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Whistleblowing at Work:
the legal implications for employees
of making disclosures of confidential information

Lucy Vickers

A thesis submitted in partial fulfilment of the requirements of Oxford Brookes
University for the degree of Doctor of Philosophy

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Abstract

The thesis examines the nature and extent of protection available to "whistleblowers", employees who disclose to outside bodies wrongdoing or malpractice at work. It begins with a consideration of the philosophical basis for providing protection for such employees. The legal rights of the whistleblowing employee in English law are then considered. In chapter three case law on the duty of confidence is examined and conclusions drawn on its application to employees dismissed for blowing the whistle, with particular reference to whether disclosure of information involves a breach of the employment contract. The general law on unfair dismissal is examined in chapter four to determine the extent to which an employee can claim that a dismissal for raising a concern is unfair. Protection for whistleblowing on specific issues such as race or sex discrimination, and health and safety issues is considered in chapter five.

International standards governing the protection of the right to freedom of expression, in particular Article 10 of the European Convention on Human Rights, are examined in chapter six. Chapter seven comprises a comparative study of the protection available to employees who blow the whistle in the USA, where protection exists for whistleblowers both at a constitutional level and in specific legislation.

A case study is included in chapter eight in which the position of employees in the National Health Service is examined in detail, with regard to their contractual position and the practical difficulties faced by those who wish to raise concerns about matters at work.

A fundamental distinction drawn throughout the thesis is between two types of whistleblowing: "watchdog" whistleblowing, referring the raising of concerns about immediate threats to health and safety or of serious financial loss; and "protest"

whistleblowing, referring to the participation of employees in debate on matters that are in the public interest, using specialist information gained from their employment. The recognition of these two forms of whistleblowing aids the analysis of the limitations of the legal protection as well as proving useful in the determining the scope of proposed reform.

The argument is made that the protection currently available is inadequate and the thesis ends with proposals for legal reform.

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One

Introduction

The term "whistleblower" is usually used to refer to the person who raises the alarm in public about a wrong being committed in private. Many employees are well placed to act as whistleblowers; they have unique access to information in the workplace and are often the first to know if anything is seriously wrong in the organisation in which they work. Employees therefore have the potential to act as an early warning system, to alert management or the public where serious risks arise.

However, this potential often goes unrealised; concerns are not voiced, or else are voiced too late. This can have disastrous consequences. Employees reported concerns about the potential safety risks of sailing with the bow doors open on roll on roll off ferries prior to the capsizing of the ferry *The Herald of Free Enterprise* on March 6th 1987, in which one hundred and ninety three people died¹. A few months before the train collision that killed thirty five people and injured five hundred, a supervisor noticed faulty wiring in the Clapham Junction Relay Room, but did not report it². One hundred and sixty seven people were killed in the explosion on the Piper Alpha oil platform; employees had had concerns about safety but had not raised them at the time³.

¹Court Inquiry, Department of Transport, Ct No. 8074, 1987 HMSO

²Investigation into the Clapham Junction Railway Accident, November 1989, HMSO Cm 820

³The Public Inquiry into the Piper Alpha Disaster, November 1990, HMSO Cm 1310

Employees not only have the potential to raise concerns about safety matters, but may also be aware of financial malpractice, the disclosure of which could prevent financial loss to many. Employees had doubts about the probity of the Bank of Credit and Commerce International (BCCI) before the disclosure of the £2 billion fraud that left many businesses in ruin. The internal auditor who, in 1990, expressed concerns was subsequently made redundant⁴.

In each of these cases employees were in a position to prevent disaster or financial scandal, but did not do so, either for fear of rocking the boat and appearing disloyal, or because they feared reprisal. The ensuing disasters have led to public concern about the lack of protection available to employees who raise concerns about safety or wrongdoing at work, although thus far, no general protection has been introduced to cover such employees⁵. Similar concerns led to the introduction of specific protection in the USA for employees who blow the whistle. For example, Michigan's Whistleblower Protection Act was introduced in direct response to an incident in the 1970's in which employees were threatened with reprisal if they volunteered information to an inquiry into the shipping of poisonous chemical fire retardant to state feed-grain cooperatives, which had serious effects on the health of those who ate contaminated food.

Concern about the lack of similar protection for employees in the UK has also been generated by several high profile cases of whistleblowing at work involving employees within the National Health Service. In February 1990, Helen Zeitlin, a consultant haematologist with the Bromsgrove and Redditch

⁴Inquiry into the Supervision of The Bank of Credit and Commerce International, 2 October, 1992, HMSO, 198

⁵Following the Piper Alpha disaster, the Offshore Safety (Protection Against Victimisation) Act 1992 was introduced. This was repealed by TURERA 1993 and replaced by s 57A EPCA 1978 (now s 100 ERA), which provides general protection against victimisation for raising health and safety concerns at work. This is discussed in detail in Chapter five.

health authority was dismissed for mentioning nursing shortages at a public meeting. Although she was ultimately successful in gaining reinstatement after an appeal to the Secretary of State for Health, she no longer works in her original job, and her case acted as a focus for concern about the difficulties faced by staff who speak out about standards at work. According to Zeitlin, before leaving her job, she had been persistently intimidated and undermined by NHS managers, who had, among other things, raised questions about her mental health⁶.

Other cases followed. Graham Pink was dismissed for gross misconduct after publishing in *The Guardian* a series of letters he had written to hospital managers, his Member of Parliament, the Chief Executive of the NHS, the Secretary of State for Health and the Prime Minister. In these he raised concerns about staffing levels on the geriatrics ward on which he worked⁷. He also spoke to the local press about his concerns⁸. Again, Pink was ultimately successful in his claim for unfair dismissal, but no longer works in his original job. His case became a *cause celebre* amongst nurses, but also led to increased fears on the part of nursing staff about the risks involved in voicing concerns. Many nursing staff have heard of his dismissal, fewer know of his success at the industrial tribunal.

Other examples of employees dismissed after blowing the whistle include Chris Chapman, a scientist at the Leeds General Infirmary, who was the only one out of a staff of two hundred to be made redundant in a work reorganisation. He had just exposed financial corruption and scientific fraud in his department. After much publicity and intervention by his Member of Parliament, he was reinstated, subject to an agreement not to speak about

⁶As confirmed in conversation with Helen Zeitlin. See also the Independent 10 September 1993. See also Lennane, "Whistleblowing": a health issue (1993) 307 BMJ 667

⁷The Guardian, 11 April 1990.

⁸Stockport Express Advertiser, July 25 1990

the case in public⁹. Social worker, Sue Machin won her claim of unfair dismissal after she was dismissed for gross misconduct. Prior to the incident that gave rise to the dismissal, she had made allegations of cruelty at the Ashworth Special Hospital where she worked, as part of the inquiry into patient treatment at the hospital by Sir Louis Blom-Cooper QC. She claims that the dismissal was a direct result of the evidence she gave at the inquiry¹⁰.

These are some of the more famous examples of reprisal taken for blowing the whistle, but they are by no means isolated examples. In its news letter, *The Whistle*, the organisation Freedom to Care¹¹ documents many examples of employees dismissed or disciplined for raising concerns; a social worker dismissed for criticising standards of care in the children's home in which he worked, a college lecturer dismissed for writing to an exam board with concerns about academic standards, a psychiatrist suspended and threatened with dismissal after making complaints about his employer¹². The charity Public Concern at Work (see below), in its annual report gives details of a selection of cases it dealt with in its first year including that of a credit controller, concerned about his employer's involvement in a million pound fraud who had been threatened with an injunction unless he undertook not to disclose any details, and employees who resigned over concerns about the state of repair of brakes on a ride at a pleasure park. In its publications on whistleblowing in defence

⁹As confirmed in conversation with Chris Chapman.

¹⁰As confirmed in conversation with Sue Machin. See also, the Independent 3 June 1995. For report on Ashworth Special Hospital, see Report of the Committee of Inquiry into Complaints about Ashworth Special Hospital, August 1992, HMSO Cm 2028-1.

¹¹A self help and lobbying group for workers in health and social services.

¹²The Whistle, Volume II, No. 6., Winter 1994, Freedom to Care.

procurement, the police and local government¹³, many more cases are documented.

The publicity and resulting concern about the risks faced by employees who raise concerns about work-related issues have had a number of practical consequences. Both the Royal College of Nursing and the Manufacturing Science Finance Union set up confidential telephone "hot-lines" used by nursing and other health care professionals to report concerns¹⁴. Several self help and lobby groups have been set up, giving support to those who blow the whistle and lobbying for legal protection to be provided for employees¹⁵.

In addition, October 1993 saw the launch of Public Concern At Work, a charity set up to help employees raise and employers address concerns about malpractice at work. The charity provides various services to help employees with serious concerns about wrongs that may threaten the public interest. It provides a legal advice and assistance service for employees who may face dismissal or discipline for raising concerns. It also advises employees on how best to raise concerns internally, sometimes acting as a neutral channel through which this can be done. In addition, it provides training and consultancy to employers on how to deal with concerns raised

¹³Speaking up by sector: The Police (1993) Public Concern at Work, London. Speaking up by sector 2: Local Government, blowing the whistle on fraud and corruption (1994) Public Concern at Work, London. Speaking up by sector 3: Blowing the whistle on defence procurement (1995) Public Concern at Work, London.

¹⁴See The Royal College of Nursing, Report on Whistleblow Scheme (1992) and Freedom of Speech in the NHS, A Guide for Negotiators, MSF, July 1993

¹⁵For example Freedom to Care for those working in the health and social services, and the Council for Academic freedom and Academic Standards, in the further and higher education sector.

by employees, undertakes research and seeks to influence public debate on accountability and corporate and public governance¹⁶.

Public Concern at Work has also been involved in various attempts to introduce legislation to provide employment protection for whistleblowers. In the autumn of 1995, together with the Campaign for Freedom of Information, it produced a Whistleblower Protection Bill as a ten minute rule Bill, sponsored by Tony Wright MP. The response to consultation on this Bill led, in the spring and summer of 1996, to a second attempt to introduce legislation. The Public Interest Disclosure Bill, Don Touhig MP's private member's bill, provided for a remedy for employees dismissed for raising certain matters of public concern. The classes of information covered were limited to offences or breaches of statutory requirements, improper or unauthorised use of public or other funds, miscarriages of justice and dangers to the health and safety of any individual or to the environment. As a general rule, protection was only to be provided if disclosures were made internally at first, and only applied to employees. Even though the protection offered was restricted after consideration in committee¹⁷, the Bill did not make it through the parliamentary process.

Despite the failure to introduce general protection for employees who report wrongs, some recent legislation has imposed a duty on employees to report concerns. Section 48 of the Pensions Act 1995 imposes a duty on auditors and actuaries to report cases to the Occupational Pensions Regulatory Authority where they have reason to believe that any duty imposed by law is not being complied with, and where that failure will prevent the

¹⁶To this end the charity was involved in giving evidence to the Nolan Committee on Standards in Public Life. Its proposed code for an internal reporting mechanism to be adopted by public services was taken up by the Nolan Committee. (Second Report of the Committee on Standards in Public Life, 1996, HMSO Cm 3270 I - II.)

¹⁷For example, as originally drafted, the list of protected matters that could be raised was only illustrative, and included abuse of authority and maladministration as well as those already listed.

Authority from carrying out its functions. Failure to make a report can lead to the auditor being disqualified by the Authority. The Pensions Act states that compliance with this duty will not constitute a contravention of any other duty owed by the auditor, so that it cannot amount to a breach of confidence or breach of contract on the part of the auditor. Auditors in other financial sectors are under a similar duty to report concerns to their respective regulators¹⁸.

However, no specific employment protection is provided by the Pensions Act and other similar regulations. The parliamentary debate on the Public Interest Disclosure Bill¹⁹ indicates the ongoing concern of the legislators about the costs to businesses in providing employment protection. Although the recently introduced Section 100 Employment Rights Act 1996 (ERA 1996)²⁰ provides employment protection for safety representatives who have adverse action taken against them for raising health and safety concerns at work, it is notable that this section was introduced to ensure compliance with European law²¹. It appears that insufficient weight is given by UK legislators to the potential cost of ignoring the valid concerns of employees.

As the examples given above show, there is ample evidence that employees who raise concerns at work often suffer reprisal. As a result, it is quite common for employees to resign before raising a concern. Alternatively, rather than lose their jobs, they may choose to stay quiet. Given the public

¹⁸For example, Auditors (Insurance Companies Act 1982) Regulations 1994 SI 1994/449; Auditors (Financial Services Act 1986) Rules 1994 SI 1994/526; Accountants (Banking Act 1987) Regulations 1994 SI 1994/ 524; Building Societies (Auditors) Order 1994 SI 1994/ 525.

¹⁹H.C. Deb., 1st March 1996 cols. 1108 - 1175

²⁰Previously s 57A EP(C)A 1978, and introduced by the Trade Union Reform and Employment Rights Act 1993.

²¹EC Framework Directive 89/391

interest in encouraging the disclosure of certain matters, particularly where health and safety are involved, this gives cause for serious concern.

1 Definitions of whistleblowing

Before considering the employment protection currently available for employees who blow the whistle, the definition of whistleblowing needs further refinement, as a distinction can be drawn between two types of whistleblowing which affects the level of protection that is needed.

The two types of whistleblowing can be illustrated by contrasting the cases of Helen Zeitlin and Graham Pink with those of the employees at Clapham Junction, BCCI and on the Piper Alpha oil platform. In the latter cases, the employees had knowledge of illegal conduct, or specific safety risks. They had the chance act as watchdogs, alerting the public or their fellow employees to the existence of danger or wrongdoing that placed them at significant risk of financial loss, serious injury or death. Helen Zeitlin and Graham Pink, on the other hand, were not so much alerting the public to specific and imminent dangers, as using their positions as employees to protest about developments in the NHS.

In effect, there are two different types of conduct that are being termed "whistleblowing". The first can be referred to as "watchdog whistleblowing", and refers to the case where the employee discloses a current and avoidable danger to health and safety, or serious financial malpractice. In contrast, "protest whistleblowing" can be used to denote the case where an employee uses her experience at work to participate in debate on issues of public importance, often using her position inside an organisation to shed new light on issues already being debated in public. Both types of whistleblowing can be said to serve the public interest,

although the public interest in favour of watchdog whistleblowing is stronger, given its ability to avert imminent disaster.

The different types of whistleblowing raise slightly different issues, and arguably deserve different levels of protection. Yet the distinction between the two is not always clear cut. For example, in raising his concern about under staffing on his hospital ward, Graham Pink could be said to have been protesting about standards of care within the NHS. Or he could be said to have been acting as a watchdog to alert the public to the risks to safety involved in under staffing. Similarly, the BCCI internal auditor's actions in raising concerns could be seen as those of a watchdog, reporting the risk of serious financial loss, or as those of a protester, objecting to financial irregularities.

However, the distinction between the two remains valid, and can be useful when considering questions such as the extent to which the public interest served by the whistleblower's disclosure outweighs the duty of loyalty owed by the employee to her employer. Even though the concepts involve a degree of overlap, they will be used throughout the following chapters to draw a generalised distinction between the two types of conduct.

2 Overview of the thesis

The chapters that follow will consider the extent to which employees are protected when disclosing matters of public concern at work. The focus is on employees in both public and private sector employment²².

Chapter two considers the philosophical basis for providing protection for employees who speak out at work. Particular attention is given to the justifications for protecting protest whistleblowing, which is viewed as an aspect of freedom of speech. The writings of Milton, Mill and Meiklejohn are used to assert that protest whistleblowing merits strong legal protection, there being a presumption in favour of protecting freedom of speech which should only be overridden where there are strong interests in restrictions.

Chapter three looks at the legal position of the employee beginning with the question of whether blowing the whistle involves a breach of the contract of employment. Case law on the duty of confidence and the interpretation of the concept of the public interest are examined in detail. The factors that influence the determination of the public interest in any particular case are identified and applied to the example of the whistleblower.

Chapter four examines the protection against unfair dismissal contained in the Employment Rights Act 1996 to determine the extent to which an employee can claim that a dismissal for blowing the whistle is unfair. In

²²It does not consider the special position of civil servants under the Official Secrets Acts. For discussion of the implications of public interest disclosure for civil servants see Cripps, *The Legal Implications of Disclosure in the Public Interest*, 2nd Edition (1994) Sweet and Maxwell, London, Chapter 3. Other matters of relevance but not included in the thesis are discussed by Cripps, including the public interest as a defence to defamation arising out of disclosures of information (Chapter 6) and the public interest as a defence to proceedings instituted in an attempt to discover the identity of employees who disclosure information (Chapter 8).

particular the operation of the test of fairness contained in s 98(4) ERA 1996 is considered and applied to the example of a dismissal for raising public interest concerns at work.

Protection for whistleblowing on specific issues is examined in chapter five. The victimisation provisions of the Sex Discrimination Act 1975, Race Relations Act 1976 and Disability Discrimination Act 1995 are considered, together with the protection against dismissal or action short of dismissal for raising health and safety issues²³ and for partaking in trade union activities²⁴.

Chapter six looks at the protection for whistleblowers under the European Convention on Human Rights. Article 10 ECHR provides for the right to freedom of speech. The extent to which this affords protection for employees who exercise their freedom of speech in the workplace is considered.

Chapter seven contains a comparative study of the protection of whistleblowers in the USA. Specific legislation is in force in the USA to protect employees against reprisal for blowing the whistle at work. In addition, employees enjoy a constitutional rights to freedom of speech and can claim damages for the tort of "wrongful discharge" if dismissed in breach of public policy. An examination of the operation of these varied forms of employment protection demonstrates that, despite the seeming wealth of protection in comparison with that available in the UK, the US employee is not fully protected against reprisals for whistleblowing. The shortcomings of the protection in the US provide useful lessons when considering reform proposals for the UK.

²³ss 44 and 100 ERA 1996

²⁴ss 152 and 146 TULR(C)A 1992

Chapter eight consists of a case study on whistleblowing in the NHS. First, the need to protect the freedom of speech of NHS staff is justified, using the arguments examined in chapter two. Next, the terms of employment of staff in the NHS are examined, together with the UKCC Code of Professional Conduct for nursing staff, and the government's Guidance for Staff on Relations with the Public and the Media. The practical problems faced by staff in the NHS when considering raising concerns are then assessed. Informal interviews with NHS managers, nursing staff and nursing staff representatives were conducted in order to inform the discussion in this chapter. The case study is not based on any statistical analysis and makes no claim to be an exact sociological study; instead, interviews with selected individuals are used to show the conflict between the various sources of obligation on NHS staff.

The final chapter considers various proposals for improvement in the protection available to employees who blow the whistle. One option discussed is increasing the use of internal reporting mechanisms within the workplace. In addition the creation of a new automatically unfair reason for dismissal is suggested, and its scope examined.

Two

Whistleblowing and Freedom of Speech

The examples provided by the disasters at Zeebrugge, Clapham Junction, and on the Piper Alpha oil platform provide a sobering justification for protecting those who wish to raise concerns about health and safety at work. Had the individuals involved felt safe to raise their concerns, lives might have been saved. Similarly, financial fraud and mismanagement might cause fewer losses if employees feel safe to report concerns.

In such cases, where there is a concern about an immediate health and safety risk, or the risk of serious financial malpractice, it is easy to justify protecting the individual who speaks out. The information, if acted on, can help avert danger or disaster; the individual with access to the information should therefore be encouraged to come forward with the information so that those in a position to do so can take appropriate action. Without the information no action can be taken. Despite the fact that there may be competing interests present, such as an interest in commercial confidentiality, or in employee trust and confidence, this is unlikely to outweigh the public interest in allowing the information to be disclosed, in such circumstances.

Although not always accepted in the courts¹, these arguments provide strong justification for protecting the speech of the watchdog whistleblower. Perhaps more difficult to justify is protection for the protester, where the immediate public interest served by the speech is less obvious, and where

¹See Chapter Three on Confidentiality and the Public Interest.

the interests in speaking may more readily be outweighed by the interests of an employer in confidence, loyalty and privacy. This section therefore concentrates on the justification for protecting the protest whistleblower. This justification applies equally to watchdog whistleblowers, but is not so necessary to the case for protection because of the existence of strong pragmatic arguments in favour of watchdog speech.

In order to see why the speech of the protester needs protection alongside that of the watchdog, protest about matters at work needs to be seen as an aspect of the right to freedom of speech. According to this view, the public interest is served by protest, and there should be a presumption in favour of protecting the speaker, unless there are very strong reasons to the contrary². This argument is based on the view that the right to free speech is a fundamental right which will usually "trump" other rights, such as the right of an employer to privacy and confidence. It is worth considering these arguments in some detail to see whether they shed any light on the position that courts should take when weighing competing interests to confidence and to free speech.

1 Why should free speech be protected?³

There are three broad arguments in favour of the protection of free speech as a fundamental right. First, freedom of speech can be seen as an aspect of personal autonomy, without which an individual cannot be totally fulfilled. According to this view, the right to free speech should be upheld

²The need to protect individual freedom of speech, with only strictly limited exceptions, is recognised by the European Convention on Human Rights, Article 10. The way in which the rights enshrined in the Convention might be used by whistleblowers is considered in Chapter Six.

³The arguments in this section are based on Barendt, *Freedom of Speech* (1985) Oxford, and Schauer, *Free Speech: A Philosophical Enquiry* (1982) Cambridge.

as it serves the personal interests of the speaker. Secondly, freedom of speech has been said to lead to the discovery of the truth by allowing everyone to contribute to debate. Here, free speech serves the interests of the audience rather than the speaker. The final reason for protecting free speech also serves the interests of the audience but would protect one type of speech above others; the argument is that freedom of political speech is necessary to enable citizens to understand political arguments so as to be able fully to participate in the democratic system.

If any of the three approaches are sustainable, then it will be possible to argue that free speech should be protected, not on the basis of the content of the speech, (such as the fact that it reveals fraud or misconduct), but because the right to speak itself deserves protection. Although, if used to argue for the protection of all types of speech, each of the theories has its limitations, they can provide a basis from which to argue for a high level of protection for some types of speech, particularly political speech⁴.

1.1 Free Speech as an Aspect of Individual Autonomy

The first argument supporting special protection for freedom of speech is that it is the ability to hold opinions and beliefs, and to communicate them, that makes us fully human. In order to be able to develop one's ideas on moral or political issues, one needs to have access to a wide range of views and opinions. Thus, the right to speak, write, and discuss freely is fundamental to individual development and autonomy and the protection of the right to communicate is essential in a civilised society.

However, such an approach does have limitations as a philosophical justification for granting freedom of speech special protection. On a general

⁴It is not intended to consider general free speech theory in depth. Although the theories used here to justify protection for political speech can be used to argue for protection of other types of speech, these arguments will not be considered.

level, when one compares the right to free speech with other rights equally beneficial to human development, such as rights to education or housing it is not clear why free speech should enjoy particular protection, other than for the negative reason that it is easier to prevent encroachments on a right to speech, than to require the positive action necessary to ensure that a right, for example, to education is available to all.

More particularly, the argument essentially seems to be that freedom of speech is one aspect of the right to human dignity. If this is so, then again it is unclear how the right to free speech should fare in competition with other aspects of human dignity such as a right to privacy, or an interest in enjoying the confidence of one's friends or colleagues. This is especially so when the speech involves disclosure of facts or information, as opposed to opinion, where it may be difficult to see the speech as an aspect of self expression. Thus, to the extent that freedom of speech is an individual right, it is not clear why that right should prevail over any other.

On the other hand, it has been argued that free speech supports the human dignity of the audience as well as the speaker⁵. Scanlon suggests that it is only by hearing the ideas and opinions of others that one can develop one's own beliefs. This idea is developed to argue for special protection for political speech (see below), but even at a general level, such a view gives a stronger reason to uphold the right of one person to speak against the right of another to confidence. Once the interests of the audience are taken into account one person's right to confidence is no longer weighed against another's right to speak, but against the rights of many. Viewed in this way, however, the argument for free speech prevailing over other rights is more utilitarian, concerned with upholding free speech as the way to satisfy the

⁵Scanlon, 'A Theory of Freedom of Expression' in *The Philosophy of Law*, ed. R. M. Dworkin (Oxford, 1977)

interests of the greatest number, rather than anything inherent in the right to speech itself.

1.2 Free Speech Leads to Truth

The argument that freedom of speech will lead to the discovery of truth can be traced most famously to Milton in *Areopagitica*⁶, his speech in defence of the freedom to publish without state censorship. He argues that without the freedom to debate new ideas there is no health in intellectual or moral life, and that truth, when contrasted with error will always win:

"Let (truth) and falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter? Her confuting is the best and surest suppressing."

Thus the argument is that if full and open debate is allowed, then the truth will emerge.

This argument was developed by Mill in *On Liberty*⁷. Mill argues that freedom of speech is essential if the truth on any matter is to be discovered. An opinion that is silenced may in fact be true, and by silencing it, one will have prevented the truth from being discovered. Even if the silenced opinion turns out to be an error overall, it may contain an element of truth that will be lost in the silencing of the whole. Furthermore, even if the opinion is totally in error, the truth will be strengthened by the debate. In fact, he goes as far as to say that truth is enfeebled if not fully and regularly debated:

"If the opinion is right, [people] are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as

⁶Areopagitica (1644) in *Areopagitica and other prose works* (1927) Dent and Sons, London.

⁷J. S. Mill, *On Liberty* in *On Liberty and Other Writings*, Edited by Stefan Collini, Cambridge University Press (1989)

great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."⁸

Thus, free speech should be given greater protection than other rights because it is only through free speech that we can arrive at the truth about a situation. In the case of the watchdog whistleblower the necessity of reaching the truth is obvious, and this can also be the case for the protester. For example, the free speech of a whistleblower in the NHS is necessary if we are to reach correct conclusions on whether recent reforms are working, and in order best to determine how the service should be run.

The argument has been taken up by various judges in the USA when looking at the scope of their First Amendment rights. They use the terminology of the market: "[T]he ultimate good desired is better reached by free trade in ideas... [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market".⁹ Although this approach has led to extensive protection for many types of speech, it shares the limitations of Mill's argument from truth.

First, it makes the presumption that there is an objective truth that can be known, which is not always the case. In some cases, factual information can be said to be true without the need for wide public debate. Elsewhere, the "truth" is more elusive. For example, in the context of protest whistleblowing in the NHS, we may know how many staff there are on a ward, but still not know whether it is understaffed, that issue being more complex and in the end, relative. The argument from truth is thus limited as a justification for protecting the protester.

⁸Mill, op cit. p 20

⁹*Abrams v United States*, 250 U.S. 616, 630 (Holmes and Brandeis, dissenting).

Secondly, whilst suppression of views may prevent the emergence of truth, the causal link between wide and public debate and the emergence of truth is not established. Historical experience shows that society does not necessarily recognise the truth when presented with it. The only way round this is to redefine truth, from an objective concept to a relative one in which the "truth" is that which is generally accepted by society. However, if this is done, the strength of the argument is lost as it is no longer clear why "truth" must emerge only from public debate and not from any other source recognised by society, such as myth or tradition. Truth effectively becomes a relative concept and there is no reason for granting it special protection. In arguing that freedom of speech should be afforded special protection, Mill also assumes that the discovery of truth is the highest of human goals although this is not necessarily so; the maintenance of dignity, privacy and confidence may rank along side.

Finally, Mill presumes that the only reason for suppressing speech is that it is false, although there are many occasions where information that is true is not necessarily best debated in public for reasons of confidence, commercial sensitivity, privacy etc. In fact, whilst this is a limitation of Mill's argument for upholding the right to free speech on any issue, it does explain the development of the final reason for upholding free speech for particular categories of speech; for it not always the fear of falsity that leads to the suppression of speech, but a fear of the consequences of the truth being universally known and discussed.

1.3 Free Speech Upholds Democracy

The argument that free speech upholds democracy is mainly associated with the work of Alexander Meiklejohn¹⁰. He argues that free speech is a

¹⁰see Meiklejohn, *Free Speech and its relation to Self Government*, (1972) Kennikat Press, New York.

necessary part of self government; a democratic system requires that the electorate is sufficiently informed to participate. The public thus need all relevant information before them when playing their part in the democratic process and for this reason, freedom of speech must be maintained. The interests served by speech in this model are those of the audience not the speaker. "What is essential is not that everyone shall speak, but that everything worth saying shall be said¹¹." Here the emphasis returns to a certain extent to the content of speech; not all speech is worthy of special protection, but political speech is.

Again the theory has limitations although it is probably the strongest argument in favour of protection for public sector employees who protest about matters at work. The first criticism is that the theory is based on the idea that the electorate is sovereign: government's role is to serve the people thus people need information in order to be able to judge whether the government has done what they want it to do. However, if the electorate is sovereign, there is no theoretical reason why it should not vote for a government which does not uphold free speech; nor is there a reason why a majority of the electorate may not vote for the suppression of the speech of a minority. These arguments can only be overcome by refining the argument with insights gained from the Mill's arguments from truth considered above.

Schauer argues that it is in conjunction with the argument from truth that the argument from democracy gets its strength as a rationale for giving special protection to political speech. Since governments have enormous power, they have the potential to make errors of a greater size and import than most decision makers. Since the issues surrounding the decisions in

¹¹Meiklejohn, op cit p. 25

which they are involved are rarely clear cut, it is vital that they are debated and discussed widely so that the possibility of error is minimised¹².

This argument will not apply to all information; for example, neither purely commercial information, nor that relating to the private lives of public figures are politically relevant. The communication of such information thus deserves no special protection. However, in many cases, information can lead to better, more informed political debate and participation in the political process. Thus, information about how a government policy is working, how government funding policies will affect parts of the public sector or about how a public utility is being run may all be necessary to enable the electorate to participate knowledgeably in the political process. Equally, governments may be keen to restrict access to exactly this type of information.

The refined argument from democracy is further strengthened by considering the reasons for suppression of speech, as free speech is often suppressed not because it is false, but from a fear of what the truth, in public hands, may lead to. The argument takes into account the tendency of governments to restrict information that is harmful to them. As Schauer puts it; "Freedom to criticise the government is a check on the survival instincts of self-perpetuating governmental organisations."¹³ Thus free speech is not merely necessary because the electorate needs certain information: it is also necessary to act as a check on governments' tendency to be "economical with the truth" when it is in their interests to be so.

¹²"By virtue of the power we grant to government, the effects of its fallibility are magnified by the importance of the decisions it makes. The special concern for freedom to discuss public issues and freedom to criticise governmental officials is a form of the argument from truth, because the necessity for rational thinking and the possibility of error in governmental policy are both large and serious. There is little certainty in questions of governmental policy, and the consequences are particularly serious when the chosen policies turn out to have been mistaken." Schauer, *op cit.* p 46

¹³Schauer, *op cit.* p. 43

Scanlon points out that governments are notoriously partisan and unreliable where political issues are concerned¹⁴. He argues from this that political speech is distinctively important and deserves particular protection to prevent governments from determining when speech should be allowed.

1.4 Protest as Political Speech

The key to recognising the political nature of much protest speech is to recognise the public aspect of many otherwise private employment relationships. Where the employer is part of the public sector and funded from public money, this is easy to see. Those who contribute to the funding of such bodies via taxation have a legitimate interest in their work. Obviously, if there is illegal or improper conduct in this sector, it is right that the public should be informed. Moreover, the public sector is concerned with the provision of essential services, for example health care and education. Again, whether as contributors to the funding, or users of the service, or both, members of the public have a legitimate interest in knowing that these services are run as well as possible.

Such interests also arise in many areas of the private sector. The most obvious are the industries that were recently part of the public sector. The services they provide, such as the provision of gas and electricity are essential ones, occupying a monopoly position in the market. Given the dependence of most people on these services, there is a legitimate public interest in their operation, despite the fact that they are privately owned. The same can be said for many private companies that operate in areas once dominated by the public sector, and now in the private sector as a result of the government's drive towards the contracting out of essential services.

¹⁴Scanlon, *Freedom of Expression and Categories of Expression* (1979) 40 U. Pittsb. L.R. 519

These employers include agencies that provide care staff used by social services and hospitals, companies that provide street cleaning services for local councils, catering companies operating in schools, colleges and hospitals, and companies providing public transport. These private employers are largely funded by public money and therefore should be subject to the same public scrutiny as the public sector.

To a limited extent, the same argument can be applied to the traditional private sector. In some circumstances, the public will have a legitimate interest in the dealings of the company, for example where public health or safety are at stake, or where the company is involved in illegal conduct. However the situations where public scrutiny is appropriate are less common.

Thus, despite the private nature of the employment relationship, matters of concern to employees may often also be matters of public concern. At times, those concerns have political implications. The political nature of much protest whistleblowing is clearest in respect of those who work in the public sector. In recent years, most parts of the public sector have been subject to significant organisational change. An internal market has been introduced to the NHS; school budgets are locally managed and some have opted out of local authority control entirely; many local services are contracted out of local authority control following compulsory competitive tendering; and government agencies have been, and continue to be, privatised.

These changes are far reaching, and have, in many cases, been carried out against the wishes of many of those working in the different services. At the same time, the changes form a key part of government policy in these sectors, and it is important for the government that they are seen to be a success. Taking the NHS as an example, the introduction of the internal market, and the setting up of trust hospitals were major changes introduced

without the support of many who worked within the service. Even before the changes, the public perception of the state of the NHS was known to be a matter of vital political importance¹⁵. This is especially the case following the changes to its structure as any shortcomings in the service are likely to be seen to be the result of the changes and therefore the responsibility of the government that introduced them.

This argument can be applied in any part of the public sector which has been subject to the changes outlined. It is of party political importance that the changes are viewed as a success by the voting public. Given the electoral importance of public opinion on these issues, it is clearly right that such opinion should be well informed. In the NHS the government has requested that good news stories be published about the work of the service¹⁶, and many trusts now have public relations departments. However, in order to ensure that the public will be able to obtain sufficient information to participate fully in the electoral process, the rights of others, such as those who work within the service, to put their views across to the public need also to be ensured.

The same argument can be applied to the recently privatised sector; again, the question of whether the change is beneficial is politically sensitive, and should be the subject of fully informed debate. Similarly, industries funded mainly from the public purse, such as the defence industry should be subject to similar scrutiny and debate. A problem arises when considering the traditional private sector. Most of the time these industries and companies operate to serve the private interests of shareholders and

¹⁵Recognised by Mr John Maples, then Conservative Party deputy chairman, in a memo leaked to the Financial Times in 1994, setting out tactics for avoiding a Conservative defeat at the next election. On the NHS he says "The best result for the next 12 months would be zero media coverage". Financial Times 21 November 1994, p 10.

¹⁶Recognised in Maples's memo, above.

consumers. However, there may be times when their operations can come in for public scrutiny, for example if they pursue environmentally unfriendly policies, or even if they pay very low wages. These are issues that have political significance, and public debate is legitimate. It is arguable that employees of these companies should be allowed to participate in that debate, especially if the employers for which they work mislead the public as to their policies on such issues. Whether they should be protected from adverse action for initiating a such a debate is more questionable. To argue for such protection would probably be to weaken the stronger arguments for protection of speech on issues that are more clearly political.

1.5 Protection for Political Speech

The recognition that political speech is particularly susceptible to interference from government provides strong grounds for protecting it. In addition, the recognition of audience interests in hearing speech as well as the speaker's interest in speaking, can provide additional reasons for protecting speech even where the subject matter is not overtly political. From the arguments from truth and autonomy it can be argued that, regardless of content, there should be a presumption in favour of free speech which should only be rebutted by evidence that another important interest, such as confidence or privacy, is likely to be injured by the speech.

Thus the protection of speech still ultimately depends on its content, but a presumption in favour of allowing free speech can benefit those who speak out at work. Although interests in commercial confidence or privacy are still accepted and recognised, any such interest in restraining information will need to be especially strong if it is to outweigh the presumption in favour of speech. In addition, where the subject matter can be regarded as political, courts should be very wary of restraining speech.

2 Recognition of the interests in free speech in substantive law

Given the philosophical justifications for giving the widest protection to free speech, it is worth considering the extent to which these concerns are reflected in the substantive law.

2.1 The European Convention on Human Rights and the argument from democracy¹⁷

Article 10 ECHR, subject to some restrictions, provides the right to freedom of expression, including freedom to hold opinions and to receive and impart information and ideas. It covers a wide range of types of speech including artistic expression. To this extent, the right can be seen as upholding an aspect of individual autonomy, both in the right to express oneself, and in the right to receive information. However, the case law on the Convention makes clear that political speech will be given special protection.

The Convention has as one of its main aims the maintenance of effective political democracy in order to protect the "fundamental freedoms which are the foundation of justice and peace in the world¹⁸". It is recognised that freedom of speech¹⁹ has a vital role in achieving this aim: "freedom of expression constitutes one of the essential foundations of [a 'democratic society'], one of the basic conditions for its progress and for the

¹⁷See Chapter Six, Protection Available under Article 10 of the European Convention on Human Rights.

¹⁸Preamble to ECHR

¹⁹Freedom of speech is protected under Article 10 of the Convention although the protection is not absolute. Article 10(2) recognises that freedom of expression carries with it duties and responsibilities, and that in some cases freedom of expression must be limited. However, the circumstances in which such limitations may occur are restricted. See separate section on ECHR.

development of every man."²⁰ The particular importance of political speech is also recognised: "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the convention"²¹.

The view of a democratic society reflected in the Convention is one of "pluralism and tolerance"²², recognising that there may be more than one view of the truth. The argument from truth in its strict Millian sense holds little sway within the Convention, instead, it is the lack of any objective truth that gives rise to the need for the discussion and debate seen as vital for the upholding of a pluralist democracy. The main rationale for providing protection for free speech can therefore be seen to be a form of the argument from democracy.

In terms of the level of protection necessary, the Court and Commission have, in some cases, recognised that protection needs to cover any activity which, if not prohibited, might deter speech. In *Lingens*²³ it was accepted that the threat of legal proceedings could inhibit participation in public debate, and in *Van Der Heijden v the Netherlands*²⁴ the Commission accepted that termination of employment restricted and penalised freedom of speech²⁵. However, in other cases, the Court appears to take the line that the Convention does not provide employment protection and

²⁰*Handyside v UK* (1981) 1 EHRR 737

²¹*Lingens v Austria* (1986) 8 EHRR 407

²²"Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'." *Handyside*, above, para 49.

²³*ibid.*

²⁴11002/84 (1985) decision of 8th March

²⁵The case was declared inadmissible as the measure was necessary in a democratic society; his political activity was on behalf of party that was hostile to presence of foreign workers and was clearly incompatible with his job.

interference with the right to free speech by way of dismissal is not sufficient to warrant the protection of the Convention²⁶.

Despite these limitations, it is clear that the importance of free speech to the democratic process is reflected in the Convention. Although Article 10 protects freedom of expression in more general terms, the special relevance of political speech to the aims of the convention mean that the Court will be particularly careful before finding that interference with the right comes within the restrictions contained in Article 10(2).

2.2 Freedom of Speech in UK law

Although a signatory of the ECHR, the UK has not incorporated the Convention into domestic law²⁷. Freedom of speech has traditionally been seen to enjoy only residual protection under the common law, that is it exists to the extent that other laws do not restrict it. However, more recently, the principle of freedom of speech has gained recognition to the extent that courts will interpret legislation and common law as far as possible to accord with it.

The first way in which this is done is in accepting that freedom of speech serves the public interest and can be used to determine the scope of common law rules relating to the protection of privacy, confidence or the right to a fair trial²⁸. In some cases, where free speech remains a residual interest there seems to be a presumption in favour of confidence which is

²⁶See *Kosiek v Germany* (1986) 9 EHRR 328, and *Glasenapp v Germany* (1987) 9 EHRR 25. See also *Vogt v Germany* (Council of Europe, 7/1994/454/535) and discussion in ECHR chapter.

²⁷See Chapter six, Whistleblowing and Human Rights, para 5.

²⁸For detail on how this balancing takes place, see Chapter Three, Whistleblowing and the Contract of Employment.

rebutted only where iniquity is disclosed²⁹. However, in other cases, freedom of speech seems to be the rule, with restraint allowed exceptionally if there is good reason³⁰.

It may be that this reflects different philosophical approaches to the protection of free speech. Although this is rarely explicit in the cases, occasionally judges do give their reasons for upholding the right to free speech above other rights. For example, in *Woodward v Hutchins*³¹ Lord Denning allowed the disclosure of information about a group of singers because the information corrected a false impression fostered by the group. He argued that there was, in such circumstances, a public interest in knowing the truth. Whilst not quite Mill's argument, such an approach, does recognise the importance of free speech for the discovery of the truth, where erroneous images are created.

Similarly, in cases involving information about the public sector, the "argument from democracy" can be identified in the decisions of some judges who have argued that the public interest in knowing how government and public industries work outweighs the interests in confidentiality³². In fact, those cases where the presumption seems to be

²⁹*Gartside v Outram* (1856) 26 LJ Ch 113

³⁰In *Attorney-General v Jonathan Cape Ltd* [1976] QB 752 Lord Widgery made it clear that it was for the plaintiff to show that the publication of the material was in breach of confidence, and that the public interest required that publication be restrained. Thus the burden of proof in relation to the public interest lies on the plaintiff. This approach was endorsed by the House of Lords in the Spycatcher case, *Attorney-General v Guardian Newspapers (No. 2)* [1988] 3 WLR 776

³¹[1977] 1 WLR 760

³²See *A-G v Jonathan Cape Ltd* [1976] QB 752 where an injunction to restrain publication of cabinet discussions was refused, and the dissenting judgment of Lord Salmon in *British Steel v Granada Television* [1981] AC 1097 where he argued that as British Steel was a nationalised industry, the public was morally entitled to know why it was losing money.

in favour of disclosure rather than confidence tend to be those in which information relevant to government is involved³³.

The argument from democracy can be identified more strongly in *Derbyshire County Council v Times Newspapers Ltd*³⁴, where the principle of freedom of speech was used to restrict the rights of government bodies to bring actions for libel. The right to free speech was being used there in a much stronger and more direct way, to restrict the development of legal remedies, rather than simply as way of limiting the scope of common law rules. A claim by a local authority for damages for libel was not allowed, on the basis that to do so would be to place an undesirable fetter on the freedom of expression. Lord Keith recognised that government bodies, both elected and non-elected, need to be open to public criticism and that the threat of a civil action for defamation would have an inhibiting effect on such speech³⁵. Lord Keith's reasoning on the importance of free speech echoes Schauer's comment that "[c]riticism of public officials and public policy is a direct offshoot of the principles of democracy"³⁶ and is a clear indication of the argument from democracy gaining recognition by the judiciary as a basis for providing increased protection for political speech.

This approach can also be seen in *Hector v Attorney General of Antigua and Barbuda*³⁷, where the Privy Council was required to interpret the scope of the Antiguan constitutional right to free speech. It held that a

³³Such as *A-G v Jonathan Cape* and *A-G v Guardian Newspapers (No. 2)*, above.

³⁴[1993] 2 WLR 449. See also the case brought by British Coal against the NUM for libel, in which a High Court judge ruled that public bodies should be open to criticism in the interests of free speech, *The Guardian*, 29 June 1996.

³⁵Although he referred to Article 10 ECHR, Lord Keith believed that similar protection was available under the common law without need to rely on the Convention.

³⁶Schauer, *op cit.* p 39

³⁷[1990] 2 AC 312

newspaper editor's conviction for printing a false statement likely to undermine public confidence in the conduct of public affairs, was in breach of the constitution. Lord Bridge pointed out that any attempt to stifle criticism of those holding government office or responsible for public administration amounts to political censorship and, moreover, that the purpose of such criticism is to undermine public confidence in those in power, and persuade the electorate that their opponents would do better in office³⁸. The clear implication is that such criticism and discussion is essential for the democratic process, and that such speech should therefore be given the utmost protection.

3 Protection of the speech of whistleblowers

Freedom of speech may well require special protection, but that protection can take several forms. It might be argued that a prohibition on criminal sanctions for speech meets the requirements, or that prior restraint of speech should be prevented, so that courts are able to compensate any damage caused by the speech without prohibiting it altogether.

However, if the right to free speech is to be protected fully, wider protection is necessary. The starting point must be to identify, and then prevent, deterrents to speech. Criminal sanctions or the threat of damages are not the only threats that can deter speech; the threat of losing a job can also deter. This was recognised by Mill in *On Liberty*: "Men are not more zealous for truth than they are for error, and a sufficient application of legal or even of social penalties will generally succeed in stopping the

³⁸ibid. at p. 318

propagation of either...men might as well be imprisoned, as excluded from the means of earning their bread."³⁹

Protection for freedom of speech thus needs to extend to the workplace, where the threat of dismissal or discipline can act as a significant restraint on speech. The need for such protection is reinforced by a recognition of the public interest that can be served by employees' freedom to speak about work related issues. The extent to which such protection is currently available in English law will be examined below.

³⁹Mill, *op cit.* pp 31 and 34

Three

Whistleblowing and the Contract of Employment

1 Introduction

Employees who blow the whistle often face dismissal or disciplinary action. In contrast to the position in the USA¹, there is no specific protection for employees who find themselves in this position in the UK. In order to determine whether dismissal or discipline gives rise to any legal remedies for employees in England it is necessary to determine whether whistleblowing involves a breach of contract. The most obvious way in which whistleblowing can amount to a breach of contract is when it involves a breach of confidence. Additionally, blowing the whistle may amount to a breach of the terms of loyalty and fidelity that are implied into contracts of employment. If blowing the whistle involves a breach of contract the legal protection available to the employee will be limited². If there is no breach, disciplinary action against the employee will give rise to a legal remedy on the part of the employee³.

1.1 The basis of the duty of confidence

¹See Chapter seven, Whistleblower Protection in the USA.

²See Chapter Four Whistleblowing and Unfair Dismissal. Even where there is a breach of contract, a dismissal could be unfair if carried out using an unfair procedure.

³The action could be for wrongful dismissal if inadequate notice is given, or for unfair dismissal. See Chapter Four.

A duty of confidence arises from the recognition in law that it is "in the public interest that when information is received in confidence - for a limited purpose, as it always is - it should not be used for other purposes"⁴. The duty of confidence that arises from this public interest has been founded on different juridical bases over time. In the employment relationship the duty is based on the employment contract and forms part of the duty of good faith⁵; where the duty is not express, it is readily implied by courts⁶. The duty of confidence is also recognised in equity where the court is of the view that the relationship of the parties is such that an obligation of confidence arises. Relationships such as husband and wife⁷, and cabinet ministers and colleagues⁸ have been said to give rise to an equitable obligation, and the work relationship should also be covered by the equitable duty of confidence. In fact in *Coco v A.N. Clark (Engineers) Ltd*⁹ Megarry J. said that the equitable duty of confidence could arise in any case where "the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence".

The advantage of the equitable obligation is that it arises where there is no contractual relationship between the "owner" of the information and the discloser. Thus it avoids the failure of claims due to the privity of contract doctrine as well as covering information obtained prior to a contract coming

⁴*Norwich Pharmacal Co. v Commissioners of Customs and Excise* [1972] RPC 743 per Lord Denning.

⁵*Robb v Green* [1895] 2 QB 315

⁶See below.

⁷*Argyll v Argyll* [1967] Ch. 302

⁸*Attorney-General v Jonathan Cape Ltd* [1976] QB 752

⁹[1969] RPC 41

into operation, or disclosed after its termination. Additional obligations of confidence have in the past been based on the law of property and tort, although generally claims are now based on contract or equity. Predicting which will be used is not always easy; indeed the cross-over between the two concepts has led some to suggest that the action for breach of confidence is in fact an action *sui generis*¹⁰. Courts take a flexible, pragmatic approach to the question, using whichever jurisdiction gives the best protection for the information. Concepts and case law from one jurisdiction are used in proceedings in the other when considering the meaning of terms such as the public interest¹¹. For the purposes of the discussion below, a contractual duty of confidence will be assumed, although some of the cases considered involve the equitable duty¹².

2 The duty of confidence in the Contract of Employment

Some employers expressly include a duty of confidence in the contracts of employment of their employees. However, where no express provision is made, such a term is implied.

¹⁰Gurry, *Breach of Confidence*, (1984) Clarendon Press, Oxford

¹¹Gurry, *Breach of Confidence*, (1984) Clarendon Press, Oxford. For more detail on the effect of the conceptual basis of the duty of confidence on the interpretation of the public interest see Cripps, *The Legal Implications of Disclosure in the Public Interest* (1994 Sweet and Maxwell, 2nd Edition) p 17ff.

