unchecked. Whistleblowing is a deliberate non-obligatory public interest act on the part of a worker. The unique status and benefits of whistleblowing should be acknowledged by the law and the wider community.

[21] Quoted in the *Independent*, 11th April 2010.