

Why Is Whistleblowing Still A Risk?

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Why Is Whistleblowing Still A Risk?

Despite being a world leader in the financial markets, the UK falls short of other jurisdictions when it comes to providing protection for whistleblowers. And with the [New York Times](#) stating the roots of a major new global financial crisis could already be taking hold in America, whistleblowers can provide an [invaluable check](#) on the behaviour of senior decision makers. But despite the Financial Conduct Authority (FCA) increasing its resources to handle complaints from whistleblowers, those brave enough to stick their head above the parapet are still risking having it ruthlessly removed.

Studies show that blowing the whistle poses a risk for the person disclosing the information due to:

1. the psychological prejudice people have towards whistleblowers, and
2. the lack of legal protection

In this article, we will look at these two factors in detail, examine how other jurisdictions regulate for the protection of whistleblowers and look at the proposed changes to UK law which could provide greater safety for those prepared to speak out against conduct from senior officials which is illegal or breaches their fiduciary duty to clients, shareholders, or both.

“No good deed goes unpunished” – Psychological prejudice towards whistleblowers

A [forthcoming study](#), *Post-disclosure Survival Strategies: Transforming whistleblower experiences*, conducted by Professor Marianna Fotaki of Warwick Business School and Professor Kate Kenny of Queen’s University Belfast, found that 62% of whistleblowers stated that they had been demoted, and almost all were eventually dismissed or resigned their post. In addition, many whistleblowers find themselves [blacklisted by recruitment agencies](#), and even if they do manage to secure a position, once word of their actions becomes public, many experience unfavourable behaviour in their new workplace.

[Studies](#) show that despite rhetoric praising those who have the courage to stand up to an authoritative figure doing wrong, humans have a natural suspicion against ‘moral agents’.

“Moral Agents (good or bad) seem tougher than others and better able to endure life’s tribulations. This mental schema means that the suffering of heroes is less salient and less demanding of empathy than that of others. When a normal person is punched our heart leaps, but when Superman or Batman gets punched we shrug it off because we expect them to do the same. It’s hard to picture Gandhi whimpering over a bruised knee”.

Another [study](#) confirms we actively reject and resent those who do the ‘right thing’ because doing so threatens the self-image of those who turned a blind eye.

Legal protection – it is there, but is it robust enough?

The Public Interest Disclosure Act 1998 (PIDA) came into force on 2 July 1999

PIDA provides two levels of protection to whistleblowers who make what PIDA refers to as a “protected disclosure”:

1. a dismissal will be deemed automatically unfair if the reason for that dismissal was that the individual made a protected disclosure, and
1. workers who make a protected disclosure cannot be subjected to detriment for having done so.

The protection against dismissal is also enhanced compared to an ‘ordinary’ unfair dismissal claim in that there is no requirement to have two years’ service with the employer before bringing a claim, and the arbitrary cap on financial compensation (the lower of a year’s pay and £83,682) does not apply.

To qualify for protection, a whistleblower must show that:

- They have disclosed information (rather than merely threatening to do so);
- The information must relate to one of six types of ‘relevant failure’;
- They have a reasonable belief that the information tends to show one of the six types of ‘relevant failures’;
- They have a reasonable belief the disclosure was made in the public interest; and
- Requirements about the identity of the person to whom the information has been disclosed are met (these are complex, but broadly PIDA encourages disclosures to the employer but does protect disclosures to external third parties in certain circumstances).

Meeting these tests can be a minefield for whistleblowers, which is why seeking legal advice making the disclosure is essential. Whistleblowing claims can be notoriously hard to

prove; roughly 4% of Employment Tribunal claims are successful.

How other countries protect whistleblowers

Having taken a hammering in the 2008 financial crisis, it is no surprise that the United States leads the way when it comes to regulations to encourage and support whistleblowers. The [US Securities and Exchange Commission \(SEC\)](#) is authorised by Congress to provide financial awards to people who come forward with information that leads to a Commission enforcement action in which over \$1,000,000 in sanctions is ordered. Awards can be valued at up to 30% of the money collected. The Trump administration shows no signs of rolling back on legislation designed to encourage employees to report wrongdoing, for example, in June 2018, President Trump signed into law the Whistleblower Protection Coordination Act, permanently reinstating the Whistleblower Ombudsman Program.

In Australia, incoming legislation, expected to be in force from January 2019, will force all but the smallest of companies, to put in place a detailed whistleblowing policy and ensure it is communicated to staff. In New Zealand, the State Services Commission recommended changes to the Protected Disclosures Act. Public consultation on the suggestions which would increase whistleblowers' rights have now ended, and decisions will be made in the New Year. And in Canada, The Ontario Securities Commission adopted a whistleblower programme in 2016, which provides rewards of up to \$5m.

How the UK can improve whistleblower protection

In May 2018, the CEO of Barclays, Jes Staley, was fined a total of £642,430 by the FCA for trying to uncover the identity of an anonymous whistleblower. However, the penalty attracted significant criticism as it represented only 14% of his total compensation.

Unlike their US counterparts, UK whistleblowers receive no

financial incentive for reporting wrongdoing. And because of the lack of clarity in the law, the risks of blowing the whistle are high. For example, if the internal rules of an organisation (based on FCA requirements) are breached, it does not automatically mean there has been a breach of the law. These types of situations can lead to the person making the disclosure being left without any protection under PIDA.

Lord Godfrey Cromwell, a robust advocate for increasing whistleblowing procedures, has [said](#):

“It is a widely-held misunderstanding that the FCA regulates the whole financial services world. Significant areas – for example bank lending to SMEs – remain unregulated and it comes as a shock to whistleblowers and aggrieved customers alike that the FCA is largely unable to engage in such areas.”

In early 2018, the charity Whistleblower UK put forward its proposal for a bill to amend PIDA, to include an independent Office For the Whistleblower. Many leading parliamentarians support the proposal, including Lord Cromwell and Baroness Susan Kramer, along with the Institute of Business Ethics and Public Concern at Work. The organisation is also campaigning to have penalties imposed on those who retaliate against whistleblowers.

BDBF recently acceded for the successful claimant [in the landmark Court of Appeal case of *Timis & Sage v Osipov* \[2018\] EWCA Civ 2321](#) which held that an employee may bring a claim against a fellow worker for whistleblowing detriment where the detriment is a dismissal. This provides an alternative route for employees who have been dismissed because of whistleblowing in situations where the organisation which employed them becomes insolvent.

However, when it comes to pushing through legislation, or even getting a Bill tabled, at the moment, the great monster of Brexit is standing in the way. Heather Buchanan, director of

policy and strategy for the All Party Parliamentary Group on Fair Business Banking and Finance, told [Global Risk Regulator](#):

“Everything is about Brexit right now, It is probably the biggest challenge. Everyone says [there is] no time on the floor for this stuff; it does take a very sustained effort. We can look at legislation going through but the space for new legislation is very difficult right now”.

Final words

Blowing the whistle is a risky business and should never be undertaken without legal advice. The price paid by many who have ‘done the right thing’ has been professional and personal. However, [research](#) has shown that those who blow the whistle in their workplaces tend to have a strong moral compass and a desire to confront wrongdoing, therefore, they are left with no choice regarding whether to speak up. The least they can ask for is for the law to provide protection.

BDBF are employment law specialists with particular experience of acting for whistleblowers in the financial services and health sectors. If you want to find out about making a claim following detriment or dismissal related to whistleblowing, please contact Clare Brereton, Associate (claretaylor@bdbf.co.uk) on 020 3828 0350.

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