¹²Given that employees owe a duty of confidence based on contract, this chapter will concentrate on the contractual duty. See Chapter two of Cripps, *Legal Implications of Disclosure in the Public Interest*, 2nd edition (1994) Sweet and Maxwell, London, for the implications of basing a claim on equity rather than contract.

2.1 Implied duty of confidence

Terms are implied into contracts both to give effect to the presumed intention of the parties, and to facilitate the business efficacy of the contract. Both these aims are served where a duty of trust and confidence is implied into the contract: first, it can safely be assumed that both parties to the contract would intend there to be a degree of trust between them in entering the new relationship; secondly, to attempt to carry on an employment relationship without some basis of trust between the parties would be to run into disaster. However, the duty is not an absolute one, as will be considered below.

Examples of the general implied duty of trust and confidence include *Robinson v Crompton Parkinson Ltd*¹³, where the employer was held to have breached the contract in falsely accusing the employee of theft; and *Bliss v S.E.Thames R.H.A.*¹⁴, where the employer's requirement that the employee undergo a medical examination after a committee of enquiry had found no evidence of psychiatric problems was held to be a breach of the implied term of trust and confidence.

In addition, an implied duty of confidence in relation to specific confidential information has developed from the need for business to preserve commercial secrets. Since information can be exploited for economic gain it is clearly necessary to allow those who invest in invention and discovery of new processes and products to reap the benefits of such industry. To do otherwise would discourage invention and competition. As a result, an implied term of confidence prevents employees from disclosing

¹³[1978] IRLR 61 EAT

¹⁴[1985] IRLR 308

confidential information during the course of their employment, and from disclosing trade secrets even after employment has ceased¹⁵.

The public interest in preserving confidence between employer and employee extends beyond the commercial necessity of encouraging invention and competition, and ensuring the smooth working of work relationships. As indicated by Griffiths L.J in *Lion Laboratories v Evans*¹⁶, there is a moral dimension to the duty as well. "There is a public interest of a high order in preserving confidentiality within an organisation. Employees must be entitled to discuss problems freely, raise their doubts and express their disagreements without the fear that they may be used to discredit the company and perhaps imperil the existence of the company and the livelihood of all those who work for it. *And I am old-fashioned enough to think that loyalty is a virtue that it is in the public interest to encourage...*" (emphasis added)¹⁷.

Although clearly established, the implied duty of confidence is not absolute and does not apply where it is in the public interest that information be disclosed. This was recognised in the employment context in *Initial Services v Putterill*¹⁸ where Lord Denning held that the obligation of confidence is subject to exceptions, including where information is disclosed relating to "any misconduct of such a nature that it ought in the public interest to be disclosed to others." The exact scope of this "public interest exception" will be examined in detail below.

¹⁵*Faccenda Chicken v Fowler* [1986] ICR 297

¹⁶[1984] 2 All ER 417 CA

¹⁷*Ibid* at p. 433

¹⁸[1968] QB 398

2.2 Express terms and other terms requiring confidentiality

Many employment contracts contain express terms requiring that employees maintain the confidentiality of information to which they are privy as a result of their employment. Confidentiality clauses may also be incorporated into a contract from an outside source. For example the terms of a collective agreement may be incorporated into the contracts of individual employees who are covered by that agreement. Similarly, terms may be incorporated from works rules, or company handbooks, or professional codes of conduct¹⁹. Alternatively, confidentiality clauses may be imposed after the employment contract has terminated as part of a negotiated settlement.

Express confidentiality clauses sometimes include the proviso that information can be disclosed where it is in the public interest to do so, but this is not usually the case. More often, limited exceptions are included, such as restricting disclosure of information to authorised persons. Many confidentiality clauses contain no reference to the public interest exception at all. However, whether or not it is referred to in an express term, and whether the term is in the employment contract or is part of a post-employment agreement, the public interest exception will apply.

Implied terms, or terms incorporated into the contract may sometimes conflict with each other or with an express term. In such cases, express or incorporated terms will, where possible be interpreted so as not to conflict with the duties implied into the contract by common law. How this is achieved is considered below.

¹⁹It is a term of employment of most nurses that they are registered with the UKCC. Registration requires compliance with the UKCC code of professional conduct. Similar requirements apply to doctors.

2.2.1 The interpretation of express terms that omit the public interest exception, include a limited exception, or conflict with other terms.

At times it is possible to resolve any conflict between contractual terms by looking at the intention of the parties involved. If, for example, all parties intended a public interest exception to apply, courts can interpret the confidentiality clause to include the exception, even though it is not expressly included. However where the intentions of the parties cannot be ascertained, the court itself will have to determine the scope of the employee's duty. Although the general rule is that express terms take precedence, as courts cannot imply into a contract something that is expressly excluded, any ambiguities in an express term will be interpreted so as not to conflict with the terms usually implied into contracts. In *Johnstone v Bloomsbury Health Authority*²⁰ a doctor's contractual duty to work 40 hours per week plus an average of 48 hours overtime was interpreted to be subject to an implied duty to have regard for the health of the employee. This implied duty meant that the employer could not require so much overtime of the employee that his health would suffer. Had the contract specified expressly that the employee was to work 100 hours per week, this would have been upheld, notwithstanding the dangers to health involved, as there would have been no ambiguity involved. However, the lack of precision in the number of hours required enabled the court to imply into the term the restriction with regard to health.

If this is applied in the context of express confidentiality clauses, it seems that these will be interpreted so as to include an exception for information in the public interest, even though this is omitted from the clause itself. In addition, an express term using potentially ambiguous terminology, for example requiring that matters be reported to an "appropriate" person, may be interpreted so as to comply with the law on the implied duty of

²⁰[1991] IRLR 118 CA

confidence; this could, where the public interest demands, result in even the media being viewed as an appropriate recipient of information (see below).

2.2.2 Express terms that exclude the public interest exception

Not only will terms that omit a reference to a public interest exception to confidentiality be interpreted to include one, but any attempt expressly to exclude the exception is unlikely to be successful. Even where terms are not ambiguous, they will only be upheld to the extent that they do not conflict with a recognised public interest. This was made plain in statements of the Court of Appeal in *Initial Services v Putterill*²¹. Both Salmon L.J. and Winn L.J. pointed out that an express term prohibiting the employee from disclosing matters that it is in the public interest to disclose would be void for reasons of public policy. Equally void would be a term limiting disclosure to particular recipients such as the police when the information is such that it ought to be made available on a wider basis²².

Evidence of courts refusing to uphold express terms on the basis that they are void for public policy reasons can be found in the case law on the enforcement of post-employment restrictive covenants. This indicates that courts will not enforce contractual terms that are in conflict with the public interest in freedom of trade²³; any term purporting to restrain an employee's freedom to work will only be upheld to the extent that it is reasonable, notwithstanding that the term is expressly included in the contract. Similarly, courts will not enforce contracts which involve the

²¹[1968] 1 QB 396

²²See [1968] 1 QB 396 at pp.409 and 412

²³See in general *Employee Competition and Confidentiality* IDS Employment Law Supplement No. 72 (December 1994)

performance of illegal acts, thereby refusing to uphold express contractual terms on grounds of public policy.

It will not be possible to determine the exact scope of any express or incorporated term without knowing the scope of the implied duty of confidence; this requires a consideration of the nature of the public interest served both by that duty and in some cases by its opposite, the duty to disclose information.

3 The scope of the duty of confidence

Determining the precise duties of employees in respect of disclosure of information at work will require an examination of the duty of confidence and its interpretation within the general law, both in contract and equity. In order to discover the exact scope of this duty it is necessary to consider when disclosures will be said to be in the public interest and when that public interest will outweigh the interest in confidence. In resolving this conflict courts undertake a balancing exercise between the competing interests, weighing factors such as the nature of the information and the recipient of the disclosure. Case law can provide considerable guidance as to the outcome of this balancing exercise.

3.1 Information must not be in the public domain

Before examining how the courts determine whether the public interest is served by a particular disclosure, a more fundamental aspect of the confidentiality of information needs to be considered. In some cases it may be argued that the information, although sensitive, is not confidential in the first place because it is already known to the public.

It would seem obvious that there can be no confidence in information that is already known to the public. It used to be assumed that this is because the fact that the information was in the public domain was a defence to a breach of confidence action²⁴. It is now clear that the general inaccessibility of information is a vital characteristic of confidential information in the first place; thus, where information is in the public domain there is no confidence to be breached. In *Woodward v Hutchins*²⁵ Lord Denning, referring to a hypothetical case of a press agent attending a dance which many others attend, said that "any incident which took place at the dance would be known to all present. The information would be in the public domain. There could be no objection to the incidents being made known generally. It would not be confidential information."²⁶

Whether something is in the public domain or not, however, is something that cannot be determined in absolute terms, but may be a question of degree²⁷. Whilst inaccessibility is a general characteristic of confidential information, uncertainties remain where information is known to a large number of people or where information, although accessible to the public, is used by a person who came across the information in circumstances of confidence.

3.1.1 Information known to a large number of people

²⁴See Law Commission Working Paper No. 58 where public knowledge of information was classified as a defence to a breach of confidence action.

²⁵[1977] 1 WLR 760

²⁶*Woodward v Hutchins* [1977] 1 WLR 760 at 764.

²⁷per Lord Donaldson MR in the Court of Appeal in *Attorney General v Guardian (No. 2)* [1988] 2 WLR 805 at 868, quoting Cross J in *Franchi v Franchi* [1967] R.P.C. 149.

One question that arises is whether information can remain confidential when known by a large number of people, for example, within a large organisation. The answer is that it can, as long as it is made clear to those that receive it that the information is confidential despite its seemingly wide dissemination.

In *Sun Printers v Westminster Press Limited*²⁸, a copy of a report on the future of the company was circulated among unions and all levels of management. A copy was also passed to the local press who intended to publish extracts from it. Sun Printers were unsuccessful in seeking a permanent injunction to prevent the publication. The Court of Appeal held that the report could not properly be said to be confidential as it had been widely circulated within the workplace. It could therefore not be said to have been sent out on a confidential basis. However, it was also said that confidence could have been preserved by stamping the word "confidential" on the document and that "there is nothing... to prevent the fullest communication between management and workforce under a seal of confidentiality"²⁹. Thus, where adequate steps have been taken to maintain confidence, the fact that information is well known to a large number of people will not prevent it being confidential as regards the population as a whole.

Where information is disseminated among a large group of people, such as the workforce of a large employer, care therefore needs to be taken by the employer if confidentiality in the information is to be preserved. Otherwise, an employee may be able to argue that disclosure of the information did not amount to a breach of confidence as there was no confidence in the information capable of being breached.

²⁸[1982] IRLR 292

²⁹Per Donaldson LJ at p.295

3.1.2 Information obtained in circumstances of confidence

It might be assumed that confidence is lost where information is published or widely disseminated. However, any such assumption needs to be guarded following the decision in *Schering Chemicals v Falkman Ltd*³⁰ which suggests that a duty of confidence will be imposed on a person to whom information is provided in confidence, even where that information is available from public sources to any person who cares to investigate.

In *Schering Falkman Ltd* contracted to provide public relations training for executives of Schering following bad publicity about the drug "Primodos". Elstein contracted with Falkman to provide some of the training and it was in this context that he obtained the information regarding the drug. Subsequently, Elstein made a television programme about the drug with Thames TV.

Schering applied for an injunction to restrain what they saw as a breach of confidence. Since Elstein had no contract with Schering the case had to rely on equitable principles, and Elstein was said to owe a fiduciary obligation to Schering not to disclose the information. In Elstein's defence it was said that the information was already in the public domain; a research assistant working for Elstein had obtained all the information used in the programme from material already in the public domain such as research papers, periodicals, newspapers and magazines. Despite this fact, the injunction was granted.

According to Shaw L.J., the fact that the information was in the public domain did not relieve Elstein of the duty of confidence. The argument that Elstein's duty of confidence ended once the information was public

³⁰[1981] 2 WLR 848

knowledge was, in Shaw's view, "at best cynical", and even "specious"³¹. However, although such an approach would be understandable had Elstein himself brought the information into the public eye, the line taken by Shaw L.J. ignores the fact that the information was readily available to the public and was already being discussed. Indeed, the reason Elstein was contracted to provide public relations advice to Schering in the first place was to train their executives in the handling of this publicity.

Templeman L.J. mentioned that others were free to make programmes about the drug, but Elstein had voluntarily undertaken the duty not to disclose and so could not use the information himself. However, the usual view³² is that information already known to the public is not confidential in the first place; if this is the case then no duty of confidence can attach to such information. The decision of the majority in *Schering* is disappointing. It could be used in future to prevent those who have an insider's informed view on an issue from contributing to public debate on the issue, even where the facts used in the contribution are already known to the public.

A preferable view was expressed by Lord Denning in his dissenting judgment. He held that the information was not confidential because it was in the public domain: "Any stranger starting from scratch... could have got all this information together and published it without breaking any confidence at all"³³. However, Lord Denning also includes an alternative reason for allowing publication of the information, that it is in the public interest, suggesting that he could contemplate finding that there was a

³¹Ibid at p 870 G.

³²See *Woodward v Hutchins*, above.

³³*Schering* at p 864 H.

breach of confidence otherwise³⁴. Thus the public domain issue seems, even in Lord Denning's view, only to support the public interest issue, rather than being the deciding factor in the case.

Although all three judges considered other factors in making their decisions, such as whether the information was in the public interest, the reasoning of the majority on the public domain issue does cast doubt on the assumption that information that is in the public domain cannot be disclosed in breach of confidence. Where information is obtained by a party in circumstances giving rise to an obligation of confidence, it seems that that party may not be allowed to disclose the information even though the information is available to any other party, who is, in addition, free to publicise it.

Further support for this view can be found in *Home Office v Harman*³⁵, although the case involves contempt of court rather than breach of confidence. The case involved contempt proceedings brought by the Home Office against Harriet Harman, then a legal officer for the National Council for Civil Liberties. She had given a journalist access to documents that had been referred to in court although she had given an undertaking that the documents disclosed on discovery would not be used for any other purpose than for the case in hand. In her defence Harman argued that the documents had been read in open court and the information would be contained in the transcript of the trial. Thus the information was readily available to the journalist and her disclosure involved no contempt.

In the majority judgment, Lord Diplock held that Harman was in contempt of court even though the journalist could have obtained the information by

³⁴"in our present case, the *public* interest in the *Primodos* and its effects far outweighs the *private* interest of the makers in preventing discussion of it. Especially when all the information in the film is in the public domain" (per Lord Denning at p 865 H.)

³⁵[1982] 1 All ER 532

other means. Although Diplock said that the case was purely a contempt of court case and involved no issues about documents coming into the public domain, the case does add support for the argument one person may be restricted from disclosing information while the rest of the world remains free to do so. The court, however, was not unanimous in finding that confidentiality and the public domain were not in issue. Lords Scarman and Simon dissented, arguing that the undertaking given in relation to the documents did not apply once the documents were no longer confidential. Thus once the information was in the public domain it was no longer confidential and there could be no contempt of court in allowing the journalist access to the documents.

Again, in the interlocutory hearings in the "*Spycatcher*" litigation³⁶ the fact that the book was readily available to anyone who wanted to read it did not prevent the granting of injunctions against publication in the UK, although Lords Oliver and Bridge dissented, arguing that as the information was in the public domain, publication should not be restrained. When the case reached the House of Lords in the final hearing of the case, however, these latter arguments prevailed and the wide availability of the book did lead to the lifting of the injunctions³⁷.

On the public domain issue, the dissenting views of Lord Denning in *Schering* and Lords Scarman and Simon in *Harman*, and the views of the House of Lords in "*Spycatcher No.2*" are to be preferred. Although confidentiality can remain in information that is known to a finite number of people, once the public have access to information, there seems no reason to uphold a duty of confidence in the information in relation to one particular person. A disclosure may involve breach of some other duty, such

³⁶*Attorney-General v Guardian Newspapers Ltd* [1987] 1 WLR 1248.

³⁷*Attorney-General v Guardian Newspapers Ltd (No. 2)* [1988] 3 WLR 776 and [1990] 1 AC 109

as the duty of loyalty in the employment contract³⁸, but it does not breach confidence as the information is not confidential.

3.1.3 The public domain issue and whistleblowers

Prior to the *Schering* case, one might have assumed that there would never be a breach of confidence where information is accessible to the public. However, such an assumption would be unsafe, particularly where information is obtained by a party in circumstances giving rise to an obligation of confidence, as will be the case for most whistleblowers.

This is of little significance to watchdog whistleblowers, whose information is unlikely to be in the public domain in any event, and who must rely totally on the public interest concept, discussed below, to defend themselves against a breach of confidence action. It may, however, be of significance to protest whistleblowers, particularly those who wish to use their knowledge and experience to add to public debate. As will be seen below, they may find it more difficult to show that their whistleblowing meets the public interest criteria, particularly because they are likely make their disclosures to a wide audience. In some cases they may wish to rely on the argument that the information is in the public domain. If the majority judgments in *Schering* and *Harman* are followed, this avenue may be closed to them. It is to be hoped that instead, courts will in future follow the alternative views referred to above, so that such speech will not be seen to be in breach of confidence.

³⁸See below.

3.2 Determining whether the public interest is served by a disclosure.

Where information is not in the public domain, it will be *prima facie* confidential, unless the public interest is served by its disclosure. A distinction needs to be drawn between information that is *in the public interest* and information *of public interest*, that is, merely interesting to the public³⁹. The general public interest in preserving confidentiality cannot be outweighed by the fact that the public find particular information interesting or even fascinating. In contrast, where it is in the public interest that information be disclosed the information will not be viewed as confidential.

3.2.1 A Public Interest defence?

In many cases, the fact that the public interest is served by a disclosure is said to act as a defence to an action for breach of confidence. For example, *Initial Services v Putterill*⁴⁰ involved an application to strike out the defence that the disclosure was in the public interest. The assumption is that confidence will be upheld and the onus lies on the discloser to make out the defence that the information is in the public interest.

³⁹In *Lion Laboratories v Evans* [1984] 2 All ER 417, which involved the disclosure of documents casting doubt on the reliability of breathalyser machines, this distinction seems partly to be blurred in the judgment of O'Connor L.J. who said "once the public interest has been properly aroused and brought out in public, then it seems to me that material such as that contained in the documents... should be before the public and not restrained from use." (at p. 432 d) However, it is also clearly argued elsewhere in the case that the information was *in the public interest*, as well as being interesting to the public.

⁴⁰[1967] 3 All ER 145

However, in *Attorney-General v Jonathan Cape Ltd*⁴¹, it was said instead that lack of a public interest in the information is a prerequisite of the duty of confidence. Lord Widgery made it clear that it was for the plaintiff to show that the publication of the material was in breach of confidence, and that the public interest required that publication be restrained. The burden of proof in relation to the public interest was thus shifted to the plaintiff. This development in *Jonathan Cape* is important in that it strengthens the view that restraint of information should be the exception rather than the rule. However, it has not always been followed and later cases continue to refer to the "defence" of public interest⁴². In "*Spycatcher No.2*" the House of Lords again held that a lack of public interest in the information was a prerequisite of confidentiality, suggesting that this may be the case in relation to government information, with the duty of confidence still assumed in the case of private information, unless public interest can act as a defence⁴³.

If this is the case, it raises the question of whether it should apply to disclosures of information about government funded institutions and the public sector in general⁴⁴. If so, this could be of considerable help to public sector employees, particularly those who engage in protest whistleblowing, where it is more difficult to make out that the public interest is served by the disclosure. The presumption would then be that

⁴¹[1976] QB 752

⁴²For example *Lion Laboratories v Evans* [1984] 2 All ER 417 and *Francome v Mirror Group Newspapers* [1984] 1 WLR 892

⁴³See Cripps, *The Legal Implications of Disclosure in the Public Interest* (Sweet and Maxwell, 2nd Edition, 1994) at p. 116. She points out that in *Fraser v Evans* [1969] QB 349 the public interest issue is framed in terms of "just cause or excuse" for publication of confidential information even though the case involved Government documents. See also discussion under "The Public Sector and Private Sector Divide".

⁴⁴Whistleblowing, IDS Brief 1995, 544, 7-12

disclosure would be lawful, with the onus on the employer to demonstrate why the information should be restrained⁴⁵.

3.3 Interpretation of Public Interest Concept

Both confidentiality and disclosure can be in the public interest and the job of the court is to balance these conflicting interests. Predicting the outcome of this balancing exercise can be difficult as it is influenced by a variety of factors.

3.3.1 Type of Information

The early cases in which the concept of public interest disclosure was developed concerned the disclosure of crimes or civil wrongs; the public interest definitions accepted in the cases seemed to be limited to such information. Hence "[t]here is no confidence as to the disclosure of iniquity"⁴⁶ and "the duty to the public to disclose the criminal or illegal intention may properly be held to override the private duty to respect and protect the client's confidence."⁴⁷ In later cases the categories of information that may be disclosed in the public interest have increased,

⁴⁵See Cripps, *op. cit.* p. 26 for some possible advantages of continuing to classify the "public interest" as a defence, because of the increased potential this allows for the court to exercise discretion in the granting of remedies for breach of confidence. Such a discretion could potentially be used in a breach of contract claim to allow a defence if the employee reasonably believed that her disclosure was in the public interest. In contrast, if a lack of public interest is a precondition of a duty of confidence, the duty will still arise where the employee is mistaken, however reasonably, in her belief that the public interest is served by the disclosure.

⁴⁶*Gartside v Outram* (1856) 26 L.J.Ch. 113

⁴⁷*Weld-Blundell v Stephens* [1919] 1 KB 520 at 527

representing a welcome expansion to the concept of the public interest, albeit at the cost of certainty.

In *Initial Services v Putterill*⁴⁸ Lord Denning thought the public interest exception was not restricted to cases of crime or civil wrong, but extended to "any misconduct of such a nature that it ought in the public interest to be disclosed."⁴⁹ He went on "...The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation..."⁵⁰. Again in *Fraser v Evans*⁵¹ Lord Denning said "[iniquity] is merely an instance of just cause or excuse for breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret"⁵².

In subsequent cases various types of information apart from illegal conduct have been said to be eligible for disclosure in the public interest. In *Hubbard v Vosper*⁵³ it was held that a book describing courses run by the "Church of Scientology" could be published despite the fact that the information contained in the book was obtained in breach of confidence. "[T]he courses... indicate medical quackeries of a sort which may be dangerous if practised behind closed doors... There is good ground for thinking that those courses contain such dangerous material that it is in the public interest that it should be made known."⁵⁴ There was no suggestion

⁴⁸[1968] 1 QB 396

⁴⁹Ibid at p. 405 D

⁵⁰Ibid at 405 F

⁵¹[1969] 1 QB 349

⁵²Ibid at 362 G

⁵³[1972] 2 QB 84

⁵⁴Ibid, per Lord Denning at p 96

that the information revealed illegal conduct, just that it was "medically" dangerous.

Again in *Lion Laboratories v Evans*⁵⁵ the type of information that could serve the public interest was not restricted to illegal behaviour. The case involved the disclosure of information casting doubt on the reliability of breathalyser machines used by police to provide evidence of intoxication in drink-driving cases. Even though there was no suggestion of misconduct on the part of the manufacturers, disclosure by former employees was allowed because the information affected "the life, and even the liberty, of an unascertainable number of Her Majesty's subjects." There was clear public interest in avoiding wrongful convictions based on unreliable evidence and this outweighed any duty of confidence owed by the employees to their former employer.

Perhaps the widest classification of information that can be in the public interest was given in *Woodward v Hutchins*⁵⁶ where a public relations agent to some well known singers⁵⁷ had written a series of articles for a national newspaper disclosing information relating to the singers' private lives, conduct and personal affairs. Lord Denning pointed out that the singers had sought publicity in order to present themselves in a favourable light. He went on to say that there was a public interest in knowing the truth and where a party builds up a particular image to gain advantageous publicity, the public interest will be served where it is demonstrated that the image fostered is untrue. It was in the public interest that the information be published because "[t]he public should not be misled"⁵⁸.

⁵⁵[1984] 2 All ER 417

⁵⁶[1977] 1 WLR 760

⁵⁷Professionally known as Tom Jones, Engelbert Humperdinck, Gilbert O'Sullivan and Gordon Mills.

⁵⁸Ibid at p 764 B

The statement in *Woodward* admits a very broad concept of the public interest, and should not be used to introduce a "defence of truth" into the duty of confidence. To do so would be to ignore the basis of the duty of confidence, which is founded on the public interest in respecting the confidence in information disclosed for a limited purpose. On the other hand, where a particular message has been given to the public, the case is authority for the fact that information indicating the falsity of such information may be disclosed in the public interest.

However, the trend to widen the categories of information that may be disclosed is not uniform. In *Beloff v Pressdram Ltd*⁵⁹ the public interest was given a more restrictive interpretation: "The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure... in the public interest, of matters carried out or contemplated, in breach of the country's security or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity... Such public interest, as now recognised by the law, does not extend beyond misdeeds of a serious nature and importance to the country and thus, in my view clearly recognisable as such"⁶⁰. Information relating to the reliability of breathalysers may not be regarded as in the public interest according to this formulation, let alone information about the private lives of pop stars!

In 1981 in *British Steel v Granada Television*⁶¹ Lord Wilberforce would not allow that the revelation of "mismanagement and government intervention" could amount to the type of misconduct envisaged by Lord

⁵⁹[1973] 1 All ER 241

⁶⁰Ibid, per Ungood-Thomas J. at p.260 g

⁶¹[1981] AC 1097

Denning in *Initial Services*⁶². Although the information may not have related to "misdeeds of... importance to the country", it is arguable that the conclusion reached by the majority in *British Steel* was unduly restrictive. In the Court of Appeal, Lord Denning pointed out that the documents revealed that there had been government intervention in the steel strike, intervention that had previously been denied. If his view in *Woodward* had been adopted, this could have provided grounds for allowing disclosure as the public had been misled as to the government involvement in the strike⁶³.

Despite the disappointingly narrow interpretation of the public interest in *British Steel*, it is worth noting that the categories of information that may be in the public interest are not yet closed; courts have accepted that they may "alter from time to time... as social conditions and social legislation develop"⁶⁴.

3.3.1.1 Disclosure of beneficial information

It is notable that all the cases suggest that the public interest is served by disclosure, if not of misdeeds, then of damaging information, such as information indicating danger, or the misleading of the public, as opposed to disclosures of information that may be of benefit to the public. If an

⁶²On the other hand Granada in that case never argued that it was disclosing "iniquity".

⁶³However, Lord Denning was of the view that Granada's irresponsible handling of the documents was such that it forfeited right to the protection of its source. The fact that alleged mismanagement related to a publicly owned company was another factor ignored by the court in assessing whether the public interest was served by the disclosure, although this was recognised by Lord Denning in the Court of Appeal and Lord Salmon in his dissenting judgment in the House of Lords. For discussion of the relevance of disclosure relating to the public sector or the private sector, see below.

⁶⁴*D v NSPCC* [1977] 1 All ER 589 at p 605 b, per Lord Hailsham

employee working for a drugs company believed that a cure for AIDS had been found, but that the company had "commercial" reasons for suppressing that information (preferring, for example, to wait until a more profitable vaccine can be produced), it is not clear whether courts would say that the public interest would be served by allowing that disclosure. The more restrictive interpretations of the public interest in the case law suggest that the disclosures that are in the public interest must relate to illegal behaviour, or misdeeds. The more generous approach still suggests information must relate to a detriment to the public before it is in the public interest to disclose it⁶⁵. It is arguable that withholding a known treatment for a fatal disease does amount to a detriment to the public and a moral wrong of such proportions that it can be classed as a misdeed, which would make it much easier to show that the public interest is served by its disclosure.

However, less extreme examples, where there may be genuine reasons for maintaining secrecy, are easy to imagine. A company may wish to maintain the confidentiality of the make up of a drug; an employee knowing that the drug could be produced much more cheaply discloses this information. The case law on trade secrets provides strong protection for employers against employees who disclose information that is commercially sensitive and may deprive the employer of the profit that he could otherwise expect from the goods he manufactures⁶⁶. There is no indication that the rule that employers are entitled to protect trade secrets⁶⁷ is subject to the public interest exception except where that information discloses wrongdoing or

⁶⁵For example the concern over the reliability of the breathalyser in *Lion Laboratories*, or the public interest in disclosing impending disasters suggested in *Malone v Commissioner of Police (No.2)*, above.

⁶⁶See *Employee Competition and Confidentiality*, IDS Employment Supplement 72, Incomes Data Services Ltd, December 1994.

⁶⁷*Faccenda Chicken v Fowler* [1986] ICR 297

misconduct, or at the very least, discloses a potential harm, as opposed to a benefit, to the public.

3.3.1.2 The public sector and private sector divide

It has been argued that the public interest is served more directly where information relates to public sector industries or services, and that therefore disclosures of such information should be more readily protected. Certainly, disclosures of government information appear to be treated differently by the courts with the onus on the government to show why disclosure should be restrained⁶⁸. The reason for distinguishing between government secrecy and private sector confidence is explained by Lord Goff in *"Spycatcher No. 2"*⁶⁹: "in the case of Government secrets the mere fact of confidentiality does not alone support ... a conclusion [that confidential information should be protected], because in a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism."⁷⁰

Information relating to the public sector is not limited to government information however, and the same distinction between public sector and private sector can be drawn for a wider range of information than government secrets. It has been argued that the public have an interest in knowing what occurs within industries and services funded by them, and that they should be open to scrutiny and criticism as the government is. As

⁶⁸See discussion above on whether there is a public interest "defence" in confidentiality cases.

⁶⁹*Attorney-General v Guardian Newspapers (No. 2)* [1988] 3 WLR 776

⁷⁰*Ibid* at p. 807 H

with government secrets, there will be times where information needs to remain confidential⁷¹, but the general rule should be to promote openness.

Such a line does have some judicial support. In his dissenting judgment in *British Steel Corporation v Granada*⁷², Lord Salmon argued that it was in the public interest that the information leaked to Granada should be disclosed, as it related to a publicly owned industry: "it is a nationalised industry... If it operates at a serious loss, it causes serious harm to the nation... It is not surprising that the public should wish, and indeed are morally entitled to know how it is that B.S.C. is in such a parlous condition."⁷³ A similar approach was taken by Lord Denning at the hearing before the Court of Appeal where he said that the documents raised a number of points "of considerable public interest... Especially as the British Steel Corporation was a public corporation accountable to Parliament"⁷⁴.

Although this line of reasoning has yet to be adopted by the majority⁷⁵, it is arguable not only that it should be, but that it should be extended to cover the recently privatised sector and those parts of the private sector providing services previously provided by the public sector. As has been

⁷¹For example, in respect of government information for national security reasons, and in respect of publicly owned companies in respect of some commercial information.

⁷²[1981] AC 1097

⁷³Ibid at p. 1187-1189

⁷⁴[1981] AC 1097 at p. 1123.

⁷⁵However, the extent to which judges appear willing to challenge government decision, reflected in a series of judicial review cases which have found against the government suggests that a change of attitude among the judiciary is taking place, which may in time be reflected in the case law on the definition of the public interest.

argued above⁷⁶, Government changes to the public sector including local government, education and the NHS are issues of public importance and the public interest is served by having information relating to them readily available. There should be very clear reasons for restraining the disclosure of such information.

This can be contrasted with the position in the private sector. Where a company is owned and run by private individual the public interest is served by the maintenance of confidentiality unless there is good reason for breaching it. This allows parties to carry on business in the knowledge that negotiations and decisions can be made in private. Information indicating mismanagement, or disclosing how particular spending decisions are made are unlikely to be public interest issues, whereas such information relating to the public sector may be. However, where information reveals illegal or wrongful conduct, the type of information involved means that the public interest will be served by its disclosure whether the industry or service is in the public or the private sector.

3.3.1.3 Type of information disclosed by whistleblowers

Given the sometimes contradictory case law on this issue, anticipating with any certainty whether information disclosed by a whistleblower will be said to be of a type that may serve the public interest is difficult. However, some conclusions can be drawn. Disclosures of illegal conduct, such as fraud, tax irregularities, corruption, or breach of health and safety regulations at work are all clearly eligible for protection, subject to the balancing of the other factors examined below. Indeed, the need to extend protection beyond disclosures of misconduct and misdeeds to protect the

⁷⁶See Chapter two, Whistleblowing and Freedom of Speech

disclosures of other whistleblowers was recognised in *Malone v Commissioner of Police*⁷⁷, where Megarry V-C said "there may be cases where... there is a just cause or excuse for breaking confidence. The confidential information may relate to some apprehension of an impending chemical or other disaster, arising without misconduct, of which the authorities are not aware, but which ought in the public interest to be disclosed to them"⁷⁸. Thus, those involved in watchdog whistleblowing should find that they can clear the first hurdle in showing that their disclosure was in the public interest.

Protest whistleblowers may have more difficulty. Concerns of the type raised by some NHS whistleblowers such as disclosures of mismanagement and complaints regarding funding, managerial support or staffing levels⁷⁹, clearly do not amount to legal wrongs, and even though they are of a serious nature, it could be said that the public interest is not directly served by their disclosure. On the other hand, taking the NHS as an example, it can be argued that it is in the public interest that these concerns be made known, especially where the information contradicts statements and publicity about the state of the Health Service made by the government and by individual hospitals and trusts. However, the courts have yet to adopt such reasoning.

⁷⁷[1979] 2 All ER 620

⁷⁸Ibid at p 635 c

⁷⁹These were the most common concerns expressed by nursing staff contacting the RCN Whistleblow Scheme, *Whistleblow, Report on the Work of the RCN Whistleblow Scheme*, RCN (1992).

3.3.2 Identity of Recipient

A second factor considered by the courts when determining whether a particular disclosure is in the public interest or not is the identity of the person or organisation to whom the information is given. Whilst it may be in the public interest that the information is revealed to someone, it is not necessarily the case that the public interest is served by general disclosure.

In *Initial Services v Putterill*⁸⁰, which involved a disclosure to the press, Lord Denning made the point that in some cases disclosure to the general public via the media may not be justified, although disclosure to a relevant official might be (in that case the registrar responsible for enforcing the Restrictive Trade Practices Act 1956). Later cases have also taken the line that the public interest may be served by disclosure to some, but not to all.

In *Attorney-General v Guardian Newspapers No. 2*⁸¹, the House of Lords said that even where disclosure was in the public interest, it did not follow that publication should be via the media. In some cases it would be better to disclose to some other body who could investigate. Where security personnel wished to claim that a disclosure was in the public interest they would need to show that they had tried internal channels before resorting to disclosure to the press. In *Re a Company's Application*⁸², arising from an employee's threat to reveal financial irregularities to FIMBRA and the Inland Revenue, the fact that disclosure was to be to a relevant regulatory body was central to the decision that no breach of confidence was involved, despite the malicious reasons for the disclosure⁸³. Again, in *W v Egdell*⁸⁴,

⁸⁰[1968] 1 QB 396

⁸¹[1988] 3 WLR 776

⁸²[1989] 2 All ER 248

⁸³See discussion under "Motive" below.

disclosure of a medical opinion within the hospital system was not a breach of patient confidence, although wider publication, for example in an academic article, probably would have been.

On the other hand, in *Initial Services* Lord Denning recognised that in certain circumstances disclosure on a wider scale can be justified, and indeed disclosure via the press has been allowed in many cases. *Initial Services* itself concerned an unsuccessful attempt to prevent disclosure of price fixing in a newspaper article, with the Court of Appeal finding that, at times, the person with a proper interest in receiving information may be the press. Similarly, in *Fraser v Evans*⁸⁵, and *Woodward v Hutchins*⁸⁶ disclosures by journalists, and in *Hubbard v Vosper*⁸⁷ disclosure in a book, were not prevented.

In *Lion Laboratories v Evans*⁸⁸, where an injunction was sought to prevent former employees disclosing information about the unreliability of breathalysers to the press, no issue was raised about the identity of the person to whom the disclosures were made. The information was important for the proper administration of justice as the machine could be used to provide evidence in criminal prosecutions. Clearly the general public should have access to information that could be important in defending criminal

⁸⁴[1990] 2 WLR 471

⁸⁵[1969] 1 All ER 8. "There are some things which are of such public concern that the newspapers, the Press, and, indeed, everyone is entitled to make known the truth and to make fair comment on it." per Lord Denning, at p. 12 D

⁸⁶[1977] 1 WLR 760

⁸⁷[1972] 2 QB 84

⁸⁸[1984] 2 All ER 417

charges⁸⁹; thus disclosure on the widest possible scale was justified. This was approved in "*Spycatcher No. 2*" where it was agreed that in circumstances such as those in *Lion Laboratories*, media publication was acceptable.

3.3.2.1 Recipient of information and the whistleblower: the exhaustion of internal procedures

Despite the cases indicating a willingness by courts to allow publication via the press, whistleblowers should be wary of using the media, particularly if other channels have not been exhausted. Those who contemplate acting as watchdog whistleblowers, raising concerns about illegal or irregular or unsafe conduct should try to raise matters internally at first. Once any internal procedure is exhausted, or if an adequate response is not received, or if internal disclosure is unsuitable (for example the concern relates to internal management) then disclosure to other bodies, such as a regulatory body, trade union, or an MP may be appropriate. Where this has been done, courts are unlikely to find that the disclosure involves a breach of the duty of confidence. In addition, express terms attempting to restrict the categories of persons to whom information may be disclosed will be void to the extent that they conflict with the public interest. It would therefore not be open to an employer to rely on a contractual clause that prevents external disclosure where the public interest is served by that disclosure⁹⁰.

Clearly, where concerns are urgent, on matters of health and safety for example, internal disclosure will not be appropriate. Instead, the quickest

⁸⁹" We are here dealing with a machine on the accuracy of which may depend a person's livelihood, or even his liberty" Ibid, per Griffiths L.J. at p. 433

⁹⁰See the judgment of Winn L.J. in *Initial Services v Putterill* [1968] 1 QB 397

way to reach the widest number of people will be by disclosure via the media. In addition, where other channels have been exhausted, or where there is no alternative channel of investigation, disclosure via the press may again be acceptable.

Greater difficulty on this issue is faced by the protest whistleblower who will by definition want to catch the public eye, most obviously via the media. The types of concern raised by protesters are less likely to be of an urgent nature requiring disclosure on such a wide scale, and it may therefore be that a court will find that the public interest is not served by the disclosure. The only way to counter such a conclusion is to raise the argument made above that, particularly where it relates to public sector institutions, protest serves the public interest. To be effective, the protest needs publicity; thus the public interest is served by public disclosure. Given the approach to the issue in the cases such as *Fraser v Evans*⁹¹, *Woodward v Hutchins*⁹² and *Hubbard v Vosper*⁹³ where wide disclosures were allowed, it is not impossible that such an approach may be taken in a whistleblowing case.

3.3.3 Timing of Disclosure

In weighing the public interest in disclosure against the public interest in confidentiality, the courts also consider whether the public will be protected by disclosure of the information. Thus, where the disclosure of information is likely to prevent harm to the public the courts are unlikely to require the

⁹¹[1969] 1 All ER 8. "There are some things which are of such public concern that the newspapers, the Press, and, indeed, everyone is entitled to make known the truth and to make fair comment on it." per Lord Denning, at p. 12 D

⁹²[1977] 1 WLR 760

⁹³[1972] 2 QB 84

maintenance of confidentiality. This was apparent in the judgment of Shaw L.J. in *Schering Chemicals Ltd v Falkman Ltd*⁹⁴. "If the subject matter is something inimical to the public interest or threatens individual safety, a person in possession of knowledge of that subject matter cannot be obliged to conceal it although he acquired that knowledge in confidence."⁹⁵ Thus, in *Lion Laboratories*⁹⁶, the information about reliability of breathalysers could bring immediate benefit to any person facing criminal charges based on evidence from such machines, and so the court allowed its wide publication.

Where a concern relates to a future danger, then again the courts appear to favour disclosure. In *Initial Services v Putterill*⁹⁷ Lord Denning held that the public interest exception to the duty of confidence should extend to "crimes, frauds and misdeeds, both those actually committed as well as those in contemplation"⁹⁸, and in *Malone v Commissioner of Police*⁹⁹ Megarry V-C held that information relating to "some apprehension of an impending chemical or other disaster" should, in the public interest, be disclosed¹⁰⁰.

The case law is more contradictory in relation to the disclosure of past misconduct. In *Schering Chemicals Ltd v Falkman Ltd*¹⁰¹ Shaw L.J.

⁹⁴[1981] 2 WLR 848

⁹⁵*Ibid* at p 869.

⁹⁶[1984] 2 All ER 417

⁹⁷[1968] 1 QB 396

⁹⁸*Ibid* at p 405 F

⁹⁹[1979] 2 All ER 620

¹⁰⁰*Ibid* at p. 635 c

¹⁰¹[1981] 2 WLR 848

argued that the fact that the drug "Primodos" had been withdrawn from the market and that the immediate threat to health had therefore passed meant that the public interest was not served by disclosure of the information: "No such consideration [of public safety] has existed in this case since the time that Primodos was withdrawn from the market. Neither the public nor any individual stands in need of protection from its use at this stage in the history."¹⁰² As Cripps points out¹⁰³ this statement is unfortunate in that it suggests that there is no lesson to be learnt from the Primodos affair and no public interest in how it occurred. However, the comments perhaps help explain the judgment of Talbot J., who granted an injunction to restrain publication in *Distillers Co. (Biochemicals) Ltd v Times Newspapers Ltd*¹⁰⁴, where information was to be disclosed many years after the harmful effects of the thalidomide drug had been discovered.

However, the fact that the threat to the public had passed was raised by Lord Denning in his dissenting judgment in *Schering*, to the opposite effect. The publication of material revealing information about the drug Primodos could not affect its sales since it had been withdrawn from the market long since, and this was one reason he used to argue that the information should be revealed.

Given the contradictory case law on this issue, it is difficult to predict how courts will view the fact that a disclosure made by an employee relates to past wrongdoing. However, it is suggested that a court's approach should depend on whether the duty of confidence owed by the employee is express or implied. Where a duty of confidentiality is only implied courts should

¹⁰²Ibid at p 869.

¹⁰³Cripps, Y. *Legal Implications of Disclosure in the Public Interest* (2nd edition, 1994) Sweet and Maxwell, London at p. 132

¹⁰⁴[1975] 1 QB 613

make a presumption in favour disclosure; the fact that the threat is past will mean that there is no good reason for restrictions and publication will involve no breach of duty. Where confidentiality is imposed as an express term of a contract, the presumption should be in favour of confidence; in such a case, the fact that a threat is not current means that there is no good reason to upset that presumption and disclosure is less likely to be acceptable.

3.3.4 Motive for Disclosure

There are some indications that courts will consider the motives of the person who reveals information and may more readily find there to be a breach of confidence where information is disclosed out of malice, spite or for material gain. In *Initial Services v Putterill*¹⁰⁵ Lord Denning made clear that he would not have approved of disclosure in the case had it been made out of spite or for financial reward: "That indeed would be a different matter. It is a great evil when people purvey scandalous information for reward."¹⁰⁶ This view is also reflected in comments made by the court when upholding the injunction against disclosure of information in *Schering*¹⁰⁷: Templeman L.J. pointed out that Elstein had obtained the information because he "agreed for reward" to take part in the training session. He had then used that information "for his own gain"¹⁰⁸. He went on to say that if the injunction were not granted the court would enable "a trusted adviser to make money out of his dealing in confidential

¹⁰⁵[1968] 1 QB 396

¹⁰⁶*Ibid* at p. 406 G

¹⁰⁷[1981] 2 WLR 848

¹⁰⁸*Ibid* at p. 879

information."¹⁰⁹ Shaw L.J. spoke of the lack of protection for "mercenary betrayal"¹¹⁰. Concern was also expressed in the "*Spycatcher*" cases about publication of information disclosed by disloyal employees for financial gain¹¹¹.

This view has not been taken in all cases. In *British Steel Corporation v Granada*¹¹² Lord Fraser said that "[t]he informer's motives are... irrelevant"¹¹³; and in *Lion Laboratories*¹¹⁴ Stephenson L.J. said that the public have a right to know some confidential information "even if [it] has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer"¹¹⁵. Moreover, the fact that financial gain was made from the disclosures did not prevent the court from allowing the disclosures in *Woodward v Hutchins*¹¹⁶ and *Hubbard v Vosper*¹¹⁷.

In *Re a company's application*¹¹⁸ the possible malicious motive of the defendant was explicitly referred to and still did not prevent a finding that the disclosure could be allowed. Scott J. reasoned that if the alleged breaches of FIMBRA rules had taken place, then they ought to be reported.

¹⁰⁹Ibid at p. 881 E.

¹¹⁰Ibid at p. 869 H

¹¹¹See Lord Griffiths in *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1988] 3 WLR 776 at p. 804

¹¹²[1981] AC 1097

¹¹³Ibid. at p. 1202 D

¹¹⁴[1984] 2 All ER 417

¹¹⁵Ibid at p. 422 j

¹¹⁶[1977] 1 WLR 760

¹¹⁷[1972] 2 QB 84

¹¹⁸[1989] 2 All ER 248

If they were untrue, FIMBRA would discover this, and no harm would be done to the company. In neither case was the public interest in the investigation taking place affected by the motive of the discloser. This reasoning suggests courts will treat the motive of the person making the disclosure as secondary to other factors when weighing up whether or not to allow disclosure.

Although the motive of the discloser may not affect a decision on whether to allow publication of information, it may affect the remedy available to the employee who is dismissed for any breach of confidence. Although where the public interest is served by disclosure there may be no breach of confidence, the level of remedy available to the wrongfully dismissed employee could be affected by any financial reward already obtained by the disclosure. The remedy could similarly be affected in an unfair dismissal case where compensation must be just an equitable¹¹⁹.

3.3.5 Reasonable belief in the truth of facts disclosed?

The public interest is unlikely to be served by disclosure of unfounded suspicions of wrongdoing. It has been suggested that the public interest exception to breach of confidence depends on the employee being able to show that she has reasonable grounds for the belief that the information sought to be disclosed is true. Thus, the exception will not be allowed "upon a mere roving suggestion... or even, perhaps, on a general suggestion

¹¹⁹s 123 ERA 1996 (previously s 74 EP(C)A 1978). Employees should also note that where information is disclosed for financial reward they may be in danger of committing an offence under the Prevention of Corruption Acts 1906 and 1916 and the Public Bodies Corrupt Practices Act 1889. See Cripps, *op. cit.* p. 173 ff.

[that there might be wrongdoing]"¹²⁰; and "the generic defence to breach of confidence, that it is in the public interest to publish, must be supported by evidence to show why the plaintiff should not be given interlocutory relief"¹²¹. This point was repeated in *Attorney-General v Guardian Newspapers (No. 2)*¹²² when Lord Keith said that "it is not sufficient to set up the defence merely to show that allegations of wrongdoing have been made. There must be at least a prima facie case that the allegations have substance."¹²³

This requirement is not absolute and the amount of evidence needed to support the contention that the public interest is served by the disclosure may vary depending on who disclosure is made to. In *Re a company's application*¹²⁴, Scott J. refused to consider whether the allegations of breaches of FIMBRA regulations and tax irregularities were true; these were issues that would be considered by FIMBRA and the Inland Revenue after the disclosures had been made to them. If the allegations were substantiated action would follow, and if unsubstantiated would be ignored. There was no need for the judge hearing the case to be concerned with the veracity of the claims. However Scott J. distinguished *Attorney-General v Guardian Newspapers (No. 2)*¹²⁵ on the basis that the case dealt with disclosure on a wide scale via the media. In such cases the court would need to consider whether there was reasonable basis to the allegations. In contrast, where there is no more than "disclosure to a recipient which has a duty to

¹²⁰*Gartside v Outram* (1856) 26 LJ Ch 113 at 114

¹²¹*Lion Laboratories v Evans* [1984] 2 All ER 417 per O'Connor L.J. at p. 431 f

¹²²[1988] 3 WLR 776

¹²³[1988] 3 WLR 776 at 787

¹²⁴[1989] 2 All ER 248

¹²⁵*Ibid.*

investigate matters within its remit, it is not... for the court to investigate the substance of the proposed disclosure"¹²⁶

Thus the employee who blows the whistle to the wider world will need to be sure that her belief in misconduct or other wrongdoing is based on reasonable grounds in order to be confident that disclosure will not amount to a breach of the duty of confidence. Less solid suspicions of misconduct may only safely be disclosed where the disclosure is internal to the organisation or to a body charged with a duty to investigate such concerns.

3.4 Balancing the public interest factors

Where a court must decide whether an employee's whistleblowing serves the public interest, all the above factors are considered. If the balance is in favour of disclosure then the whistleblowing will entail no breach of confidence, and so no breach of contract. This is the case regardless of any express or incorporated terms requiring confidentiality¹²⁷.

Re a company's application (above) illustrates the balancing exercise that courts undertake. The threatened disclosure was to a regulatory body, not to the general public, a factor that weighs in favour of the disclosure being made. The disclosure was motivated by malice, a factor that can weigh against disclosure. However, other factors weighed in favour of disclosure; the disclosure was to a limited audience with a proper interest in the information, and the information was of a type that it was clearly in the public interest to disclose (tax irregularities and breaches of FIMBRA rules, both 'misdeeds'). The disclosure was therefore allowed, and had this been in issue, would not have involved a breach of contract.

¹²⁶*Re a company's application* [1989] 2 All ER 248 at p. 252d

¹²⁷See section 2.2 on express terms above.

4 Whistleblowing as a breach of the contractual duty of mutual trust, cooperation and fidelity

Thus far discussion has been limited to the potential breach of confidence involved in any disclosure. However, a disclosure may also involve the breach of other contractual terms, namely the implied terms of trust, cooperation and fidelity. These terms may be breached where the employee expresses her opinion on work related matters, or makes statements of opinion unfavourable to the employer, whether or not the information is already in the public domain.

In *Ticehurst v British Telecommunications plc*¹²⁸ a duty of fidelity was implied into the contract of employment by the Court of Appeal, and said to include exercising any discretion in supervising work faithfully in the interests of the employer. The duty was implied in the context of industrial action, but it indicates an approach by the court to employees' implied duties that extends beyond the strict confines of job descriptions and express terms, to a more general duty of faithful service. It is arguable that disclosing information to external bodies breaches such a term, whether the information is confidential or not.

In the earlier case of *Thornley v ARA Ltd*¹²⁹, where the employee was dismissed for disclosing confidential information to the press following what he believed was an unsatisfactory response by his employer to concerns raised, the EAT held that the disclosure amounted to a breach of trust owed to his employers and a breach of the "fundamental, common

¹²⁸[1992] IRLR 219

¹²⁹*Thornley v Aircraft Research Association Ltd*, September 14 1976, 539/11 and, May 11, 1977 EAT 669/76

sense, contractual obligation upon a servant not to let his master down"¹³⁰.

Thus, participation in debate on sensitive issues by an employee may well involve the breach of one of these additional implied terms, even if it does not involve a breach of confidence, because, for example, information is in the public domain.

However, these additional implied terms will be subject to the public interest exception in the same way as the implied duty of confidence. If a contract contained a term expressly limiting the disclosure or discussion of information even where it is in the public interest that it be disclosed, such a term would not be enforced for reasons of public policy. If unsustainable as an express term, courts will clearly not imply such a term into a contract. Thus a court is unlikely to hold that the implied duties of fidelity and loyalty have been breached where information that is in the public interest is disclosed or discussed.

For the watchdog whistleblower, where the public interest is more easily made out, this will have the result that the disclosure involves the breach of neither the implied duty of confidence nor any other implied term. However, the protest whistleblower may still face uncertainty. The difficulties in showing that the public interest is served by protest speech have been highlighted above. Even where a public interest in disclosure is difficult to make out, for example because it is made to the media, the protester may sometimes be able to argue that the information is in the public domain, and so no breach of confidence is involved. However, the additional duties of trust, cooperation and fidelity mean that there may still be a breach of contract, even though there is no confidence to be breached. Given that the criteria for assessing the public interest are the same

¹³⁰1977 EAT 669/76, p. 8 para g-h

regardless of the implied term involved, the protester remains dependent on showing that the wider public interest is served by the disclosure, an argument, as showed above, that courts have been reluctant to endorse.

5 Conclusion

5.1 Watchdog whistleblowers

Where the employee acts as a watchdog whistleblower, the type of information revealed, such as fraud, tax irregularities or corruption, or breach of health and safety regulations at work, is clearly of a type that warrants disclosure in the public interest. Where the employee works within the public sector¹³¹, then a wider range of information may be suitable for disclosure including financial mismanagement, and information that tends to show that the public image promoted by the sector is misleading.

However, before deciding that the disclosure is indeed in the public interest, the court will consider other relevant factors, the main one being that the disclosure should be to a suitable recipient. Disclosures to a regulatory body are more likely to be in the public interest even where the information is commercially highly sensitive, or where evidence to support the allegation is vague. Disclosure to the press is less likely to be warranted unless it reveals a current danger to health and safety or to liberty. In addition, a court may require that there is some evidence, beyond mere suspicion of the employee, that any such danger exists although even this may depend on the seriousness and imminence of the danger exposed.

In theory, then, watchdog whistleblowers wishing to raise a concern and have it investigated ought not to have too much difficulty in meeting the

¹³¹and arguably in certain sectors of the private sector, such as providers of monopoly services, and of services until recently provided by the public sector. See Chapter two, Whistleblowing and Freedom of Speech.

requirements of the public interest concept. However, in practice, they may still find themselves unprotected. The courts may continue to take the restrictive view of the public interest, illustrated in some of the cases discussed above, and find that there is a breach of contract on the facts, despite the arguments that exist to the contrary. In addition, cases may be unsuccessful, because they may fail to show that any adverse action taken against them was caused by the alleged breach of contract¹³², in which case any success in showing that there is no breach is of no value.

5.2 Protest whistleblowers

Protest whistleblowers may face even more uncertainty. On the one hand, engaging in protest about work related issues may involve no disclosure of confidential information at all, as the information may be in the public domain. Thus NHS staff speaking in public about the move to trust status, or British Rail staff speaking in public about rail privatisation may not disclose any information not already accessible to the public. However, such conduct may involve breach of additional implied contractual terms examined above.

Furthermore, in order to add weight to the protest, the speaker may disclose information that is *prima facie* confidential. For example, in discussing recent changes in the organisation of the NHS, a speaker may disclose current staffing levels, information that may be commercially sensitive after the introduction of the internal market to the NHS. Given that such disclosure does not reveal misconduct or illegal behaviour, it is not clear that the disclosure will be said to be in the public interest. The other factors taken into consideration by the courts in determining the issue, such as the recipient of the information, may also weigh against a finding of public interest. The fact that the disclosure will almost certainly be made publicly,

¹³²For more detailed discussion of causation problems see Chapter Five.

rather than through a regulator, and the fact that it will be hard to verify whether staffing levels are adequate in any event, may mean that disclosure may be said not to be in the public interest.

Yet effective protest requires publicity. Internal disclosure is therefore inappropriate. In order to gain protection, protesters need courts to recognise more readily the wider public interest served by public debate on issues of public importance, and the public interest served by the participation of insiders in that debate. They will then be able to rule that the protesters' disclosures containing confidential information are warranted in the public interest.

5.3 Effect of finding breach of contract.

Given the number of variables involved in the question, it can be hard to determine in advance whether a particular incident of whistleblowing involves a breach of contract. Employees proposing to make a disclosure will therefore be involved in a certain amount of risk-taking. Where, taking into account all the factors considered above, it is decided that there is a breach of contract, the employer will be justified in taking disciplinary action against the employee. Unless the breach of contract serious enough to warrant summary dismissal, notice would need to be given if disciplinary action were to include dismissal, to avoid a finding of wrongful dismissal.

If the disclosure serves the public interest, and therefore involves no breach of contract, any adverse action taken by the employer will be without legal justification. Although dismissal will not be wrongful if proper notice is given, any disciplinary action would be unfounded. It would therefore amount to a breach of contract by the employer, so that the employee could treat the contract as terminated and claim a remedy for constructive dismissal. In such circumstances, the employer is very unlikely to have

given notice, and so a wrongful dismissal claim will probably be successful.

Where whistleblowing leads to dismissal, whether or not it involves a breach of contract, the employee may have a remedy for unfair dismissal. The extent to which whistleblowers can use the protection offered by the right not to be unfairly dismissed is the subject of the next chapter.

Four

Whistleblowing and Unfair Dismissal

1. Introduction

The Employment Rights Act 1996¹ provides that where an employee has worked for the same employer for the requisite period², and complies with other qualifying conditions³ she will have the right not to be unfairly dismissed⁴. This general protection is available to employees dismissed for blowing the whistle. Dismissal is given a wide meaning in the Act, and covers termination of employment by the employer, expiry of a fixed term contract without renewal and constructive dismissal⁵. The remedies provided under the Act are reinstatement, reemployment or compensation (see below).

¹The provisions relating to unfair dismissal were previously found in the Employment Protection (Consolidation) Act 1978. In this chapter, references to the old legislation will continue to be given.

²Currently two years, though see *R v Secretary of State for Employment ex parte Seymour-Smith* [1995] IRLR 464

³The worker must be an employee, under the normal retiring age and employed in the UK

⁴s 94 ERA 1996, previously s 54 Employment Protection (Consolidation) Act 1978

⁵s 95 ERA 1996, previously s 55 EP(C)A 1978. Employees employed on a fixed term contract of a year or more may contract out of the protection provided in respect of termination of the contract without renewal if this is agreed in writing prior to the expiry of the term, s 197 ERA 1996.

The statutory protection against unfair dismissal operates on a separate basis from the common law. Even though it involves a breach of contract by the employer, a dismissal may still be fair; conversely a dismissal on the grounds that the employee is in breach of contract can be unfair. Thus, where a whistleblower is dismissed, deciding whether or not the disclosure amounted to a breach of contract will not resolve the question of whether the dismissal was unfair or not. The question may be relevant, however, to deciding whether there was a fair reason for the dismissal in the first place.

Where an employee brings a claim for unfair dismissal, she must first show that there has been a dismissal. The onus then shifts to the employer to show that there was a fair reason to dismiss. The potential fair reasons are limited to those listed in s 98 ERA 1996 (s 57 EP(C)A 1978), namely the capability or qualification of the employee, the conduct of the employee, the fact that the employee is redundant, that the continued employment of the employee is illegal, or some other substantial reason that justifies the dismissal of a person holding the position that the employee held (s 98 (1) and (2) ERA, previously s 57 (1)(a) and (2) EP(C)A). This last reason acts as a catch all provision that can be used to cover almost any reason for dismissal, and together with "the conduct of the employee" is the most applicable reason in the context of public interest whistleblowing⁶.

Where the employer can show that the dismissal was for one of the fair reasons, then the tribunal decides whether the dismissal was fair or unfair, having regard to the reasons shown by the employer and looking at whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or

⁶Whistleblowing will be presumed to be in the public interest for the purposes of the following discussion.

unreasonably in treating the reason as sufficient reason for dismissing the employee. (s 98 (4) "the s 98(4) fairness test")⁷.

In addition to the five fair reasons contained in s 98 ERA 1996, there are some "automatically unfair" reasons for dismissal, including dismissal for carrying out health and safety duties, dismissal on grounds of pregnancy, dismissal for asserting a statutory right, dismissal in connection with a transfer of an undertaking and dismissal for taking part in the activities of a trade union⁸. Dismissals for these reasons are unfair whether or not the employer could show that the test of fairness contained in s 98(4) would be satisfied.

2. The s 98(4) fairness test

The s 98(4) fairness test is of key importance in assessing the extent to which a dismissal for blowing the whistle will be fair or unfair. The intention was to make the test neutral as between the parties and so s 98(4) is worded to ensure that the burden of proving fairness does not rest on either party. However when the decisions of tribunals are examined it is clear that the neutrality of the legislation is somewhat elusive. The fairness or unfairness of the decision to treat the reason as sufficient reason to dismiss is a question of fact⁹; it is not the job of the tribunal to substitute its own judgement for that of the employer. It is accepted that there may be

⁷Previously s 57(3) EP(C)A 1978

⁸Ss 99, 100, 104 ERA (previously ss 57A, 60 and 60A EP(C)A) and Regulation 8(1) TUPE Regulations 1981 (although regulation 8(2) provides that where there is an economic, technical or organisational reason entailing changes in the workforce, dismissal can be fair) and s 152 TULR(C)A. The automatically unfair reasons for dismissal that can be used by whistleblowers are considered in detail in Chapter Five.

⁹*UCATT v Brain* [1981] IRLR 224

a range of employer responses that are reasonable and fair and as long as the employer's decision to dismiss does not fall outside this range of reasonable responses the decision will be fair¹⁰.

In effect the bench mark against which the fairness of an employer's response is tested is that of other employers. If it can be shown that many employers react in a certain manner to particular types of conduct the tribunal is unlikely to find that the reaction is unfair; it cannot find that the response was outside the range of reasonable responses that can be expected of an employer unless it is prepared to find that most employers are unreasonable¹¹. This may cause problems for whistleblowers, as there can be little doubt but that the average employer will not wish to continue employing a person who has blown the whistle on malpractice or wrongdoing, regardless of the size of the employer's undertaking.

Nevertheless, before the fairness of a particular dismissal is considered, the employer will need to show that there is a *prima facie* fair reason for the dismissal. Those that are most appropriate are misconduct and "some other substantial reason justifying the dismissal". These reasons will be considered in the context of whistleblowing, together with the s 98(4) fairness test as it applies to each potentially fair reason.

3. Misconduct as a fair reason

Where an employee has breached a term of the contract of employment, it will be open to the employer to use this as a fair reason to dismiss. It should be emphasised that this is not determinative of the issue of fairness;

¹⁰*Rolls Royce Ltd v Walpole* [1980] IRLR 343
Richmond Precision Engineering Ltd v Pearce [1985] IRLR 179

¹¹See *Saunders v Scottish National Camps* [1980] IRLR 174

the dismissal is still subject to the s 98(4) fairness test. It is worth noting that the term used in s 98 is the conduct of the employee; reference is not specifically made to breach of the terms of the employment contract, although given the implied duty of trust and confidence owed by the employee, most misconduct will amount to a breach of contract.

As has been said above, where disclosure of information is in the public interest, no breach of the implied duty of confidence will have taken place¹². Any attempt to present misconduct based on breach of confidence as a fair reason for dismissal should therefore fail. Any argument that other contractual terms, express or implied, have been breached will also fail if the public interest is served by the disclosure¹³. However, an employer may still argue that such conduct gives rise to a substantial reason for dismissal (see below).

3.1. Whistleblowing as misconduct

Where information disclosed is plainly in the public interest, for example where it concerns wrongful or illegal conduct and is disclosed internally or to appropriate external agencies, there is no misconduct on the part of the employee and an employer who argues that a dismissal was for such a reason will fail to establish a *prima facie* fair reason for the dismissal. Those who act as watchdog whistleblowers should therefore find that any attempt by an employer to argue that dismissal was for misconduct will fail.

However, as has been seen, the definition of the "public interest" is not certain and will depend on the balancing of many different factors in each particular case. An employee may well find that her disclosure made in

¹²See Chapter Three.

¹³See discussion in the Chapter Three.

good faith will not be found to be protected by the public interest defence. In particular, protest whistleblowers who use inside knowledge to add to public debate on an issue of public importance may not be covered by the defence and could find themselves dismissed for misconduct. However, this will not necessarily mean that dismissal is fair as the decision will still be subject to the s 98(4) test of fairness.

4. Misconduct and the s 98(4) test of fairness

The main reasons for dismissals on the ground of misconduct being held to be unfair are the lack of a fair procedure and inconsistency on the part of the employer in treating the misconduct as a reason to dismiss. Particular problems can arise for whistleblowers where the employer believes there to have been misconduct at the time of dismissal yet it is subsequently discovered that there was in fact no misconduct, because the public interest was served by the disclosure.

4.1. Fair procedure

The s 98(4) test is usually interpreted to require that dismissals are carried out using a fair procedure. Even where there is no contractual right to a particular form of hearing, a fair dismissal will need to be preceded by a system of warnings before the final sanction of dismissal is imposed. On the other hand, in cases of dismissal for gross misconduct, there is no need for warnings to be given, and summary dismissal without notice will be fair.

It may be that the particular circumstances of the case mean that the breach of confidence or trust involved in a whistleblowing incident does amount to gross misconduct. However, unless this is the case, dismissal will be unfair unless the conduct persists after warnings have been given. This will

be so even though the public interest is not served by the disclosure and the whistleblowing involves a breach of contract.

Where the public interest is served by the disclosure, it will be hard to argue that the conduct amounts to misconduct at all. The dismissal should thus be unfair, unless the employer can show some alternative fair reason for the dismissal.

4.2. Inconsistencies

There are two elements to the need for consistency: the employer must act consistently as between different employees in similar situations, and there must be consistency between the reason given for dismissal and the treatment of the employee.

In *The Post Office v Fennell*¹⁴, the employee's dismissal for assault of a fellow employee was held to be unfair as the employers had not dismissed other employees for similar conduct in the past. This rule applies regardless of the "human agency" through which employer acts, and so the fact that different decisions are taken by different individual managers will not excuse the employer¹⁵. Unless employers have a clear and consistent policy on the treatment of whistleblowers they may find that dismissal, even where disclosure amounts to misconduct, is unfair.

The second element of consistency is that the employer needs to be consistent in relation to any disciplinary action taken. For example, an employer may choose to ignore an initial disclosure and then take severe

¹⁴[1981] IRLR 221

¹⁵*Cain v Leeds Western HA* [1990] IRLR 168

action such as dismissal on a later occasion. If no formal warning or other action is taken at first, it is harder to argue subsequently that outright dismissal is appropriate¹⁶; if disclosure is so serious, the employer needs to explain the lack of action on the first incident¹⁷. On the other hand, if an employer reacts to a first incident with dismissal, a tribunal may feel that the action is unfair, for lack of a fair system of warnings.

4.3. Employer's belief in misconduct

Where it is unclear whether there has been misconduct in a particular case the employer can dismiss fairly as long as she believes on reasonable grounds that there has been misconduct. For example, where an employer suspects that the employee is guilty of misconduct such as theft from the workplace, the dismissal can be fair if it was based on a genuine and reasonable belief that the employee dismissed was the culprit, even though the truth of the matter, proved after the dismissal, is that the employee was not¹⁸.

The reasonableness of the employer's belief is judged according to the facts known to the employer *at the time the decision to dismiss was taken*. It is not open to an employer to rely on information acquired after the event to

¹⁶See *F.S. Investment Services v Lawson* [1991] IRLIB 426, 12-13

¹⁷Graham Pink disclosed information to the press on various occasions and at first no action was taken. He was dismissed for a subsequent disclosure, after refusing to accept an offer of alternative employment. The alternative employment involved as much scope for breach of confidence as his old post, another factor that was inconsistent with a dismissal for the gross misconduct involved in the breach of confidence.

¹⁸*BHS v Burchell* [1980] ICR 303. This part of the decision is unaffected by the later decision in *Boys and Girls Welfare Society v McDonald* [1996] IRLR 129

demonstrate that the dismissal was fair¹⁹. This can work to the employee's advantage where the employer subsequently discovers additional misconduct that could have given rise to a fair reason to dismiss had it been known at the time. However, the converse is also true, and can work harshly on the employee who cannot rely on later information to show that the dismissal was unfair. If the employer reasonably believed that the employee was guilty of misconduct at the time of the dismissal, the fairness of the dismissal is judged on the assumption that the employer's belief was correct, even though it later transpires that there was no misconduct.

This can cause problems for whistleblowers, as the question of whether the disclosure was justified or not, and therefore whether there was misconduct or not, cannot easily be determined without a court hearing in which all aspects of the case are weighed and considered. As seen in Chapter Three, it is hard to predict the outcome of the balancing exercise involved. However, the employer is faced with a situation which may need to be dealt with immediately. If, at the time when the decision to dismiss is made, the employer believes that it is not in the public interest to disclose the information, the decision, based on a genuine belief that the conduct was in breach of contract, will probably be seen to be fair. This will be the case, even though it is later decided that the public interest is served by the disclosure.

¹⁹Although the later discovery of such information may affect compensation. *W Devis and Sons Ltd v Atkins* [1977] AC 931, confirmed in *Polkey v A.E. Dayton Services Ltd* [1988] ICR 142. This is not affected by the apparent retreat from *Polkey* in *Duffy v Yeomans and Partners Ltd* [1994] IRLR 642.

5. "Some other substantial reason" (SOSR) and whistleblowing.

The final fair reason contained in the ERA, "some other substantial reason that justifies the dismissal" is a catch all provision which, in effect, allows any reason that is sufficiently substantial to be subjected to the s 98(4) test of fairness. It has been used to provide a potentially fair reason for dismissal in many cases which do not fall easily into the other fair reason categories, for example the refusal to accept changes in the terms and conditions of employment which were necessary for business reasons²⁰.

The wide ambit of SOSR means that it can be used in whistleblowing cases where, strictly, there is no breach of contract. The result is that the fairness of a dismissal can then be determined without reference to the question of whether the disclosure is in the public interest. For example, a particular disclosure may or may not serve the public interest and so may or may not involve a breach of contract. Nevertheless, the employer could argue that the resulting bad relationship between the parties is itself a substantial reason that justifies ending the employment relationship. In deciding whether such a reason for dismissal is a potentially fair reason, the tribunal would not need to consider questions of confidentiality and the public interest. The justification for the employee's conduct would not be legally relevant to that question²¹.

A further "substantial" reason that an employer might use is that the working relationships between employees have been adversely affected by

²⁰*RS Components v Irwin* [1970] 1 All ER 41, where a dismissal for refusal to accept the introduction of a restrictive covenant in the contract of employment was fair.

²¹One would hope that it would be relevant once s 98(4) was being applied, but see below on the tendency for the application of s 98(4) to be merged with the question of whether the reason for dismissal was substantial.

the whistleblower's conduct. Again issues of confidentiality and the public interest are avoided. Tribunals have even been willing to accept the employer's genuinely mistaken belief that a fair reason existed as "some other substantial reason justifying the dismissal."²² Thus, even though there may in fact be no misconduct because disclosure was in the public interest, an employer could argue that her own, mistaken belief that there had been misconduct was sufficient reason to dismiss²³.

Some substantial reasons that may lead to a decision to dismiss are worthy of specific discussion: pressure to dismiss brought by colleagues of the whistleblower and pressure brought by those external to the organisation such as customers of the business.

5.1. Internal pressure

If the wrongdoing disclosed by a whistleblower implicates fellow employees, they may exert pressure on the employer to dismiss the employee. However, s 107 ERA (previously s 63 EP(C)A) requires the tribunal to ignore any pressure exercised on the employer by way of industrial action when deciding on the reason for dismissal. In *Callanan v Surrey AHA*²⁴, a student nurse had reported on a colleague whom he had witnessed hitting a patient. The other nurses in the hospital then refused to work with him, and he was sent to work in the nursing school. He later resigned and claimed constructive dismissal. The employing health authority

²²*Bouchaala v Trust House Forte Hotels Ltd* [1980] IRLR 382. Here the employer mistakenly believed that continued employment of the employee was illegal.

²³Such an argument should not be necessary, given the rule in *W Devis and Sons Ltd v Atkins* and *Polkey v A. E. Dayton Services Ltd*, that the employer is judged according to the facts as he believed them to be, discussed above.

²⁴COIT 994/36 5th Feb. 1980

was not allowed to rely on the internal pressure to justify the dismissal. Since there was no other reason for the dismissal, this left the employer with no potentially fair reason for the dismissal, and the dismissal was unfair.

This is likely to be the outcome in many cases in which the reason for dismissal is pressure by fellow workers aimed at persuading the employer to dismiss, as the extent of s 107 ERA is quite broad, covering any industrial action (not only strikes), as well as threats of such action²⁵.

However, pressure to dismiss may take other forms. A personality clash between staff can provide a potentially fair reason for dismissal, although, it will not be fair where insufficient attempts are made by the employer to improve the relationship before dismissal²⁶. Alternatively, where employees are very unhappy about working with the whistleblower, it could affect their work, amounting to a commercial pressure on the employer to dismiss (see below).

Internal pressure to dismiss may not operate directly. It may be that colleagues continue to work with a whistleblower, but treat her so badly at work that she feels she has no option but to leave. The position in relation to poor working relationships as a result of whistleblowing is unclear²⁷. On the one hand, employers who fail to protect an employee from harassment may themselves be in breach of contract; on the other, tribunals are reluctant to require employers to employ workers where trust and confidence have broken down.

²⁵*Faust v Power Packing Casemakers Ltd* [1983] IRLR 117

²⁶*Turner v Vestric Ltd* [1981] IRLR 23

²⁷see Napier, *AIDS, Discrimination and Employment Law* (1989) 18 ILJ 84 and Watt, *HIV, Discrimination, Unfair Dismissal and Pressure to Dismiss* (1992) 21 ILJ 280

In *Wigan Borough Council v Davies*²⁸ the employer's failure to provide support to an employee to enable her to carry out her job without harassment from colleagues, was found to be a breach of contract entitling the employee to claim constructive dismissal. In such circumstances, it is difficult for an employer to show that dismissal was fair. In *Smith v YHA*²⁹ the constructive dismissal of a storeman was held to be unfair because insufficient support was given by management when he reported serious stock losses. The employer's attitude was a breach of the implied term of trust and confidence implied into the contract of employment.

Resignation followed by a claim of constructive dismissal is always a risky course of action for employees as the onus is on them to show that there was cause to treat the employment relationship as ended. In addition, whilst an employer owes a duty to protect the employee from harassment of fellow employees, it may not be practicable to require people to work together when relationships have clearly broken down between them. This is especially so where the work involves a high degree of trust and cooperation between colleagues. In such a case, it may be possible for the employer to succeed in arguing that their approach (even if it amounts to constructive dismissal) is within a range of reasonable responses for an employer. It is to be hoped that such an argument would not be successful, given that after a successful claim of unfair dismissal, the employee does not have to return to work. An award of compensation to the employee could be awarded which would in some measure meet the requirements for justice to the employee without forcing an ongoing working relationship on to the parties.

²⁸[1979] IRLR 127

²⁹March 6, 1980, COIT 977/213

5.2. External pressure

Additional problems arise when employers face pressure to dismiss from those outside the organisation, such as customers. The employer may feel that the commercial interests of the business will be best served by yielding to the pressure and that this is a substantial reason justifying the dismissal. Tribunals have varied in their approach to this issue. In *Scott Packing and Warehousing Co Ltd v Paterson*³⁰ a major customer of the employer demanded an employee's dismissal in return for its continued custom. The dismissal, in compliance with the demand, was held to be fair. The EAT held that "an employer cannot be held to have acted unreasonably if he bows to the demands of his best customer ... even if the customer's motive for seeking the removal of the employee was suspect."

This reasoning, especially that referring to the motive of the customer, has been disapproved in later cases³¹, and it has been pointed out that although the demands of a customer may be a substantial reason justifying the dismissal, the reason must still be subjected to the s 98(4) test of fairness, and a resulting dismissal cannot be assumed to be fair. In *Wadley v Eager Electrical Ltd*³², the employee was dismissed following his wife's arrest and conviction for theft (his wife also worked for the company). The employer believed Wadley's continued employment would lead customers to lose confidence in the company. Although the EAT accepted that concern about customers' loss of confidence could amount to a substantial reason justifying the dismissal, when all the circumstances of the case were considered, such as the fact that the employee had 17 years' service and had been dismissed without notice, it was not reasonable for the employer to

³⁰*Scott Packing and Warehousing Co Ltd v Paterson* [1978] IRLR 166

³¹see *Grootcon (UK) Ltd v Keld* [1984] IRLR 302 EAT

³²[1986] IRLR 93

treat the reason as a fair reason to dismiss. The dismissal was thus unfair³³.

This scenario may become more common in future as a result of increased contracting out of services within the public sector, with the result that the service providers are dependent on a small number of clients, perhaps only one. Problems could arise if the employee of a subcontractor blows the whistle on issues that concern the main contractor. For example, if a worker is employed by a company which contracts to provide a service to the NHS, and that worker speaks publicly about health service issues, the contractor may feel it necessary to dismiss her in order to continue to hold the contract for the service. The fairness of the dismissal then turns on the reasonableness of the employer's action in dismissing the employee in order not to jeopardise the continued custom of a major client. Whether or not the disclosure amounted to a breach of confidence, and whether or not the public interest is served by the disclosure, are not of direct relevance to that issue. Indeed, to require the employer to take account of the wider public interest in taking the decision to dismiss would be to require the employer to serve the public interest before commercial interests, a requirement that is not currently made by the legislation.

6. "Some other substantial reason" and the s 98(4) test of fairness

Despite the broad nature of the SOSR as a fair reason for dismissal, such a dismissal is not automatically fair. The employer must still comply with the requirement that it be fair to treat the reason as a reason to dismiss; for example the employer should give notice or warning of any dismissal. In cases of dismissal after pressure exerted by customers, the employer may

³³See also *Dobie v Burns International Security Services (UK) Ltd* [1984] IRLR 329

need to see whether the employee can be moved on to work that does not involve that customer, before the use of dismissal will be considered to be fair.

On the other hand, it has been suggested that the SOSR potentially fair reason is often interpreted such that s 98(4) becomes redundant, the enquiry into the substantiality of the reason being merged with that of the fairness of the reason³⁴. This merging can have great disadvantages for the employee as substantial reasons can be assumed to be fair, without sufficient emphasis on the fair procedures required in relation to dismissals for redundancy, capacity and misconduct, a danger recognised and remedied in *Wadley v Eager Electrical Ltd*³⁵.

There is a second danger; where dismissal seems fair, or at least within a range of reasonable responses of an employer, the dismissal may be held to be fair without sufficient investigation of whether the reason was substantial in itself. Yet, the requirement that the reason for dismissal be substantial is the only requirement that the tribunal can judge objectively when assessing the fairness of the decision to dismiss under s 98(1)(b). If, in relation to SOSR, the tribunal determines whether there was a fair reason by reference to the standards of the average employer then, in effect, the question of whether there was a fair dismissal becomes a single question ("was the dismissal fair?"), rather than remaining twofold as it is for the other fair reasons, where the tribunal decides first whether the reason is made out (judged objectively), and then applies s 98(4) (applying the standard of the average employer).

³⁴Bowers and Clarke, *Unfair Dismissal and Managerial Prerogative: A Study of "Other Substantial Reason"* (1981) 10 ILJ 34

³⁵[1986] IRLR 93 see also *Grootcon (UK) Ltd v Keld* [1984] IRLR 302 EAT

Where the dismissal is only judged according to the standards of the average employer, issues such as the public interest served by the employee's action are likely to receive less attention than they deserve in the determination of whether there was an unfair dismissal.

7. Relevance of public interest factors in dismissal for whistleblowing.

In considering the fairness and equity of a dismissal for blowing the whistle, it is to be hoped that the tribunal members would look at the issue of public interest; indeed, some of the factors that determine whether or not a disclosure is in the public interest may influence the decision on the fairness of a dismissal. For example, dismissal is more likely to be unfair if a disclosure is made internally than if it is made to the press. In *Thornley v ARA Ltd*³⁶, the plaintiff raised matters of concern about aircraft design internally at first. It was only when he disclosed confidential information to the press (following what he believed was an unsatisfactory response by the employer) that he was dismissed. It is clear from the reasoning of the Industrial Tribunal and the Employment Appeal Tribunal that it was the disclosure to the press that formed the grounds for dismissal³⁷. The assumption can be made that had disclosure remained internal (a factor that would also affect whether there was a breach of confidence), then the dismissal might have been said to be unfair.

In *Cornelius v London Borough of Hackney*³⁸, an employee disclosed confidential documents, revealing corrupt practices by council staff, to a local councillor and to his union. His dismissal was found to be unfair, and

³⁶September 14 1976, 539/11 and, May 11, 1977 EAT 669/76

³⁷"...the real gravamen of the employer's complaint ... was that *by sending the letter to The Guardian on the 7th June 1976 he was in breach of trust to his employers*" *Thornley*, p. 8 f (italics supplied).

³⁸EAT/1061/94, reversing the IT decision COIT 4376/92/LS.

an earlier order reducing his compensation by 50% on the basis that he had contributed to his dismissal by failing to use the proper channels of communication with management was overturned. The EAT held that communication to a councillor and to the union was a proper means of communication; it was also pointed out that Mr Cornelius was acting from good motives. Again, factors that would affect the classification of a disclosure as a breach of contract at common law affected the tribunal's assessment of the fairness of the dismissal.

Similarly, matters such as the motive of the employee and the identity of the recipient of the information may be taken into consideration when considering the level of compensation to be awarded to the employee³⁹.

However, tribunals are not *required* to take such matters into account when assessing the fairness of a dismissal by anything in the ERA. The question is whether the dismissal itself was a reasonable response by the employer at the time of dismissal, not whether the action by the employee that led to dismissal was reasonable or, indeed, in the public interest. For example, in *Byford v Film Finances Ltd*⁴⁰, the employee gave information about her employer to the opposing side in shareholders dispute because she believed that the employer was involved in illegal conduct. In finding the dismissal to be fair, the EAT were concerned with the reasonableness of the employer's actions at the time of the dismissal and gave short shrift to arguments based on the reasonableness of the *employee's* actions.

This accords with the s 98(4) test of fairness, which provides that it is the fairness of the employer's actions which is judged, not the fairness or justice of the outcome from the employee's perspective. The requirement

³⁹Compensation is to be the amount that the tribunal considers just and equitable in all the circumstances. s 123 ERA 1996 (previously s 74 EP(C)A 1978). This is discussed further below at para 9.2.

⁴⁰EAT/804/86 (Lexis Transcript)

that the fairness be assessed in accordance with the "equity and substantial merits of the case" is not used by tribunals to broaden the question to cover the fairness of the outcome from the employee's point of view.

8. Automatically unfair dismissal

In addition to the potentially fair reasons contained in s 98 ErA 1996, there are also various "automatically unfair" reasons for dismissal where it is not open to the employer to argue that the dismissal was fair. The automatically unfair reasons that can be of use to whistleblowers, such as the protection for those who raise concerns about health and safety matters, are considered in Chapter Five. The advantage for the employee of the dismissal being for an automatically unfair reason is that it avoids the application of the s 98(4) test of fairness; the employer cannot argue that the dismissal was within a range of reasonable responses. However, employers are likely to argue that the dismissal was for a potentially fair reason. In such a case it will be for the employee to show that the dismissal was, in fact, for the prohibited reason, a task that can prove difficult.

9. Remedies for unfair dismissal

Despite the fact that the unfair dismissal legislation may not always protect the dismissed whistleblower, it will be successful in some cases. In these cases the employee will be entitled to the remedies available under the ERA, consisting of reinstatement, re-engagement or compensation⁴¹.

9.1 Reinstatement and Reengagement

The remedies of reinstatement and re-engagement are discretionary, and in exercising their discretion in the matter the tribunal are required to take into

⁴¹s 105 ERA, previously s 68 EP(C)A 1978

account whether the employee wishes to be re-engaged or reinstated, and whether it is practicable for such an order to be made⁴². The tribunal also considers whether it is just to order reinstatement where the employee contributed to the dismissal. Often, by the time the case has been through the tribunal, relations between employer and employee have broken down to such an extent that the employee does not wish to return to the job. Similarly, where trust and confidence between the parties has broken down, the employer may suggest that it is not practicable for the employee to return even where she wishes to. In such cases it is unusual for a tribunal to order re-engagement or reinstatement, and the most usual remedy granted by the industrial tribunals is compensation⁴³.

Although where an ongoing working relationship is impossible reinstatement or reengagement would be impracticable, the rarity of these remedies limits the usefulness of unfair dismissal protection for many employees, who may be more interested in preserving job security than in returning to the job market with a low level of financial compensation. The lack of reinstatement or reengagement as a remedy may be a particular problem for specialised employees of large employers such as the health service, local authorities, the police and armed services, where it may not be feasible to find similar work with a new employer. In the case of whistleblowers, even moving area to a new employer may be a problem if the particular incident of whistleblowing is publicised generally and within the sector in which the employee works.

⁴²Previously s 69 (5) and (6) EP(C)A 1978

⁴³Reinstatement and re-engagement have been ordered in less than 5% of cases. However, Dickens et al. argue that reinstatement or reengagement could be ordered more often and that the assumption that employees do not favour these remedies may be false. Dickens, Jones, Weekes and Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (1985) Oxford

The limitation of remedies to compensation in many cases may act as a severe limitation on the confidence which employees feel in the unfair dismissal protection. Whilst this may be of little relevance for those dismissed for fair reasons such as incapacity or redundancy, who have no choice in whether they are dismissed, it is relevant for those contemplating blowing the whistle. These employees face a choice: to speak out and risk dismissal or to keep quiet and remain employed. If the remedies available for dismissal are inadequate, they may decide to remain silent with the result that the public is denied information that it is in its interests to have.

9.2 Compensation

The remedies for unfair dismissal are further limited by the fact that levels of compensation are restricted. The basic award is calculated on the basis of length of service and weekly pay⁴⁴, subject to a maximum of 20 years' service and £210 weekly pay.

The compensatory award is supposed to be that which is just and equitable in all the circumstances⁴⁵. The aim is not to punish the employer for unfair conduct, but to compensate the employee for her loss⁴⁶. Where dismissal is automatically unfair the compensatory award is increased by a special award, which does reflect disapproval at the employer's conduct. It will be argued⁴⁷ that a special award should be available where employees are dismissed for making public interest disclosures, in order to reflect the fact that the employer's actions were in breach of the public interest.

⁴⁴And a multiplier on the basis of age.

⁴⁵s 123 ERA 1996.

⁴⁶*Clarkson International Tools Ltd v Short* [1973] IRLR 90 and *Lifeguard Assurance Co. Ltd. v Zadrozny* [1977] IRLR 56

⁴⁷Chapter Nine, Conclusions and Proposals for Reform, para 3.1.6.

The compensatory award is currently subject to an upper limit of £11,300⁴⁸. Although the maximum is increased at times, the level remains low in comparison with the actual losses suffered by those on all but the lowest incomes. Employers may see this amount as an acceptable price to pay to settle cases before they attract adverse publicity. The limit set on compensation means that it is relatively cheap for employers to remove those they see as trouble makers, thereby discouraging other workers from speaking out. Although clearly some compensation for the employee is better than none, the dismissed employee may well be left without a job, and with losses far in excess of £11,300.

Obviously, the only way to recoup these losses is to get another job. However, unless re-engagement or reinstatement are ordered, which is rare, the employee may have difficulties in doing this, as the ERA only prohibits unfair dismissal, not unfair refusal of employment⁴⁹. Once it is known that an applicant is seeking work because of a previous dismissal for blowing the whistle, a potential employer may well choose to give the job to another applicant. The compensatory award is supposed to enable the tribunal to compensate for future losses, but, given that whistleblowers may well remain out of work for some time, the limit on awards of £11,300 means

⁴⁸This amount can be increased where a reinstatement or re-engagement order is made and not complied with. However, given that reinstatement or re-engagement are rarely ordered, this additional award is rarely going to protect the employee.

It is arguable that, following the approach in *Marshall v Southampton (No. 2)* [1993] IRLR 445, compensation for dismissal in breach of s 100 ERA (57A EP(C)A) should not be limited to the statutory limit because it is based on EC Directive 89/391. However, Directive 89/391 does not contain an equivalent of Article 6 of Directive 76/207 which was the subject of the *Marshall* case.

⁴⁹Contrast the protection available for refusal to employ on grounds of trade union activity (s 137 Trade Union and Labour Relations (Consolidation) Act 1992) and similar protection for refusal to employ on grounds of sex (s 6 Sex Discrimination Act 1975) or race (s 4 Race Relations Act 1976).

that future losses remain uncompensated. Again, the potential whistleblower, faced with a choice of whether or not to risk dismissal by speaking out, may decide not to, with the public interest the loser.

9.2.1 Contributory fault

A tribunal may reduce compensation paid to an employee if it finds that she contributed to her dismissal to any extent⁵⁰. In *Cornelius v London Borough of Hackney*⁵¹, the industrial tribunal reduced an employee's compensation by 50% on the basis that he had contributed to his dismissal by disclosing information to his union. Although the EAT overturned the decision on the basis that this was not an improper channel of communication, it was not suggested that a reduction for contributory fault would have been inappropriate if improper channels had in fact been used.

The use of this mechanism to reflect fault on the part of the employee could be useful in whistleblower cases. Where a disclosure of information that is otherwise in the public interest, is made through an inappropriate channel, tribunals should reduce compensation on the grounds of contributory fault rather than find the dismissal fair. Similarly, where an employee makes what is otherwise a public interest disclosure maliciously, compensation can be reduced.

Reducing compensation for contributory fault in this way allows the decision of the tribunal to reflect the fact that it was in the public interest that the information be disclosed, whilst still ensuring that the employee does not gain from misconduct. If, in contrast, an employee's bad motive means that a dismissal is held to be fair, there is no way for the tribunal

⁵⁰s 123(6) ERA 1996 (previously s 74(6) EP(C)A 1978.

⁵¹EAT/1061/94, reversing the IT decision COIT 4376/92/LS.

decision to reflect the fact that she may have disclosed serious wrongdoing by the employer.

10. Conclusion

It is clear from the above that the employee who is dismissed for blowing the whistle at work cannot be assured of a sufficient remedy even though it is in the public interest that the information be disclosed. Not only are the remedies inadequate if dismissal is found to be unfair, but even that finding cannot be guaranteed. Remedies would be improved by removing the limit on compensation and encouraging the use of reinstatement and reengagement. Of the other problems in using unfair dismissal in whistleblowing cases some are fairly practical, while others are more deep rooted, and involve the standard of fairness currently contained in s 98(4).

Specific proposals for the creation of a new automatically unfair reason for dismissal for those who blow the whistle in the public interest are made in the concluding chapter. The following sections will consider general shortcomings in the law on unfair dismissal. These apply equally to those dismissed for other reasons, but are of particular relevance to whistleblowers. This is because employees have a choice of whether to make a disclosure or not; where the protection is perceived as limited, they may well decide not to speak at all, and so not be put in a position where the protection is needed.

10.1. Practical problems

Only employees have the right not to be unfairly dismissed. Thus anyone who works on a self-employed basis has no protection against dismissal for blowing the whistle. A short term contract for services may be terminated, or not renewed, without redress, other than for wrongful dismissal if

insufficient notice is given. In addition, those without sufficient continuity of service are not protected. Increasing numbers of employers are introducing temporary contracts for staff⁵². Although once one has worked for more than two years for an employer, even on a series of temporary contracts, one is eligible for unfair dismissal protection, the fact that the contract is up for renewal gives an added sense of insecurity to the individual. Unfair dismissal protection would be enhanced by a reduction of the two year qualification for eligibility⁵³.

Further problems arise when considering the practicalities of bringing a case before a tribunal. Research indicates that an employee's chances of success are greatly enhanced by having legal representation at the hearing⁵⁴. The intricacies that may be involved in the determination of whether the public interest is served by a particular disclosure mean that the public interest whistleblower may be in particular need of legal representation at a hearing. Although unionised employees may be able to gain help from their unions, without legal aid to fight a case, such representation may well be beyond the resources of other employees.

10.2. Problems with the test of fairness

As already discussed, the dismissal of the whistleblower, whether for misconduct or for some other substantial reason will be subject to the test contained in s 98(4): whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating the reason for dismissal as a

⁵²See Industrial Relations Service (1994) *Non-Standard Working Under Review*, Industrial Relations Review and Report, August 1994.

⁵³See conclusions where it is proposed that there be no minimum qualifying period for whistleblowers.

⁵⁴Dickens, Jones, Weekes and Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (1985) Oxford

sufficient reason for dismissing the employee. That question is interpreted to require that the employer's response to the employee's action must have been within a range of reasonable responses expected of an employer. It is judged purely from the point of the employer, and the question is determined on the basis of facts known to the employer, and the employer's reasonable beliefs, at the time of the decision to dismiss.

This test puts the employee at a considerable disadvantage in comparison with the employer in cases of dismissal for whistleblowing. The employee's reason for breaching the employer's trust (and possibly the factor that makes the dismissal seem unjust) is not relevant⁵⁵, and the dismissal can be fair even though it is later established that in fact the employee was right to speak out.

Collins has argued that the s 98(4) test is not neutral as between the parties⁵⁶. The phrasing of the test favours the employer; the tribunal must be satisfied that the dismissal is unfair⁵⁷. It appears to be neutral but in the end claims regarding dismissals that cannot be said to be actually unfair must fail. In Collins's view this amounts to a presumption of fairness on the part of the employer.

The validity of his argument is evidenced by the interpretation of the range of reasonable responses test which assumes that as long as some other employers tend to behave in the way that the employer in question has behaved, then the behaviour is reasonable. Although a dismissal which lacks a fair procedure may well be unfair (even though such behaviour is common even among "reasonable" employers), it is likely that in considering other aspects of fairness, such as whether it is fair to dismiss

⁵⁵*Byford v Film Finances Ltd* EAT/804/86 (Lexis Transcript)

⁵⁶Collins, *Justice in Dismissal* (1992) Clarendon Press, Oxford

⁵⁷Section 94

an employee who has disclosed information which embarrasses the employer, the question will turn on whether other employers would do the same. As Elias puts it, "[t]he concept of fairness is located within a framework which accepts that the employer has in principle the right to dismiss where this is necessary to protect his business interests."⁵⁸

To this extent, "the concept of fairness ... becomes norm-reflecting rather than norm-setting"⁵⁹. As long as the test of fairness reflects current employment practice, the whistleblower, traditionally seen by the employer as a disloyal employee, will have difficulty in showing that her dismissal is unfair as dismissal will be a common response. The only way to avoid this is to show that there was no potentially fair reason for dismissal. This may be possible in cases of dismissal for misconduct where the public interest in information means that there is no breach of contract; however, this argument on the part of the employee can be blocked if the employer chooses to argue that dismissal is for some other substantial reason.

The s 98(4) test means that the fairness of the dismissal is judged from the perspective of the employer; the question is whether *the employer's conduct* was reasonable or unreasonable. The overall fairness in the outcome, from the employee's point of view, is not considered. The fact that the employee discloses in good faith, and the fact that the information is in the public interest are not put into the equation in assessing the fairness of the dismissal.

⁵⁸Elias, *Fairness in Unfair Dismissal: Trends and Tensions*, (1981) 10 ILJ 201 at 211

⁵⁹Elias, *Fairness in Unfair Dismissal: Trends and Tensions*, (1981) 10 ILJ 201 at 213

This was approved in *Polkey v Dayton Ltd*⁶⁰ where it was said that "[t]he choice in dealing with [s 98(4)] is between looking at the reasonableness of the employer or justice to the employee... the correct test is the reasonableness of the employer." If many employers would dismiss for disclosure, dismissal is within a range of reasonable responses, and fair. The viewpoint of the employee with information which it is in the public interest to disclose is ignored.

Given that a choice between looking at the reasonableness of the employer and justice to the employee must be made, it is arguable that the decision in favour of the reasonableness of the employer is as good as any other. However, where choosing justice to the employee also involves upholding the employee's decision to serve the public interest, this would seem good reason to exercise the choice in favour of the employee.

10.2.1. The introduction of public law concepts

Collins suggests⁶¹ that the general weakness of the unfair dismissal legislation in protecting employees arises from the fact that unfair dismissal is essentially a remedy of the private sphere. Although the assumption of freedom of contract between the parties is amended by the introduction of a right not to be unfairly dismissed, the right operates in the context of a private contractual relationship in which the parties do not enjoy equality of bargaining power. The use of management prerogative is limited to an extent by the unfair dismissal legislation, but it nevertheless remains in the interpretation of s 98(4) to include as fair any dismissal that comes within

⁶⁰[1988] ICR 143, where Lord Mackay adopted the statement by Browne-Wilkinson J. in *Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91

⁶¹in *Justice in Dismissal* (1992) Clarendon Press, Oxford

the range of reasonable responses. As has been pointed out above, this test can be fatal to the whistleblower's chances of success as many employer dismiss for disclosure of information.

Collins suggests that this general weakness in the protection can only be overcome if the legislation is used to set standards and to review the exercise of power by the employer over the employee⁶². This would enable principles of natural justice, already present in the public law remedy of judicial review, to be considered by the tribunal. The tribunal would assess whether the employer's power had been exercised with proper consideration for the rights of those affected. This would enable the tribunal to move away from a standard of fairness based on employer custom and practice, towards a recognition of the employee's legitimate expectation of fair treatment within the employment relationship, with the question of fairness being judged from both the employer's and the employee's perspective.

Collins's suggestions have been questioned by Fredman and Lee⁶³ who point out that public law remedy of judicial review only allows the *procedure* by which a decision is reached to be challenged. They argue that the unfair dismissal legislation is superior in this respect in that it allows the fairness of the decision itself to be called into question. Fredman and Lee are probably right in that to replace the unfair dismissal legislation with a system of judicial review would merely lead to an alternative set of weaknesses in the protection available to employees, not least because it is not clear whether the remedies available under judicial review would be of any use to employees.

⁶²Collins, *Market Power, Bureaucratic Power and the Contract of Employment* (1986) 15 ILJ 1

⁶³Fredman and Lee, *Natural Justice for Employees: The Unacceptable Faith of Proceduralism* (1986) 15 ILJ 15

However, the suggestion is not so much that unfair dismissal should be replaced by judicial review as it currently operates, but that the test of fairness in s 98(4) should be moderated, taking on board concepts currently used in judicial review jurisprudence. At present, under s 98(4) the employer's interests and values outweigh those of the employee. The introduction of concepts and vocabulary of natural justice and legitimate expectation into the s 98(4) test could balance out the test enormously. It would allow tribunals to consider the justice of a dismissal from the employee's perspective, taking into account the reasonableness of the employee's actions as well as that of the employer. Tribunals could then be vehicles through which standards of employer practice could be improved, rather than merely being mirrors of current standards⁶⁴.

The incorporation of such ideas into unfair dismissal law would be of benefit to all employees seeking protection⁶⁵. It may be of particular help in public interest whistleblowing cases, where a consideration of the wider interests represented by the employee and the public may have an impact on the outcome. For example, the employee who discloses information later shown to be in the public interest may, under the current law, be fairly dismissed if, at the time of the dismissal, the employer reasonably believed the employee to be guilty of misconduct. However, allowing the tribunal to consider the justice of the outcome from the employee's perspective, as well as the justice of allowing someone acting in the public interest to be punished for that action, may mean that such a dismissal would be held to be unfair.

⁶⁴A proposal for protection to be based on an alternative model, that of discrimination, is discussed in the Chapter Nine, Conclusions and Proposals for Reform.

⁶⁵It is worth noting that the "range of reasonable responses" test is the product of case law, and is not contained in s 98(4) ERA.

Clearly to take such a line would mean that the employer pays for what may have been innocent conduct, rather than the employee. It is arguable that the employer is in the better position to meet the cost than the employee, especially given the options of reinstatement and reengagement, remedies that need not cost the employer greatly in financial terms. The likelihood of any change that would increase the costs to the employer is slim. However, the alternative is that the employees pay for conduct that is both innocent and in the public interest by losing their jobs without compensation. Given that some employees will not be prepared to pay this price, information may well remain undisclosed, and the public interest unprotected.

Five

Special Situations: Victimisation and the exercise of statutory rights

1. Introduction

Employees who blow the whistle on certain specific matters may enjoy additional protection to that available against unfair dismissal under the Employment Rights Act 1996. The Sex Discrimination Act 1975 (SDA), Race Relations Act 1976 (RRA) and Disability Discrimination Act 1995 protect those who raise concerns about equal pay, sex, race or disability discrimination and s 100 ERA 1996 (s 57A EP(C)A 1978) provides protection for those who take action on health and safety matters at work. Employees who raise concerns via a trade union may enjoy the specific protection in TULR(C)A 1992 for those taking part in trade union activities.

This protection needs to be viewed along side the more general protection from unfair dismissal if the full range of legal protection available to whistleblowing employees is to be understood.

2. Protection under the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995

The Sex Discrimination Act and Race Relations Act provide virtually identical protection against discrimination by way of victimisation. The provision in the Disability Discrimination Act is substantially the same, although the wording is not identical. It is assumed that, in this area at least, the provisions of the Disability Discrimination Act 1995 will be interpreted in the same way as those in the SDA and RRA, although there is as yet no case law on the Act. What follows will therefore refer to the SDA and RRA only, but is likely to apply equally to the Disability Discrimination Act.

Section 2 of the Race Relations Act provides:

2. Discrimination by way of victimisation

(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has -

(a) brought proceedings against the discriminator or any other person under this Act; or

(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or

(c) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or

(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act, or by reason that the discriminator knows that the

person victimised intends to do any of those things, or suspects that the person victimised has done or intends to do, any of them.

(2) Subsection (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

Section 4 of the Sex Discrimination Act provides exactly the same protection except that it covers the bringing of proceedings or giving of evidence in proceedings under the Equal Pay Act 1970 and Part I of Schedule 5 to the Social Security Act 1989 as well as the Sex Discrimination Act. As a result, case law on s 4 of the Sex Discrimination Act can be used in interpreting s 2 of the Race Relations Act and vice versa¹. The remedy available to employees where victimisation has taken place is compensation. There is no statutory limit on levels of compensation awarded.

Evidence suggests that many of those who bring proceedings under the two Acts suffer some form of victimisation as a result² and these provisions are designed to protect against this. Yet, the protection is not limited to this; in addition it covers those who merely allege that discrimination has taken place and those who do "anything under or by reference" to the Acts, a phrase that is capable of covering a wide range of activity including raising general concerns about discrimination. It would thus appear that an employee who blows the whistle on a specific incident of discrimination or who raises general concerns about discrimination or equal pay should be covered by the Acts. However, restrictive interpretation of the provisions mean that this may not always be the case.

¹It will presumably be used to inform any discussion on the scope of the protection under s 55 of the Disability Discrimination Act 1995.

²See Ellis, *Victimisation of Applicants* [1992] NLJ 1406

Before considering its limitations, the potential width of the protection should be recognised. The protection of any action done "under or by reference" to the Acts is very wide and can cover a variety of behaviour. In *Kirby v Manpower Services Commission*³ the EAT held that an employee who reported a concern about race discrimination to a local Council for Community Relations was doing something under or by reference to the Act (although the case failed on other grounds). This confirms that there is no need for a concern to be linked to current or prospective proceedings in order for the protection to be available. It thus can clearly be used to protect an employee who reports or protests about race or sex discrimination or equal pay.

Furthermore, the SDA and RRA provide that the protection of the employee is only lost if an allegation is neither true nor made in good faith⁴. This means that if an allegation is true, protection is available regardless of the motive of the reporter; and alternatively, that if the allegation turns out to be false, that the reporter will be protected as long as the allegation was made in good faith. This provision is of clear benefit to the employee, particularly the assurance that reports made in good faith will be protected.

However, despite these strengths, the protection is limited both by the wording of other sections of the SDA and RRA and by restrictive interpretations given by the courts. First, they limit the protection to discrimination "in any circumstances relevant for the purposes of any provision of this Act". This means that only victimisation by way of adverse treatment in employment, education or provision of goods, services, facilities and premises is covered, as these are the areas of discrimination covered by the SDA and RRA. Victimisation by discrimination in any other

³[1980] 1 WLR 725 EAT

⁴s 2(2) Race Relations Act 1976 and s 4(2) Sex Discrimination Act 1975. s 55(4) Disability Discrimination Act has a similar provision.

way is not covered, for example discrimination by a fellow employee where the actions cannot be said to be in the course of employment⁵. More comprehensive protection would be provided by prohibiting *any* adverse treatment of complainants⁶.

Secondly, successive restrictive interpretations by the courts have had the effect of rendering the protection virtually unusable for many employees. Although an early restriction was overruled, it has been replaced by an interpretation equally able to undermine the working of the Acts.

The first case that limited the effectiveness of the Acts was *Kirby v Manpower Services Commission*⁷ which concerned the reporting of discrimination against black job applicants. Kirby was employed at a job centre run by the Manpower Services Commission, where he interviewed applicants for jobs. In the course of his job he received confidential information from both employees and employers. The MSC discovered that on various occasions Kirby had reported to the local Council for Community Relations cases where potential employers had refused to employ black applicants. Kirby was demoted and brought a claim under s 2 RRA. Although it was held that such action could be victimisation in that it was action taken with reference to the Race Relations Act, Kirby was ultimately unsuccessful in his claim. The EAT held that in reporting the employers, Kirby had breached their confidence, and that the MSC were only treating Kirby as they would have treated any other employee who breached confidence. Kirby had therefore not been treated less favourably

⁵See *Waters v Commissioner of Police of the Metropolis* [1995] ICR 510

⁶Proposed by The Commission of Racial Equality, *Second review of the Race Relations Act 1976* (CRE, 1992) referred to in Ellis and Miller, *The Victimisation of Anti-Discrimination Complainants - Is it Contempt of Court?* [1993] PL 80 at 82.

⁷[1980] 1 WLR 725 EAT

than any other employee who acted as he did and so could not claim the protection of the section.

Interpreted in this way, the Act's ability to protect those who raise concerns about race or sex discrimination was severely limited. It would only protect those who were victimised because of the specific subject matter of the concern raised, rather than for raising a concern per se. It allowed employers an easy route to avoiding the implications of the Act. Given that there is no protection for raising general public interest concerns at work, almost any employee who raised discrimination concerns would be open to victimisation on the basis that an employer would legally victimise those who raise other concerns⁸.

Doubts about the interpretation of the Act in *Kirby* were expressed in subsequent cases⁹ and it was eventually overruled in *Aziz v Trinity Street Taxis Ltd*¹⁰. The case involved a taxi driver, Aziz, who, suspecting unfair treatment by the company of which he was a member (Trinity Street Taxis), made a secret recording of conversations with members of the company to see whether the sympathy he received publicly was maintained in private. After making the recordings he made a claim for race discrimination against the company. In the course of proceedings the existence of the recordings became known and Aziz was expelled from the company. He claimed that this amounted to victimisation under s 2 of the Act. However, Aziz was unsuccessful at the Industrial Tribunal, Employment Appeal Tribunal and

⁸The argument that there was no breach of confidence by Kirby because he raised matters that were in the public interest, was not raised. However, had it been, it might have been successful, given that Kirby had raised legitimate concerns with a body charged with investigating such matters, the local Council for Community Relations.

⁹*Wild and Joseph v Stephens and David Clulow Ltd*, 16 June 1980, COIT, 1031/35 (Sir Jocelyn Bodilly, Chairman).

¹⁰[1988] IRLR 204

Court of Appeal. The Industrial Tribunal held that he was expelled because of the breach of trust involved in making the secret recordings of his conversations. The EAT followed the approach in *Kirby*, holding that Aziz had not proved that he had been treated less favourably than others who engaged in a similar breach of trust. The Court of Appeal held that this was the wrong approach. Instead of considering whether the applicant had been treated less favourably than a person who had done the same acts but outside the context of discrimination proceedings, the tribunal should compare the applicant with a person who had not done the acts that the applicant had. In so deciding, the Court of Appeal overruled *Kirby*.

However, the Court introduced a new limitation on section 2. It held that a causal link must be shown between the action of the applicant and the reaction of the discriminator. Without the causal link, no claim is made out. In Aziz's case, the decision to expel him was made because the making of secret recordings was felt by members to be underhand and a breach of trust. This broke any chain of causation between the complaint of discrimination and the expulsion from the company.

Although the overruling of *Kirby* was to be welcomed, in effect the restriction on the use of the SDA and RRA is maintained through different means. The extent to which this interpretation undermines the working of the Acts can be seen in various cases. For example, in *British Airways Engine Overhaul Ltd v Francis*¹¹, a case decided before *Kirby* or *Aziz* but using similar reasoning, the EAT held that there was no victimisation where Mrs Francis, a union shop steward was reprimanded after making a statement to the press complaining that her union was not carrying out its policy of seeking equal pay for women. The company claimed that the reprimand was for the breach in company regulations involved in making an unauthorised statement to the press. The EAT confirmed the industrial

¹¹[1981] IRLR 9 EAT

tribunal's finding that this did not amount to discrimination by way of victimisation for making an allegation about breach of the Equal Pay Act. Interestingly, it also found that the reprimand did amount to a penalty for taking part in trade union activities¹², although there seems no logical reason why, if the reprimand was purely for breach of company regulations this latter claim should succeed any more than the claim under the Sex Discrimination Act.

A similar approach was taken in *Re York Truck Equipment Ltd*¹³ where the applicant lost her claim for discrimination by way of victimisation following her dismissal after reporting an attempted rape by one of the employing company's clients. The employer argued that the dismissal was not a reaction to the allegation of rape but was caused by the applicant's disruptive conduct in continuing to involve the company in her "private life problems", including enquiries by the police, after the employer had taken what it felt to be adequate steps to ensure that there would be no further trouble. The industrial tribunal found in favour of the employer and this was upheld by the EAT. There was no causal link between an action related to the Sex Discrimination Act and the dismissal. Instead, the cause of the dismissal was the disruptive conduct of the employee in the manner in which she raised the concern.

If this approach continues, then the potential for the SDA and RRA to protect employees from victimisation is severely restricted. It appears that an employer is allowed to separate out the subject matter of a concern from the manner in which it is raised; where the manner is unacceptable to the

¹²Now contrary to s 146 TULR(C)A 1992

¹³Reported in Industrial Relations Legal Information Bulletin 20 February 1990, p 11.

employer then this can be grounds for dismissal¹⁴. This leaves the employee in a very difficult position, especially considering that in some cases, lack of reaction from an employer to a concern may tempt an employee to use some form of "disruptive" behaviour in order to ensure that the employer considers the complaint. Clearly such a tactic could leave the employee unprotected.

In *Nagarajan v Agnew*¹⁵, there is evidence of a degree of retreat from the approach in *Aziz*. The EAT pointed out that *Aziz* was a case where there was only one motive for the dismissal, a motive that was not related to the Race Relations Act. In contrast, where there are mixed motives for an action, as there were in *Nagarajan*, the actor will be liable as long as one of the motives is discriminatory. Support for this approach was found from cases dealing with other parts of the RRA and SDA, in which a more generous approach to the interpretation of the Acts is taken, in contrast to that in relation to the victimisation provisions. In *O'Neill v Governors of St Thomas More Upper School*¹⁶ a similar approach to causation was taken to that in *Nagarajan*. The respondent school in the case argued that the dismissal of a female member of staff was not by reason of her pregnancy, but because the father of the child was a Roman Catholic priest. The EAT held that the factor alleged to be causative of the discriminatory act did not even need to be the main cause, as long as it was an effective cause. In this case the fact of the pregnancy permeated the decision to dismiss and so the dismissal was discriminatory. Such an approach to causation in victimisation would improve the protection provided by the law.

¹⁴It should be noted that in this case the applicant did not qualify for unfair dismissal protection; had she done so, the industrial tribunal would have found the dismissal unfair.

¹⁵[1994] IRLR 61 EAT

¹⁶[1996] IRLR 372

Further support for those seeking to prove victimisation can be found in *Baker v Cornwall County Council*¹⁷, where the Court of Appeal pointed out that in discrimination cases the discriminator is very unlikely to admit the discrimination. If the alternative explanation for the discriminator's behaviour is accepted too readily, then it will often be very difficult to prove the complainant's case. Instead, the Court suggested that tribunals should be prepared to draw the inference that there has been discrimination in cases where the circumstances are consistent with discrimination, unless the alleged discriminator can show otherwise. In *Owen and Briggs v James*¹⁸, the Court of Appeal held that a finding that a racial consideration was an important factor in a decision is sufficient to found a case of discrimination. Clearly, tribunals must allow defences to succeed where appropriate, but once the ease with which an alternative explanation can be given has been recognised, the victims of discrimination should find it easier to succeed in their claims, even though they retain the burden of proving the causal link between the victimisation and an act with reference to the SDA or RRA.

One final limitation of the victimisation provisions was confirmed in *Nagarajan*¹⁹. Nagarajan, whilst an employee of London Underground Ltd., made several claims of discrimination against his employer. He was later unsuccessful in his application for a new job with London Regional Transport, after an unfavourable report was written about him. He claimed that this was victimisation for making the earlier claims of discrimination. Despite its more generous approach to finding discriminatory motives, the EAT held that the anti-victimisation provisions only applied to events occurring during the course of employment and not to the victimisation of a former employee. Thus an employee is only protected against

¹⁷[1990] IRLR 194

¹⁸[1982] IRLR 503

¹⁹[1994] IRLR 61

discrimination by a current employer²⁰. No protection is granted for those denied a fair reference by reason of any actions done with reference to the SDA or RRA. This limitation has the potential seriously to undermine the protection provided by the sections, especially as many employees prefer to raise concerns about a workplace after they have left.

In conclusion, the victimisation provisions of the RRA, SDA and Disability Discrimination Act provide welcome protection to those who blow the whistle on race, sex or disability discrimination at work. However, the protection is limited, the most serious limitation being the strict requirement for a direct causal link between the action of the employer and the fact that the action of the employee had reference to the Acts, allowing the employer to escape liability where objection is taken to the method by which a concern was raised. A more flexible approach on this issue, for example following the approach to causation taken in the USA²¹, would strengthen the protection provided by the Acts.

3. Scope of Protection under s 100 ERA 1996

Section 100 ERA provides special protection of relevance to an employee who blows the whistle on health and safety matters. It is automatically unfair to dismiss a safety representative for raising concerns about health and safety in the workplace. Where there is no safety representative or safety committee, or it is not practicable to use those means, the protection extends to cover any employee who raises such concerns. The dismissal of employees who leave their place of work (or refuse to return to it) in circumstances of serious and imminent danger is also covered. Section 44 ERA (previously s 22A EP(C)A 1978) provides parallel protection against

²⁰An employee could also be protected against victimisation by a future employer, s 6 SDA and s 4 RRA.

²¹Discussed in Chapter Seven, Whistleblower Protection in the USA at para. 3.2.2.3.

action short of dismissal. These sections were introduced into the EP(C)A 1978 following the adoption of the EC Framework Directive 89/391²² which requires measures to be taken to encourage the improvement in safety and health of workers. Employees are already under a duty to inform their employer of concerns about health and safety²³; sections 44 and 100

²²Article 13(2)(d) of the Framework Directive imposes a duty on employees to inform their employers and fellow workers of any shortcomings in the protection arrangements and any work situation which they have reasonable ground for considering represents an immediate danger to safety and health. Workers representatives are required to take part in measures that can affect health and safety and are not to be placed at a disadvantage for doing so.

²³ s 7 Health and Safety at Work Act 1974

"It shall be the duty of every employee while at work -

(a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work...."

SI 1977/500 Safety Representatives and Safety Committees (SRSC) Regulations 1977 includes in the safety representative's functions the making of representations to the employer on general matters affecting the health, safety or welfare at work of the employees at the workplace - Regulation 4(1)(d)

The SRSC Regulations only apply to union appointed safety representatives and committees. The more recent regulations below apply to all employees.

SI 1992/2051 Management of Health and Safety at Work (MHSW) Regulations 1992, Regulation 12

"Every employee shall inform his employer or any other employee of that employer with specific responsibility for the health and safety of his fellow employees -

(a) of any work situation which a person with the first-mentioned employee's training and instruction would reasonably consider represented a serious and immediate danger to health and safety; and

(b) of any matter which a person with the first-mentioned employee's training and instruction would reasonably consider represented a shortcoming in the employer's protection arrangements for health and safety,

insofar as that situation or matter either affects the health and safety of that first-mentioned employee or arises out of or in connection with his own activities at work, and has not previously been reported to his employer or to any other employee of that employer in accordance with this paragraph.

strengthen this commitment to health and safety by providing the protection of job security that is necessary if employees are to feel safe to fulfil these duties²⁴.

In addition to protection against dismissal and action short of dismissal, designated employees and safety representatives are also eligible for additional remedies such as a special award and interim relief²⁵. The advantage to the employee is not only in the increased compensation represented by the special award, but also the fact the case is heard speedily, with the opportunity for reengagement, reinstatement or payment of wages, pending a full hearing²⁶.

The protection is subject to various limitations and cannot be used by all employees. In the first place, the main focus of the Framework Directive and sections 100 and 44²⁷ is on the protection of safety representatives and the additional remedies of interim relief and the special award are only available to these employees²⁸. Other employees are protected only when there is no safety representative or committee, or, if they do exist, when it

In addition, the Approved Code of Practice which accompanies the MHSW regulations, provides that employees should inform their employer of any matter relevant to health and safety so that the employer can fulfil his duty to provide safe work environment.

²⁴The Health and Safety (Consultation with Employees) Regulations 1996 SI 1996/1513 extends protection to employees consulted on health and safety matters.

²⁵ss 125 and 128 ERA (previously ss 75A and 77 EP(C)A)

²⁶ss 129 and 130 ERA (previously ss 77A and 78 EP(C)A)

²⁷Sections 100 and 44 are drafted in substantially the same terms. Discussion will be limited to s 100 but the same points will apply to the protection available under s 44.

²⁸ss 118(3) and 128 ERA (previously ss 72(3) and 77 (1) EP(C)A)

is not reasonably practicable to use them as the channel through which to communicate concerns²⁹. The circumstances in which a tribunal will find that it was not "reasonably practicable" to use the designated means are not clear, but more worryingly, it is not at all clear why an employee may not raise genuine concerns about health and safety without going through the designated route of safety representatives where they exist. For example, an employee who voices concern direct to management will not come within the protection of s 100. Of course, a dismissal for such action may still be unfair, but it is not automatically so.

The second limitation of the protection is that it seems only to protect those who raise concerns about health and safety *in the workplace*, rather than, for example, concerns about the safety of consumers of the goods once they have left the workplace. The only possible exception to this is where "appropriate action" is taken to protect the employee *or other persons* from serious and immediate dangers³⁰. Again, the dismissal of an employee for raising concerns about the safety of consumers in less urgent circumstances will not come within the protection of the section.

This was confirmed in *Brendon v BNFL Flurochemicals Ltd*³¹, where an employee was unsuccessful in claiming the protection of s 100 in relation to his dismissal for his reluctance to sell a particular chemical to customers abroad as he believed that they might sell the product on illegally. The tribunal commented that "the protection given by the subsection extends only to matters concerned with the health and safety at work or in the workplace and not to matters which are ... not connected with the safety of the products but are in reality ethical considerations regarding [the] possible end user [of the product]".

²⁹s 100(1)(c)

³⁰s 100(1)(e) and s 44(1)(e)

³¹COIT Case No. 59163/94

Thirdly, s 100(3) provides a defence to employers where it can be shown that the action taken by the employee is negligent. This is presumably designed to cover the situation where, for example, an employee leaves the dangerous place of work without taking simple steps to avoid the continuation of the danger, such as switching off a machine. However, it has been suggested³² that this could cover negligence liability for statements made by employees which might cause economic loss to the employer, such as where statements about the safety of goods manufactured by the employer are made publicly. Arguably this would be covered by s 100(1)(e) (taking appropriate steps to protect others in circumstances of danger), but dismissal for such action may nevertheless be fair if the statement is made negligently and the employer incurs loss. On the other hand, if it is in the public interest that the statement was made, the employer defence may not apply³³.

The limitations outlined above mean that there is often no automatic protection for ordinary employees who blow the whistle on health and safety matters. However, it may be the case that those who are not covered by s 100 will still be able to find a remedy for dismissal. One possibility for public sector employees is that where the Framework Directive provides more extensive coverage than domestic legislation, and where the rights are sufficiently clear, the directive may be used directly³⁴. However, although the directive does include some wider obligations than those in domestic legislation on matters such as the extent to which employers must provide information on health and safety, it does not give any wider employment

³²Cripps, *The Legal Implications of Disclosure in the Public Interest* (1994) Sweet and Maxwell, London at p 320.

³³*Ibid*, at p 320.

³⁴See *Van Duyn* [1975] Ch 358 and *Foster v British Gas* [1990] IRLR 353 and [1991] IRLR 270

protection to those who raise health and safety matters. Thus, employees remain dependent on domestic protection against dismissal.

There is nothing to stop the employee who does not come within s 100 from claiming that the dismissal is unfair using the general unfair dismissal protection. Although the failure to bring the claim within s 100 means that the unfairness of the dismissal is not automatic, it is still open to a tribunal to find that it was unfair. There are two factors in health and safety cases that may improve the chances of success in a claim beyond those in other the whistleblowing cases. First, it may be difficult for an employer to claim that there has been misconduct because employees are, by virtue of s 7 of the Health and Safety at Work Act, under a duty to take reasonable care for the health and safety of people who may be affected by their acts or omissions at work, a duty which may involve disclosing concerns more widely than envisaged by s 100. Secondly, the public interest in encouraging the protection of health and safety at work is clear, and it is to be expected that tribunals, in applying the s 98(4) test of reasonableness, will be unwilling to find that a dismissal for such a reason is fair³⁵.

It is thus arguable that the additional protection provided by s 100 is not the panacea for health and safety dismissals that it might seem at first sight. This view is confirmed when one considers that designation of certain dismissals as automatically unfair does not overcome the severe practical problems faced by employees in showing that a dismissal was caused by raising matters of health and safety. The fact that the dismissal is automatically unfair merely avoids the uncertainty of whether an industrial tribunal will find the dismissal fair or not. It does not avoid the problem of showing that the dismissal (or other detrimental treatment) was caused by the reporting of health and safety concerns. As in the case of discrimination by way of victimisation, unless this causal link is shown, an employee will

³⁵See previous chapter on interpretation of s 98(4) in the case law.

not come within the protection of the section. Given the consequences of a finding that a dismissal was for a health and safety (or indeed a discrimination) reason, employers have everything to gain from showing that the dismissal was for some other reason.

4. Scope of Protection for taking part in Trade Union Activities

The Trade Union and Labour Relations (Consolidation) Act 1992 provides protection against dismissal and action short of dismissal for membership or non-membership of a trade union and for taking part in the activities of a trade union at an appropriate time³⁶. It is possible that an employee who is a member of a trade union and who discloses information as part of a trade union campaign may be able to use these sections as protection against any resulting or threatened penalty. However, the protection is limited to actions that are endorsed by the trade union and can therefore be said to be an activity of the trade union; a unilateral decision by an employee to disclose information will not be protected merely because the employee is a trade unionist³⁷.

As with the protection outlined above, the protection is more generous than that for other unfair dismissals as interim relief is available together with the added compensation of a special award if the case is made out. However, although such dismissals are automatically unfair, this by itself does not solve all the problems. Even where there is an activity of a trade union, the sections only apply where the "reason" for dismissal³⁸ or

³⁶ss 146 and 152 TULR(C)A 1992.

³⁷*Chant v Aquaboats Ltd* [1978] ICR 643 where an employee acted as a spokesman for a group of employees in raising concerns with management. The action was not an action of the union just because he was a trade unionist. His actions may now be covered by s 57A EP(C)A 1978.

³⁸s 152 TULR(C)A 1992

"purpose" of action short of dismissal³⁹ is to penalise the individual for taking part in the trade union activity. This imposes restrictions on the operation of the section similar to the causal requirement in relation to the protection provided by the Sex Discrimination Act and Race Relations Act. In fact, the restriction may be even stronger in that even where the employee can show that but for the participation in the trade union activity she would not have been dismissed or subjected to the detrimental treatment, the employer may have a defence if it can be shown that there was some ulterior motive or purpose for the action⁴⁰.

The "purpose" or "reason" requirement may well prevent whistleblowers using the protection. In cases where employees are dismissed or have action short of dismissal taken against them for blowing the whistle on matters relating to the work place, it may well be that tribunals find that the purpose or reason for the action is the breach of confidence involved, or the consequent lack of trust between the parties⁴¹, rather than the fact that the action was a trade union activity.

On the other hand, the result in *British Airways Engine Overhaul Ltd v Francis*⁴², suggests that the causal link requirement in the SDA and RRA may prove a bigger obstacle to employees than the "purpose" or "reason" requirement in relation to ss 146 and 152. Here the trade unionist employee was reprimanded for making a press statement about equal pay without authorisation. The EAT held that this was not victimisation under s 4 SDA

³⁹s 146 TULR(C)A 1992

⁴⁰*Associated Newspapers Ltd v Wilson and Associated British Ports v Palmer* [1995] 2 All ER 100

⁴¹Even if the disclosure is in the public interest and so does not involve a breach of confidence it may result in a lack of trust between the parties which could affect future working relations.

⁴²[1981] IRLR 9 EAT

because the reprimand was for the breach of company rules involved. It might seem logical that it could therefore not be for the purpose of penalising trade union activity either, however the EAT held that the reprimand did amount to action short of dismissal for taking part in trade union activities. Similarly, in *Bass Taverns Ltd v Burgess*⁴³ the Court of Appeal did not allow an employer's claim that a dismissal for making critical remarks about the company at a union recruitment meeting was not a dismissal for trade union activities. It referred with approval to *Lyon v St James Press Ltd*⁴⁴ where the court warned that ready acceptance that a dismissal was for the actions actually undertaken could obstruct the protection of trade union activities; instead it was important to bear in mind the trade union context of the actions.

The circumstances in which a whistleblower can use the protection provided by sections 146 and 152 TULR(C)A will be fairly rare. The disclosure would need to be part of recognised trade union activity and the penalty would need to have been imposed because it was trade union activity rather than because of the breach of confidence involved. The weakness of the sections in adequately protecting the whistleblower is perhaps unsurprising. The sections were designed to provide support for individual workers seeking to further their collective interests. Although whistleblowing in the public interest can be seen as the pursuit of collective interests it tends to be carried out by individualist means, and is not one of the core activities that the legislation aims to protect.

⁴³[1995] IRLR 596

⁴⁴[1976] IRLR 215

5. Protection for witnesses who give evidence at public inquiries

Under the Witness (Public Inquiries) Protection Act 1892 it is an offence to threaten, punish, damnify or injure a person for having given evidence at an inquiry⁴⁵. An employee who is penalised, by dismissal or otherwise, for disclosing confidential information at an inquiry may also claim compensation⁴⁶. The protection is limited to the giving of evidence at a public inquiry held "under the authority of any Royal Commission, or by any committee of either House of Parliament, or pursuant to any statutory authority,"⁴⁷ and does not cover evidence at informal inquiries or evidence given at court⁴⁸. The Act's ambit is therefore rather narrow and it will only protect the whistleblower in very limited circumstances⁴⁹.

6. Conclusions

The provisions discussed above provide legal protection for employees who blow the whistle on certain specific issues at work, and can be seen to complement the protection available under the general law. Despite the various origins of the protection, they share the same major weakness in protecting whistleblowers; the difficulty in showing that the adverse treatment was caused by protected conduct. If any additional protection for whistleblowers is to be introduced and is to be effective, the problem of causation will need to be addressed.

⁴⁵Section 2 Witnesses (Public Inquiries) Protection Act 1892

⁴⁶Section 4

⁴⁷Section 1

⁴⁸Attempts to injure or punish a witness in court proceedings would be contempt of court.

⁴⁹See chapter 10 in Cripps, *The Legal Implications of Disclosure in the Public Interest*, (1994) Sweet and Maxwell, London, 2nd Edition.

Clearly, employers need to guard against the possibility of employees avoiding legitimate disciplinary action by making a disclosure, so a causal link does need to be shown between the disclosure and any adverse action. Equally, insistence on a direct link can be exploited by employers, who have all to gain from showing that dismissal was for a reason that is not prohibited.

As considered above, there is, within the current law, the potential for a broader approach to causation to be taken. Where the circumstances are consistent with dismissal for a prohibited reason, a causal link can be inferred, and the onus put on the employer to refute it⁵⁰. Courts can also be warned against accepting too readily any contention that dismissal was for a legitimate reason, and reminded of the ease with which alternative reasons can be presented⁵¹. Where there appears to be more than one reason for a dismissal, a causal link should be accepted where the prohibited reason is one of the effective causes, and in considering this question, the context of the dismissal should be considered⁵².

Taken together, these developments suggest that courts could take a more flexible approach to causation, without waiting for any major amendments to the law. If applied to whistleblower protection, a more flexible approach on causation could allow courts to look at issues such as whether the raising of concerns was justifiable, or whether there was a bona fide reason for raising the issue, as well as the manner in which the concern was raised. Where it is right that the concern should have been raised, protection should be available for any resulting victimisation, even though there may be other

⁵⁰*Baker v Cornwall County Council* [1990] IRLR 194

⁵¹*Bass Taverns Ltd v Burgess* [1995] IRLR 596, *Lyon v St James Press Ltd* [1976] IRLR 215

⁵²*O'Neill v Governors of St Thomas More Upper School* [1996] IRLR 372

causes involved. Such an approach to causation could strengthen the protection available under any new legislation, although the potential for any changes in the test of causation should not be overestimated. The experience of the USA suggests that changes to the test of causation only has a limited effect; the main problem in using legislative protection for whistleblowing remaining that of proving causation⁵³.

Arguably, these provisions are of additional and wider significance, beyond the protection they provide to specific types of whistleblower. They demonstrate a recognition by the legislature that individual protection against reprisal is needed if the wider objectives of the legislation are to be achieved. A right not to be discriminated against on grounds of sex will clearly be ineffective if employees can be dismissed for exercising it. Equally, if employees are to be encouraged to raise concerns about matters that are in the public interest, similar protection is needed. Indeed, it was a desire to end corruption and maladministration that led to legislation to protect whistleblowers in the USA.

The inclusion of victimisation provisions in the legislation examined above indicates that in respect of the specific issues covered, the argument for employee protection has been won. These provisions could therefore be used to argue for protection to be extended to cover employees who disclose a wider range of matters which are equally in the public interest.

⁵³See the experience in the USA, discussed in Chapter Seven.

Six

Whistleblowing and Human Rights: Protection available under Article 10 of the European Convention on Human Rights

It will be asserted that the uncertainties in the law on confidentiality, and the limitations inherent in unfair dismissal legislation mean that the UK law fails adequately to protect those who blow the whistle at work. It is therefore worth considering the extent to which a whistleblower who is not protected under domestic law would be successful if a claim were to be brought under the European Convention on Human Rights. Article 10 provides the right to freedom of expression, and is the provision of the Convention that is most relevant when an employee is disciplined or dismissed for speaking out on matters of public concern.

Article 10:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

1 The Aims of Protection

The preamble to the European Convention on Human Rights provides that the "fundamental freedoms which are the foundation of justice and peace in the world are best maintained... by an effective political democracy...". The European Court of Human Rights (the Court) recognises that freedom of speech is central to those aims; it is clear from the case law on Article 10 that freedom of speech is protected because of its importance to the democratic process. Citizens need information so that informed participation in the political process can take place. Thus the right to free speech (to impart information) and the right to receive information are protected by the same article of the Convention. This rationale for the protection of speech is reflected in the judgement of the court in *Handyside* that "freedom of expression constitutes one of the essential foundations of [a 'democratic society'], one of the basic conditions for its progress and for the development of every man¹".

It is clearly important that, if the public is to enjoy freedom of information, free speech should enjoy general protection; this is particularly important

¹ (1981) 1 EHRR 737. See also *Sunday Times v UK* (1979) 2 EHRR 245, *Lingens v Austria* (1986) 8 EHRR 407, *Barthold v Germany* (1985) 7 EHRR 383.

in relation to information that is of public interest or concern. For this reason protection should be available to employees who may have specialist knowledge to enable them to participate and contribute to debate on issues of public importance. However, it is not clear that such protection is always available under the Convention.

2 Use of the European Convention on Human Rights by individual employees

Before an individual can bring a claim to the European Court of Human Rights she must have exhausted any local remedies and be able to show that the failure to protect her rights can be imputed to the State. The first condition will be fairly easily met: the employee dismissed for blowing the whistle will need to bring a claim for unfair dismissal to a tribunal, and go through any appeal process open to her. Public sector employees will easily meet the second condition as the failure to uphold the employees' freedom of speech will be an action of the State. Private sector employees may have more difficulty in meeting this condition.

2.1 Action of the State

It has been accepted by the Commission and Court that a failure to enact legislation to protect employees from breaches of the Convention can be imputed to the State. This was confirmed in *Young, James and Webster v UK*², where the three applicants, employed in a workplace which operated a closed shop, were dismissed for non-membership of a union. They successfully argued that this was in breach of their right to freedom of association under Article 11. The failure to provide domestic legislation to prohibit dismissal for non-membership was the responsibility of the state

²[1981] IRLR 408

and could therefore be imputed to the state for the purposes of claiming the protection bringing the case. Arguably, then, any failure by the domestic courts to protect whistleblowers could similarly be imputed to the state and give rise to a claim.

However, in *Rommelfanger v FDR*³ the European Commission on Human Rights ruled inadmissible a case concerning the dismissal of a doctor in a Roman Catholic hospital for writing a letter to the press disapproving of the Church's attitude to abortion. The Commission held that the case involved no direct state interference with the applicant's freedom of expression. His contractual duties to the hospital had been breached by the letter, and the Commission was of the view that the enforcement of contractual duties, if the contract had been freely entered into by the parties, did not constitute an interference by a public authority warranting the action of the Commission or Court. This was particularly the case because the law applied by the domestic courts included a degree of flexibility as to its application, allowing the court to weigh up competing interests of employer and employee. This meant that the employee was adequately protected by the domestic law, even though in this instance the discretion was exercised against him.

This case may cause difficulties for a private sector employee who wishes to claim the protection of the Convention. Arguably, there exists sufficient flexibility in the domestic law, whether in the interpretation of the public interest defence to a breach of confidence claim, or in the application of the test of fairness in unfair dismissal⁴, for the Commission to find that the enforcement of this area of law does not constitute an interference by the State. On the other hand, failure of the domestic law to protect public

³Applic. No. D12242/86 (1989) 62 D&R 151

⁴s 98(4) ERA 1996, previously s 57(3) EP(C)A 1978

interest whistleblowers, particularly by the operation of the "range of reasonable responses" test in unfair dismissal is, equally arguably, the responsibility of the State, and thus a claim under Article 10 of the Convention may be possible.

2.2 Approach of the Court where penalty for speech is dismissal

A further difficulty for an employee in bringing a claim under the Convention is that dismissal has not always been seen as a sufficient infringement of human rights to warrant protection. However, after the case of *Vogt v Germany*⁵, this difficulty may have diminished.

In *Kosiek v Germany*⁶, where a probationary lecturer was dismissed from his post because of his active membership of the National Democratic Party, it was stated that the Convention did not cover access to public office, and this was what was at the heart of the issue in this case. Similarly, in *Glaserapp v Germany*⁷, a probationary secondary school teacher was dismissed amongst other things for refusing to certify in writing that she did not support the German Communist Party, the KPD. The Court held again that the issue was one of access to the civil service, and thus not covered by the Convention.

By taking this line, the Court did not have to consider whether the dismissals were necessary in a democratic society nor whether they were justified or proportionate⁸. If it had done so, it would have had to address the fact that in neither case was the mode of interference (dismissal) related

⁵(1996) 21 EHRR 205

⁶(1986) 9 EHRR 328

⁷(1987) 9 EHRR 25

⁸See discussion on this below.

to the speech. The speech was totally unconnected with the applicants' duties in school. It is arguable that action taken in connection with employment can never be a proportionate response to speech outside that employment. The finding that there was no *prima facie* breach of the Convention meant that this issue was ignored.

A similar approach was taken in *Leander v Sweden*⁹ where the applicant claimed that the refusal to offer him a job as a museum technician, because certain secret information allegedly made him a security risk, was in breach of Article 10. The application was dismissed on the basis that the right to recruitment to the public service was not recognised by the Convention. According to these three cases, employees dismissed for speaking on matters relating to their work may find that they cannot claim the protection of the Convention as there is no *prima facie* breach of the convention¹⁰.

However, these fears have been lessened following the case of *Vogt v Germany*¹¹. Like *Kosiek* and *Glasnapp* the case involved the dismissal of a teacher for being a member of the German Communist Party. This time, the court upheld her claim that this breached Article 10. It distinguished *Kosiek* and *Glaserapp* on the basis that they concerned probationary employees and therefore access to the civil service. *Vogt*, in contrast, was already a permanent civil servant at the time of the dismissal. This meant that the Court could no longer avoid the issue of whether dismissal amounted to an interference with the rights guaranteed under the Convention. Although the margin in favour of finding that the dismissal

⁹(1987) 9 EHRR 433

¹⁰Although in each of these cases the penalty for speaking was dismissal from the civil service, the reasoning could apply to other employees dismissed for speaking on work-related matters.

¹¹(1996) 21 EHRR 205

amounted to an interference warranting protection was very narrow (ten votes to nine), it sets a clear precedent to be followed.

After *Vogt*, it is much less likely that the Court or Commission will take the view that dismissal does not involve a prima facie breach of the Convention¹². Even before *Vogt* there were cases that supported the contention that dismissal for exercising the right to freedom of expression is in breach of the Convention. In *Lingens*¹³ it was said that the threat of legal proceedings could inhibit participation in public debate: although prosecution is a more serious penalty than dismissal, the threat of dismissal will operate as a very real restraint on speech on sensitive issues. In the admissibility proceedings in *Glaserapp*¹⁴ it was said that "the scope of Article 10(1) may be wider than merely to forbid the complete interruption or prevention of freedom of expression, and may extend further to protect the individual against certain other restrictions or penalties which result directly from the expression or holding of an opinion". In addition, in *Van Der Heijden v the Netherlands*¹⁵ the Commission recognised that to dismiss for exercising the right to free speech is to restrict and penalise that freedom, and this can be just as strong a deterrent to speech as total prohibition¹⁶.

¹²In 1995 *Ahmed v UK* (1995) 20 EHRR C.D. 72 which involves a claim under Article 10 by local government employees whose political activities are restricted by the Housing and Local Government Act 1989, was found admissible.

¹³(1986) 8 EHRR 407

¹⁴*X v Germany* 9228/80 (1983) 5 EHRR 471

¹⁵11002/84 (1985) decision of 8th March

¹⁶The case involved the dismissal of the director of an immigration centre on account of his political activities. The Commission stated that although the case concerned only the effects of exercising the right of free speech, not the removal of the freedom itself, nonetheless the termination of employment did restrict and penalise freedom of speech as it resulted from its exercise. The case was declared inadmissible as the measure was

As was pointed out in one of the dissenting judgments in *Vogt*¹⁷, the distinction between the protection of the freedom of speech of probationers and that of permanent staff is difficult to maintain on any principled basis. Indeed, if the distinction is raised in a future case, rather than confirm the distinction between probationary and permanent staff, it would be preferable for the Court to admit that there has been a change of policy, and to follow the approach of *Lingens* and *Van Der Heijden*, recognising that dismissal for exercising the right to free speech is sufficiently strong a deterrent to speech to warrant protection.

Once the issue is seen to be one of freedom of speech, rather than access to jobs, then an employee who has been dismissed for exercising that right will be able to have the necessity and proportionality of the dismissal considered. Dismissal is a severe response and the interest in restricting speech will need to be very strong to be proportionate. Such an approach is also consistent with the statements of principle in cases such as *Handyside* that free speech is vital for a democratic society. Once it is recognised that the threat of dismissal is a serious disincentive to speaking out on matters of public importance, it is clear that such action needs the full protection of the Convention.

3 General provisions of Article 10

Article 10 protects the holding and expressing of opinions, and the imparting and receiving of information. Although the protection covers all types of information and opinion and "is applicable not only to

necessary in a democratic society; his political activity was on behalf of party that was hostile to presence of foreign workers and was clearly incompatible with his job.

¹⁷That of Judge Jambrek.

‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”¹⁸, the level of protection given varies according to the type of information as will be seen below. Furthermore, the protection is not absolute, but is limited by the operation of Article 10(2).

3.1 Restrictions contained in Article 10(2)

Article 10(2) recognises that freedom of expression carries with it duties and responsibilities, and therefore that in some cases freedom of expression must be limited. However, the circumstances in which such limitations are to occur are restricted. They must be prescribed by law; they must be for one of the reasons listed in the section; and they must be necessary in a democratic society. All three of these conditions must be met before a restriction or interference with freedom of expression will be acceptable under the Convention. The legitimate reasons that will be most relevant to the whistleblower will be the protection of the reputation of others; the prevention of the disclosure of information received in confidence and, in some cases, interests of national security. Even where such a legitimate reason for interference with freedom of expression exists, such interference will still be in breach of the Convention unless the interference is prescribed by law and necessary in a democratic society.

3.1.1 Prescribed by Law

In *The Sunday Times v UK*¹⁹ the Court had to consider how precise legal prescriptions had to be to meet the requirements of Article 10(2). The case

¹⁸*Handyside*, as above

¹⁹(1979) 2 EHRR 245

involved an injunction to prevent the publication of articles about the thalidomide drug whilst litigation was ongoing between the drug manufacturers and the parents of children born with deformities whose mothers had taken the drug during pregnancy. The law governing contempt of court, under which the injunction was obtained was, at that time, contained in imprecise rules of English common law. The Court's answer on the question of whether there was sufficient certainty for the injunctions to be "required by law" was as follows:

"First the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable."²⁰

Where the legitimate aims of a restriction on speech relate to the protection of the reputation of others or prevention of disclosure of information received in confidence, such restrictions will be provided by the laws on defamation and on restraint of disclosure of confidential information. Any uncertainty in the outcome of a case of defamation probably is within the bounds of acceptable uncertainty envisaged by the Court in *The Sunday Times* case. In respect of the rules on breach of confidence, the outcomes are difficult to predict, given the many different factors that can be taken into account in assessing the public interest in any particular case. However,

²⁰Ibid at para 49. See also *Hodgson and others v UK* (Applications 11553/85 and 11658/85, Admissibility decision, 9th March 1987) 51 D&R 136 where the Commission said that "The mere fact that a legislative provision may give rise to problems of interpretation does not mean that it is so vague and imprecise as to lack the quality of 'law' in this sense".

given the approach in *The Sunday Times* the rules preventing disclosure of confidential information would probably be considered sufficiently certain.

It is arguable that the implied employment terms requiring trust and confidence between the parties mean that dismissal for breach of confidence is a penalty that is prescribed by law. The terms are certain and well established, and are implied by the operation of the common law. Alternatively, dismissal or discipline may be prescribed by professional rules that govern the employee, such as the professional codes of conduct that impose a duty of confidence on medical staff. In *Barthold v Germany*²¹ the Court accepted that restrictions on professional advertising imposed by a professional body were 'prescribed by law' for the purposes of Article 10(2). The 'law' for these purposes is not limited to national laws but extends to professional rules and codes of conduct. Discipline or dismissal of an employee may therefore be 'prescribed by law' where this is provided for by a professional code of conduct.

3.1.2 Legitimate aims listed in Article 10(2)

If an employee speaks out about matters of concern at work, and restrictions on that speech are provided by law, the restriction must be for a purpose listed in Article 10(2). Restrictions in the interests of national security are clearly necessary although the Court should consider any such claim carefully. The other purposes that are likely to be applicable are the protection of the reputation of others and the prevention of the disclosure of information received in confidence.

Where information relates to matters of public interest, no duty of confidence arises²². It is therefore arguable that any restrictions on the

²¹(1985) 7 EHRR 383

²²*Gartside v Outram* (1856) 26 LJ Ch 113

communication of such information are without a legitimate aim and so will be in breach of the Convention. If this were accepted by the Court and Commission in a particular case, there would be no need to undertake the subjective assessment of whether the restriction would be necessary in a democratic society; the public interest whistleblower could be fairly safe in assuming that, because of the lack of a legitimate aim, restrictions to speech would be in breach of the Convention. However, it is not clear that the Court and Commission would take this approach, and in any event, other legitimate aims, such as the protection of the reputation of others would still give rise to a legitimate restriction.

Furthermore, it is not easy to predict in every case whether the public interest will be sufficient to negate the confidence in the information. Where it does not, the restriction will be for a legitimate aim and, as in other cases where the restriction is for the one of the purposes listed in Article 10(2), the necessity of the restriction will then fall to be considered.

3.1.3 Necessary for a democratic society

"The Court notes... that, whilst the adjective 'necessary', within the meaning of Article 10(2), is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable', or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessary' in this context.... Article 10(2) leaves to the Contracting States a margin of appreciation."²³

²³*Handyside* at para 48

3.1.3.1 Proportionality

In *Handyside* the court said that in order for a restriction to be necessary in a democratic society, it must be proportionate to the legitimate aim pursued²⁴. A disproportionate response will involve a breach of the Convention. What is a proportional response will vary from case to case, depending on the context and the type of speech. This is recognised by the Court and it allows a margin of appreciation to states in their application of the Convention.

3.1.3.2 The Margin of Appreciation

The *Handyside* judgment makes it plain that as the necessity for a restriction on free speech will not always be easy to judge, a margin of appreciation, that is, a degree of latitude or flexibility, is allowed to states in their observance of the Convention. It is also clear that this flexibility is limited. It is subject to European supervision and any restriction is to be proportionate to the aim pursued.

The extent of the margin allowed may depend on the type and subject matter of the speech²⁵. In *Handyside* where the concept was used in relation to Article 10(2), the court was concerned with the prosecution of the publisher of a book under the Obscene Publications Acts. The book called 'The Little Red Schoolbook' was aimed at school aged children and contained a number of pages with information relating to sex and drugs, with no mention of the illegality of the drugs mentioned, nor of the illegality of sexual intercourse between boys over 14 and girls under 16. In

²⁴*Handyside* at para 49

²⁵"The scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10(2)." *The Sunday Times* at para 59.

deciding that the prosecution involved no breach of the Convention, the Court recognised that there is no uniform European concept of morals and that individual states are in a better position to decide necessary limits on freedom of speech in such matters. The margin of appreciation referred to by the court allowed such discretion to be introduced into the concept of necessity in the Convention. In contrast, in *The Sunday Times*, the need to maintain the authority of the judiciary could be judged more objectively than the moral questions in *Handyside*²⁶. There was therefore a narrower margin of appreciation and the Court was willing to find that the UK was in breach of the Convention.

A margin of appreciation is probably necessary for the Convention to be workable, given that there is always room for judicial discretion in interpretation, and especially given the rather vague language of the Convention²⁷. On the other hand, the margin of appreciation should not be interpreted so widely that it prevents the Court from undertaking effective supervision of national courts and legislation. This was the fear of the dissenting judges in *Jacobowski v Germany*²⁸. The majority of the Court held that there was no breach of Article 10 where an injunction was allowed preventing the applicant from circulating to journalists newspaper cuttings which were critical of his former employer. They said that although this amounted to an infringement of the applicant's freedom of expression,

²⁶"Precisely the same cannot be said of the far more objective notion of the 'authority' of the judiciary.... Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation." (*The Sunday Times* at para 59.) Also see O'Donnell, *The Margin of Appreciation Doctrine: Standard in the Jurisprudence of the European Court of Human Rights* [1982] *Human Rights Quarterly* 474

²⁷Also, ultimately countries can withdraw from the Convention if it is interpreted against their interests and it is preferable to keep them within the Convention rather than have them leave altogether even though the price may be the weakening of the convention. See O'Donnell, *op. cit.*

²⁸(1994) 19 EHRR 64

it was not disproportionate (and was therefore necessary) bearing in mind the wide margin of appreciation needed in complex and fluctuating matters such as unfair competition. The three dissenting judges argued that the majority had given excessive significance to the doctrine of the margin of appreciation and had, as a result, relied too heavily on the findings of the domestic courts. Allowing too wide a margin of appreciation meant that the Court had not undertaken the effective supervision required by the Convention.

The dissenting judges may well be right. The concept should not be allowed to weaken the protection provided by the Convention²⁹. Although the margin of appreciation can play a useful part in the interpretation of the Convention, if used too freely it can lead to the Court abdicating responsibility for setting standards and relying too heavily on the findings of domestic courts.

3.1.3.3 The relevance of the type of speech

The concepts of proportionality and the margin of appreciation taken together mean that the content of speech will be relevant in determining whether interference is in breach of the Convention. For example, as noted above, speech relating to moral issues will be subject to less supervision than speech relating to the authority of the judiciary. Moreover, where the content of speech upholds one of the stated aims of the Convention (that is, the maintenance of a democratic society), the Court will be very reluctant to sanction interference. The Court recognises that "freedom of political debate is at the very core of the concept of a democratic society which

²⁹In *Brind v UK* (Application No. 18714/91) (1994) 18 EHRR CD 76 the Commission decided that, given the margin of appreciation given states, the Government's broadcasting ban on those representing proscribed organisations under the Prevention of Terrorism (Temporary Provisions) Act 1984 did not contravene Article 10 of the Convention.

prevails throughout the Convention"³⁰. As a result, political discussion is given special protection.

In *Lingens v Austria*³¹ the applicant was convicted of criminal defamation after publishing two articles that criticised the Austrian Chancellor. In holding that this violated Article 10, the Court recognised that press freedom was the best way for people to learn the views and opinions of political leaders, and that the limits of acceptable criticism are wider as regards a politician than as regards a private individual. Despite the fact that the restriction on speech was for the legitimate aim of protecting the reputation of others, it still infringed the rights of the applicant to enjoy freedom of speech as it was disproportionate.

Similarly, in *Castells v Spain*³², the Court held that the conviction of the applicant for insulting the government was in violation of Article 10, even though it served the legitimate aim of preventing public disorder and protecting the reputation of others. The Court pointed out that "[i]n the democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion"³³.

The Court recognises the vital role of the press in informing public opinion on political and other matters of public interest. In several cases the vital

³⁰*Lingens v Austria*, at para 42.

³¹(1986) 8 EHRR 407

³²(1992) 14 EHRR 445

³³*Ibid.* at para 46. See also *Schwabe v Austria* (1993) 14 HRLJ 26 and *Oberschlick v Austria* (1991) 19 EHRR 389.

role of the press as "public watchdog" is recognised and protected³⁴. Taken together these cases indicate that the Court will be reluctant to sanction infringements on the freedom of expression of those who speak about matters that can be said to be of political importance.

However, the converse does not apply. In *Thorgeirson v Iceland*³⁵, the applicant was convicted of defamation for writing newspaper articles criticising the police. The government of Iceland sought to argue that the restrictions allowed by Article 10(2) varied according to the type of speech or expression, with political speech accorded the greatest level of protection; since the opinions expressed by the applicant did not relate directly to the participation of citizens in a democracy, they did not amount to political speech, and therefore interference would be more readily justified. The Court did not accept the argument. It stated that the restrictions of freedom of expression should be narrowly interpreted and that there is no warrant in case law for distinguishing between one type of speech and another. It thus seems that the 'type of speech' argument can only be used to argue for an increase, and not a decrease, in protection³⁶.

4 Application to the whistleblower

Thus far, it would appear that an employee who is restricted from speaking out about misconduct or wrongdoing at work, or who uses her inside knowledge to contribute to public debate will enjoy the protection of the Convention. In cases where the information is 'confidential' but of public

³⁴See *Thorgeirson v Iceland* (1992) 14 EHRR 843, para 63; *Barthold v Germany* (1985) 7 EHRR 383, para 58; *Jersild v Denmark* (1995) 19 EHRR 1, para 31.

³⁵(47/1991/299/370) Judgment 25th June 1992

³⁶It seems that all types of speech are equal but some are more equal than others! At any rate, in this regard, any inconsistencies seem to be resolved in favour of increased protection.

interest, it may be arguable that no legitimate aim is served by a restriction since there is no confidence to be protected. Alternatively, no penalties are prescribed by law to protect the reputation of others where statements are true, or can be classed as fair comment. In other cases the Court will need to look at the third requirement of Article 10(2), that the restriction is necessary for a democratic society. Any restriction will need to be proportionate; given the importance it affords freedom of public debate, it would seem unlikely that the Court would allow a restriction that would discourage others from contribution to that debate³⁷. This will be especially so where the debate can be classed as political³⁸.

Whether or not the speech of the whistleblower would be protected may depend on the nature of the restriction imposed. In *Lingens* and *Thorgeirson* criminal defamation proceedings were brought in respect of the publication and writing of articles criticising a senior politician and the police respectively. In both cases, such penalties for the expression of opinion were found to be in violation of the Convention as the threat of criminal proceedings would inhibit contribution to public debate. In other cases where there has not been a total ban on speech, the protection of the Convention has been more limited.

First, in the case of injunctions prohibiting speech, the position may depend on whether the restriction totally prevents expression of the opinion. One of the reasons for the decision in *Jacobowski*³⁹ that an injunction against the circulation of newspaper cuttings did not constitute a violation of the

³⁷Note that in *Jacobowski v Germany* (1992) 19 EHRR 64, the Court stated that "[t]he fact that, in a given case, [freedom of speech] is exercised other than in the discussion of matters of public interest does not deprive it of the protection of Article 10" (at para 25).

³⁸See Chapter Eight for argument that speech relating to the NHS can be seen to be political.

³⁹(1995) 19 EHRR 64

Convention was that the injunction did not prevent every expression of the opinion, but only prevented publication of the circular. Injunctions that prohibit all expression of an opinion would be more likely to be in breach of the Convention.

Secondly, in several sets of admissibility proceedings the Commission has recognised that those accepting certain jobs should accept corresponding restraints on their freedom of speech. In *E v Switzerland*⁴⁰, a judge, who was reprimanded for distributing a leaflet that commented on pending legal proceedings, argued that such an interference with his free expression was not necessary for the maintenance of the authority and impartiality of the judiciary. The Commission disagreed and in finding the complaint inadmissible said that the judge should, as a public official serving in the judiciary, show restraint in the exercise of his freedom of expression. In *Morrisens v Belgium*⁴¹, an application to the Commission was declared inadmissible where a teacher was dismissed following a television interview in which she had made allegations against the provincial authorities and made "unacceptable insinuations" concerning the heads of the school. The Commission considered that by entering the civil service, the applicant had accepted certain restrictions on the exercise of her freedom of speech⁴².

Although, as particularly illustrated in *E v Switzerland*, restrictions on speech may be necessary in a democratic society, it is perhaps unfortunate that the Commission was so ready to recognise special duties of certain people to restrain speech without recognising the special duty these same people may have in contributing to public debate on matters of public, and

⁴⁰Decision of 7th May 1984, 38 D&R 124

⁴¹(1988) Decision on admissibility of 3rd May 1988 (Application Number 11389/85)

⁴²See also admissibility proceedings in *B v UK* (1986) 45 D&R 41, and *Hasledine v UK* (1992) 73 D&R 225.

at times political, importance, despite the fact that elsewhere the importance of such debate is clearly stressed⁴³.

Furthermore, the fact that Morrisens made her statements on television, the impact of which is both wide and immediate, was noted by the Commission; although it is unclear what weight it gave this factor, it clearly did not regard it favourably. Such an attitude is perhaps surprising given the strong indications in the case law on Article 10 that freedom of the press and other media are to be afforded special protection as "public watchdogs"⁴⁴. It is to be hoped that where a person is engaging in a legitimate exercise of the freedom of expression, the medium through which the speech is communicated would not unduly sway the Court towards a finding that an interference is necessary.

The final limitation on the protection offered by the Convention to the whistleblower is that mentioned earlier: the Court's reluctance at times to recognise that dismissal is sufficient interference with free speech to warrant protection. As argued above, it is to be hoped that, following cases such as *Vogr*⁴⁵, the Court and Commission will in future recognise that dismissal or the threat of it can act as a significant fetter on free speech.

However, these reservations should not be used to detract from the fact that the Convention contains great potential to protect public interest disclosure. The decisions of the Commission and Court demonstrate a clear commitment to the principle that free speech and public debate are vital to a democratic society. Once the Court recognises that the threat of dismissal

⁴³See *Lingens v Austria* (1986) 8 EHRR 407

⁴⁴*Thorgierson v Iceland* (1992) 14 EHRR 843, para 63; *Barthold v Germany* (1985) 7 EHRR 383, para 58; *Jersild v Denmark* (1995) 19 EHRR 1, para 31.

⁴⁵Although the narrow margin in that case (10 votes to 9) should be noted.

inhibits that debate then employees who are dismissed for disclosure of wrongdoing in the workplace, or for using inside information to contribute to public debate, will have a better chance of success in claiming the protection of the Convention at the European Court of Human Rights.

5 Use of the Convention at a domestic level

The whistleblower who seeks the protection of the European Convention on Human Rights cannot be guaranteed success. However, in addition to the legal difficulties that may arise in claiming that there has been an infringement of the right to freedom of expression, an applicant will also face extremely long delays as the European Commission and Court struggle to deal with an ever increasing number of applications⁴⁶.

Clearly, the protection of the Convention, such as it is, would be of more direct use to applicants if it were to be incorporated into UK law. Although the growing movement backing incorporation of the Convention⁴⁷ may eventually prevail, until this happens, an individual can only rely directly on the Convention if a claim is taken to Strasbourg.

⁴⁶See Warbrick, *Rights, the European Convention on Human Rights and English Law* (1994) 19 *European Law Review* 34.

Under Protocol 11 the Commission and Court will be merged and a new Court structure introduced. It is hoped that when all parties have ratified Protocol 11, the process will be speeded up. See Schermers, *The Eleventh Protocol to the European Convention on Human Rights* (1994) 19 *European Law Review* 367.

⁴⁷see for example, the aims of Charter 88 and Bingham, *The European Convention on Human Rights: Time to Incorporate* (1993) 109 *LQR* 390. It will be interesting to see whether the move towards incorporation is advanced, following Bingham's elevation to the position of Lord Chief Justice.

Even without direct incorporation, in some areas the Convention has been in effect been accepted into UK law via its relationship with EC law. The ECJ has accepted that EC law is to be interpreted so as to conform with the Convention⁴⁸. Since the UK courts must interpret domestic legislation to comply with EC Law, there will be areas of UK law that must be interpreted by UK courts to comply with the Convention. Although the areas covered by EC law tend to be those of economic activity, this is interpreted widely and already covers areas such as employment and discrimination law. In addition, as the European Union moves towards greater unity the areas covered will expand⁴⁹.

In addition, there is a growing trend for courts to refer to the Convention when considering the scope of the domestic law⁵⁰. For example, the Convention has long been used to aid interpretation of the domestic primary and secondary legislation where they contain ambiguities⁵¹. In *Waddington v Miah*⁵² Lord Reid referred to Article 7 of the Convention in deciding that the criminal offence created by s 24 of the Immigration Act 1971 could be applied retrospectively. This use of the Convention was confirmed in *R v Secretary of State for the Home Department ex p. Brind*⁵³, but was

⁴⁸*Prais v Council*, case 130/75 [1976] ECR 1589. More generally, see Grief, *The Domestic Impact of the European Convention on Human Rights as Mediated Through Community Law* [1991] PL 555

⁴⁹See Lord Browne-Wilkinson, *The Infiltration of a Bill of Rights* [1992] PL 397 at p. 401-2

⁵⁰If this trend continues, it has been argued that full incorporation of the Convention may become unnecessary, Lord Browne-Wilkinson, *The Infiltration of a Bill of Rights* [1992] PL 397

⁵¹For discussion of the uses of the Convention in domestic law see the judgment of Lord Balcombe in the Court of Appeal in *Derbyshire C.C. v Times* [1992] 3 All ER 65.

⁵²[1974] 1 WLR 683

⁵³[1991] 1 AC 696

strictly limited to ambiguity, that is where the wording of legislation is capable of bearing more than one meaning. The Court refused to extend the principle to cover the exercise of discretion; ministers could not be required to exercise the discretion granted by legislation in accordance with the Convention. This was confirmed in *R v Ministry of Defence, ex parte Smith*⁵⁴ in which the Court of Appeal held that a failure to take account of the Convention was not of itself grounds for impugning the exercise of discretion of a minister. The Convention could only provide background to a complaint of irrationality in a claim for judicial review.

However, the Convention can be used by courts (as opposed to Ministers) in considering whether or not to grant discretionary remedies such as injunctions. In *Attorney-General v Guardian Newspapers Ltd*⁵⁵ the House of Lords considered the Convention in deciding to uphold the injunctions against publication of the book "Spycatcher" on grounds of national security. The Convention is also used where the common law is uncertain. In the Court of Appeal hearing of *Derbyshire C.C. v Times*⁵⁶, Lord Balcombe decided the question of whether local authority could sue in libel solely on the basis of the Convention⁵⁷. In *Attorney General v Blake (Jonathan Cape Ltd, third party)*⁵⁸ Sir Richard Scott V-C considered the Article 10 in determining the scope of the duty not to disclose information that is not confidential. Moreover, in *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhary*⁵⁹, the Divisional Court considered the Convention in

⁵⁴[1996] 1 All ER 257

⁵⁵[1987] 1 WLR 1248

⁵⁶[1992] 3 All ER 65

⁵⁷"...since it states the right to freedom of expression and the qualifications to that right in precise terms, it will be convenient to consider the question by reference to art 10 alone." [1992] 3 All ER 65 at 77 g

⁵⁸[1996] 3 All ER 903

⁵⁹[1991] 1 All ER 306

determining the scope of the blasphemy laws, an area where the common law was not even uncertain⁶⁰. The Convention clearly has a place within the common law and its use could aid the whistleblower both in considering the scope of the duty of confidence, and in considering the need for an injunction to restrain the speech.

⁶⁰"... the common law of blasphemy is, without a doubt, certain. Nevertheless [counsel] thought it necessary, and we agree, in the context of this case, to attempt to satisfy us that the United Kingdom is not in any event in breach of the convention" (ibid. at p. 320).

Seven

Whistleblower Protection in the U.S.A.

PART ONE - Common Law Protection

1 Introduction

The legal protection for whistleblowers available in the United States of America provides an interesting contrast to that available under English law. The most obvious contrast is that the USA has a constitution that protects freedom of speech. Thus the culture in which employees may raise concerns is one where freedom of speech is assumed.

However, any benefit that this may offer the whistleblower is tempered by a second main contrast between the UK and the USA: the fact that the USA has no general employment protection equivalent to the right in the UK not to be unfairly dismissed. Instead the basic position is that employees can be hired and fired at will, and no reason need be given. To a certain extent this may cancel out the advantage of the constitutional guarantee of free speech, although the harshness of the rule is mitigated to some extent by the creation within the common law of a remedy in contract and tort where dismissal breaches public policy. This remedy has been used with a degree of success by whistleblowers, although it is not designed for such use.

A further contrast with the UK is that some employees are covered by specific statutory protection against reprisal for blowing the whistle at work. Given that one proposal for reform in the UK is the introduction of

statutory protection for whistleblowers, it is worth considering the experience of the USA in some detail, to see whether it provides a model that could be followed here.

2 Employment-at-will

Employees who are members of a union are usually covered by collective agreements that provide a right not to be discharged, or dismissed, without good cause. This is a right that is similar to the unfair dismissal protection available in the UK. However, the majority of employees are in non-unionised employment¹, mostly employed on an "at-will" basis, unless the contract is for a fixed term. "At-will" employment is said to reflect the voluntary nature of the agreement and means that the contract is regarded as indefinite; it may be terminated by either party "with or without cause or justification. This means a *good* reason, a *wrong* reason, or *no* reason."²

The justification of the rule is that it provides equal freedom to both parties to discontinue the relationship at any time, the freedom to fire being counterbalanced by the freedom to resign. Further justification is provided by the view that restrictions on the right of the employer to fire at will can have severe implications for the business of the employer, with the fear of wrongly losing a potential lawsuit preventing employers from dismissing inefficient workers³. However, it is increasingly recognised that the dependence of the employer on wages means that her freedom to resign is

¹Only about 40% of workers work in unionised employment and numbers are reducing. See Pitt, *Dismissal at Common Law: The Relevance in Britain of American Developments* (1989) 52 MLR 22 and Wiler, *Governing the Workplace*, Harvard University Press, 1990.

²*Hinrichs v Tranquillaire Hospital* (1977) 352 So.2d 1130

³See Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, (1989) 60 University of Colorado Law Review 91.

more apparent than real, with the result that the freedom of the employer is unchecked and open to abuse.

In the absence of general legislative protection for employees along the lines of that available against unfair dismissal in the UK, it is perhaps not surprising that exceptions to the common law rule have been developed in the US. For example, statutory protection is available against discrimination on specific grounds such as race, sex and disability, and public sector employees are entitled to have personnel decisions made on grounds of merit only⁴. Dismissals that have the effect of punishing employees in the exercise of their constitutionally protected rights, such as the right to free speech, are also unlawful. Furthermore, some of the harshness of the basic contractual rules have been tempered by a more generous use of implied terms as well as the creation and development of the tort of 'wrongful' or 'retaliatory' discharge.

3 Constitutional Limitations to At-Will Employment

The First Amendment to the United States Constitution guarantees the right to free speech. The constitution can be used to rule unlawful legislation that undermines the provisions of the constitution. It also provides an individual cause of action against the State, allowing individuals to claim that an action is unlawful if it infringes constitutional rights. In the employment context this has been used by state employees in claiming that dismissal for

⁴Discussed in detail in Part Two, below.

exercising the right to free speech is unconstitutional⁵. Where successful, such claims limit the usual rule of employment at will.

Until relatively recently, however, the right to free speech guaranteed by the constitution was limited only to protecting speech, and could not be used to provide job security, the courts taking the approach typified by Justice Holmes in *McAuliffe v Mayor of New Bedford*⁶: "[A policeman] may have the constitutional right to talk politics, but he has no constitutional right to be a policeman". The attitude was that if one wanted to speak, one would not be prevented, but that one may need to be prepared to give up one's job in the process. This approach is echoed in the European Court of Human Rights decisions in *Kosiek*⁷ and *Glasnapp*⁸ where it was held that a denial of access to employment did not infringe the right to free speech⁹.

Since the *McAuliffe* decision, protection has been extended and it has been ruled unconstitutional for the state to dismiss an employee for exercising the right to free speech. In *Pickering v Board of Education*¹⁰, a teacher was

⁵The exception to at-will employment based on constitutional rights was developed in relation only to employees of the state. However, in *Novosel v Nationwide Insurance Co.* 721 F 2d 894 (1983) the First Amendment right to free speech was used by a private sector employee. The employee claimed that the constitutional right gave a clear mandate of public policy from which to claim wrongful discharge (See below)

⁶29 NE 517 (1892)

⁷(1986) 9 EHRR 328

⁸(1987) 9 EHRR 25

⁹Although this approach may no longer be taken following the decision in *Vogt* (1996) 21 EHRR 205. See Chapter Six, and the discussion of *Jacobowski* (1995) 19 EHRR 64 in which it is suggested that the Convention offers less protection where the right to speak is not totally restricted; and *E v Switzerland* (1984) 38 D&R 124 where it is pointed out that some jobs entail valid restrictions on freedom of speech.

¹⁰391 U.S. 563, 88 S.Ct 1731 (1968)

dismissed for sending a letter to the local newspaper in connection with a proposed tax increase, in which he was critical of certain current and past funding policies of the Board of Education. The Supreme Court recognised the public importance of speech on such issues remarking that "on such questions [as the tax increase] free and open debate is vital to informed decision making by the electorate".

The Court went on to hold that teachers should not be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. Instead, the interests of the employee in commenting on matters of public concern should be balanced against the interests of the state as employer in promoting the efficiency of the public services it performs through its employees. In undertaking this balancing exercise, the court could take into account factors such as the effect of the speech on the employee's performance of his job, the effect of the speech on discipline and harmony in the workplace and the overall impact on the operation of the employer's enterprise. Since *Pickering's* letter affected neither his own work nor the workplace, his dismissal was ruled unconstitutional.

In the later case of *Connick v Myers*¹¹ the balancing test advocated in *Pickering* was refined. Myers was an assistant district attorney, who was informed that she was to be transferred to a different office, despite her opposition to the move. She was dismissed after she had circulated a questionnaire among staff, seeking their views on office transfer policy and other matters. The Court applied the balancing test set out in *Pickering*, but made it clear that the test only applied where the employee's speech referred to a matter of public concern, such as matters of political, social or other concern to the community. Employers could continue to enjoy wide

¹¹61 U.S. 138, 103 S.Ct 1684 (1983)

discretion in dealing with employees speaking on other issues. While the issue that Pickering wrote to the press about was clearly a matter of public concern, the conduct of Myers was held not to relate to such a matter, and her discharge was said to be lawful.

Further guidance on the application of the *Pickering* balancing test was given in *Rankin v McPherson*¹², where a probationary clerical worker employed by the county constable was dismissed for making a political comment to a fellow employee. The Court held that even though a probationary employee could be dismissed at will, she would be entitled to reinstatement if the dismissal was for exercising her constitutional right to free speech. In deciding whether the comment was a matter of public concern, for the purposes of the tests in *Pickering* and *Connick*, the court held that it should look at its content, form and context. In McPherson's case, the statement was made in private and did not interfere with the running of the office. It could therefore counterbalance the interest of the employer in promoting the efficiency of its services.

Effectively the courts now apply a two stage test in deciding whether a dismissal violates an employee's constitutional rights. The first question is whether the speech addresses a matter of public concern, relating to social, political or other community concerns. This is to be decided with reference to the content, context and form of the speech. If the matter does not address a matter of public concern, then the usual employment-at-will rule will apply, and the employee can be dismissed without redress. If a matter of public concern is addressed, the court should proceed to consider whether the employee's interest in making the statement outweighs the interest of the employer in suppressing it.

¹²483 U.S. 378 (1987)

The protection provided by the First Amendment to state employees ought to cover public interest whistleblowers. The requirement that matters relate to a public concern should not prevent them using the protection. Those raising concerns about wrongdoing, or risks to health and safety ought to be able to show that the concern relates to social or community concerns¹³. The recognition in *Pickering* that the public interest is served by free debate by the electorate on political questions, ought to enable those engaging in protest whistleblowing to be able to use the protection, where the protest can be said to amount to political speech¹⁴. Once the matter has been found to relate to a public concern, the court will consider whether the employer's interest in suppressing the speech outweighs the interests of the employee in speaking; given the public interest nature of the whistleblower's speech, the balance should be in favour of providing protection to the employee.

However, despite the ostensible benefits to whistleblowers of a constitutional right to free speech, the protection does have its limitations, and it is not necessarily the case that the existence of a written constitution would provide superior protection to that currently available in the UK. Most important, the protection only applies to state employees. Unless the whistleblower is a state employee, the general employment-at-will rule applies, allowing dismissal even though the speech relates to matters of public importance (unless one of the exceptions discussed below applies)¹⁵.

Secondly, as with the protection in the UK against dismissal for health and safety reasons and against victimisation in race and sex discrimination

¹³They should also be able to use the protection offered under statute, discussed in Part Two, below.

¹⁴See Chapter Two.

¹⁵See *Novosel v Nationwide Insurance Co.* 721 F 2d 894 (1983)

cases, establishing a causal link between the speech and the dismissal can present problems. The test of causation used in First Amendment cases is that found in *Mount Healthy City School District Board of Education v Doyle*¹⁶. It is formulated to try to balance fairly the needs of employees to show causation, and those of the employer to avoid liability where dismissal was for some legitimate reason. Under the *Mount Healthy* test, where the exercise of free speech is a substantial cause of dismissal the burden shifts to the employer to show that dismissal would have occurred without the speech. This test is helpful to employees, although establishing the causal link remains a substantial hurdle to many in showing that their dismissals were unlawful¹⁷.

4 Common Law Exceptions to Employment At-Will

In addition to the constitutional protection afforded to free speech, US courts have begun to recognise exceptions to the principle of at-will employment, based in contract and tort. Both types of exception were suggested by Lawrence Blades in an article written in 1967¹⁸, and have since been accepted in most states.

Blades argued that the increasing power of large corporations, and the difficulties in defining the proper limits of employer power, meant that a tort of wrongful discharge should be introduced to protect employees. He pointed out that a large proportion of employees are employed by a relatively small number of employers and that "large corporations ... pose

¹⁶97 S.Ct 568, 429 U.S. 274 (1977), discussed in more detail below.

¹⁷See discussion below; and in Part Two, where a more generous approach to causation is adopted by the Whistleblower Protection Act.

¹⁸Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power* [1967] Columbia Law Review 1404

a threat to individual freedom comparable to that which would be posed if governmental power were unchecked¹⁹". Although it would be difficult to determine the exact limits of any controls that should be introduced to check that power, Blades argued that controls should be introduced at least to provide employees with protection against any excessive abuse of employer power, such as where employer demands that an employee act in breach of a code of ethics or even break the law, or face discharge with no redress.

Although Blades suggested that legislation to curb the excesses of the "at-will" employment rule was unlikely, his ideas on the introduction of the tort of wrongful discharge have been taken up with most states now recognising such an exception to the general rule²⁰. In addition, courts have used implied contractual terms to lessen the impact of at will employment, another device suggested by Blades. Although the presumption is that employees who are not employed on fixed term contracts work on an at-will basis, courts have been prepared in some cases to find an implied term in the contract that there will be no discharge without good cause.

5 Exceptions to At-Will Employment Based on Contract

Various contractual exceptions to the "at-will" rule have been developed, although their development has been hampered courts' unwillingness to infer a promise of job security into contracts unless they can find that additional consideration, beyond the usual 'work for wages' bargain, has been given by the employee. However, courts are becoming increasingly willing to imply terms into employment contracts that protect employees

¹⁹Ibid at p.1404

²⁰Many courts refer to Blades' article when recognising the tort for the first time. See *Pierce v Ortho Pharmaceutical Corporation* 417 A 2d 505 (1980) and *Palmateer v International Harvester Co.* 421 N.E. 2d 876 (1981)

from arbitrary or retaliatory discharge and increased flexibility in finding adequate consideration has led to the development of a more workable exception to the general rule. Examples of actions that have been accepted as additional consideration for this purpose include an employee turning down another offer of employment²¹, undertaking training paid for by the employee²², and relying on the promise of job security by, for example, selling his own business to the employer and becoming an employee himself²³. Once additional consideration has been found, the right not to be dismissed without cause can be implied into the contract and the employee can claim damages if dismissed without good reason.

Some courts have implied terms into contracts without the requirement of extra consideration. For example, where an employee had a long record of service, with a good track record and no history of complaints, a court was prepared to imply a right not to be arbitrarily discharged, even though no specific consideration was offered by the employee²⁴.

In some states, courts have also been prepared to imply terms into the individual contract from written or oral statements of personnel policy. For example, in *Toussaint v Blue Cross and Blue Shield of Michigan*²⁵, the plaintiff was told at a pre-employment interview that he would be employed

²¹*Fulton v Tennessee Walking Horse Breeders Association of America* 476 SW 2d 644 (1971)

²²*Ward v Consolidated Foods Corp.* (Tex. Civ. App. 1972) 480 SW 2d 483

²³*Stauter v Walnut Grove Prod.* (1971) 188 NW 2d 305

²⁴*Pugh v Sees Candies* 171 Cal. Rptr. 719 (Cal. App. 1981), where the court implied a term of 'no arbitrary discharge' into the contract of a worker who had a very long record of employment, with a good track record, no criticism in the past etc.

²⁵ 292 NW 2d 880 (1980)

as long as he did his job satisfactorily. In addition, the employer's personnel manual set out the same policy and reinforced the oral assurances, stating that the company did not discharge without cause. The court was prepared to imply this assurance into his contract as a contractual term, despite the absence of additional consideration. The court addressed the issue of extra consideration but stated that the enforceability of terms should not be limited to cases where there was consideration beyond the agreement to work. The employee did not need to provide additional consideration in order to rely on additional employer promises: the court was instead interested in finding and upholding the intention of the parties as evidenced by the features of the relationship. Although the approach in *Toussaint* has been adopted in several states, it has not been universally followed. In *Valentine v General American Credit Inc*²⁶ even the Michigan Supreme Court limited *Toussaint* to its facts and stated that the case did not create a right to be discharged only for just cause unless there is actual contractual provision.

Courts have also recognised that the implied term of good faith between the contracting parties prohibits dismissals motivated from malice or bad faith²⁷. The employee protection provided by such an interpretation does not depend on finding additional consideration as it is part of the original contract.

The extent to which whistleblowers can use this contractual protection if dismissed is fairly uncertain and will depend on the state in which an action is brought. Even where the exception is recognised, the employee will need to show that there was a contractual right not to be dismissed without good cause, and that the whistleblowing, being in the public interest did not constitute a good cause. She will also need to show that additional

²⁶420 Mich.256, 362 NW 2d 628 (1984)

²⁷*Monge v Beebe Rubber Company* 316 A.2d 549 (1974)

consideration was given, that the term may be implied from written or oral statements of the employer, or that the discharge was motivated by malice. The first two grounds are fairly easy for employers to avoid, as these implied terms may be overridden by express terms in the contract pointing out that the contract is one that is terminable at will. Even where a term restricting discharge to cases of "good cause" can be implied, what will count as "good cause" may be open to varying interpretations. The "bad faith" exception may be less easy to exclude, and may in any event be the most appropriate to use in whistleblowing cases. However, the uncertainty of the protection, and the limitation of the remedies to damages for breach of contract mean that the contractual protection is not adequate protection for those discharged for whistleblowing.

6 Exceptions to At-Will Employment Based on Tort

In addition to recognising contractual limitations to the doctrine of at-will employment, some states have recognised a tortious remedy for dismissal, known as "retaliatory discharge" or "wrongful discharge", under which employees can claim compensation for discharge in breach of public policy. The tort, also referred to as the "public policy exception" to at-will employment, has only been developed in the last forty years and has not gained universal acceptance. Even where its existence is acknowledged, the interpretation of "public policy" varies enormously. Although not developed specifically to cover employees dismissed for blowing the whistle, where it is accepted, the tort may provide them with a means of redress.

6.1 Early recognition of the "public policy exception"

The tort of retaliatory discharge was first recognised in the case of *Petermann v Teamsters*²⁸. Petermann, an employee at will, was discharged

²⁸*Petermann v International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396*, 344 P.2d 25 (1959)

from his employment with the Teamsters Union, which was undergoing an investigation for labour racketeering. He claimed that the union had instructed him to perjure himself before the investigative committee, and that his discharge resulted from his refusal to do so. The Californian court held that the general right to discharge may be limited by public policy. Although the exact nature of public policy may be difficult to define, "it would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee... on the ground that the employee declined to commit perjury, an act specifically enjoined by the state"²⁹.

From these beginnings has sprung a whole range of cases testing the limits of the tort of wrongful or retaliatory discharge based on public policy. Although in its original context the new tort could be said to be merely an extension of the court's contempt powers, it has since been used to protect employees who have been discharged for enforcing their statutory rights. In *Frampton v Central Ind. Gas Co.*³⁰, an employee was dismissed after she had filed a compensation claim following an injury at work where she lost 30% of the use of her arm. The court allowed a claim for a remedy in tort on the grounds that when an employee is discharged "solely for exercising a statutorily conferred right, an exception to the general rule must be recognized"³¹. Similarly, in *Nees v Hocks*³² a successful claim of wrongful discharge was made where an employee was sacked for serving on a jury against her employer's wishes.

²⁹344 P.2d 25 at 27

³⁰297 NE 2d 425 (1973)

³¹Ibid. at p. 428

³²536 P.2d 521 (1975)

In all these cases, the public policy at stake is very clear. To allow employers to impose a requirement that the employee commit a crime, forgo a statutory right or neglect a statutory duty, or else face dismissal would not only be to sanction a major abuse of employer power but would also undermine the working of the statutes creating the crimes, rights and duties in the first place. It is thus not difficult to see that such employees should be granted protection. In this context, it is interesting to note that dismissal for asserting a statutory right only became automatically unfair in the UK in 1993³³, and even now, the only statutory rights protected are rights under the Employment Rights Act 1996.

The reaction to the wrongful discharge tort in the US has been varied. Some states have accepted and broadened the tort, others have refused to accept it at all. Where courts refuse to recognise the tort, it is on the grounds that there is a greater public interest in allowing employers maximum freedom to run their businesses in the most efficient way, which entails the freedom to dismiss employees for any reason that the employer may choose, or indeed no reason at all. It has also been said that the concept of a public policy exception to the well established rule of "at-will" employment is too nebulous to be left to courts to determine. The vague nature of the concept means that in virtually every case the interpretation will be open to dispute. The view of these courts is that the matter is best dealt with by legislation, rather than individual courts³⁴.

The majority of states, however, has accepted the tort to varying degrees. In most cases courts require a "clear mandate" of public policy before

³³It was introduced as s 60A EPCA 1978 by TURERA 1993. It is now found in s 104 ERA 1996.

³⁴See *Hinrichs v Tranquillaire Hospital* 352 So 2d 1130 (1977) (Alabama) and *Lampe v Presbyterian Medical Center* 592 P 2d 513 (1978) (Colorado). The tort of retaliatory discharge was later recognised to a limited extent in *Cronks v Intermountain Rural Electric Association* in 1988, (see below).

allowing the exception, but there is still variation in what is accepted³⁵. Some limit its operation to discharge for refusal to violate the provisions of a statute. In *Cronks v Intermountain Rural Electric Association*³⁶ the court in Colorado³⁷, accepted the existence of the public policy exception but limited it to cases where the employee could show that the dismissal was for a refusal to perform an action ordered by the employer, where to comply with the order would have involved the breach of a specific statute whose terms amount to more than a broad statement of policy. In *Cronks* the employee's dismissal for refusing to take part in the awarding of work without competitive bidding did not meet these restrictions and so his claim was not allowed. Although the actions by the employer were illegal, the mandate of public policy was insufficiently clear to allow the exception to be used.

6.2 Development of a wider concept of "public policy exception"

In other cases, a broader concept of public policy has been recognised to found a claim for retaliatory discharge. In *Petermann*³⁸ the notion of public policy was given a fairly wide formulation, but has since been restricted in some cases to statutorily defined policies. Such restrictions leave the employee who acts as a volunteer of information, acting as

³⁵"Few courts have flatly rejected the notion... where courts differ is in determining where the line is to be drawn that separates a wrongful from a legally permissible discharge." *Adler v American Standard Corporation* 432 A.2d 464 (1981)

³⁶765 P 2d 619 (1988)

³⁷In contrast to its approach 10 years earlier in *Lampe v Presbyterian Medical Center* 592 P 2d 513 (1978), see below.

³⁸344 P 2d 25 (1959)

unofficial internal policeman, unprotected. However, it has been increasingly recognised that the public policy exception, broadly defined, could provide protection for employees who suffer retaliation for reporting misconduct by an employer. Since to allow such conduct by an employer is to condone the activity, some courts have been willing to use the tort to protect employees, despite the fact that such conduct also entails disloyalty.

In *Palmateer v International Harvester Co.*³⁹ the employee brought a retaliatory discharge claim following his dismissal for giving information about a fellow employee to the local police. He intended to give further information and to give evidence at the trial. Prior to this case, the state involved (Illinois) had recognised cases based on clear, statutory policies, such as a discharge for bringing a worker's compensation claim⁴⁰. In *Palmateer* the court decided that although there was no statutory duty to inform the police about crimes that have taken place, there was still a clear public policy in favour of upholding the enforcement of the state's criminal code and exposing criminal behaviour; on this basis, *Palmateer's* claim was upheld.

The recognition that *courts* can determine the existence of a "clear mandate" of public policy gives the tort a much greater potential to protect those who blow the whistle on malpractice or misconduct at work, even though in *Palmateer* the policy was still connected to the upholding of criminal statutes. In *Pierce v Ortho Pharmaceutical Corporation*⁴¹, the court in New Jersey accepted that a clear mandate of public policy could

³⁹421 N.E. 2d 876 (1981) (Illinois)

⁴⁰*Kelsey v Motorola Inc* 384 N.E. 2d 353 (1978)

⁴¹417 A 2d 505 (1980)

be founded not only on legislation but on judicial and administrative decisions, and ethical codes as well⁴².

Perhaps the widest mandate of public policy was found in the New Hampshire case of *Monge v Beebe Rubber Company*⁴³, a case involving dismissal following incidents of sexual harassment. The court was prepared to find that "a termination ... of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not (sic) the best interest of the economic system or the public good." The court recognised that although employers have an interest in running their businesses as they see fit, this must be balanced against the interest of the employee in job security. The public interest, in the eyes of the court, would be served by maintaining a proper balance between these two competing interests. The case is significant in that it is one of the only decisions to recognise that the public interest can be served by creating a degree of job security for employees, rather than recognising only the public interest in allowing employers unfettered freedom to hire and fire. If a mandate of public policy in favour of creating job security were to be recognised then the potential for employees, whether whistleblowers or not, to use the retaliatory discharge tort would be greatly increased. However, the decision in *Monge*

⁴²Dr Pierce was ultimately unsuccessful in her claim for retaliatory discharge. She had refused to take part in experiments using drugs containing saccharin even though they had been approved by the FDA for tests on humans. The court decided that Dr Pierce was acting on a personal, moral basis, since the tests were not harmful, and that there was, on the facts, no clear mandate of public policy.

Despite the statement in *Pierce* that a code of ethics may provide a clear mandate of public policy, in *Suchodolski v Michigan Consolidated Gas Co.* 316 NW 2d 710 (1982) (Michigan) the code of ethics of the Institute of Internal Auditors was not accepted as giving rise to a clear mandate of public policy.

⁴³316 A 2d 549 (1974)

has not been generally followed and even in New Hampshire it has been restricted to its facts⁴⁴.

In *Novosel v Nationwide Insurance Co.*⁴⁵ the First Amendment right to free speech which had been used as the basis of an exception to at-will employment for state employees was used by a private sector employee in a wrongful discharge case. Novosel claimed that he was dismissed for refusing to participate in lobbying on behalf of his employer before the state legislature. The court upheld his claim that his dismissal breached public policy, stating that "the protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfilment of jury service or the filing of a worker's compensation claim"⁴⁶. On the issue of whether the first amendment could be used by private sector employees the court argued that "[t]he protection of important political freedoms ... goes well beyond the question whether the threat comes from state or private bodies."⁴⁷ Clearly, then, an individual's right to freedom of speech can constitute a clear mandate of public policy for the purposes of the wrongful discharge tort.

6.3 Additional Factors Considered by Courts in Retaliatory Discharge Cases

The extent to which courts uphold cases of retaliatory discharge will depend mainly on their view on public policy, and whether it requires a specific statute or is open to judicial interpretation. However, additional factors can

⁴⁴*Howard v Dorr Woolen Co.* 414 A 2d 1273 (1980)

⁴⁵721 F 2d 894 (1983)

⁴⁶At p. 899

⁴⁷At p. 900

also be relevant to the success or otherwise of a claim of 'public policy' wrongful discharge. Many of these factors militate against the tort being used by whistleblowers and highlight the limitations of the tort in providing adequate protection in this context. It is interesting to note that some of the factors coincide with those used in English law in determining whether the public interest is served by particular disclosures. At times the US and UK courts treat similar factors very differently.

6.3.1 Motive of Employer in Dismissing Employee.

In *Geary v US Steel Corporation*⁴⁸ an action for wrongful discharge was brought by a company salesman who had been dismissed after raising concerns with his managers about the safety of some of their products. He was told to continue working which he duly did, although he continued to voice his concerns. The company subsequently withdrew the product from the market, and Geary was dismissed. Geary brought an action in tort claiming that the dismissal was "wrongful, malicious and abusive", the first such action in Pennsylvania. The court recognised that in some circumstances a public policy exception to at-will employment could be recognised, but refused to accept it in this case. The main reason was that no clear mandate of public policy was violated in the case, but the court also referred to the fact that the employer had not dismissed Geary with intent to violate a public policy⁴⁹ but for other reasons, such as the fact that Geary was operating outside the usual chain of command in raising concerns in the way that he did.

⁴⁸319 A 2d 174 (1974) (Pennsylvania)

⁴⁹"The novel theory of recovery which appellant advances must surely involve specific intent on the part of the company to harm Geary or achieve some other proscribed goal" *Geary* at p. 177

The implication is that had the employer dismissed the employee specifically in order to prevent health and safety concerns from being aired and investigated, then the court may have taken a different view. To that extent, then, employer motives can be a relevant factor in deciding whether to allow a claim for retaliatory discharge⁵⁰. Such an approach risks undermining the whole protection as it makes it easy for employers to avoid any liability by arguing that discharge was for some other reason. Given the problems that are always present for employees in establishing causation, a requirement that the employer must intend to violate public policy before protection is given makes it even harder for the employee to find protection via the tort.

6.3.2 Approach of Employee.

In *Petermann*, the employee was effectively a "passive victim of coercion"⁵¹ in that his dismissal was the result of his refusal to comply with his employer's demand that he act illegally in giving false testimony before a legislative committee. This, coupled with clear legislative intent to prohibit perjury, can be seen as relevant to the success of the case. In *Wagenseller v Scottsdale Memorial Hospital*⁵², where the court recognised the public policy exception to at-will employment, the employee was dismissed after a river rafting trip with hospital staff in which she refused to participate in activities which were contrary to various criminal statutes. Again the criminal statute contained a clear mandate of public policy, but

⁵⁰See Conway, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, [1977] Wisconsin Law Review 777

⁵¹Conway, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, [1977] Wisconsin Law Review 777

⁵²710 P 2d 1025 (1985) (Arizona)

also the employee played a passive role in the incidents leading to her dismissal. Again, in *Monge*⁵³, dismissal followed the employee's refusal to date the factory foreman, and the dismissal was held to be wrongful despite the absence of a statutorily defined public policy.

In contrast, employees have been less successful in cases where they have taken the initiative in raising a concern or reporting illegal conduct. Geary⁵⁴ took the initiative in raising health and safety concerns and was unsuccessful in his claim; in *Adler v American Standard Corporation*⁵⁵, the employee lost his claim for wrongful discharge after disclosing illegalities and irregularities discovered during a review of the management and operation of the division in which he worked.

However, this factor is not decisive: there are cases of employees who take the initiative in reporting conduct and who succeed in their claims of wrongful discharge. Palmateer⁵⁶ acted on his own initiative when he supplied information about a fellow employee to the police and yet he was successful in claiming wrongful discharge because of the clear public policy in enforcing the state's criminal code. In *Sheets v Teddy's Frosted Foods Inc*⁵⁷, the quality control director of the company notified the employer that the labelling of some of the products was incorrect, and in breach of a specific statute. The employee was dismissed, but succeeded in his claim of wrongful discharge. Again, the mandate of public policy in the case was very clear and based on statute.

⁵³316 A 2d 549 (1974)

⁵⁴See above.

⁵⁵432 A 2d 464 (1981) (Maryland)

⁵⁶421 NE 2d 876

⁵⁷427 A 2d 385 (1980) (Connecticut)

These cases suggest that if the mandate of public policy is clear enough, employees will be able to claim wrongful discharge even where they have taken the first step in raising a concern. Where the mandate is less clear, the question of whether the employee initiated the disclosure, or played a passive role in refusing to comply with an illegal, or immoral command may make a difference to the outcome of the case, with courts readier to grant protection to the "passive victim of coercion" than to employees who take their own decision to raise a concern.

This is likely to cause difficulties in whistleblowing cases as they usually involve employees taking the initiative in raising concerns or disclosing illegal conduct. Unless the mandate of public policy is extremely clear, such employees may have difficulty in showing that discharge was wrongful. However, this will also depend on how the remaining factors, are weighed by the court in the individual case.

6.3.3 Motive

Employees who raise concerns or make disclosures of confidential information maliciously, or in order to create difficulties for an employer, rather than from a genuine concern about public policy may not be seen as deserving of a remedy for any resulting dismissal⁵⁸. On the other hand, the converse is not always the case: the fact that a concern is raised in good

⁵⁸"The court can insist on employee good faith. It can expect the employee to have a genuine concern about the public policy in issue." Holloway and Leech: Employment Termination: Rights and Remedies, (1985) The Bureau of National Affairs, Washington, D.C., p 306.

faith does not always mean that it is granted protection. In *Geary*⁵⁹ the court noted that the actions of the employee may be praiseworthy and in good faith, but that this was not sufficient to found a claim in the absence of a clear mandate of public policy.

The approach of the US courts on this issue can be contrasted with that of the UK when considering motive in relation to the duty of confidence⁶⁰. In the UK, the motive of the employee was very much secondary to the issue of whether the information was in the public interest. However, this difference in approach reflects the different bases of the two actions. The duty of confidence cases in the UK are concerned with the question of whether information should be disclosed or suppressed. Whether or not the information deserves disclosure can, effectively, be judged objectively, and the motive of the employee is not particularly relevant to that question. The question in these US cases arises in the context of an individual employment remedy, and therefore arguably should be affected by motive; equally, in the UK cases, the remedy for breach of confidence, as opposed to the decision of whether breach of confidence has occurred, can be affected by the employee's motive.

6.3.4 Good Faith

The employee's belief in good faith that a violation of a statute has occurred will not be sufficient of itself to found a claim even based on the clear mandate of public policy contained in that statute. In *Adler*⁶¹, the employee reported what he believed to be illegalities and irregularities, for example in the misuse of corporate funds by officers of the company for personal benefit. He claimed that his subsequent dismissal was wrongful as

⁵⁹See *Geary* above.

⁶⁰See Chapter Three, para. 3.3.4 above.

⁶¹See above.

it was an attempt to conceal the illegal conduct. The court, in rejecting his claim said that "Adler's undisclosed perception of what constitutes 'commercial bribery' is hardly adequate ground upon which to base a decision that such activities violate the declared or undeclared policy of this state."⁶²

The UK cases take a more flexible approach on this question. Where disclosure is made internally within the organisation, or to a relevant external body, reasonable grounds for a suspicion will be sufficient to prevent a finding that the employee is in breach of confidence in making a report⁶³.

The approach of the UK is preferable, as the US approach leaves the employee in an uncertain position. Unless she can be absolutely sure that her information is correct, which may be difficult unless she is in a senior position with access even to internally confidential information, she risks dismissal in reporting what may be genuine and serious concerns. Although the desire to prevent unfounded allegations being raised by disaffected employees is also understandable, restriction of the employee protection to cases where the allegations are correct is rather severe. A fairer approach would be to require that the employee act in good faith and with a reasonable belief in the truth of information that is reported. It also allows cases where there are reasonable grounds to suspect illegal conduct to be investigated. If the allegation turns out to be incorrect, the good faith employee should be satisfied, and the company will have cleared its name; this does not seem to be good reason to allow the employee to be dismissed without remedy.

⁶²*Adler v American Standard Corporation* 432 A 2d 464 (1981) (Maryland).

⁶³See Chapter Three, para. 3.3.5.

6.3.5 Expertise of Employee.

A further factor that courts seem to take into account in deciding whether to allow a claim of wrongful or retaliatory discharge is the status of the employee. In *Geary*⁶⁴, the employee who raised a concern about the safety of steel tubing for use in the oil and gas industry was a salesman, with no specialist knowledge or responsibility for product safety. In raising his concern he had gone outside the established chains of command⁶⁵. His claim was unsuccessful. In contrast, in *Sheets v Teddy's Frosted Food*⁶⁶, the concern about mislabelling of food was raised by the company's quality control director. In finding that his subsequent dismissal was wrongful, the court contrasted the case with *Geary* on the basis that Geary had no expertise or responsibility for product safety, whereas Sheets was the person who would be prosecuted for the mislabelling were the practice to be discovered. A similar approach was taken when the public policy exception was recognised in *Harless v First National Bank*⁶⁷, the manager in the bank's consumer credit department having been dismissed after raising with his superior at the bank the fact the state consumer protection legislation was being violated. Again, the employee had acted within the correct chain of command, and had responsibility in relation to the issue about which the concern was raised.

These cases indicate that unless the whistleblower raises concerns that are within her remit at work, then she may have difficulty in succeeding in a claim of wrongful discharge, and raises questions about the purpose of the

⁶⁴See above.

⁶⁵Holloway and Leech, *Employment Termination: Rights and Remedies*, (1985) The Bureau of National Affairs, Washington, D.C., at p. 556.

⁶⁶See above.

⁶⁷246 SE 2d 270 (1978)

tort. If the aim is to provide an element of job security, is it understandable that it should be limited to cases where employees raise concerns linked to their jobs. If the aim is to protect the public interest, the position of the employee raising the concern should be irrelevant. The fact that the position of the employee does seem to be important illustrates the difficulties of using the tort to protect whistleblowers, a task it was not designed to do.

6.3.6 Internal or External Disclosure⁶⁸

An additional factor that seems to affect courts' determination of whether or not to allow the public policy exception to at-will employment is whether information is reported internally or externally. In some cases, employees have raised matters inside the organisation, within existing management structures; alternatively some have disclosed matters to external authorities whose responsibility is to investigate such issues, such as the police. Employees may also consider reporting matters to the media. It might be expected that since employers would prefer matters kept within the privacy of the organisation, and since internal reporting carries no risk of breach of confidence, that employees would be more sure of protection if disclosures were kept internal. However, this does not appear to be the case.

In many cases of internal reporting, the dismissal has not been found to give rise to a case of wrongful or retaliatory discharge, in contrast to where reports have been made externally. In such cases the courts do not usually refer specifically to the forum in which the concern was raised, instead the

⁶⁸See generally, Dworkin and Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society* (1991) 29 American Business Law Journal 267

finding of a clear mandate of public policy coincides with cases of external reporting and vice versa⁶⁹.

However, in some cases the issue is addressed. In *Zaniecki v P. A. Bergner & Co.*⁷⁰, an employee was dismissed for reporting theft internally to the relevant supervisor, but was unsuccessful in his claim for wrongful discharge. The court distinguished the *Zaniecki* case from the earlier case of *Palmateer*⁷¹ on the basis that *Zaniecki* involved internal reporting; such a case did not give rise to the same public policy concern as that in *Palmateer* of allowing employees the right to turn to public officials without fear of loss of livelihood. *Wiltsie v Baby Grand Corp.*⁷² was decided similarly, with the reporting of illegal behaviour to a supervisor giving rise to dismissal which the court found to be lawful. The court said that since the report was made using internal channels, rather than appropriate, external, law enforcement agencies, the employee was acting in a private capacity, and on this basis was not eligible for the protection which is available for those who act for a public purpose.

Perhaps even more surprising was the decision in *House v Carter-Wallace Inc.*⁷³, where a case arising from internal reporting of concerns about the sale of contaminated tooth polish were said to amount to no more than a management dispute. Such matters were not capable of providing grounds

⁶⁹Contrast *Palmateer*, above, where wrongful discharge was found in a case where fellow employees were reported to the police, and *Geary*, above, where concerns were raised via internal channels and the claim was not allowed.

⁷⁰493 N.E. 2d 419 (1986) (Illinois)

⁷¹See above.

⁷²774 P 2d 432 (1989) (Nevada). The employee was a poker room manager, who reported illegal conduct by his supervisor to a more senior manager.

⁷³556 A 2d 353 (1989)

for a wrongful discharge case, and were not deserving of the protection provided by the public policy exception.

Not only is the finding in *House v Carter-Wallace* difficult to justify theoretically, but it also ignores that fact that there are several cases of internal reporting in which claims of wrongful discharge have been successful. In both *Sheets v Teddy's Frosted Foods*⁷⁴ and *Harless v First National Bank*⁷⁵, the successful applicants had reported breaches of statute to internal supervisors⁷⁶. Again the issue of whether the report is made internally or externally may be subordinate to the issue of whether there is a clear mandate of public policy. Where public policy is clear enough, for example based on statute, then internal reporting may be protected despite the approach in *House v Carter-Wallace*. If, on the other hand, the public policy is less clear cut then the whistleblower will run fewer risks by reporting to a relevant external body.

This approach, of protecting external reports more readily than internal ones, contrasts starkly with that taken under English law on the question of whether the public interest in disclosure overrides the duty of confidence. Under English law, where disclosure is made internally, it is *easier* to show that it serves the public interest; and the public interest must be very strong for external disclosure to be justified.

This US approach, preferring to protect external reporting is not illogical: arguably, if a person has genuine public policy concerns, they should be

⁷⁴See above.

⁷⁵See above.

⁷⁶Although in *Sheets v Teddy's Frosted Foods* the point was made in the dissenting judgment of Chief Justice Cotter that the statute was not necessarily thwarted by dismissal of the employee: he could have made an anonymous phone call to the relevant regulatory body and need not have jeopardised his employment at all.

raised publicly. Internal reporting allows companies to cover up any wrongdoing, whereas reporting to a relevant agency may lead to proper investigations and appropriate sanctions to be applied. However, to use these arguments to deny employment protection when concerns are raised via an accepted and appropriate internal channel is surely wrong. The main justification of employee protection for making such disclosures is to enable the particular public policy to be carried out. For example, if illegal accounting procedures are stopped by internal reporting then the main public policy objective has been attained. Alternatively, the public policy is not advanced at all by the continuance of the illegal accounting procedures accompanied by the dismissal without redress. Whilst the involvement of an external agency, who may impose some form of penalty for the illegal activity, may also be desirable, to deny any sort of protection to the employee who advances the public policy to a lesser degree may be to miss an opportunity of making that advance just because a way to achieve a greater advance is known to exist.

6.4 Difficulties in the use of public policy exception

As has been seen above, courts look at a range of factors in deciding whether a particular dismissal comes within the public policy exception to at-will employment. However, two factors in particular are likely to determine whether the employee is successful or not: the decision as to whether a sufficiently clear public policy is served by the employee's conduct, and the question of causation.

6.4.1 Public Policy or Private Concern?

The employment at-will doctrine is based on the recognition of an employer's right to hire and fire at will. In the cases where the public policy exception to the doctrine is not recognised the courts appear to give

particular weight to the employer's right, regarding it to be in the public interest that they have maximum unfettered freedom to take management decisions in relation to their staff. Despite the recognition that this can sometimes be abused and used to cover up malpractice by the employer, many courts believe that the public interest is better served by allowing maximum freedom to employers in all cases, rather than by fettering their discretion in a few. This is because of a belief that the threat of legal proceedings can prevent employers from making correct judgements about staff as well as preventing wrongful decisions⁷⁷.

However, most courts do now accept the notion of a public policy exception. "[W]here courts differ is in determining where the line is to be drawn that separates a wrongful from a legally permissible discharge."⁷⁸ The main factor that is used in determining where that line should be drawn is the clarity of the public policy on which the wrongful or retaliatory discharge claim is to be based. If there is a very clear, statutory mandate of public policy, courts may be willing to allow a claim of wrongful discharge even where reports are made internally, or where the employee took the initiative in raising the concern. Conversely, even where the mandate is less clear, the employee may succeed in a claim for retaliatory discharge if the employer put her in the position of having to choose whether to act illegally or be dismissed, or if the employee made reports externally to an appropriate body.

Undoubtedly, whether or not there is a clear mandate of public policy should be important in deciding whether to grant employee protection. However, a clear definition of public policy is lacking. In *Wagenseller v*

⁷⁷"The ever present threat of suit might well inhibit the making of critical judgements by employers concerning employee qualifications." *Geary v United States Steel Corporation* 319 A 2d 174 at 179 (1974) (Pennsylvania).

⁷⁸*Adler v American Standard Corporation* 432 A.2d 464 (1981)

*Scottsdale Memorial Hospital*⁷⁹, the court said that "only those [policies] which have a singularly public purpose" would provide a basis of wrongful discharge and that "a matter must strike at the heart of a citizen's social rights, duties and responsibilities before the tort will be allowed." In practice these statements do not provide much help in discerning whether a particular concern will involve an appropriate public policy. As is seen by the contradictory case law, it is very difficult to predict from the type of concern how it will be classified by a court. For example, it might be expected that the reporting of a risk to the health and safety of the public would be a prime social responsibility of citizens and that such activity, involving a clear public purpose, would be protected. However, *Geary*⁸⁰ lost his case for wrongful discharge after having raised concerns over the safety of tubular casing designed for use under high pressure in the oil and gas industry; the court did not view the matter as raising an issue of public policy.

A series of cases involving the health care sector illustrate inconsistencies in the approaches of courts on this issue. In *Lampe v Presbyterian Medical Center*⁸¹ a nurse was dismissed for refusing to reduce the overtime worked by staff. She argued that to do so would jeopardise the safety of patients and would undermine declarations of policy contained in legislation which imposed on her a duty to safeguard life, health and public welfare. The court refused to recognise the public policy exception to at-will employment in this case. Similarly in *Hinrichs v Tranquillaire Hospital*⁸² the court refused to recognise the exception where an employee was dismissed for her refusal to falsify certain medical records. However, in *O'Sullivan v*

⁷⁹710 P 2d 1025 (1985) (Arizona)

⁸⁰*Geary v United States Steel Corporation* 319 A 2d 174 (Pennsylvania)

⁸¹592 P 2d 513 (1978) (Colorado)

⁸²352 So 2d 1130 (1977) (Alabama)

*Mallon*⁸³ an X-ray technician was successful in a claim of wrongful discharge; she was dismissed for her refusal to carry out catheterisations as to do so would breach state laws. Whilst *Lampe* can be distinguished on the grounds that the statutory basis of her claim was not clear cut⁸⁴, the second two cases pose greater problems. It is not clear why the public policy in preventing operations being performed by unqualified staff is greater than in preventing the falsification of medical records. In both cases the conduct is clearly highly undesirable; employees who reveal such conduct uphold important public policies and should be protected.

The difficulties in identifying whether a clear mandate of public policy exists are not dissimilar to the difficulties faced in the UK courts in identifying which types of conduct are in the public interest. In the UK the courts have oscillated between a wide approach verging on a view that there is a public interest in knowing the truth⁸⁵, and a more restrictive approach, taking the view that the public interest is served only by disclosure of illegal conduct⁸⁶. The extent to which the law can be used by whistleblowers can depend on which approach is taken by the courts on this issue.

In addition to the general uncertainties in the US law on the approach of courts to deciding whether an issue raises a public concern or not, a particular problem can also be identified. Courts differ in the extent to

⁸³390 A 2d 149 (1978) (New Jersey)

⁸⁴Also, the extent to which the cutting of overtime may have jeopardised safety may be a matter of opinion. Even if the statutory basis of the claim was clear, it may not be clear that the statute was breached in this case.

⁸⁵*Woodward v Hutchins* [1977] 1 WLR 760. See Chapter Three para. 3.3.1.

⁸⁶*Beloff v Pressdram Ltd* [1973] 1 All ER 241. See Chapter three para 3.3.1.

which they view the right of an employee to job security as a matter of public policy or a matter of a private interest, and yet this can be vital to the outcome of a case.

In *Campbell v Ford Industries*⁸⁷, the employee, who was also a stockholder in the company, was dismissed after he had asked for information about the value of stock and whether the company was involved in corporate misdealing. Campbell claimed wrongful discharge on the basis that his dismissal undermined the public policy in the statute which grants stockholders the right to such information. Despite the fact that his claim had a statutory basis, the court held that the interest of a stockholder was proprietary *and private*, and that there was no compelling *public* policy to be upheld. Furthermore, Campbell's "demand to inspect corporate books and records was an attempt to exercise his rights as a stockholder, and had no direct relation to his rights as an employee"⁸⁸. Whilst a demand to see corporate books may have no inherent relation to employee rights, one might expect that the relation to employee rights would arise once an employee is dismissed for making that request. Presumably, the employer, in deciding to dismiss saw some connection between the two.

The identification of the concern as merely a private matter can be fatal to the success of the case, as it affects the way in which the court weighs the interest alongside the other interests. In any particular case, a number of interests exist, and where they conflict, the court must decide which interest will be given precedence. In wrongful discharge cases the interests are threefold: "an at will employee's interest in job security, ... is deserving of recognition. Equally to be considered is that the employer has an important interest in being able to discharge an at will employee whenever it would

⁸⁷546 P 2d 141 (1976) (Oregon)

⁸⁸At p 146

be beneficial to his business. Finally, society as a whole has an interest in ensuring that its laws and important public policies are not contravened."⁸⁹

In weighing these competing interests, courts will usually allow public interests to outweigh private ones. The interests of society and of the employer are both viewed as public interests, and can counterbalance each other. The employee's interest in job security may tip the balance in favour of granting employee protection, but this can depend on whether it is seen as a public interest or a private one. If it is merely a private interest, then it will not usually be given precedence over a public interest⁹⁰: where it is viewed as a public interest, then courts compare like with like and the public interest in job security, added to society's interest in a public policy not being contravened, may outweigh the employer's interest in carrying on business unfettered.

The approach of the courts in *Campbell*⁹¹ and *Monge*⁹² can be contrasted on this point. In *Campbell* the employee's interest in seeing company records was said to be merely a private interest, and could not outweigh the

⁸⁹*Adler v American Standard Corporation* 432 A.2d 464 (1981) at p.470. Interestingly, although the case involved the disclosure by the employee of potential fraud, the court was still prepared to find that the public policy in allowing employers to discharge employees when beneficial to business (presumably defined in terms of profit?) outweighed the public policy of uncovering fraud. This second public interest could not be allowed to override the company's interest in operating free from disruption.

⁹⁰Although there is nothing inherent in the nature of a private interest that makes it subordinate to a public interest, as the law on human rights makes clear, the courts do not usually regard the private interest in job security as sufficiently fundamental to warrant protection in the face of the public interest in allowing employers maximum discretion in the running of their businesses.

⁹¹*Campbell v Ford Industries* 546 P 2d 141 (1976) (Oregon)

⁹²*Monge v Beebe Rubber Company* 316 A.2d 549 (1974)

well established public policy of allowing maximum discretion to employers in the running of business, via the at-will doctrine. A much broader definition of public policy was adopted in *Monge*. Again the interest of the employer in being able to operate his business efficiently and profitably was recognised but it was said to be subject to other interests, such as the interests of the employee in maintaining his employment. In addition the court recognised the interest of the public in maintaining a proper balance between the two competing interests, and went as far as to recognise that unfair discharge in any event is not in the general public interest.

The acceptance in *Monge* that the interest in job security is more than just a private interest of the employee was important in the recognition of the tort of wrongful discharge. If more courts were prepared to recognise that the public interest is served by granting a degree of job security to employees, then the scope of the public policy exception would be greatly enhanced. Instead, "the courts' methodology reveals the discretionary, indeed arbitrary nature of their preferences for one set of interests over another" and it lacks "a principled basis for deciding which firings implicate the interests of the public"⁹³.

The uncertainty in the area greatly reduces the ability of the public policy exception to protect employees who blow the whistle on malpractice or wrongdoing at work, as even those who could succeed may be deterred from bringing claims. Instead all courts need to recognise that job security is not merely a private matter, and that the public interest is better served by protecting against abuses of employer power than by refusing to curb that power.

⁹³*Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, (1983) 96 Harvard Law Review 1931

6.4.2 Causation

As is the case in the UK cases on victimisation for raising concerns about discrimination, the protection of employees is limited by the difficulty in showing a causal link between the raising of a concern and dismissal. Thus, even where the tort of wrongful or retaliatory discharge is recognised, employees have difficulty in using it, particularly if employers are able to argue that the dismissal was not linked to the disclosure of information or raising of a concern. If employers can show that there was some other reason for the dismissal, then the employee's case will fail on the grounds that there was no causal link between the protected conduct and the dismissal. For example, the employer may argue that the employee was dismissed not because of the disclosure, but because other employees are unwilling to work with the discharged employee. In *Geary*⁹⁴ the court said in justification of its refusal to grant a wrongful discharge claim, "even an unusually gifted person may be of no use to his employer if he cannot work effectively with fellow employees"⁹⁵.

A second reason employers may use to explain the dismissal is that the employee's conduct breached internal rules and that this gave rise to the dismissal. In *Mudd v Hoffman Homes for Youth Inc.*⁹⁶, a social worker raised with the board of directors her concerns that two colleagues were involved in substance and child abuse. The court concluded that Mudd was discharged for disrupting the chain of command and not in retaliation for raising the concern. Clearly these alternative reasons may play a part in a decision to dismiss, but they should not allow employers to avoid liability where the main reason for dismissal undermines a clear public policy.

⁹⁴*Geary v United States Steel Corporation* 319 A 2d 174 (1974)

⁹⁵*Geary* at p. 179

⁹⁶543 A 2d 1092 (1988)

The issue of causation was raised in *Mount Healthy City School District Board of Education v Doyle*⁹⁷, a case based on the First Amendment exception to at-will employment. The *Mount Healthy* test, if adopted in wrongful discharge tort cases would go some way towards improving the position of employees trying to show a causal link between their conduct and dismissal. In *Mount Healthy*, the employee claimed he was discharged for comments made on a radio show and that this breached his constitutional right to free speech. The employer argued that dismissal was also due to various other incidents including one where he made obscene gestures to female students. The District Court held that as long as the protected conduct was a substantial reason for the dismissal, then the dismissal was unlawful. However, the Supreme Court felt that the employer should be allowed the chance to show that dismissal would have taken place in any event, without the protected conduct. It advocated the use of a twofold test: first, was the protected conduct a substantial reason for the decision to dismiss; second, if so, could the employer show that the employee would have been dismissed if it had not been for the protected conduct? If the protected conduct was a substantial reason for the dismissal, *and* the employee would not have been dismissed but for the protected conduct then causation is made out.

Where the employee has been involved in separate incidents, some protected and some not, it may not be unjust to dismiss her for the unprotected acts. To allow protected acts to make her immune from dismissal for any other acts would be to put the employee in a better position as regards employment protection for having taken the protected action than if she had done nothing. This could be open to abuse by a manipulative employee who, facing legitimate dismissal, could decide to claim immunity by making a protected disclosure.

⁹⁷97 S.Ct 568, 429 U.S. 274 (1977)

The *Mount Healthy* test avoids this problem, whilst overcoming the problems faced by employees like Mudd, above. In *Mudd*, the fact that the concern about colleagues was raised through the wrong channel broke the chain of causation between the raising of the concern and the dismissal. However, applying the *Mount Healthy* test, Mudd could have established causation; the raising of the concern was one of the substantial causes of the dismissal and if it had not been for that conduct she would not have been dismissed. Thus, the second stage of the test will not allow an employer to escape liability by relying on the manner in which the concern was raised⁹⁸. The employer's defence in relation to causation will only work where a completely separate incident is relied to explain the dismissal. Such an approach seems fair to both employee and employer and should be adopted in tort as well as first amendment cases.

7 Remedies

The remedies for retaliatory discharge, dismissal in breach of contract and dismissal in breach of the employee's constitutional rights are limited to financial remedies, with reinstatement an option for First Amendment cases only. Whilst these may go some way to compensating the employee for the loss of the job, they are limited in two ways. First, where only damages are available, it is difficult to fully compensate for loss of a job, given that future employers may be unwilling to employ someone previously dismissed for blowing the whistle. Secondly, although compensation may go part of the way towards punishing the employer for the wrong reported,

⁹⁸Unless this amounts to insubordination, in which case that in itself may give cause to discharge. In *Chambliss v Board of Fire and Police Commissioners* 312 NE 2d 842 a policeman was dismissed after exercising his right to silence under the Fifth Amendment to the Constitution in an enquiry into his involvement in a rape case. This refusal to speak was said to amount to insubordination and provided separate and legal grounds for dismissal even though dismissal for the constitutionally protected 'conduct' of refusing to speak would, alone, not have been lawful.

it does not always do so in full. Furthermore, even where reinstatement is available, the remedies remain private remedies for the individual dismissed and cannot have employer orders attached. For example, a requirement that an employer desist from falsifying medical records or stop producing faulty tubular casing cannot be added to an order for compensation to be paid to the employee⁹⁹.

8 Conclusions on the common law protection

The harshness of the employment-at-will doctrine is mitigated considerably by the exceptions that have been introduced by developments at common law. However, the exceptions are limited by being set against a general rule which upholds the employer's prerogative to hire and fire with a minimum of interference. In particular this is reflected in the somewhat restrictive approach of courts to the question of whether there is a mandate of public policy which justifies interfering with the employer's rights. This limitation is not dissimilar to that in the English law on breach of confidence and the public interest concept, where courts are sometimes slow to recognise the public interest served by speech, and instead uphold the employer's right to confidence in its place¹⁰⁰.

In both cases, the common law position has long been to uphold employer prerogative. Although exceptions to this now exist, they are limited, and full employee protection will be a long way off if it is reliant purely on the development of the common law. This is the case in both the UK and the US. In both jurisdictions, it is possible to use the general employment protection that already exists, (wrongful discharge in the US and breach of

⁹⁹Contrast this with the remedies available under the statutory whistleblower protection.

¹⁰⁰See *British Steel v Granada Television* [1981] AC 1097, and Chapter Three, above.

confidence and unfair dismissal protection in the UK) to obtain some limited protection for those who blow the whistle at work. However, the use of this protection is limited, not least because it has not developed with the problems faced by whistleblowers in mind. Instead, the USA has provided additional protection via the creation of specific statutory protection, both federal and state, for employees who blow the whistle. It is worth considering this protection in detail to see the extent to which specific legislative protection for whistleblowers can solve the various problems already identified.

PART TWO - Statutory Protection

1 Introduction

Various statutory provisions exist to grant protection to employees who are penalised at work for blowing the whistle on illegal or other wrongful conduct. Some statutes provide that employees are not to suffer retaliation for disclosing any breach of the regulations or offences they create. Other statutes, both federal and state, provide more generalised protection for employees who have action taken against them for whistleblowing. The details of the protection granted by these whistleblower protection acts varies from statute to statute and state to state. The workings of the federal Whistleblower Protection Act will be examined, followed by Michigan's Whistleblowers' Protection Act, the first of the state statutes. Other states' acts will be referred to by way of comparison.

2 Protection in statutes other than Whistleblower Protection Acts

Many statutes provide protection for employees who file complaints suggesting that the terms of the statute have been breached. For example the Occupational Safety and Health Act provides that "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceedings under or related to this chapter or has testified or is about to testify in any such proceedings or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter"¹. Similar provisions can be found in many statutes including the Employment

¹29 U.S.C. section 660(c)(1)

Retirement Income Security Act², the Water Pollution Control Act³, and the National Labor Relations Act⁴.

The equivalent provision in Title VII Civil Rights Act⁵ (which covers race and sex discrimination) provides that it is not only unlawful to discriminate against those who bring charges, testify or assist in proceedings under the act, but also to discriminate against those who oppose any practice made unlawful under the act⁶. This suggests that protection is available for those who act as protest whistleblowers in relation to sex or race discrimination, in addition to the protection provided to those who actually report breaches of legislation to appropriate bodies as under the other statutes.

Protection from retaliation for those who blow the whistle is also provided by the False Claims Act⁷, which covers the disclosure of fraud perpetrated against government departments. Not only does this Act require that whistleblowers should not be penalised for initiating, or for giving testimony or assistance in proceedings⁸, it also allows them a share in the proceeds of the action, providing a strong incentive to blow the whistle. The aim of the Act is to encourage the discovery of fraud by contractors against government departments by the disclosure of, for example, the making of false claims for payment, the falsifying of records of payment, and the giving of receipts for payments without checking that the information on the

²29 U.S.C. 1001-1381 at section 1140

³33 U.S.C. 1251 at section 1367a.

⁴29 U.S.C. 151 at section 158(a)(4)

⁵42 U.S.C. sections 2000e - 2000e-17

⁶Section 2000e - 3a.

⁷31 U.S.C. 3729 -3731.

⁸31 U.S.C. 3730(h)

receipt is true⁹. Where such fraud is revealed, the person responsible is liable for a fine of between \$5,000 and \$10,000 plus three times the amount of the fraud¹⁰. A person will be liable if she takes part in the fraud knowingly, or being reckless as to the truth or falsity of the information; no intent to defraud is needed¹¹. Where such fraud is disclosed, the Attorney General may bring an action against the perpetrator¹², or the person who discovered the fraud may start the action in the name of the government, which may then decide whether to take the action over¹³. Where the action is successful, the person who disclosed the fraud is eligible to be paid between 15% and 25% of the proceeds (plus costs) if the government brings the claim, and between 25% and 30% (plus costs) where the claim is brought personally¹⁴.

The False Claims Act has been successful in encouraging whistleblowing¹⁵ although the method of providing financial incentives to do so may be

⁹31 U.S.C. 3729(a)(1)-(7)

¹⁰This is reduced to 2 times the amount of the fraud where the person committing the fraud cooperates fully with the investigation, section 3739 (a) (A)-(C).

¹¹31 U.S.C. 3729 (b)

¹²31 U.S.C. 3730 (a)

¹³31 U.S.C. 3730 (b) and (c)

¹⁴31 U.S.C. 3730 (d) (1) and (2). Where the fraudulent conduct disclosed by has previously been disclosed in a court hearing or via the news media, the amount that the person bringing the action can claim is limited to 10% of the proceeds, section 3730 (d) (1).

¹⁵After introducing amendments to the False Claims Act in 1986 to encourage its use (including guaranteeing a minimum reward, and clarifying that no intent to defraud need be shown), the number of claims rose from around six per year to 280 in 1990. Callahan and Dworkin report in 1992 that almost \$70,000,000 had been recovered by the government as a result of the Act. Callahan and Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act* (1992) 37 Villanova Law Review 273

questionable. It is also of fairly limited application, restricted to the disclosure of fraud against the government. In contrast the Whistleblower Protection Act 1989 provides employment protection to federal employees who disclose a range of wrongdoing.

3 Whistleblower Protection Act 1989 U.S.C. Title 5

3.1 History

In 1978 the Civil Service Reform Act (CSRA) introduced a merit system covering the federal civil service and providing for a system whereby employees' job prospects and promotion would be judged on merit only, and would not be affected by arbitrary action. Part of this system works by specifying that certain "personnel actions" (including appointment, promotion, disciplinary action, transfer, reinstatement, performance evaluation, a decision relating to pay or benefits, or a significant change in duties) may not be carried out for particular prohibited reasons. These prohibited reasons include discrimination on grounds of race, sex or handicap, the coercion of political activity, and retaliation for disclosure of the violation of laws, or disclosure of gross mismanagement or abuse of authority¹⁶. This last category was included because of a recognition that federal employees who make such disclosures serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditure¹⁷. Where personnel action is taken for a prohibited reason, corrective action can be ordered.

The CSRA was amended in 1989 as the system of protection was not working effectively. Prior to that the protection was enforced by the Merit

¹⁶5 U.S.C. 2302

¹⁷Section 2 of Pub.L. 101-12

Systems Protection Board (MSPB), with allegations being investigated by the Office of Special Counsel (OSC), a branch of the MSPB. Employees had limited individual rights of appeal. The CSRA as originally enacted was unsuccessful in fulfilling its purpose, with the Office of Special Counsel bringing no corrective action cases between 1979 and 1989¹⁸. The reason for the small number of cases brought may have been that few deserving cases arose, though this is unlikely given that in some cases where the OSC turned the case down, successful appeals to the MSPB were made. Instead it seems that the role of the OSC, as a branch of the MSPB, was unclear and the protection only as strong as the will of the incumbent to pursue a case¹⁹.

The Whistleblower Protection Act 1989 (WPA 1989) amended the CSRA in several ways including separating the OSC from the MSPB, introducing an individual right of action and changing the burden of proof in order to help employees show that a prohibited personnel action had taken place. The changes have worked: since 1989 the OSC has received an increased number of cases, and brought 97 corrective actions between 1989 and 1994²⁰.

3.2 The Workings of the Whistleblower Protection Act 1989

3.2.1 Who is Protected?

The Act covers employees of the federal civil service, although there are a number of exceptions. Employees of various agencies, such as the Federal

¹⁸See 1994 U.S. Code Cong. and Adm. News p. 3550

¹⁹Devin and Aplin, *Whistleblower Protection - The Gap Between the Law and Reality* [1988] Howard Law Journal 223

²⁰See 1994 U.S. Code Cong. and Adm. News p. 3550

Bureau of Investigation, Central Intelligence Agency, Defense Intelligence Agency and National Security Agency are excluded from the protection of the Act, as are employees whose jobs are excepted from the competitive civil service because of their confidential or policy-making characters. The President may also exclude positions for the purposes of good administration²¹.

Taken together the exclusions are fairly extensive. In a survey of 19 covered agencies in 1992²², it was found that out of around 2 million employees in the agencies, 220,000 were not covered by the Whistleblower Statutes. Exceptions on grounds of national security are understandable, but it is not clear why those disclosing wrongdoing in their departments should automatically be excluded from protection against retaliatory action just because they are employed in confidential or policy making positions. If the aim of the legislation is to uncover fraud, there seems no reason to exclude such employees from protection for helping in this, especially since in many cases it will be those in more senior positions who have access to information that reveals the most serious wrongdoing. According to the survey, the Department of Defense, an agency which may need some exclusions on the grounds of national security, had the greatest number of excluded employees. Yet it is worth noting that the sector with the greatest number of fraudulent claims against the government under the False Claims Act is the defence contractor industry²³, suggesting that Department of

²¹s 2302 (a)(2)(B) and (C). Other exceptions include employees in a Government corporation, the General Accounting Office. See *Van Werry v MSPB* 995 F 2d 1048 (1993) U.S. Court of Appeals, Federal Circuit. Military staff are also excluded, but covered by a separate Military Whistleblower Protection Act 10 U.S.C. 1034.

²²*Whistleblower Protection: Agencies' Implementation of the Whistleblower Statutes Has Been Mixed*. March 1993, U.S. General Accounting Office.

²³*Strada, Counterclaims Against Whistleblowers: Should Counterclaims Against Qui Tam Plaintiffs Be Allowed In False Claims Act Cases?*, (1993)

Defense employees have the potential to play a major role in revealing relevant information and should be given full protection under the WPA.

3.2.2 What is Protected?

The WPA 1989 provides that a person may not take or fail to take, or threaten to take or fail to take, personnel actions in relation to another employee because of her actions in making any disclosure which she reasonably believes evidences "a violation of any law, rule or regulation", or which evidences "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety"²⁴. Employees are not only protected against dismissal but also action short of dismissal, such as demotion, disciplinary action, performance evaluation, actions concerning pay, benefits, or any significant change in duties²⁵.

The meanings of gross mismanagement²⁶ and abuse of authority have been considered by the MSPB, and the terms fairly strictly interpreted. In *Ellison*

62 University of Cincinnati Law Review 713.

²⁴5 U.S.C. section 2302(b)(8). The words "or threaten to take or fail to take" were added to the section by the 1989 Act.

Section 2302(b)(8)(A) covers any disclosure of such information except where the disclosure is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defence or the conduct of foreign affairs. Section 2302(b)(8)(B) covers any disclosure, even of such information as long as it is made to the Office of Special Counsel or the Inspector General of the appropriate government agency or to any employee designated by the head of the agency involved.

²⁵*Id* section 2302(a)(2)(A)(i)-(x)

²⁶Prior to the 1989 Amendments, the CSRA covered disclosures to mismanagement. In 1989 this was limited to disclosures of "gross" mismanagement.

*v MSPB*²⁷ the Board pointed out that merely disclosing an adverse personnel action and alleging that it indicates gross mismanagement is not sufficient to base a claim²⁸. Otherwise, any employee who has a personnel action taken against him would be able to claim that it evidences mismanagement and appeal the action under the WPA. Similarly, in *Carey v MSPB*²⁹ the employee claimed that when the agency for which he worked had closed down, he and other workers had not been redeployed in accordance with agreed procedures. This was not accepted as the basis of a WPA claim because it was not supported by specific information, apart from generalised grievances about agency management.

Whilst it is only fair to employees to allow an appeal system for contested personnel actions, to allow the WPA to be used for this purpose would be a misuse. It is designed to provide protection for employees who have retaliatory action taken against them for disclosing wrongdoing and its ability to do this would be undermined by allowing it to be used as an additional appeals procedure. Instead, the term "gross mismanagement" has, rightly, been limited to action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to carry out its duties³⁰.

The term "abuse of authority" is similarly strictly interpreted. A report by an employee that a supervisor spent time playing computer games on government computer equipment did not amount to a report of an abuse of

²⁷7 F 3d 1031 (1993) U.S. Court of Appeals, Federal Circuit

²⁸"An employee does not necessarily make a section 2302 (b)(8) disclosure merely by informing the [Inspector General of an agency] of an adverse personnel action and alleging that it evidences mismanagement or the like" *Id* at p. 1035

²⁹768 F 2d 1338 (1985)

³⁰See *Geyer v Department of Justice* 63 MSPR 13, MSPB 1994

authority in *D'Elia v Department of Treasury*³¹. Instead it was said that an abuse of authority for the purposes of the WPA had to result in personal gain or advantage to the official exercising power or to some other person. Again, given that the purpose of the WPA is to protect those who act in the public interest from retaliatory action, its protection should be limited to cases where serious issues that impact upon that public interest are disclosed. To allow the raising of more minor complaints to be protected would be to risk trivialising the Act³².

On the other hand, where the employee believes *on reasonable grounds* that she is disclosing serious misconduct covered by the act, (a violation of law, gross mismanagement, gross waste of funds etc.) she is protected from retaliation for doing so. In *Carter v Department of Army*³³, the employee disclosed in a criminal investigation that his supervisor had accepted a washing machine in exchange for a telephone line. The MSPB accepted that this could be a protected disclosure as long as the employee reasonably believed that it evidenced gross mismanagement or an abuse of authority. Thus the determination of whether or not the disclosure is protected was based on the employee's belief about that fact, although such belief must be based on reasonable grounds. The WPA has also been used successfully to protect an employee who was outspoken in raising general concerns within the agency and with the public, about practices which he believed were wasteful. Despite the agency's contention that there was no relevant disclosure involved, the employee was able to use the Act to argue that the disciplinary action taken against him was retaliatory, and so unlawful³⁴.

³¹60 MSPR 226, MSPB 1993

³²These cases, where employees are dismissed for making fairly trivial complaints at work, highlight the lack of any generalised protection against unjust dismissal. Such dismissals in the UK would probably be unfair.

³³62 MSPR 393, MSPB 1994

³⁴*Sowers v Dept. of Agriculture* 24 MSPR 942, MSPB 1984

The approach of the WPA on this point contrasts with the common law protection where a reasonable belief in wrongdoing is not sufficient to gain a remedy for retaliatory discharge. It comes closer to the approach in the UK where reasonable grounds for a suspicion can prevent a finding that a disclosure is in breach of confidence where it is made internally³⁵. This approach provides increased protection for the employee and is therefore more likely to encourage use of the WPA by employees.

3.2.2.1 The relevance of motive

In *Fiorello v U.S. Department of Justice*³⁶ the court held that disclosures by a prison guard of alleged improprieties and corruption in the prison where he worked were made for personal reasons, and not from a desire to inform the public of issues of general concern. For this reason, he could not rely on the WPA to challenge the demotion and suspension that followed his disclosures. However, in 1988 the case was overruled by Congressional action, on the basis that barriers should not be made that limit the flow of information from employees about government wrongdoing³⁷. After this amendment, the motive of the employee in raising a concern is not relevant. If the employee has a reasonable belief in the wrongdoing disclosed, then she will be protected³⁸. On this, the WPA takes the same position as the courts in the UK.³⁹

³⁵See Chapter Seven, para. 6.3.4.

³⁶*Fiorello v U.S. Department of Justice, Bureau of Prisons* 795 F 2d 1544 (1986) U.S. Court of Appeals, Federal Circuit

³⁷See report in *Horton v Department of Navy* 66 F. 3d 279 (1995), and legislative history: S. Rep. No 413, 100th Congress., 2d Sess 12-13 (1988).

³⁸*Horton v Department of Navy* 66 F. 3d 279 (1995)

³⁹See Chapter Three, para. 3.3.4, and Chapter Seven, para 6.6.3. above.

The motive of the employer in taking retaliatory action is also unimportant. Although there needs to be a causal link⁴⁰ between the disclosure and any contested personnel action, the disclosure need not be the main motivation for the employer. Clearly, where the motive is one of retaliation, or where there is an intention on the part of the employer to use, for example, dismissal to cover up illegal or wrongful activity, this will provide the strongest evidence that the disclosure and the dismissal were causally linked. However, such a motive is not essential to the success of the case⁴¹.

3.2.2.2 Internal or external reporting?

Those employees who make disclosures specifically prohibited by law, or required to be kept secret in the interests of national defence or the conduct of foreign affairs, may only be protected under the WPA if the disclosure is made via the Office of Special Counsel, or other person designated under the Act⁴². However, employees who disclose other appropriate information, not relating to such issues, will qualify for WPA protection whether they disclose the information internally or externally. Thus, most employees who raise concerns about gross mismanagement, abuse of authority, waste of funds or violation of law will be protected from retaliation regardless of the identity of the recipient of the information.

⁴⁰See below.

⁴¹*Marano v Department of Justice* 2 F 3d 1137 (1993) U.S. Court of Appeals, Federal Circuit

⁴²Section 1213 (a)(1) and (2). Those designated by the Act to receive disclosures of restricted information, in addition to the Special Counsel, are the Inspector General of an agency or another employee designated by the head of the agency (Section 1213 (a)(2)).

The protection can be compared here with the approach taken in breach of confidence actions under English law, where the identity of the recipient of information is of some importance. Although wide disclosure can be acceptable, this depends on the type of information disclosed. Disclosure on a wider basis than necessary risks a finding that the disclosure is in breach of confidence. In contrast, the WPA approach provides greater protection to the whistleblower and reflects that fact that the WPA is designed for the purpose of encouraging the disclosure of wrongdoing. The protection under English law is not designed for whistleblowers, but consists of exceptions to a general rule designed to prevent disclosures.

3.2.2.3 The need to show causation

Before an employee can succeed in a claim for protection under the Act it is obviously essential that there be a causal link between the protected conduct⁴³ and the alleged retaliatory personnel action. However, proving the existence of a causal link can be difficult.

Prior to the 1989 amendments to the CSRA the whistleblowing had to be a significant or motivating factor in the decision to take action against the employer. The MSPB used the *Mount Healthy*⁴⁴ test of causation (from the First Amendment protection case) in deciding whether there was sufficient causal link⁴⁵, the initial burden of proof being on the employee to show that the protected disclosure was a substantial or motivating factor in the personnel action, and then shifting to the employing agency, who could

⁴³Disclosing mismanagement, violation of laws etc.

⁴⁴*Mount Healthy City School District Board of Education v Doyle* 97 S. Ct 568, 429 U.S. 274 (1977)

⁴⁵The *Mount Healthy* test was adopted by the MSPB in *Gerlach v FTC* 8 MSPB 599, 9 MSPR 268 (1981) and is discussed in Part One above.

escape liability if it could show by a preponderance of the evidence that the same action would have been taken even if the protected disclosure had not been made. The disadvantage of this is that it allows employers to escape liability where a second reason for dismissal or discipline can be found, even though the employee is also being penalised for legitimate whistleblowing activity; it can thus be seen to undermine the ability of the Act to protect such activity⁴⁶.

In 1989 the Act was changed in order to help employees overcome the causation hurdle in proving their claims; the difficulties presented by the earlier test had been noticed in a Senate Committee on Governmental Affairs report⁴⁷. The new test requires only that the employee show, by preponderance of the evidence, that the whistleblowing was a "contributing factor", in the personnel action taken, before corrective action can be ordered⁴⁸. This can be shown by pointing to circumstantial evidence such as that the official taking the action knew of the disclosure and the action was taken within a period of time after the disclosure such that it is reasonable to conclude that the disclosure contributed to the personnel action⁴⁹.

Once the employee has shown that the whistleblowing contributed to the adverse personnel action, the burden of proof shifts to the employer. Rather

⁴⁶Fisher, *Whistleblower Protection Act: A False Hope for Whistleblowers* (1991) 43 Rutgers Law Review 355 at p. 378.

⁴⁷Whistleblower Protection Act 1988, Report of the Committee on Governmental Affairs, United States Senate, Report No. 100-413, July 6 1988, cited in *Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult*, October 1992. U.S. General Accounting Office.

⁴⁸Section 1214 (b)(4)(B)(i) and section 1221 (e)(1)

⁴⁹Section 1221 (e)(1)(A) and (B).

than just show by a preponderance of the evidence that there was another reason for the action, the employer must now show by "clear and convincing" evidence that the same action would have been taken in the absence of the whistleblowing activity by the employee, a much stricter test⁵⁰. Although the employer is still protected against the bad faith employee who blows the whistle in order to gain protection against legitimate disciplinary action, the burden of proof is shifted; whereas any doubt would, under the earlier test, have been settled in the employer's favour, under the new tests the benefit of the doubt is given to the employee.

Clearly, some causal link must be shown between whistleblowing and retaliatory action; if there is no causal link at all, there is no need for protection. Equally obviously, employers should not be penalised for taking legitimate disciplinary action against employees. Yet, proving causation remains difficult for employees seeking protection for whistleblowing. It is always open for employers to try to show some other reason for the dismissal; unless an employee has an unblemished record at work, employers can often, over time, find some credible reason for dismissal or disciplinary action and can then argue that the whistleblowing was not even a contributory factor in the action⁵¹.

Again the position can be compared with that in the UK in sex and race discrimination cases, where similar difficulties in establishing causation are experienced, and where courts have been cautioned about accepting the discriminator's explanation for conduct too easily, because of the difficulties complainants have in proving their cases. Instead, the Court of Appeal has suggested that tribunals draw the inference that there has been

⁵⁰Sections 1214 (b)(4)(B)(ii) and 1221 (e)(2)

⁵¹Fisher, *Whistleblower Protection Act: A False Hope for Whistleblowers* (1991) 43 Rutgers Law Review 355 at p 410

discrimination where the circumstances are consistent with discrimination, unless the alleged discriminator can show otherwise⁵².

Such a suggestion may help employees, but is weaker than the approach in the USA where the position on causation is set out in the legislation and provides very different standards of proof for employer and employee. The employee can use *circumstantial evidence* to show *by preponderance of the evidence* that a disclosure *contributed* to a reprisal; the employer can only refute that by *clear and convincing evidence* that the action would have been taken in any event.

However, it seems that even providing a generous test for employees by legislation has not solved the problem of causation, and has not had a significant effect on the success rate of whistleblower claims. Lack of evidence of a causal link between personnel actions and disclosures remains a principal reason for the Office of Special Counsel not to pursue claims on behalf of employees⁵³. Yet, beyond creating a low burden of proof for the employee, allowing the employee to rely on circumstantial evidence, and imposing high burden of proof on the employer, it is difficult to see what more can be done by legislation to help overcome the problem.

3.2.3 Remedies

Where an employee does overcome the problem of establishing causation and can show that retaliatory action has been taken against her for disclosing information, or raising concerns about what she reasonably

⁵²*Baker v Cornwall County Council* [1990] IRLR 194

⁵³*Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult*, October 1992. U.S. General Accounting Office.

believes to be a violation of law, or a serious case of gross mismanagement, waste of funds, or abuse of authority she is then eligible for the full protection of the WPA. The protection provided is fairly extensive. First, the MSPB can grant the employee a stay of the contested personnel action⁵⁴, while the case is investigated. If the personnel action was retaliatory and is not corrected, then corrective action can be ordered⁵⁵. The employee will be placed as close as possible to the position she would have been in prior to the contested action, and will be reimbursed for lost pay and benefits, legal fees, travel or medical expenses and any foreseeable consequential losses⁵⁶.

The level of compensation provided by the WPA, covering future and past losses, can give employees the confidence to blow the whistle where they believe there is wrongdoing at work. Such remedies can also influence the employing agencies. Remedies that are limited to past losses and reinstatement impose little burden on employers who may take the view that it is worth the risk of incurring the expense in order to remove a troublesome employee; more extensive remedies that include consequential losses can make that a risk that is less worth taking. To this extent, the remedies available under the WPA are superior to those available to employees successful in unfair dismissal cases under English law.

Perhaps even more significant, the Special Counsel and MSPB have other powers as well as the power of awarding compensation and corrective action to the individual whistleblower. If the employee's disclosure indicates that a criminal offence has been committed by the agency, then

⁵⁴Section 1214(b)(1)(A)(i)

⁵⁵Section 1214 (b)(4)(B)(i). This is subject to the employee showing that the personnel action was caused by the disclosure; see below.

⁵⁶Section 1214 (g)

the case can be referred to the Attorney General to consider prosecution⁵⁷; other violations are reported to the head of the relevant agency⁵⁸. The MSPB can also take disciplinary action including dismissal, demotion, suspension or a civil fine, against the person who took the prohibited personnel action, or who committed the violation of any law, rule or regulation⁵⁹.

These powers provide an extra dimension to the protection of the WPA over those available under the English law, where remedies are limited to private remedies for the discharged employee. Employees who blow the whistle in good faith, motivated by the desire to inform the public on matters of general concern, do so in the hope that the wrong disclosed will be put right. The additional powers under the WPA could act as added incentive to such employees to disclose wrongdoing, as they allow steps to be taken which are likely to do more to prevent further abuses than any private remedy for the employee. Employers who are willing to risk financial penalties by way of compensation to employees are unlikely to be as willing to risk disciplinary action, or even prosecution, against themselves; the existence of these more extensive remedies should provide greater protection and redress to the whistleblowing employee.

3.2.4 Procedure under the Whistleblower Protection Act.

The usual procedure for bringing a claim under the WPA is to refer the matter to the Office of Special Counsel. The OSC then investigates the allegation; where it relates to the disclosure of a violation of law or gross mismanagement, abuse of authority etc., the OSC refers the matter for

⁵⁷Section 1214 (d)(1)

⁵⁸Section 1214 (e)

⁵⁹Section 1215 (a)

investigation by the relevant agency who then reports back to the OSC with details of any evidence obtained, and outlining corrective action to be taken⁶⁰. If the OSC refuses to investigate a claim, or to seek corrective action on the employee's behalf, the employee has an individual right of action and can bring a claim direct to the MSPB⁶¹.

Case law suggests that employees must exhaust other remedies before bringing a WPA claim, and that the Act provides an exclusive remedy for employees who are retaliated against for blowing the whistle at work⁶². On the other hand, the WPA it is not necessarily the exclusive remedy for personnel practices prohibited for other reasons, such as sex discrimination⁶³. In *Spruill v MSPB*⁶⁴ the court stated that the jurisdiction of the MSPB over protected whistleblowing activities did not cover

⁶⁰Section 1213 (b), (c), (d), (e). Details of the report are also sent to the President and relevant Congressional committees.

⁶¹Section 1214 (a)(3) and section 1221. See also *Ellison v MSPB* 7 F 3d 1031

⁶²*Spagnola v Mathis* 859 F 2d 223 (1988) U.S. Court of Appeals, District of Columbia Circuit, involved a claim for damages for breach of the constitutionally protected right to free speech, where an employee was denied promotion, in the employee's view, for speaking to the press during an investigation into the use of narcotics by employees and members of congress. The court held that the correct avenue of redress was via the whistleblower provisions of the CSRA, and so denied the employee's claim. In *Steele v U.S.* 19 F 3d 531 (1994) U.S. Court of Appeals, 10th Circuit, the court refused a claim for damages for wrongful termination, breach of the covenant of good faith and emotional distress after a dismissal, allegedly for whistleblowing activities, on the basis that the correct avenue for such cases was the WPA. See also *Daly v Dept. of Energy* 741 F. Supp 202 (1990) U.S. District Court, District of Colorado, where the court held that the WPA provides an exclusive remedy for retaliation for whistleblowing..

⁶³*Kent v Howard* 801 F. Supp 329 (1992) U.S. District Court, S.D. California

⁶⁴978 F 2d 679 (1992) U.S. Court of Appeals, Federal Circuit

retaliation for employees filing discrimination claims with the Equal Employment Opportunities Commission. Thus where employees blow the whistle on matters such as discrimination in the work place, the remedy under the WPA supplements remedies available elsewhere; where matters disclosed by federal employees relate to violation of law, mismanagement etc., the WPA appears to offer an exclusive remedy.

3.3 The effectiveness of the Whistleblower Protection Act

Before the amendments, a major limitation to the effectiveness of the Act was the fact that the OSC seemed to view the MSPB, rather than the employee, as its client⁶⁵ and tended not to bring claims for corrective or disciplinary action⁶⁶. The amended 1989 Act separated the MSPB and OSC and set out the role of the OSC, more clearly: it was to "protect employees ... from prohibited personnel practices"⁶⁷. The reviews of the General Accounting Office which are carried out on a regular basis indicate that allowing employees to bring an individual claim after the OSC has

⁶⁵see Devin and Aplin, *Whistleblower Protection - The Gap Between the Law and Reality* [1988] Howard Law Journal 223, who report that one of the holders of the post of Special Counsel taught a course to federal managers on how to fire employees without OSC interference, and that another holder of the post stated that his job was to serve the system and not individuals.

⁶⁶In 1984, OSC closed 99% of whistleblower reprisal complaints without seeking corrective or disciplinary action (*Whistleblower Protection: Employees' Awareness and Impact of the Whistleblower Protection Act of 1989*. March 31 1993. U.S. General Accounting Office).

⁶⁷Section 1212. The establishment of the OSC is provided for by section 1211; the Special Counsel, a lawyer is appointed by the President to serve for a period of 5 years.

decided not to take action has had some impact, with about a third of employees obtaining relief after bringing a case to the MSPB⁶⁸.

However, even after the 1989 amendments the Act is not a total success. There are several problems including employees' lack of knowledge of the protection available and difficulties in proving causation. Many employees are aware that there is some legal protection for whistleblowers, but are not aware of the details of the procedure, and it has been suggested that more needs to be done to keep employees informed, possibly by imposing a statutory duty on agencies to notify employees of their rights under the Act⁶⁹.

However, even those employees who are aware of the protection seem to remain fearful that blowing the whistle may lead to reprisal, and more important than being seen to protect employees from reprisal in order to overcome this fear, is the need to be seen to be taking action in those cases where wrongdoing is reported. In one survey by the General Accounting Office, where four factors were identified by employees as likely to encourage the reporting of misconduct, two factors came out higher than the fact that protection from reprisal was available: that something would be done to correct the problem reported, and that the problem was serious⁷⁰.

⁶⁸*Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult*. October 1992. U.S. General Accounting Office.

⁶⁹*Whistleblower Protection: Agencies' Implementation of the Whistleblower Statutes Has Been Mixed*. March 1993, U.S. General Accounting Office.

⁷⁰*Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection from Reprisal*. July 1992, U.S. General Accounting Office. 90% stated the belief that the knowledge that something would be done about the misconduct would encourage them to report. 88% believed that the seriousness of the conduct would influence reporting and 84% would be encouraged by knowledge that protection from reprisal was available. The fourth factor was that the employee could remain anonymous

This suggests that employees blow the whistle from a genuine desire to serve the public interest and may be prepared to do so even with a risk to job security if the issue is serious enough and can be corrected. The MSPB and OSC have powers to take disciplinary action against wrongdoers and to report cases of violation of criminal laws to the Attorney General. If these powers were seen to be used, this could provide more powerful incentives to speak out. Without action to remedy the wrong disclosed, whistleblowing in the public interest remains an empty gesture and attracts few participants.

Another practical problem for employees is the need for legal advice before bringing a claim. The OSC role is to act as an ombudsman, investigating and prosecuting violations of the Act, rather than as the employee's advocate⁷¹, and employees may therefore feel the need to instruct their own advocate. Although legal expenses are recoverable in the event of success, the risk of losing a case may make employees unwilling to bring a claim.

However, the main obstacle to the success of the Act in protecting the whistleblower from reprisal remains the difficulty in proving causation. The changes to the burden of proof in the 1989 Act seem to have had little effect on the success rate of cases, suggesting that the only way to improve protection on this front is to change the attitudes of those investigating and hearing cases, to make them especially aware of the problems involved, and wary of accepting what could be bogus defences by employers. Otherwise, employers will be able to continue to take retaliatory action against whistleblowing employees, which is the whole purpose of the Act to prevent.

(68%).

⁷¹*Frazier v MSPB* 672 F 2d 150 (1982)

4 Michigan's Whistle-blowers' Protection Act⁷²

The WPA only covers employees of the federal civil service. Other employees have to rely on the protection provided by individual states. The first state to enact legislative protection for whistleblowers was Michigan, whose Whistle-blower Protection Act was introduced in 1981. The provisions of this Act will be examined, and other state acts discussed by way of comparison.

4.1 History

Michigan's Whistle-blowers' Protection Act was enacted in response to a specific incident in the 1970's in which a poisonous chemical fire retardant was shipped to state feed-grain cooperatives, instead of a nutritional supplement, causing livestock losses and having serious effects on the health of those who ate contaminated food. It was later discovered that some employees had been threatened with dismissal if they volunteered information about the chemical at the ensuing inquiry, and this discovery led to the introduction of the Michigan Act.

4.2 The workings of the Michigan Act

4.2.1 Who is protected?

The Michigan Act applies to all employees, public and private, although it does not cover independent contractors⁷³. To this extent it gives wider coverage than the federal WPA and the Whistleblower Protection Acts of many other states⁷⁴. However, the type of whistleblowing to which

⁷²Michigan Compiled Statutes Annotated 15.361-369

⁷³*Chilingirian v City of Fraser* 486 NW 2d 347 (1992)

⁷⁴For example, the equivalent statutes in Alaska, Arizona, Colorado, Delaware, Indiana, Iowa, Kentucky, Missouri, Nevada, North Carolina, South Carolina, Washington, West Virginia, Wisconsin, and Texas, protect only public sector employees.

protection is extended is limited. An employee is protected only where a violation of law, regulation or rule is reported or about to be reported. Unlike the Federal WPA, and other state protection such as that in Maine and New Jersey, reports of concerns about matters such as gross mismanagement, abuse of authority, waste of funds, or threats to public health and safety are not protected⁷⁵. The violation of law reported must be that of the employer or other employees⁷⁶, and does not extend to the reporting of illegal activity by others, so that an airline ticket agent dismissed for 'over-zealous' reporting of suspected drug traffickers could not use the Michigan Act⁷⁷.

The Act provides that employees are not to be dismissed, threatened with dismissal or otherwise discriminated against in respect of pay and conditions of employment because of a relevant disclosure⁷⁸. Protection against discrimination has been held to extend to a denial of an expectation of promotion to an employee, where in the employee's view, he was not given alternative employment following redundancy because he had reported safety violations at the employer's water plant⁷⁹.

⁷⁵See federal Whistleblower Protection Act section 2302. See also Maine's Whistleblowers' Protection Act 1983, Title 26, 833 (the Maine Act) and New Jersey's Conscientious Employee Protection Act 1986, Title 34 section 34:19-3 (the New Jersey Act).

⁷⁶See *Dudewicz v Norris - Schmid Inc.* 503 NW 2d 645 (1993) where an employee was dismissed after filing with the employer and the local county prosecutor, a complaint against a fellow employee for assault.

⁷⁷*Dolan v Continental Airlines* 526 NW 2d 922 (1995) Court of Appeals of Michigan. The employee was required only to contact the Drugs Enforcement Agency (DEA) via her supervisor, and was discharged for contacting the DEA direct.

⁷⁸Section 15.362

⁷⁹*Hopkins v City of Midland* (1987) 404 NW 2d 744 Court of Appeals of Michigan.

Protection covers those who can show by clear and convincing evidence that they have reported *or are about to report* violations, or suspected violations⁸⁰. Thus, where an employee filed a complaint after her dismissal, this did not preclude her use of the Act, as it was still open to her to show that the dismissal was caused by the employer's belief that she was about to report the violation⁸¹. On the other hand, where an employee resigned after a dispute over unlawful billing practices in a law firm, and subsequently filed complaints with the Attorney Grievance Commission, she could not claim the protection of the Michigan Act because there was no evidence that the employer knew that she would make the report, only that the employer may have feared that she might⁸². However, the dissenting judge in the case took the view that the Act rightly covers those who are about to report violations since "[e]mployers should not be allowed to peremptorily retaliate against employees with impunity"⁸³. This approach is preferable; where there is evidence that an employer has dismissed an employee because of a suspicion that she might disclose a violation, the employee should be able to bring a case within the Act.

4.2.2 Internal or external reporting?

The Michigan Act is further limited by restricting protection to external whistleblowing. Protection is only provided where reports are made to a public body⁸⁴, although the term is given fairly wide interpretation and can

⁸⁰Section 15.363 (4)

⁸¹*Lynd v Adapt Inc.* 503 NW 2d 766 (1993) Court of Appeals of Michigan

⁸²*Kaufman and Payton v Nikkila* (1993) 503 NW 2d 728 Court of Appeals of Michigan

⁸³*Id.* at p. 733

⁸⁴Section 15.362

include state employees⁸⁵. Thus, where a report was made to a social worker by an employee in an adult residential foster care home about the circumstances of a resident's death, that report was protected under the Michigan Act on the basis that the social worker, a state employee, could be a "public body" for the purposes of the Act⁸⁶. However, where complaints are raised internally, no protection is available⁸⁷.

In contrast some states protect internal and external reports⁸⁸, and other states, such as Maine and New Jersey protect reports to external bodies only after internal channels have been exhausted⁸⁹. New Jersey provides that protection for disclosure to a public body is only available where the employee has first notified the employer of the concern in writing, and has given an opportunity for the employer to respond. The exceptions to this rule are limited to where the employee is reasonably certain that the employer knows of the matter of concern, or where there is an emergency situation and the employee reasonably fears that physical harm may result from the disclosure⁹⁰. Where an employee believes that internal disclosure would not be worthwhile she will not be protected from retaliation for disclosure to a public body if a court finds that her belief was not based on reasonable grounds.

⁸⁵Section 15.361

⁸⁶*Branch v Azalea/ Epps Home Ltd.* 472 NW 2d 73 (1991)

⁸⁷*Chandler v Schlumberger* 542 N.W. 2d. 310 (Mich. App. 1995)

⁸⁸For example, Louisiana, Minnesota, North Carolina, Pennsylvania, West Virginia. Some states do not specify to whom reports should be made, for example, Illinois, Missouri and Nevada.

⁸⁹Others include, Indiana, Maine, New Jersey, New Hampshire, New York

⁹⁰New Jersey Act section 34:19-4

The Maine Act is perhaps a little more generous, limiting protection to where an employee has first raised the issue internally and given the employer a chance to respond, but allowing an exception where the employee "has specific reason to believe that reports to the employer will not result in promptly correcting the violation, condition or practice⁹¹".

The approach of the Michigan Act in refusing protection for internal reporting is perhaps not surprising given that this is the approach of some states in relation to retaliatory discharge, where internal reports are viewed as internal management disputes, and not as raising issues of public policy. However, as observed above, such a restriction is unwarranted. If the aim of the protection is to uncover wrongdoing, employees should be protected against reprisal for so doing. The only reason to restrict protection on the basis of the means by which this is done is where it involves wider disclosure than necessary. Where disclosure is internal, there seems no reason to restrict the protection.

4.2.3 The need for a genuine belief in the violation

The Michigan Act provides protection for employees who disclose violations *or suspected violations* to a relevant body. The employee only loses this protection if she knows that the disclosure is false⁹². The employee can be protected both where she mistakenly believes that illegal conduct has taken place, and where she mistakenly believes that legal conduct is illegal. Thus in *Melchi v Burns International Security Services Inc.*⁹³ the employee believed that the destruction and falsification of

⁹¹Michigan Act section 833 (2)

⁹²Section 15.362

⁹³597 F. Supp 575 (1984)

documents in a highly regulated industry such as the nuclear power industry was illegal and so his disclosures of this practice were protected.

The Michigan Act can be contrasted on this issue with the protection under the federal WPA⁹⁴ and that offered by other states such as Maine and New Jersey⁹⁵ where the employee is only protected if she has *reasonable grounds* for believing that she is disclosing a violation. The Michigan approach is more generous than that of the other jurisdictions. A requirement that disclosures be made on reasonable grounds before protection is granted can leave the individual employee in an uncertain position. She may be unsure whether or not her opinion will later be found to have been formed on reasonable grounds. Yet she needs to know that her disclosure will be protected at the time that she is contemplating the disclosure. The uncertainty may prevent the employee from making the disclosure, and illegal activity may then continue.

However, dispensing with the need for any belief in illegal conduct to be based on reasonable grounds can leave the employer in a vulnerable position, forced into defending itself against unfounded attacks. In the case of the Michigan Act, this is compensated for by the fact that protection is only given where disclosure is to a public body. Wider disclosure does not come within the protection.

The real danger posed to employers by an unfounded allegation is where it is raised in the media. If disclosures are made to a public body charged with responsibility for investigating any allegations, fewer risks are posed by false allegations. This is the approach under English law, as in *Re a*

⁹⁴5 U.S.C. 2302 (A)(8)(A) and (B)

⁹⁵Maine Revised Statutes Annotated 26.833.A and *Bard v Bath Iron Works Corp.* 590 A 2d 152 (1991); New Jersey Statutes Annotated 34:19-3

*company's application*⁹⁶, where Scott refused to consider whether the allegations of breaches of FIMBRA regulations and tax irregularities were true, on the basis that the disclosures were to be made to the relevant authorities who could investigate them. He drew a distinction between such a case and where disclosure was made on a wider scale, when a reasonable belief in the truth of the disclosure would be necessary. Such an approach seems to represent an appropriate compromise between the employee's need for certainty and the employer's interest in avoiding the disclosure of unfounded allegations.

4.2.4 The relevance of motive

Protecting disclosures that are not based on reasonable grounds may still seem generous to the employee, but it is also tempered by a requirement that the employee act with a proper motive. In *Wolcott v Champion International Corporation*⁹⁷ the dismissed employee had reported that there was insufficient ventilation at the employer's workshop and that oil and solvents had been dumped in the ground in violation of public health and environmental legislation. However, it transpired that the employee had only made the disclosures once redundancy looked likely, had himself taken part in the dumping of toxic materials and had exacerbated the fumes in the workshop by closing the doors prior to an inspection by health and safety officials. The court, in denying him protection, said that the "...Act was not intended to serve as a tool for extortion. Those availing themselves of its protection should be motivated, at least in part, by a desire to inform the public about violations of laws and statutes, as a service to the public as a whole⁹⁸."

⁹⁶[1989] 2 All ER 248

⁹⁷691 F. Supp 1052 U.S. District Court, W.D. Michigan, N.D.

⁹⁸*Id.* at p. 1059

Wolcott's motive in making his disclosures was to gain protection against redundancy where none was otherwise available; at times an employee may be motivated partially by the public interest and partially by personal or even malicious reasons. In such a case some protection may still be available, although an impure motive can affect the level of remedy available to the employee⁹⁹. This approach is understandable, although it does not solve an underlying conflict: where an illegal action is discovered as a result of a disclosure, a guilty employer should not be able to retaliate against an employee without some sanction being imposed, even if the employee is partly motivated by selfish reasons; on the other hand, where an employee acts purely for personal gain in making a disclosure, she may not be worthy of protection, especially since to do so would be to put employees in a better position by blowing the whistle than they would otherwise be given that there is no general protection against dismissal in common law. Employees fearful of legal dismissal should not be able to disclose wrongdoing purely to gain employment protection they are otherwise not entitled to.

This problem could be avoided, not on the basis that some motives preclude protection, but on the basis that there is no causal link between disclosure and dismissal where the employee is dismissed because of the malicious motive. However, given the difficulties in establishing causation, such a resolution would not be advisable. In fact, given the difficulties faced by all employees, good motive or bad, in establishing causation, it is preferable to have generous test on causation, with malicious employees losing protection because of bad motive, rather than a rule in which motive is irrelevant, but malicious employees fall on causation.

⁹⁹*Melchi v Burns International Security Services Inc.* 597 F. Supp 575 (1984). The remedy was limited to financial damages without reinstatement because there was evidence that Melchi had malicious motives for his disclosure.

Causation may be relevant in relation to the employer's motive for dismissal. Although there is no requirement that an employer have retaliatory motives before protection is granted¹⁰⁰, the absence of such motives may mean that it is more difficult to establish the necessary causal link between disclosure and retaliation.

4.2.5 The need to show causation

As already mentioned, establishing the essential causal link between whistleblowing and retaliation can cause difficulty. However, the difficulties under the Michigan Act may be even greater than those under the federal WPA, as the test of causation remains essentially that of *Mount Healthy v Doyle*¹⁰¹, with the employee's initial burden of proving a causal link between the protected activity and a dismissal shifting to the employer, who can escape liability if a legitimate reason for the dismissal can be shown. However, an extra stage to the test is allowed where the employee can show that the reason given by the employer for the dismissal is merely a pretext for what was in reality a retaliatory dismissal¹⁰².

Employees may argue that a prima facie case of retaliation is made out by drawing inferences from employer behaviour such as that the employer took no action over an internal report of unsafe working conditions and then discharged the employee once it became known that she had disclosed the position to external authorities¹⁰³. Similarly, the fact that an employee's work received no criticism prior to the reporting of illegal behaviour, and

¹⁰⁰*Melchi v Burns International Security Services Inc.* 597 F. Supp 575 (1984)

¹⁰¹97 S. Ct 568, 429 U.S. 274 (1977)

¹⁰²*Eckstein v Kuhn* 408 NW 2d 131 (1987)

¹⁰³*Tyrna v Adamo, Inc.* 407 NW 2d 47 (1987)

much criticism afterwards, may be used to infer that dismissal or discrimination in employment is retaliatory¹⁰⁴.

Once the employer has shown that there was a legitimate reason for the dismissal, the burden returns to the employee to show that the reason is a mere pretext, by persuading the court that retaliation was the most likely motivation for the discharge, or that the reason put forward by the employer is not worthy of credence¹⁰⁵. For example, in *James v HRP Inc.*¹⁰⁶ the employer claimed that the employee was dismissed for bringing video recording equipment into the rabbit breeding facility in which she worked. The employee was able to argue that this reason was a mere pretext as similar conduct by other employees had not resulted in dismissal. Instead, she argued that she was dismissed because she had been going to use the video to back up reports of animal abuse in the facility that bred rabbits for medical research.

The test under the Michigan Act is more protective of the whistleblower than the straight *Mount Healthy* test (which does not have the option for the employee to show that the employer's reason was a pretext). However, it is less protective than the federal WPA, where retaliation only need be a contributing factor for the dismissal. If there are multiple reasons for the dismissal, the Michigan Act will only protect those for whom the additional reasons are merely pretexts for what is really as retaliatory dismissal; the WPA, on the other hand, would protect the employee as long as retaliation contributed to the dismissal, even if it did so alongside the other reasons. However, as with the WPA, it is debatable whether the details of the

¹⁰⁴*McLemore v Detroit Receiving Hospital and University Medical Center* 493 NW 2d 441 (1992) Court of Appeals of Michigan

¹⁰⁵*Hopkins v City of Midland* 404 NW 2d 744 (1987) Court of Appeals of Michigan

¹⁰⁶852 F. Supp 620 (1994) United States District Court, W.D. Michigan

causation test have much impact on the extent to which employees are successful in claiming the protection of the Act; the willingness of courts to believe that retaliation can take place may be more relevant.

4.2.6 Remedies available under the Michigan Act

An employee who alleges that she has been dismissed or discriminated against in breach of the Michigan Act can bring an action for injunctive relief as well as for damages¹⁰⁷. Orders that the court can make include reinstatement, back pay, reinstatement of fringe benefits, legal fees and actual damages¹⁰⁸. Damages for loss of employment are not limited to the level of damages available under the contract of employment (which will be very little for "at-will" employees), but can cover full compensation for actual losses, as well as for emotional distress¹⁰⁹. The level of damages and type of remedy awarded may be affected by factors such as the motive of the employee in making the disclosure. Thus, in *Melchi* the employee was not awarded reinstatement because of his malicious motives in making the disclosure¹¹⁰.

As with the federal WPA, the full measure of damages available can act as an incentive for employees to blow the whistle as they can act in the knowledge that any losses will be compensated. However, the provision that any person who breaches its terms is liable to a civil fine of up to only \$500, coupled with the absence of any procedure within the Act for illegal conduct to be investigated or for action to be taken against employers who

¹⁰⁷Section 15.363

¹⁰⁸Section 15.364

¹⁰⁹*Teresa Philips* 531 NW 2d 144 (1995)

¹¹⁰*Melchi v Burns International Security Services Inc.* 597 F. Supp 575 (1984)

take retaliatory action, mean that the Act lacks some of the deterrent elements for employers present in the WPA.

4.2.7 Does the Michigan Act provide an exclusive remedy for whistleblowers?

The Michigan courts have not always taken a consistent line on the question of whether the Whistle-blower's Protection Act provides an exclusive remedy for retaliation by employers, or whether it coexists with the tortious remedy for retaliatory discharge recognised in Michigan in *Suchodolski v Michigan Consol. Gas Co.*¹¹¹. However, the position now seems to be that where the employee is dismissed for raising a concern based on a statutorily defined public policy, an exclusive remedy is provided by the Act. Where the employee relies on a public policy not defined by statute, or where the employee otherwise cannot use the Act, a tort of retaliatory discharge may be used¹¹². Thus, whereas under *Suchodolski* employees could use the tortious remedy for retaliatory discharge where a dismissal resulted from any disclosure as long as it was backed by a clear mandate of public policy, the tortious remedy is now preempted by the Act in cases where the employee discloses a violation of law.

¹¹¹316 NW 2d 710 (1982). For cases that indicate that the Michigan WPA provides an exclusive remedy see *Covell v Spengler* 366 NW 2d 76 (1985), *Dudewicz v Norris-Schmid* 503 NW 2d 645 (1993), *Driver v Hanley* 523 NW 2d 815 (1994) and *Shuttleworth v Riverside Osteopathic Hospital* 477 NW 2d 453 (1991). For cases to the contrary see *Faulkner v Flowers* 522 NW 2d 700 (1994) Court of Appeals, Michigan, *Watassek v Michigan Department of Mental Health* 372 NW 2d 617 (1985) and *Tyrna v Adamo, Inc.* 407 NW 2d 47 (1987).

¹¹²See *Vagts v Perry Drug Stores* 516 NW 2d 102 (1994) Court of Appeals of Michigan, and *Dolan v Continental Airlines* 526 NW 2d 922 (1995) Court of Appeals of Michigan, where the employee could not use the Act because she was not reporting the violations of an employer or employee, but of third parties.

5 Conclusions on statutory and common law protection

As pointed out above, the legal protection available in the USA can be contrasted sharply with that available under English law. Here no positive right to free speech is recognised, although there is a general protection against dismissal without a fair reason. In the USA there is no general protection against dismissal (although exceptions exist which can be used by the whistleblower) yet the right to freedom of speech is recognised and specific legislation protects those who blow the whistle on certain issues. However, as has been seen, the advantages of protection in the USA, the WPA and First Amendment rights, although significant, are not as great as might have been expected.

What becomes clear from an examination of the experience of the USA is that the recognition of freedom of speech as a fundamental right is not sufficient alone to provide whistleblower protection. Even though freedom of speech is protected by the First Amendment to the US Constitution, courts have been slow to recognise the extent to which the threat of losing one's job acts as a deterrent to exercising the right. Instead, the right of employers to hire and fire at will has been recognised as having enough weight to counterbalance the right to free speech when exercised in the private sector workplace. Although dismissal of state employees for exercising freedom of speech is unconstitutional, in order to protect the right of all employees to free speech, courts need to recognise that the workplace, public or private sector, is an appropriate forum in which speech should be protected.

Extension of the First Amendment rights to the private workplace remains important despite the legislative protection for whistleblowers, as it is only under the First Amendment that protection is provided for protest whistleblowing. The legislative protection only covers disclosure of wrongdoing, and does not extend to the raising of more general concerns

about work, or participation in public debate by employees providing an insider's view on issues of public importance. Moreover, the common law protection against retaliatory discharge only covers disclosures of illegal or wrongful conduct. In the absence of any generalised unfair dismissal protection, the protester in the USA is dependent on the recognition of her First Amendment rights.

The consideration of the position in the USA also illustrates the benefits of drafting specific whistleblower protection. The aims of the protection can then be clear, and it can be interpreted and developed to provide the best protection for whistleblowers. The alternative, allowing common law to develop to provide protection, has various drawbacks: it can be a slow process, and can be hampered by protection having developed without whistleblowers in mind. For example, under the US common law, and in the UK, causation presents a formidable hurdle to employees. In response, the federal WPA has a test that is designed to be lenient on employees and stringent on the employers, to reflect the fact that causation is very difficult to establish.

Similarly, designed with whistleblowers in mind, the WPA takes an open approach to the recipient of the information disclosed. The important thing is for the wrongdoing to be stopped; whether this is achieved by internal or external reporting is not relevant. In contrast, the protection of the retaliatory discharge protection is restricted for whistleblowers in some states by the need for disclosure to be external. This reflects the fact that the protection has arisen out of a culture that sees internal complaints as outside the remit of court interference, rather than being designed to offer maximum protection for the whistleblower.

An additional benefit of protection designed for whistleblowers is that remedies can be included that are particularly appropriate. Under the WPA, the court has the chance to order some action to end the wrongdoing

reported. This additional remedy may be as great an incentive to employees to report concerns as financial compensation. Protection in the UK could be improved by including some additional remedies beyond those of compensation or reinstatement, which are directed only at the employee.

A further lesson that can be learnt from the USA is that however generously legislative protection is drafted, the protection is only as strong as those who apply it. The appointment of a specific government department to investigate and prosecute cases under the protective legislation, which may at first seem a positive step toward whistleblower protection, has not been totally successful. The OSC investigates only a tiny proportion of the cases raised before it, even though some of these are then successfully appealed. Any equivalent system that could be set up for whistleblowers in this country, such as the appointment of an ombudsman, would need to be subject to very careful monitoring to ensure that it worked to safeguard the interests of whistleblowers rather than of employers. Any ombudsman would also need to have, and use, powers to investigate the wrong reported, or to refer it to relevant authorities, as well as to investigate the treatment of the employee, since the US experience indicates that this is a greater motivator to public interest whistleblowing than employment protection.

The major shortcomings within the system currently operating in the USA are ones that are inherent in any system of protection, such as that of finding sufficient evidence in support of the employee to convince those hearing the case, and encouraging employees who are aware of illegal or unsafe conduct to trust the protection provided. Ultimately these problems do not have legal solutions, and are best tackled by publicity and education of both employers and employees. Despite these inherent difficulties in providing comprehensive protection for whistleblowers, there are evident benefits, in terms of clarity and certainty, in having specific recognition of the public interest served by whistleblowing and statutorily defined

protection. Detailed proposals for such protection in the UK will be discussed in the concluding chapter.

Eight

A Case Study - Whistleblowing in the NHS

In order to view the implications of blowing the whistle in context, the position of employees in the National Health Service will be considered. There are various reasons for choosing the NHS as an example. A number of well publicised whistleblower dismissals have involved employees within the health care sector¹, and this has led to a raised profile for NHS whistleblowers. The example of the NHS is a useful one because, as part of the public sector, there are strong arguments in favour of allowing its employees to take part in protest as well as watchdog whistleblowing, not least because the service is used and funded by the public, who therefore have a right to know how it is run.

The general arguments in favour of allowing public sector employees a degree of freedom of speech at work² are reinforced in the case of the NHS because of the recent changes introduced to the way that the Service is run, and the political sensitivity of the debate that surrounds any discussion of the effectiveness of these changes. The argument in favour of protecting the speech of those employed in the NHS will be considered in detail, followed by an examination of the contractual and other

¹For example Helen Zeitlin and Graham Pink.

²See Chapter Two for detailed arguments on this point.

considerations faced by NHS employees who contemplate blowing the whistle at work.

1 The value of protecting the freedom of speech of NHS staff

The justification for encouraging employees to act as watchdog whistleblowers is as clear in relation to the NHS as it is in relation to any other sector of employment³. If an employee has information which, if known, can help prevent personal injury or financial loss, it is clearly in the public interest that the information be disclosed. In the NHS, it is likely that employees may have access to information that could cause danger to health and safety, and where that risk is serious, the information should be disclosed⁴. Similarly, especially given new funding arrangements⁵, there is potential for large amounts of public money to be misspent, or wasted, and it is in the public interest that such losses be prevented.

In addition, there are strong arguments in favour of allowing protest speech by employees in the NHS. These can be based on the general philosophical justifications explored earlier⁶. Both the argument from truth and the argument from democracy can be used. Applying Mill's argument from truth (that free speech allows the truth to be discovered), free discussion should enable the best way to run the NHS to be determined and thus the best health care possible to be provided for the public. Given that the NHS provides health care to the vast majority of the population, it is important

³See Chapter Two, Whistleblowing and Freedom of Speech.

⁴For example, the disclosure in the summer of 1995 of the fear that bags of donated blood may have been contaminated and were not safe to use.

⁵Under the internal market, discussed below.

⁶See Chapter Two, Whistleblowing and Freedom of Speech.

that it operates as well as possible; if discussion and debate can contribute to this in any way then it is to be encouraged. If the NHS can be improved by public debate about treatment or about standards of care, then this should also be encouraged.

However, as noted when considering Mill above, the argument from truth does not always work, as right answers do not necessarily exist. The example of staffing levels has already been given; the truth about staff numbers can be known but not the truth about whether such levels are adequate. The truth about many other issues raised by staff within the NHS is similarly difficult to determine, but equally important to discuss.

One obvious example is the issue of the rationing of health care. Since the inception of the NHS, as medical science has continued to develop, the number of treatments available, and the costs, have expanded. This has led to increased demands on the system, demands that probably cannot be met without increasing funding beyond limits that are acceptable to the very public that makes the demands. The need for some sort of rationing of health care is well recognised, and debate about its scope does take place, but usually behind closed doors. The public are rarely allowed to take part in such debate despite their interest in the outcome. Yet discussion of "medical inflation" and rationing cannot lead to the "truth" about any outcome, as no right answer exists. Instead, any justification for public involvement must come from the argument from democracy (the argument that a democratic system requires the participation of an informed electorate). The public uses and funds the system and should have some say in its future direction even if only indirectly via the election of the politicians who take policy decisions.

A second important issue for discussion relates to the effectiveness of the recent changes in the running of the NHS. In 1990 the National Health Service and Community Care Act introduced wide ranging changes to the

organisation of the NHS, changes that had been proposed in the 1989 Government White Paper "Working for Patients"⁷. The Act introduced an internal market for the provision of health care, and provided for the creation of trust hospitals and fund-holding GP practices. Trust hospitals and District Health Authority hospitals now provide hospital services, and fund-holding GP practices and District Health Authorities buy those services for their patients. The idea is to enable funding to follow patients more directly, increase efficiency, and encourage a higher quality service as a result of the ensuing competition between hospitals. The proposals were implemented after little consultation with the Health care professions, and despite a vigorous (though ultimately unsuccessful) campaign against them by, among others, the British Medical Association.

Now that the changes are in place, it is important to know whether they are working successfully in order to ascertain whether the policy should be continued, modified or abandoned altogether. Again, any absolute truth will be impossible to determine, but discussion involving those working within the Service must help in deciding its future direction.

1.1 The "argument from democracy" and the NHS

The need for debate on the recent changes in the NHS also highlights the democratic importance of speech in a more direct sense since the state of the NHS has become a party political issue.

Even before the recent changes, the NHS was an institution of key political significance. The principle of good quality health care, free at the point of delivery, is very dear to the public; to be seen to fail in upholding this

⁷Working for Patients, HMSO 1989

principle is probably to court electoral doom⁸. Each political party needs to be seen to be capable of safeguarding the NHS. It is thus clearly in the government's interests that the changes to the NHS are seen to work successfully.

Moreover, an additional factor in the changes introduced by "Working for Patients" was the government's desire to deal with the public perception that the NHS was receiving insufficient funding. The aim was to shift attention away from ministerial decision making and focus instead on the responsibilities of health managers, so that unpopular decisions would be of less direct political significance⁹. When this aim is taken into account the party political significance of public debate on the state of the NHS becomes very evident. The political significance of the debate brings any argument about its importance firmly within the scope of the most basic argument from democracy. If a political party seeks election based in part on its record in dealing with the NHS, then the public is entitled to as much information about this record as possible, in order to make an informed choice when voting.

1.2 Restrictions on freedom of speech in the NHS

Despite its importance to the electoral process, there does not appear to be acceptance by management of the value of free discussion or debate on the NHS. Evidence of this is provided by the introduction by many Trust

⁸This was recognised in a paper by Mr John Maples, then Conservative Party deputy chairman, leaked to the Financial Times in 1994, setting out tactics for avoiding a Conservative defeat at the next election. On the NHS he says "The best result for the next 12 months would be zero media coverage". Financial Times 21 November 1994, p 10.

⁹Para 1.17 Working for Patients states that one of the aims of the changes is "to secure a clearer distinction at national level between the policy responsibilities of Ministers and the operational responsibilities of the Chief Executive and top management."

hospitals of confidentiality clauses in the contracts of employment of their staff, in exercise of their rights to introduce new terms and conditions of employment¹⁰. These clauses make clear that disclosure of confidential information can lead to disciplinary action, and define confidential information very widely, beyond information relating to patients, to include commercially sensitive information. As a result of the introduction of the internal market and competition within the NHS, this category of 'protected' information has grown and it can be construed to cover virtually anything from financial details of purchases to cleanliness of facilities. This is because if a purchaser of treatments hears criticisms about a particular hospital, it may decide to purchase treatment elsewhere. In effect, the reputation of a particular hospital or consultant now has commercial value. Thus, much wider categories of information, such as information about staffing levels, waiting lists or standards of treatment, in fact virtually anything that may injure the reputation of the Trust, have become commercially sensitive, and can be added to the list of confidential topics about which staff may not speak.

Not only has more information become commercially sensitive since the introduction of the internal market, but since the recent NHS reforms, Trusts themselves have been allowed to operate more secretively. Trust Boards can meet in private; although they must hold open meetings in which each year's performance is presented¹¹, they are not obliged to allow public access to other meetings. Non-executive directors of the new Trusts are appointed by the Secretary of State. The members of the Board

¹⁰The scope and validity of some of these confidentiality clauses is discussed below.

¹¹Para 7(2) Schedule 2 National Health Service and Community Care Act 1990

are thus less accountable to the people they serve and who are affected by decisions made¹².

A degree of accountability to the public is provided by the NHS Executive's Code of Practice on Openness in the NHS¹³. This Code sets out in detail the obligations on general practitioners and hospitals to provide information to the public on request. Although the Code allows for extensive disclosure of information it does include several exceptions, some of which could be construed fairly widely¹⁴. The information it envisages disclosing is mainly factual information, including information relating to services provided, targets set and achieved, and details of public meetings and complaints procedures. Provision is made for disclosure of information about policy proposals. However, the Code does not refer to any compulsory procedures for public consultation about these issues. The version of accountability evidenced in the new NHS thus appears to be one of financial and economic accountability rather than any broader concept of political accountability in relation to wider aspects of health care provision and policy¹⁵.

¹²Prior to the 1990 changes, a degree of accountability was provided by the presence of local authority appointed members of the district health authorities and Community Health Councils. Since 1990 the CHC's no longer have to be consulted whenever health authorities intend to make a change to local services, and local authorities no longer appoint members of district health authorities.

¹³NHS Executive, April 1995.

¹⁴Exceptions include confidential patient information, information relating to internal discussion and advice, and management information. These categories are not defined, and if broadly interpreted, could extend widely. The Code also recommends charging for time spent providing information where this takes more than an hour.

¹⁵See Longley, *Diagnostic Dilemmas: Accountability in the National Health Service* [1990] Public Law 527

A further example of the lack of open discussion within the NHS is provided by considering the use of positive publicity about the NHS by the government. As part of the new marketing arrangements that are necessitated by the internal market, many Trusts and health authorities have professional public relations departments, and the Department of Health has requested that health authorities and trusts publicise good news stories about their work¹⁶. Whilst there is no harm in the health authorities and trusts generating publicity for their work, the political context of such information means that it is important that this is not coupled with a stifling of dissent amongst those who have first hand experience of the reforms in practice¹⁷.

However, dissent does seem to be stifled. Many of those working in the health service are scared to express their views according to the union MSF¹⁸ whose research indicates that in 1993 85% of nurses were less likely to speak to journalists than they were two years before, and 93% were less likely to speak on the record. Reasons given for this reticence include fear of losing a job or fear of repercussions from management¹⁹.

¹⁶The need to place good news stories in the media is also recognised by John Maples in his paper leaked to the Financial Times (see above).

¹⁷Although some adverse publicity is received by trust hospitals, much of this has been disclosed after investigations by the National Audit Office, or district auditors, for example, publicity in relation to financial impropriety such as the £100,000 removal expenses of one manager (The Guardian, 15/4/94), and the £70,000 paid to a manager who left the health service after presiding over large losses (The Guardian 27/5/94) etc. Disclosures by the National Auditor has often come after the event, and yet some employee must have been aware of such payments at the time they were made.

¹⁸Manufacturing Science Finance

¹⁹MSF Media Survey on Freedom of Speech in the NHS, in *Freedom of Speech in the NHS: A guide for negotiators*, MSF, July 1993.

The political sensitivity of information relating to the NHS means that any restriction on freedom of speech for those working within it has adverse implications for the proper working of democracy. However, before concluding that such speech therefore requires the fullest possible protection, arguments for restricting free speech in this area need to be considered.

1.3 Reasons to uphold confidentiality in the NHS

The most obvious check on free speech that applies to employees within the NHS is that of patient confidentiality. The right of patients to confidence in respect of medical matters is well established, and is most famously traced to the Hippocratic Oath. More recently it is confirmed in the United Kingdom Central Council for Nursing, Midwifery and Health Visiting (UKCC) Code of Practice and binds all those who work within the NHS.

There are two main reasons for upholding patient confidence: a respect for patient autonomy; and the need to ensure that patients are not deterred from seeking medical treatment because of a fear that confidence will be breached. For both these reasons, information relating to patient information is, rightly, strictly observed. Even so, patient confidentiality is not an absolute right and where the public interest demands, the right to confidence can be outweighed. In *W v Egdell*²⁰ the public interest in disclosure of a psychiatric report was said to override any breach of confidence. The report had been obtained in connection with proceedings before a mental health review tribunal, and had been held back by the patient's solicitors as it was not favourable to the patient's case. The doctor had reported that the patient was still dangerous, and the public interest in the hospital involved in his treatment knowing of the contents of this report was found to override any breach of confidence involved.

²⁰[1990] 2 WLR 471

However, because of the strength of the right to confidence, in terms of personal autonomy in particular, circumstances where patient confidence is overridden by the public interest will be rare. Even the strong democratic interest in free speech regarding the NHS is unlikely to justify a breach of confidence, especially where the individual and treatment can be identified by the general public.

On the other hand, a breach of a patient's confidence may be partial rather than total; for instance the disclosure may be of the fact a treatment was carried out without disclosure of the name of the patient, such that the general public do not know who is referred to but the patient and her relatives do. Where this is all that is disclosed, it is arguable that the public interest may more easily justify the disclosure than where confidence is totally breached. Discussion of incidents occurring in day to day medical practice may be necessary to add weight to any general discussion on standards of care; such disclosures will serve the general public interest in the ways discussed above, and if this involves a partial breach of confidence, this may be justified.

The second justification for restricting freedom of speech within the NHS is the need for commercial secrecy. Clearly businesses need to be able to conduct their affairs with a degree of privacy, and the new internal market of the NHS is no exception. Similarly, employers are entitled to expect a degree of loyalty from their employees and this again may give good cause for restricting free speech. A degree of restriction on freedom of speech is legitimate to serve these ends. However, in both cases, these interests are not absolute. Whilst they require some protection, they do not outweigh the interest in knowing what is occurring within the NHS once that interest is viewed as of public and political importance. Employee loyalty and commercial secrecy should not be able to silence speech which serves such important interests.

A final reason to limit free discussion within the NHS is put forward in the NHS Management Executive Guidance for Staff on Relations with the Public and the Media: the need to uphold public confidence in the Service, and prevent unnecessary anxiety about standards of care²¹. However, whilst public confidence may be an important concern, it is of no benefit if it is misplaced. Members of the public have a right to be given enough information about the state of the Service to make up their minds about whether they should have confidence in the Service. If they do not, they may want to take some action, if only via the ballot box. Moreover, the need to maintain confidence in the service does not survive comparison with the democratic interest in free speech. In *Hector v Attorney General of Antigua and Barbuda*²² it was recognised that the democratic process depends upon the ability of the opposition to undermine public confidence in the government. Whilst the penalty for speech was more severe in that case²³, some comparison is still valid. Given the electoral importance of the public confidence in the NHS, where there is no other reason for preventing speech, such as patient confidentiality, employees should not be prevented from participating in public debate on grounds that confidence in the NHS may be undermined.

²¹Paragraph 7 of the Guidance states: "[Local management in consultation with staff and local staff representatives] will wish to consider how best to promote a culture of openness and dialogue which at the same time upholds patient confidentiality, does not unreasonably undermine confidence in the service and meets the obligations of staff to their employer." The Guidance is discussed in greater detail in separate section.

²²[1990] 2 AC 312. See Chapter two, para 2.2.

²³A newspaper editor had been given a criminal conviction for printing a false statement likely to undermine public confidence in the conduct of public affairs.

1.4 Conclusion

Each of these reasons for restricting the freedom of speech of NHS staff has some validity. However, where employees act as watchdogs, raising concerns about health and safety issues, or financial impropriety, it is clear that the public interest in allowing their disclosures outweighs the various interests served by maintaining confidence. In addition, if speech about the state of the NHS is seen as a form of political speech, then the speech of employees who wish to raise more general concerns about their experiences of working within the NHS should also be protected.

Despite strong arguments in favour of allowing employees to participate in public debate on the health service, a consideration of the contractual duties of employees indicates that freedom of speech does not seem to enjoy much protection.

2 The Contractual Position of NHS Staff

The contracts of employment of health care employees contain a number of terms from various sources that impact upon freedom of speech. At times these contractual terms conflict with each other, leading to some confusion about the exact duties of those who contemplate blowing the whistle, either as watchdogs or protesters. Staff are subject to the general implied duty of confidence as well as duties contained in professional codes of conduct. Many NHS Trusts also impose express confidentiality clauses on employees, which in turn are supposed to accord with the NHS Executive's Guidance For Staff on Relations with the Public and Media. The example of terms governing nurses conduct will be used to illustrate the conflicting and confusing situation faced by many staff working within the NHS.

2.1 Contracts of Employment

The general implied terms of trust and confidence apply to nursing staff as they do to all employees. The extent of these duties have been examined in detail in Chapter three. In addition, many NHS Trusts have taken advantage of their new powers to introduce new terms and conditions of employment, and have included in them express confidentiality clauses. At times these confidentiality clauses are extremely widely drafted and go beyond the level of confidence required by the common law.

The confidentiality clauses of two Oxford hospitals, the Oxford Radcliffe Hospital NHS Trust and the Nuffield Orthopaedic Centre NHS Trust, may be used to illustrate the new confidentiality clauses.

Oxford Radcliffe Hospital

"You shall not, except as authorised by the TRUST or required by your duties under your employment contract, use for your own benefit or gain or divulge to any persons, firm, company or other organisation whatsoever any confidential information belonging to the employer or relating to his affairs or dealings which may come to your knowledge during your employment. This restriction shall cease to apply to any information or knowledge which may subsequently come into the public domain other than in breach of this clause..... 'Confidential information' shall include all information which has been specifically designated as confidential by the employer and any information which relates to the commercial and financial activities of the employer, the unauthorised disclosure of which would embarrass harm or prejudice the employer."

Nuffield Orthopaedic Centre

"Any matters of a confidential nature, including relating to the diagnosis and treatment of patients, individual staff records and details of contract prices and terms, must under no circumstances be divulged to any unauthorised person or persons.... Disciplinary action will be taken for any breach of confidentiality..."

These clauses are both fairly typical of new confidentiality clauses used in NHS Trust hospitals. They are very wide ranging, potentially covering a broad sweep of information, both commercial and personal and can be criticised on a number of fronts.

Neither clause mentions the role of the public interest in determining whether information is confidential or not, with no mention made of the public interest "defence", known to exist in the common law. Legally this is of little significance as the express term is read in the light of implied terms and can therefore be interpreted so as to accord with the common law duty of confidence, to include a public interest defence²⁴. Any employer seeking to rely on it will find that it is only upheld to the extent that it does not conflict with the common law. If a disclosure is in the public interest there will be no breach of contract despite the inclusion of the express term. In practical terms, the omission may be more serious, as staff are unlikely to know of the existence of implied public interest defence.

The clauses themselves contain possible ambiguities. They refer to "unauthorised" disclosures, and disclosures to "unauthorised persons", without reference to who would be capable of giving authorisation or being authorised. Given the need to interpret the clauses to correspond with the common law, one could interpret these phrases to mean that disclosures that are in the public interest are automatically authorised and so may be made

²⁴*Johnstone v Bloomsbury Health Authority* [1991] IRLR 118 CA

regardless of authorisation from management. Effectively this would mean that disclosures could be self-authorised by staff where disclosure is in the public interest. Although this might be the meaning that a court would ascribe, such an interpretation is not evident in the wording of the clause. Instead, an employee is likely to assume that authorisation must come from a person in senior management of the Trust.

The clauses cover all types of confidential information with the same blanket ban on disclosure. No distinction is made between commercial and personal information. However, the public interest in protecting information will depend on the type of information involved. The public interest will need to be extremely strong to justify any disclosure which threatens patient confidentiality. The need to protect the privacy of the patient will outweigh any interest in disclosure in all but the most serious of cases. Yet the same cannot be said of commercial or financial information. The extent to which the public interest may justify disclosure varies according to a number of different factors including the type of information, recipient of information and timing of the disclosure²⁵. Unless the employee is familiar with the intricacies of this area of common law, she will assume that the same degree of protection is needed for all categories of information and may be deterred from making a valid disclosure as a result of the drafting of the clause in this respect.

The definition of confidential information is at times extremely wide. In the Oxford Radcliffe Hospital contract, the first part of the clause includes all information "designated as confidential by the employer"; this appears to apply regardless of whether such a designation is justified. Again, the requirement that the clause be interpreted to accord with the common law where possible²⁶ means that where it is in the public interest for particular

²⁵Discussed in detail in Chapter Three.

²⁶*Johnstone v Bloomsbury Health Authority, ibid*

information to be disclosed, any designation of that information as confidential should be invalid.

The clause also includes a category of confidential information that is potentially wider. It refers to information relating to the commercial and financial activities of the employer the unauthorised disclosure of which would 'embarrass, harm or prejudice the employer'. The use of the word 'embarrass' here is difficult to justify. Given that the employer is a trust, and not a human person, it is hard to see how it can suffer embarrassment. Even if that theoretical problem is overcome, it is not clear why mere embarrassment is a reason to prevent disclosure of information relating to a publicly funded body. If the embarrassment is also harmful, or prejudicial that is already covered by the clause. Mere embarrassment (to an incorporeal entity) without any harm is an inadequate reason to prevent freedom of speech by staff.

The inclusion of embarrassing information as confidential information could cause particular difficulties for protest whistleblowers. Watchdog whistleblowers are probably safer as where wrongdoing is disclosed the public interest means that the information will be incapable of being designated confidential, and any ambiguity in the meaning of embarrassment will be resolved to include the public interest defence. However, where employees exercise their rights to free speech to protest, for example, about shortcomings in the service provided by a trust, they may be said to disclose information that embarrasses the trust (if it is capable of such an emotion). They will then be in breach of contract, even if the information could not otherwise be said to be confidential. The only defence open to the speaker is to argue that the wider, democratic public

interest is served by the speech²⁷, and that this public interest overrides the duty of confidence created by the express term²⁸.

The fact that common law implied terms can be used to mitigate any excesses in the express confidentiality clauses may mean that these criticisms are of minor importance. It is, after all, common for employers to draft contracts in terms most favourable to them, without mentioning the extent to which the terms may be modified by the operation of the common law. For example, despite the fact that post-contractual restrictive covenants can be void for being in restraint of trade, it is not usually suggested that employers should only include them in employment contracts with the caveat that they can only be relied upon to the extent that they are reasonable²⁹. Similarly, there is no requirement that all contracts specifying hours of work need to contain a reference to fact that this is subject to the need to safeguard the employee's health³⁰.

However, it is arguable that the inclusion of a very restrictive confidentiality clause in a contract of employment is prejudicial to the public interest in a way that an overly restrictive post-employment covenant is not. In the case of a restrictive covenant, the interests that are balanced against each other are private: the employer's interest in being free of competition versus the employee's right to work. There is a public policy in favour of upholding the right of the employee to ply her trade, which allows the strict wording of the contract of employment to be overridden,

²⁷An argument that has not been recognised by courts so far. See discussion on public interest above.

²⁸Where an express term conflicts with the public interest or public policy, courts will not enforce it. See discussion above.

²⁹*Spafax Ltd v Harrison* [1980] IRLR 442

³⁰*Johnstone v Bloomsbury Health Authority* [1991] IRLR 118 CA

but the employee's interest is still essentially private, albeit a private interest that is upheld by public policy.

In confidentiality cases also there is a public policy of restricting the use of confidentiality clauses where disclosures are in the public interest. But in contrast to the restrictive covenant cases, the interest in allowing disclosure is truly a public one. As argued above, the interest in allowing disclosure in the public interest is not that it upholds the personal autonomy of the individual, but that it upholds the interests of the audience in hearing what is said. The fact that the public interest defence is not referred to in the confidentiality clauses governing NHS staff may deter staff from raising valid concerns in the mistaken belief that to do so would be in breach of contract. This may mean that information that ought in the public interest to be made known remains undisclosed, and the clauses can be justifiably criticised on this basis³¹.

2.2 The UKCC Code of Professional Conduct

The United Kingdom Central Council for Nursing, Midwifery and Health Visiting is the body that governs the professional conduct of the nursing profession³². Its Code of Professional Conduct sets out the standards

³¹In its second report, the Nolan Committee on Standards in Public Life recommends that confidentiality clauses should *expressly* remind staff that legitimate concerns about malpractice may be raised with an appropriate body where it is in the public interest. Recommendation 8, The Second Report of the Nolan Committee on Standards in Public Life 1996 HMSO Cm 3270 I -II

³²The UKCC was established by the Nurses, Midwives and Health Visitors Acts of 1979 and 1992. It is the regulatory body for nurses and is charged with establishing and improving standards of education, training and professional conduct. It governs, by way of its register, who can practise and when the right to practise should be removed from an individual.

expected of nursing staff; breach of the Code could lead to loss of registration with the UKCC, which in turn could lead to loss of employment as NHS employers require staff to be registered with their respective governing body³³.

The third edition of the UKCC Code of Professional Conduct was published in 1992. It sets out the standards expected of nursing, midwifery and health visiting staff in relation to professional practice and covers issues such as the need to work cooperatively with other staff, to maintain professional competence, and to respect the dignity of patients. On confidentiality, the Code states that staff must:

"protect all confidential information concerning patients and clients obtained in the course of professional practice and make disclosures only with consent, where required by the order of a court or where you can justify disclosure in the wider public interest" (Clause 10) and;

"report to an appropriate person or authority any circumstances in which safe and appropriate care for patients and clients cannot be provided." (Clause 12).

Several matters are worth noting in relation to these clauses. Most obvious is the reference in clause 10 to the public interest, something that many contractual terms lack. The importance of protecting patient confidence is clear in the clause, but the possibility of the public interest overriding that confidence is acknowledged and provided for. Significantly, the clause also addresses the issue of who is to be the judge of the public interest in relation to such information: the individual nurse. In this respect again the

³³E.G. the UKCC for nursing staff, and the General Medical Council for doctors.

clause compares favourably with the express terms that do not identify who can authorise disclosures.

The designation of the nurse as the judge of the public interest may be helpful in cases of whistleblowing. The nurse who breaches confidence in the genuine belief that the public interest is served by the disclosure can be confident that she is not in breach of the UKCC Code. She may also be able to argue that this part of the UKCC Code is incorporated into her contract of employment, and can be used to resolve any ambiguity in the contract over who may authorise disclosure and, perhaps, what may lawfully be disclosed.

A second point that is made clear from the Code and from explanatory notes that accompany it, is the extent to which nurses are expected by their professional body to raise concerns and not to tolerate low standards of care. This is made clear in Clause 12, and in an accompanying document "Exercising Accountability"³⁴, which states that it is "clearly wrong for any practitioner to pretend to be coping with the workload, to delude herself into the conviction that things are better than they really are... *to tolerate in silence any matters in her work setting that place patients at risk, jeopardise standards of practice or deny patients privacy and dignity*"³⁵ (emphasis added). This advice clearly envisages that matters such as the standards of care offered by the NHS are the legitimate concern of nursing staff.

On the other hand, it appears that the advice to nursing staff tends towards encouraging staff to report concerns, rather than with ensuring that the

³⁴*Exercising Accountability: A framework to assist nurses, midwives and health visitors to consider ethical aspects of professional practice.* UKCC, March 1989.

³⁵*Exercising Accountability*, *ibid.* p.9

concern is dealt with³⁶. It seems that the responsibility of the nurse ends once the concern has been raised. This tends to undermine the emphasis in the Code on encouraging nurses to take the initiative in safeguarding the public interest in good standards of care.

2.3 Guidance for Staff on Relations with the Public and the Media

Guidance was published in June 1993, by the NHS Management Executive³⁷, and circulated to all managers in the NHS, setting out the principles that should be applied in dealing with those who wish to raise concerns at work. Although it has no legal effect, and does not replace contractual duties or local procedures, it does state that confidentiality clauses in individual contracts should not conflict with its terms.

Prior to the publication of the 1993 Guidance, draft guidance called Freedom of Speech for NHS Staff was published³⁸. It suggested that staff raise concerns internally and made it clear that speaking publicly could lead to disciplinary action. No mention was made of the fact that disclosure in the public interest is not a breach of contract, making the draft guidance inconsistent with the UKCC Code and the common law. The draft did state

³⁶For example, nurses are advised, having raised their with appropriate persons, to ensure that they make a record of the consequences for patients if they have not been given the care they need. *Exercising Accountability*, ibid. p.9

In a nursing textbook discussing hypothetical situations in which a nurse may consider breaching confidence, nurses are advised in difficult cases to give information to a consultant who can refer the matter to his or her professional body. See Dimond, *Legal Aspects of Nursing* (1995) 2nd Edition, Prentice Hall, London.

³⁷Now the NHS Executive.

³⁸In November 1992.

that those who raised bona fide concerns in accordance with locally agreed procedures would not be penalised³⁹, but it was not clear who would judge that the concern was bona fide, nor would it be likely that a local procedure would cover disclosure to the press in any circumstances. In any event, it might have been presumed so self evident that bona fide concerns raised in accordance with procedure should not lead to penalties, as not to need stating. Whilst the aim of the guidance was said to be to make plain that staff had the right to raise concerns, its tone was such that the freedom of speech of NHS staff was left in some doubt.

The final version of the Guidance, renamed "Guidance for Staff on Relations with the Public and the Media", was published in June 1993⁴⁰, and included some improvements, such as the recognition that the public interest can sometimes be served by disclosure. It confirms that NHS staff have a right and duty to raise matters of concern⁴¹, that management must create systems that allow that to be done easily⁴², and that the working culture of the NHS should be one of openness where staff are encouraged to contribute their views on all aspects of health care⁴³. It also recognises that free expression of views can lead to an improvement in the service⁴⁴. The procedure envisaged by the Guidance, by which this aim can be achieved, is an internal one. Staff should raise matters informally with their line manager first. Only if the informal procedure is ineffective should the matter be raised formally through the management line, or through a senior officer designated to hear such matters. Finally, the Guidance refers to

³⁹Para 5. of the Draft Guidance

⁴⁰NHS Executive, Leeds. See Appendix One.

⁴¹Para 3 (i)

⁴²Para 3(ii)

⁴³Para 5

⁴⁴Para 5

disclosures to the media, and states that these will give rise to disciplinary action if unjustified.

To the extent that the revised Guidance recognises the role of the public interest in disclosures, and reasserts that staff may have something to contribute to improving the service of the NHS, it is an improvement on the original draft. However, the final draft has its shortcomings too.

The recognition that the duty of confidence owed to an employer is not absolute but subject to the public interest⁴⁵ is not consistent throughout the document. Clause 3(iv) states that individual members of staff in the NHS have an obligation to safeguard confidential information, "particularly information about individual patients and clients, which is *under all circumstances* strictly confidential" (emphasis added). Although the circumstances will be rare, it is possible for the public interest to be served by disclosure in extreme cases, a fact that is recognised both in common law and in the UKCC Code.

The Guidance conflicts with the UKCC Code again in Clause 8 which provides that "unauthorised disclosure of personal information about any patient or client will be regarded as a most serious matter which will always warrant disciplinary action. This applies even where a member of staff believes that she is acting in the best interests of a patient or client by disclosing person information". This directly contradicts Clause 10 of the UKCC Code which provides that it is for the nurse to decide for herself whether the public interest is served by a disclosure.

The preferred procedure suggested by the Guidance is for matters to be raised informally with the immediate line manager, with formal procedures

⁴⁵Clause 10

only being used if informal channels are ineffective⁴⁶. In many cases, this will be the most appropriate way to raise concerns. It has the advantage of simplicity and speed and can avoid individual managers becoming defensive and so unwilling to change. However, where concerns relate to the managers themselves⁴⁷, internal and informal procedures are inappropriate. The formal procedure, raising the concern via each level of management in turn, suggested in clause 17, produces problems of its own. It is time consuming, and the chances of the more senior manager overturning the decision of a lower manager may become more remote with each layer of appeal, with senior managers unwilling to undermine the authority of junior colleagues. Instead, if internal procedures are inappropriate, the streamlined procedure suggested in the Guidance⁴⁸, using a designated officer, is to be preferred.

Despite the reference in its title to relations with the media and public, most of the Guidance is taken up with detail on the need to establish local procedures for raising concerns. Reference is only made to the media at the very end, and even then it does not warrant its own clause but is included in a clause that also addresses disclosure to MP's. This clause is one of the most unsatisfactory in the Guidance. It states that:

"an employee who has exhausted all the locally established procedures... might wish to consult his or her Member of Parliament in confidence. He or she might also, as a last resort, contemplate the possibility of disclosing his or her

⁴⁶The need for an internal reporting mechanism for NHS employers is also recognised by the Nolan Committee on Standards in Public Life, and accepted by the government. Government Response to the First Report of the Committee on Standards in Public Life, 1995 HMSO Cm 2931.

⁴⁷See first and second reports of Public Concern at Work and *Whistleblow*, a report on the work of the RCN Whistleblow Scheme (1992), which suggest that concerns often do relate to management.

⁴⁸see clause 21

concerns to the media. Such action, if entered into unjustifiably, could result in disciplinary action and might unreasonably undermine public confidence in the Service".(Clause 27)

The clause appears to suggest that staff who seek guidance and advice from their MP could be penalised for doing so, and that reference to an MP can only be made after exhausting all local procedures. If this is the case, this would constitute a restriction on the constitutional rights of NHS staff. In a letter to Health Service managers⁴⁹, Sir Duncan Nichol, then head of the NHS Management Executive, confirmed that the reference to the disciplinary action refers only to "unjustified" disclosures to the media and that the constitutional right to contact one's MP is not affected by the guidance. It was perhaps unfortunate that in a document of 28 paragraphs only one paragraph was used to cover reporting to MP's and disclosure to the press, on the face of it totally separate matters⁵⁰.

A literal reading of the clause suggests that even the contemplation of contacting the media can warrant disciplinary action. Assuming that this is not its meaning, a more serious concern about the clause is the lack of clarity as to when a disclosure will be justified, and therefore protected.

⁴⁹Dated 7 September 1993

⁵⁰Indeed in his letter, Sir Duncan Nichol states that the aim of paragraph 27 was to "positively suggest reference to an MP". However, since similar wording is used for the suggestion that staff contact an MP ("might wish to consult") as for the suggestion that staff contact the press ("might... contemplate disclosing"), the second suggestion clearly not being one that the guidance encourages, the reader of the paragraph will be unlikely to know that the first suggestion is "positive". If the aim of the Guidance was to encourage staff to raise concerns with MP's, this should be made clearer, and certainly not be included in a paragraph that aims to discourage the raising of concerns with the media.

The clause also refers to the fact that disclosures to the media may damage public confidence in the NHS. The point has been made above that although public confidence may be desirable, it is not of paramount importance and does not survive comparison with the democratic interest in free speech. Given the electoral importance of the public confidence in the NHS, that confidence should be based on full information. Employees should therefore not be prevented from participating in public debate on grounds only that confidence in the NHS may be undermined. Indeed it may be important for the democratic process for the opportunity to be given to undermine the public's confidence in the ability of any political party to run the NHS.

It is perhaps not surprising that having been hailed by the government as a "whistleblower's charter", the Guidance for Staff on Relations with the Public and the Media was quickly dubbed a "gagger's charter" once it had been published. On the face of it, the Guidance appears to encourage free speech for NHS staff, but does little to do so in reality. Indeed research indicates that it has had very little impact⁵¹. Most staff have not heard of it and in workplaces where it has been publicised, levels of fear about raising concerns at work have risen. This may in part be because the Guidance, by its very existence, gives the impression that the issues and procedures are very complex. Staff may be left with the impression that the consequences of making a mistake in the way in which they raise a concern are so serious that it is best not to try. The Guidance certainly does little to clarify how courts and staff should view the issues of the public interest and only adds to the conflict that already existed between the duty to speak and the duty to remain silent.

⁵¹Contained in an unpublished survey conducted by MSF, the Manufacturing, Science Finance Union, London.

3 The contractual position of whistleblowers in the NHS

Regardless of any apparent conflict between express and implied terms, the UKCC Code of Conduct and the NHS Executive's Guidance, if the public interest is served by a disclosure, then it will involve no breach of contract. Ambiguities in the express or incorporated terms will be interpreted so as not to conflict with the common law which allows disclosure, even to the media, where justified in the public interest. Thus, requirements that disclosure be made to appropriate persons only cannot be said to require internal reporting in all cases. Clearly, where reports are internal and amount to disclosures of illegalities or present dangers, all the circumstances will combine to prevent the disclosure being in breach of contract⁵². However, where the concern is such that it is not appropriate for the employee to raise it internally a court may be persuaded to interpret the term "appropriate person" so as to allow wider disclosure.

It seems likely that an employee who acts as a watchdog on her employer will not be in breach of contract as the public interest is usually served by disclosure of illegality or irregularity, whether that disclosure is made internally or externally. However, the concerns of the protester, typically raising issues such as funding levels, staffing levels, managerial support etc.⁵³ clearly do not relate to illegalities or irregularities. Any accusations arguably amount to no more than "mismanagement" and as such may not, in the view of the courts, justify any breach of confidence involved in their disclosure⁵⁴. Although the Guidance recognises that contributions from staff to any debate on the NHS may help improve the service, protesters may not find its emphasis on internal reporting encouraging, especially

⁵²See Chapter Three.

⁵³*Whistleblow*, Report on the Work of the RCN Whistleblow Scheme (1992)

⁵⁴See *BSC v Granada* [1981] AC 1097

since effective protest usually requires a degree of publicity. The failure of courts to recognise the public interest in publicity and the resulting informed public debate means that the protester is less likely to be protected than the watchdog.

4 Practical issues affecting NHS staff

Despite the impression created by a reading of the UKCC Code of Conduct and accompanying material, and the opening paragraphs of the Guidance, of a profession working in an atmosphere where teamwork and concern for patients mean that concerns are discussed and addressed openly, in reality, the freedom of discussion of staff, and openness to debate of the management, is questionable⁵⁵. The introduction of new contracts of employment have added to the fear of speaking publicly about matters at work, but many other factors also impact on an employee's decision to raise a concern.

Providing proper care with in any health care system requires good levels of team work. Care is provided twenty four hours a day, by a number of professional workers including senior and junior doctors, nurses, physiotherapists etc. Such care clearly demands a level of cooperation and teamwork above that of other work settings. Many staff have trained together and continue to work and even socialise within the same hospital circles⁵⁶. The working culture that this produces can be fairly closed and tight knit, with strong loyalties to the institution and colleagues. In any workplace, it can be difficult to raise concerns about standards without

⁵⁵MSF Media Survey on Freedom of Speech in the NHS, in *Freedom of Speech in the NHS: A guide for negotiators*, MSF, July 1993.

⁵⁶For discussion of NHS culture and its implications for whistleblowing see Winfield, *Self Regulation through Employee Vigilance* in Hunt (ed), *Whistleblowing in the Health Service*, 1995, Edward Arnold, London.

seeming to criticise colleagues: this is likely to be compounded in a workplace such as the NHS, which is so reliant on team working⁵⁷.

Additional tensions have been created for staff since the introduction of the internal market to the service. To the inherent loyalty of staff to the NHS and patient care has been added the requirement of loyalty to the particular hospital as its reputation in the eyes of treatment purchasers has taken on commercial value. The result can be that those who raise concerns are viewed as a threat to the reputation of the hospital, rather than as team members who are concerned to maintain or even to raise standards of care.

This process has not been helped by the fact that the medical professions were in general hostile to the introduction of the changes to the running of the NHS, and in many cases remain hostile to the introduction of new layers of management into the service, often staffed by non-medical staff. This new style of management means that managers concerned with the smooth operation of the internal market can often come into conflict with medical staff, professionally committed to putting patient care above commercial considerations.

Although the creation of the internal market has led to increased competition between hospitals, the NHS still remains a closed system, with most medical staff working within it. The private health sector does not yet provide major competition in terms of size, and the market within the NHS remains an *internal* one. This means that staff who are viewed as troublemakers in one hospital may find it more difficult to find new employment than employees in some other sectors. Medical skills are highly transferable within the NHS but not so much outside; if dismissed from one

⁵⁷The same could be said for many other areas of work, for example the police and armed services.

hospital for whistleblowing, it may be very hard to find comparable work again⁵⁸.

In recent years NHS employees have been dismissed for blowing the whistle⁵⁹ and their cases have received wide publicity. This fact, together with the existence of a working culture that militates against open discussion means that health service staff are likely to be very reluctant to raise concerns about workplace issues, either internally or externally.

This reluctance will be compounded where the employee does not enjoy job security, and yet there has been a move recently towards employing more nursing staff on short term contracts⁶⁰. Although an employee who has worked for more than two years on a series of short term contracts may enjoy the same protection as permanent staff in terms of protection against unfair dismissal, the staff may not feel as secure, knowing that their contracts need to be renegotiated at regular intervals. Moreover, where contracts are for a fixed term for periods of over a year, it is possible to contract out of the protection against unfair refusal to renew the contract⁶¹. Staff employed on temporary contracts are therefore likely to feel more insecure than their permanent counterparts. A further result of the increased use of short term contracts can be the demotivation of staff. Staff who know that they are only temporarily employed may feel less concerned with improving the environment of care. Of course, the converse may also be

⁵⁸Of course this argument applies to many other sectors, where the close culture and specialised nature of the work mean that although different employers exist, most of these employers know each other, for example the police or the defence industry. This can make it hard for staff to find new work using their expertise and training.

⁵⁹Such as Graham Pink and Helen Zeitlin

⁶⁰J. Buchan, *Further Flexing? NHS Trusts and Changing Working Patterns in NHS Nursing* (1994) RCN

⁶¹s 197 ERA 1996 (previously s 142 EP(C)A 1978).

true, with temporary staff feeling that they have less to lose by making their concerns public.

Another group of employees who may feel insecure are the large numbers of staff who are training within the NHS. Nursing staff and junior doctors spend much of their training moving between specialist departments. Although these employees may have a contractual right to be provided with work and training, this is often provided on a rotation basis. The exact location and content of the jobs can vary and staff may feel that their training and promotion prospects will be adversely affected by gaining a reputation as a troublemaker.

Any one of these factors, especially the closed culture and increased use of short term contracts, can exist within a workplace to create an atmosphere where staff are reluctant to raise concerns for fear of reprisals. The cumulative effect of all these factors combined within the NHS mean that its staff are particularly likely to be fearful of speaking out.

5 Are the fears of NHS staff justified?

Given the culture in which they work and the introduction of new confidentiality clauses to their contracts, it is not surprising that NHS staff have become more fearful of speaking publicly about matters relating to work in recent years⁶². This is increased by the introduction of a new commercial ethos into the workplace by the managers who can exercise control over job prospects, against the wishes of most medical staff.

⁶²Documented by MSF whose research shows that 85% of nurses were less likely to speak to journalists in 1993 than they were two years before, and 93% were less likely to speak on the record. See Freedom of Speech in the NHS: A guide for Negotiators, July 1993, MSF, London.

The professional standards of staff are based on the assumption that staff will reflect on their practice and feed any observations into the system where they can be considered and acted upon as appropriate. Indeed the confidentiality clause of the UKCC Code of Practice depends for its proper operation on a workplace managed by open and receptive staff, who are ready to listen to the views of those who provide the core service of the sector. Where this openness to discussion is perceived by staff to be lacking, they will not be prepared to take any risks in raising concerns.

The lack of satisfactory protection for whistleblowers under the general law means that there are inevitably risks attached to blowing the whistle in any sector. The recent changes in the NHS, together with the introduction of new confidentiality clauses and the Guidance is likely to fuel any inherent reluctance on the part of staff to speak out. This is particularly the case for protest whistleblowers whose disclosures are less likely to be held to be in the public interest.

The NHS provides a good example of the issues facing whistleblowers, because of the variety of interests present, such as patient confidentiality and public interest in the running of the public sector. However, as has already been pointed out, watchdog whistleblowers can operate in any sector, such as the transport sector and the finance sector, to raise the alarm before damage is done. Similarly, protesters may legitimately wish to raise concerns about many other areas of the public sector beyond the NHS.

There is a danger, not least because of the publicity attracted by NHS cases, that whistleblowing has come to be seen first and foremost as an NHS issue. In 1992, a National Health Service (Freedom of Speech) Bill was introduced to the House of Commons⁶³. The fact that it did not make it

⁶³Introduced by Derek Fatchett, and sponsored by MSF.

through the parliamentary process was probably good for whistleblowers in other sectors. If legislation is to be introduced to improve the protection available to whistleblowers, it should apply to employees, regardless of the sector in which they work. This support for the introduction of protection for employees in the NHS would be best used to give impetus to the introduction of such protection all whistleblowers.

Nine

Conclusions and Proposals for Reform

The inadequacies of the current legal protection for those who make public interest disclosures at work are abundantly clear. Employees risk disciplinary action or dismissal for their actions, and the law provides little redress. The definition of the public interest in the common law is too imprecise for anyone to be certain in advance that any breach of confidence involved in a disclosure will be said to be justified. Where the employee is dismissed as a result of the disclosure, that dismissal may well be fair if the employer believed at the time that the disclosure involved a breach of confidence, and if it can be shown that the average employer would also have dismissed an employee for similar conduct.

The failure of the law to provide protection for employees who raise public interest concerns, coupled with the fact that most employers view such conduct as a breach of loyalty, if not of confidence, means that employees are fearful of raising concerns. The result is that a useful early warning system goes unused. If health and safety warnings, and concerns about financial misconduct were given and acted on, many accidents and much financial loss could be prevented. In addition, valuable public debate is stifled where employees are prevented from participating for fear of victimisation.

In considering the protection currently available both in the UK and in the USA, various difficulties have been highlighted, such as that of establishing a causal link between the employee's disclosure and any adverse action by

the employer. In addition, other questions have been raised, such as whether protection should be limited to those who raise concerns internally, and whether the employee should be protected only if concerns raised are based on a reasonable belief as to their accuracy. In considering various options for legal reform, these issues will be addressed.

1 Incorporation of ECHR

There are many arguments for and against incorporation of the European Convention on Human Rights, and various ways in which this might be achieved. Full consideration of these issues is outside the scope of this study. What is worth considering here, is whether giving individuals a right of action under the Convention exercisable in domestic courts would provide useful support for legitimate whistleblowing.

Although courts in the UK have been keen to point out that the protection provided for freedom of speech under the common law does not differ substantially from that under the European Convention on Human Rights¹, it is probably the case that the whistleblower would be better protected under the Convention, as the case law of the Commission and Court demonstrates a clear commitment to the principle that free speech and public debate are vital to a democratic society. Arguably, then, some form of incorporation of the Convention into domestic law would enhance the rights of whistleblowers. It would enable courts to use the Convention to override the common law, rather than being limited as they are currently, to using it only to solve ambiguities or to shape the exercise of discretion provided for in the law.

¹See for example *Derbyshire County Council v Times Newspapers Ltd* [1993] 2 WLR 449.

Examination of the case law on article 10 of the ECHR indicates that the protection provided by the Convention has at times been limited where the penalty for exercising the right to free speech is dismissal². It may still be the case where the penalty for speech is action short of dismissal. Unless and until the relevant courts recognise that the threat of dismissal inhibits disclosure, then employees who are dismissed or disciplined for public interest disclosure will not find the protection they need from the Convention. The decision in *Vogt v Germany*³ and other cases⁴ suggests that the court do now recognise that the threat of dismissal can have an inhibiting effect on free speech. If this development in the case law is followed, and developed to protect action short of dismissal too, then incorporation of the Convention could provide improved protection to whistleblowing employees.

2 Encouraging internal procedures and expanding the use of external regulatory bodies as channels for raising concerns.

One method of protecting whistleblowers at work is to encourage the introduction of internal reporting mechanisms to each workplace. As well as grievance and disciplinary procedures, employers could be encouraged or required to introduce procedures allowing employees to raise concerns about illegal, improper or unsafe practices. Indeed this is the system provided for by the NHS Executive's Guidance for staff on relations with

²*Kosiek v Germany* (1986) 9 EHRR 328, *Glasenapp v Germany* (1987) 9 EHRR 25.

³(1996) 21 EHRR 205

⁴*Lingens* (1986) 8 EHRR 407 and *Van Der Heijden v the Netherlands* 11002/84 (1985) decision of 8 March

the public and media. It is also advocated by the Nolan Committee on Standards In Public Life⁵.

Internal procedures should be encouraged as they can allow for concerns to be acted upon swiftly and without damaging publicity. Once the concern is made public, employers can become defensive and attempt to deny that there is a problem rather than deal with it and correct it. However, they should not be the only route by which employees can raise concerns.

2.1 Limitations of internal procedures

First, the use of internal procedures is only appropriate where the concern raised does not relate to those involved in operating the internal procedure. In the NHS, many of the concerns relate to the managers themselves⁶, and in such cases internal and informal procedures are inappropriate. Second, the use of internal procedures will only work where the person operating the procedure has a correct understanding of the public interest. The person within the internal procedure who will determine whether the public interest is served by the disclosure will usually be a manager, who will also owe loyalty to the employer, and may find it difficult to arbitrate fairly between the public interest and the employer's interest. Third, although the use of internal mechanisms can encourage disclosure because concerns can be acted on without publicity, this is also a weakness of such mechanisms. Particularly if illegal conduct has occurred, it is arguable that action should

⁵See the Government Response to the First Report of the Committee on Standards in Public Life, 1995, HMSO Cm 2931 and the Second Report of the Committee on Standards in Public Life, 1996, HMSO Cm 3270 I - II.

⁶See first and second reports of Public Concern at Work and *Whistleblow*, a report on the work of the RCN Whistleblow Scheme (1992), which suggest that concerns often do relate to management.

be taken to punish the conduct; if reports are kept in house, matters that ought to be made known in the public interest remain secret. While internal reporting procedures are to be encouraged, therefore, it is clear that they should not constitute the only protected method of raising concerns at work.

2.2 Reporting to a regulatory body

In addition to encouraging the use of internal procedures, increased use of external regulatory bodies could also be encouraged, with disclosures to the Inland Revenue, FIMBRA etc as appropriate⁷. If concerns relate to matters where there is regulatory body which can take action, disclosure to that body is likely to be protected as involving no breach of confidence⁸. However, although disclosure via such channels is suitable in some cases, protection should not be dependant on it. The experience of the USA illustrates the problems of such an approach.

The protection offered to federal employee whistleblowers under the Whistleblower Protection Act in the USA is mediated via the Office of Special Counsel (OSC), an individual appointed under the legislation to receive and investigate allegations made by federal employees. The OSC reviews any reports made to decide whether there is a substantial likelihood that behaviour of a type covered by the legislation⁹ is disclosed. If there is

⁷Note the creation of the Occupational Pensions Regulatory Authority in the Pensions Act 1995. s 48 creates a duty on auditors and actuaries to report certain breaches of the law to the Authority. Auditors in other sectors are also under a duty to report concerns to their respective regulators, see for example, Auditors (Insurance Companies Act 1982) Regulations 1994 SI 1994/449; Auditors (Financial Services Act 1986) Rules 1994 SI 1994/526; Accountants (Banking Act 1987) Regulations 1994 SI 1994/ 524; Building Societies (Auditors) Order 1994 SI 1994/ 525.

⁸See *In re a company's application* [1989] 2 All ER 248

⁹Such as illegal conduct or gross waste of funds.

such a likelihood, the OSC refers the matter to the department concerned and can order corrective action on the part of the employee.

In the USA, the Office of Special Counsel turned down 99% of cases brought before in its first eight years of operation¹⁰. It is possible that this was because few deserving cases arose, but this is unlikely as successful appeals were made in some of the cases rejected by the OSC. Instead it seems that the role of the OSC, to operate as whistleblowers' champion, or as government department was unclear¹¹. As a result, the rights of individual employees to claim the protection of the legislation in their own right was strengthened in the 1989 amendments to the CSRA.

The second problem with the OSC system is that the whistleblower, who may be raising concerns about the abuse of government power, is forced to operate via a further government official in order to be sure of protection¹². Again, this will operate satisfactorily only where that official has a correct understanding of the public interest¹³.

Essentially, the problem with designating a particular organisation to whom employees may report concerns is that the protection provided is only as

¹⁰Devin and Aplin, *Whistleblower Protection - The Gap Between the Law and Reality* [1988] Howard Law Journal 223

¹¹Devin and Aplin, *Whistleblower Protection - The Gap Between the Law and Reality* [1988] Howard Law Journal 223

¹²Devin and Aplin, *ibid*

¹³An example of a concern being raised with the proper authority which was then not acted upon came to light in the Scott enquiry. A member of staff of Matrix Churchill sent a letter to the Foreign Secretary warning him that arms were being exported to Iraq. No action was taken in relation to the letter; neither the Foreign Secretary nor any other minister was shown the letter or informed of its existence. Scott enquiry, para D2.318

strong as the people who staff the organisation, and the powers that these persons have by law. Although it is useful for employees to know that a suitable external channel exists through which they can raise a concern, this should not be the sole route through which protection can be gained for public interest disclosures. This puts too much power in the hands of the regulatory bodies to determine the public interest. Employees who have reasonable grounds to believe that valid concerns have not been taken up by those charged with doing so, should be able to raise concerns via a different channel without fear of retaliation.

Moreover, not all areas of business are governed by a relevant regulatory body. If whistleblowers are only protected by regulatory bodies, this will lead to an arbitrary distinction between the protection available to regulated areas of business and that available to those who work in an unregulated sector. On the other hand, there are specialist bodies to whom reports on specific issues can be made, regardless of whether there is a specific sector regulator. For example, health and safety concerns can be reported to the Health and Safety Executive, and certain concerns about financial impropriety can be reported to the Inland Revenue, Customs and Excise or the police.

2.3 Improving the availability of internal procedures

Although the use of internal procedures can encourage the reporting of public interest issues, it seems that they are not yet common¹⁴. One way of encouraging firms to set up internal procedures through which employees

¹⁴In a survey of the 1996 'Times' Top 500 UK firms 83% of the 109 firms that responded stated that they neither had a whistleblowing procedure nor planned to introduce one within the next twelve months. David Lewis, *Report on Whistleblowing Procedures in 'The Times' Top 500 UK firms* (1996) (unpublished)

could raise concerns would be to introduce a system of contract compliance whereby employers would require each other to have adequate internal procedures in place before any contracts are awarded. This system could provide a cheap and effective incentive to employers to adopt good practice in relation to whistleblowers, based on market forces rather than on external penalties. Given the importance of the issue to public sector workers it would be an appropriate area in which government could set an example to the private sector¹⁵.

However, such a solution would currently be illegal with respect to local authority and other public bodies under the Local Government Act 1988¹⁶, which prohibits reference to non-commercial matters in awarding contracts. Without a lead from public sector employers it is unlikely that any other employers would impose such requirements on their contractors.

A lead to other employers may be provided if the recommendations of the two reports of the Nolan Committee on Standards in Public Life are implemented. The Committee has considered various areas of public life, including the NHS and local public spending bodies as well as civil servants and MP's¹⁷. It recommends that employers nominate someone within the organisation to be charged with investigating any employee concerns about propriety that are raised confidentially. Employees should be informed about the role of the person nominated, and should also be told of a person or body external to the organisation who can be approached if

¹⁵Contract compliance used to be legal; see the House of Commons Fair Wages Resolutions from 1946 to 1983.

¹⁶s 17 Local Government Act 1988

¹⁷Government Response to the First Report of the Committee on Standards in Public Life, 1995 HMSO Cm 2931. The Second Report of the Nolan Committee on Standards in Public Life 1996 HMSO Cm 3270 I-II

no satisfactory conclusion is reached. The recommendation in relation to the NHS has been accepted by the government¹⁸.

Such a system could be enforced legally using the mechanism of the Statement of Terms of Employment required by s 1 ERA 1996. This statement has to provide details of grievance procedures and could also be required to include information about internal reporting mechanisms and the other information identified by the Nolan Committee.

Employers in certain sectors may finally be prompted to introduce internal reporting procedures by the introduction of a new type of corporate manslaughter. The Law Commission proposes¹⁹ to overcome the difficulties of finding mens rea on the part of companies by providing that companies be held liable for deaths in cases of management failure, where the way in which a company's activities are managed or organised fails to ensure the safety of those employed in or affected by those activities. This would have implications for employers whose employees or clients are exposed to any type of physical danger, or threat to health and safety, and may encourage the setting up of internal mechanisms for the reporting of concerns. However, it would obviously be of limited significance for employers whose wrongdoing is likely to be in other areas, such as finance impropriety or maladministration, yet such concerns still need to be raised. Clearly, it is unrealistic to expect the voluntary introduction of internal reporting procedures to solve the problems of employees who wish to raise public interest concerns at work. Additional protection is also necessary.

¹⁸Government Response to the First Report of the Committee on Standards in Public Life, 1995 HMSO Cm 2931.

¹⁹Legislating the Criminal Code: Involuntary Manslaughter, Law Com. No.239 (1996)

2.4 A commission for ethics in the workplace?

An additional way of ensuring that internal reporting mechanisms are available to employees would be to create a body charged with overseeing their implementation and use, along the lines of the Equal Opportunities Commission and the Commission for Racial Equality. Such a body could also provide support to employees using the unfair dismissal protection suggested below. The work of the charity Public Concern at Work indicates that there would be work for such a body to do. It provides advice and support for individuals, gives education and training for employers, disseminates good practice and undertakes research.

However, the creation of such a body is very unlikely. Despite the support from the Nolan Committee for the use of internal reporting mechanisms, it was not suggested that a new body be created. The fact that the 1995 Disability Discrimination Act does not create an equivalent to the E.O.C. and the C.R.E. indicates that the government is no longer willing to commit funds to such bodies²⁰. The difficulties experienced in trying to create even an individual right not to be dismissed for blowing the whistle in the public interest²¹ suggest that the extra support of a commission will not be provided.

3 Creation of new automatically unfair reason for dismissal

Given that the mechanisms for protecting against unfair dismissal are already well established, the simplest way to protect the whistleblower

²⁰Despite the creation of a Commissioner for the Rights of Trade Union Members in the Employment Act 1988, and a Commissioner for Protection against Unlawful Industrial Action in Trade Union Reform and Employment Rights Act 1993!

²¹For example, the failed Whistleblower Protection Bill 1995 and Public Interest Disclosure Bill 1996.

would be to provide that it is automatically unfair to dismiss an employee for making a public interest disclosure. The scope of this protection would need to be carefully defined to balance both the interests of employers to take action where disclosures are unwarranted, and the interests of the employee in speaking.

3.1 Defining the scope of the protection

The interests of the employee in making her concerns known have been examined in full earlier, as have the interests of the public in having access to the information disclosed. In considering the scope of any employee protection against dismissal for making public interest disclosures these interests must be weighed against the interests of the employer. As has been discussed above, the employer's right to confidence and loyalty is subject to the public interest; if misconduct or illegal practice is revealed no confidence is owed, and where legitimate opinion is voiced the employer's interest should be subject to the public interest in free debate.

In addition, the employer has other legitimate interests that need to be considered in framing any legislative protection for the whistleblower. Thus far the discussion has focused on disclosures that are in the public interest, but any legislative protection will need also to ensure that the employer's right to take action against true breaches of confidence and loyalty remains. Employers need protection against vindictive or misguided employees who might otherwise be able to manipulate the employer by threatening to disclose information that is legitimately confidential, or cause loss to the employer, for example by reporting invalid safety concerns. However, it is submitted that the spectre of the vindictive employee should not be used to make otherwise desirable protection fail²².

²²In the debates on the Public Interest Disclosure Bill the opposition to the Bill was mostly on the basis that protection for employees would leave employers vulnerable to such problems. see H.C. Deb., 1st March 1996,

As well as considering who should determine where the public interest lies, and the role of the employee's motive, the following issues also need to be determined: whether the employee must raise the matter internally before being given the protection; whether the employee is protected even where she has based the allegation of misconduct on incorrect information; where the burden of proof that any dismissal was linked to disclosure should lie; whether all employees deserve the same protection; and what remedies should be available.

3.1.1 Judging the public interest

The key to providing proper protection for employees who make public interest disclosures is in correctly determining where the public interest lies in any given case. The choice of who should decide where the public interest lies in a particular case is between the employee, the court, and legislative determination. Each option has its advantages and disadvantages.

3.1.1.1 The employee

The UKCC code of professional conduct for nursing staff, whilst of limited legal authority, provides that staff should raise concerns where they are of the view that to do so would serve the public interest²³. Allowing protection where, in the employee's view, the public interest is served by the disclosure, would allow maximum protection to the whistleblower. The employee can then make a disclosure safe in the knowledge that her belief that the public interest is served gives her protection against reprisal. The benefit of making the employee the arbiter of the public interest in this way is that it gives certainty to the person contemplating blowing the whistle,

cols. 1108 - 1175

²³Clause 10, UKCC Code of Professional Conduct.

and thereby encourages public interest disclosures, and the exercise of free speech.

However, legislation drafted in this way would give employers too little protection from misguided employees. Protection should be limited to cases where the employee's belief that the public interest is served is based on reasonable grounds; this would provide some protection for the employer. However, even with such a restriction on the protection, the employee would still be protected where she had a reasonable but mistaken belief that the public interest was served by a disclosure. In such cases, the employer would have confidential or sensitive information disclosed, but would have no redress.

3.1.1.2 The courts²⁴

If the public interest is not to be judged by the employee at the time of disclosure, the most obvious alternative is for the issue to be determined once it reaches court. Arguably courts are in the best position to determine the public interest, as they are experienced in arbitrating between conflicting interests. Although employment disputes are not usually determined by considering the public interest per se, there is plenty of case law within the common law on the public interest in disclosure²⁵ which can be drawn on in looking at the issue in relation to a dismissal case. The effect would be that, subject to the other factors below, where a court decides that a disclosure is in the public interest, the employee would be protected from reprisal. Where the public interest was not served by the disclosure, there would be no such protection.

²⁴Or industrial tribunal

²⁵See Chapter Three, Whistleblowing and the Contract of Employment.

There are various disadvantages to such an approach. First, the employee is left in an uncertain position, pending judgment, and may decide against disclosure where in fact the public interest would have been served. However, it is hard to escape this problem. Even if the employee were to be allowed to be judge of the public interest this would still leave the uncertainty as to whether the court would decide that there were reasonable grounds for the employee's belief. Unless the public interest question is left totally to the employee, the employee will have some level of uncertainty. Yet to reverse this would be to leave the employer in too vulnerable a position.

Second, the protection of employees is dependent on the court's perception of the public interest. Although the courts are currently more prepared than ever to challenge the establishment²⁶, this has not always been the case, and may not be in the future. Furthermore, where employees disclose wrongdoing on the part of an employer courts are likely to find that the public interest is served, but courts have not always recognised the public interest in informed public debate of the type enhanced by protest whistleblowing. Thus, mismanagement in the public sector steel industry was not said to be of sufficient public interest to justify maintaining the confidentiality of the source of leaked information²⁷. If a restrictive view of the public interest in informed debate is taken, then leaving the question of the public interest to be determined by courts may weaken any employee protection, particularly for the protester.

²⁶For example, the successful legal challenges to some areas of government policy including the financing of the Pergau Dam from ODA money, the removal of benefit from asylum seekers, etc.

²⁷*British Steel v Granada Television* [1981] AC 1097

3.1.1.3 Legislation on the public interest

One final option is to include in any employment protection legislation a list of matters that it will be in the public interest to disclose. In the USA, the Whistleblower Protection Act 1989 provides that employees are protected if they disclose information evidencing a violation of any law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Clearly, the court must still consider whether, for example, the waste of funds disclosed is a gross waste, or whether a risk to health is substantial, but at least such a list shows that matters such as an abuse of authority or mismanagement, where serious enough, can be disclosed. Under English common law, it is not even clear whether such matters, however substantial, would be seen as public interest matters²⁸.

The difficulty in framing any list of matters that can be disclosed in the public interest is that the public interest is not static. For example, harm to the environment would probably not have been included in any list drawn up in previous decades, but now would be one of the areas of public interest that is least contentious²⁹. In order to allow for changing concepts of the public interest, any list should not be exclusive, but include provision for the court to find disclosure of matters not included in the list to be in the public interest. The advantage of including a non-exclusive list of matters that can be disclosed is that it introduces some guidance for the employee, whilst leaving the ultimate decision to the court.

²⁸*British Steel v Granada Television* [1981] AC 1097

²⁹Danger to the environment is one of the categories of public interest matters that survived in the Public Interest Disclosure Bill 1996 after its amendment in Committee. Maladministration and abuse of authority were removed from the list in the original bill.

Such an approach could be very useful for watchdog whistleblowers, providing guidance on the issues that should be disclosed in the public interest. However it may be less beneficial for protesters. It remains difficult to provide legislative support for the contention that protest whistleblowing is also in the public interest. To an extent, this can be overcome by careful drafting of the list of public interest issues covered, for example by providing that disclosures of gross mismanagement or abuse of authority are included. The list of public interest matters could distinguish between public and private sector employers, with disclosure of mismanagement and abuse of authority being covered in respect of the public sector only³⁰. Given the recent privatisation of monopoly industries and the contracting out of many public services, the distinction between public and private sector is no longer as clear as it once was³¹. In order to reflect the public interest in the running of these areas of the private sector, this could be extended to cover "emanations of the state"³².

In addition, a final provision allowing the court to find that a disclosure was in the public interest, although not relating to a listed matter, would also be of particular benefit to protest whistleblowers. Such a catch-all provision provides for the changing concepts of the public interest over time, and this may benefit watchdog whistleblowers. But it also means that the court should not be prevented from finding that protest speech about the effects of particular policies is in the public interest. It is very difficult to provide for this in any list of public interest matters. Instead, a general provision could be included stating that in deciding whether a disclosure is in the public interest or not, regard should be had for the importance of free debate on matters of public importance.

³⁰Note that the USA Whistleblower Protection Act, which covers abuse of authority and gross mismanagement, only covers state employees.

³¹Discussed in Chapter Two, para 1.4.

³²*Foster v British Gas PLC* [1991] ICR 84

3.1.2 The need for a reasonable belief in the truth of an allegation

The main argument against providing protection for the whistleblower is that it would create unacceptable difficulties for employers. The fear is that not only would employers be subject to vindictive employees blackmailing them with the threat of false allegations, but they may also have employees who are misguided, but acting in good faith in raising a concern, for example because they have misunderstood a situation and mistakenly believe that they are disclosing misconduct. Although where an employee is mistaken in her understanding the employer should easily be able to set the record straight, the time and costs involved in dealing with such cases is said to create an intolerable burden on business. Any protection therefore needs to ensure that vindictive employees are not given the power to hold businesses to ransom, and that misguided employees are dealt with fairly.

3.1.2.1 The vindictive employee and the relevance of motive

If an employee discloses confidential information out of malice, no protection will be available. Such conduct would remain a disciplinary offence by the employee and would warrant dismissal. The difficulty arises where the information disclosed is not confidential because it is in the public interest. Here the public has an interest in hearing the information and that interest is not lessened by the bad faith of the employee.

The answer is to separate the issue of employment protection from that of the right of the public to hear what the employee says. The fact that an employee was motivated by bad faith is not a reason to prevent her from speaking, if the public interest is served by the speech. In *re a company's application*³³, the employee's malicious motivation did not prevent a

³³[1989] 2 All ER 248

finding that there was no breach of confidence in reporting irregularities to the Inland Revenue and FIMBRA; thus an injunction to prevent the disclosure was not allowed.

On the other hand, a malicious motivation may be a reason to deny personal remedies, such as compensation, to the employee³⁴. The conduct of the employee in acting vindictively against the employer gives a separate reason for dismissal apart from the public interest disclosure. The fact that the employee has felt driven to such vindictive behaviour presumably means that there is no trust and confidence remaining between the parties, and this can give rise to a fair dismissal. This position can be contrasted with that of the good faith whistleblower, where trust and confidence may otherwise be unaffected and who wishes to continue in employment.

3.1.2.2 The genuine but misguided employee

More problematic than the vindictive employee is the employee whose belief that she is disclosing misconduct or wrongdoing is based on incorrect information. Here there is no malice, just misunderstanding. The damage done to the employer may lead to dismissal, yet the lack of malice means that dismissal may be unjust.

The best protection for employees would be to provide protection where disclosure is based on a genuine belief as to the accuracy of the allegation, whether or not it turns out to be correct. This approach has some support.

³⁴This is already an option under current unfair dismissal legislation. s 123 ERA 1996 (previously s 74 EP(C)A 1978) provides that the amount of compensation shall be an amount that the tribunal considers just and equitable in all the circumstances. Circumstances such as a malicious motive on the part of the employee could therefore be taken into account. Alternatively, where the employee has acted out of an impure motive the compensation can be limited on the grounds of contributory fault. See Chapter four, Whistleblowing and Unfair Dismissal para 9.2.1.

In its Termination of Employment Recommendations 1963 (No. 119) the ILO recommended that the making in good faith of a complaint that the employer had violated laws or regulations should not constitute a valid reason for dismissal. According to this formulation, watchdog whistleblowers acting out of a genuine belief in the truth of the facts disclosed would be protected³⁵. Similarly, protection against dismissal for asserting a statutory right³⁶ does not depend on the employee being correct in her belief that her rights have been infringed; her claim only needs to be made in good faith³⁷. Protection against victimisation under the Sex Discrimination Act, Race Relations Act and Disability Discrimination Act only requires that an allegation of discrimination be made in good faith³⁸. Again, in Michigan protection for disclosure to a relevant body is only lost if the employee knows that the disclosure is false³⁹. The employee can be protected both where she mistakenly believes that illegal conduct has taken place, and where she mistakenly believes that legal conduct is illegal.

However, such protection based only on the good faith of the employee does leave the employer very susceptible to false allegations, which may take time to refute and can cause unacceptable losses in the mean time.

³⁵The 1963 Recommendations were superseded by the Termination of Employment Convention 1982 and Termination of Employment Recommendations 1982. The later version is even wider, and removes the requirement that the disclosure be in good faith. Article 5 of the Convention now reads: "The filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities" shall not constitute a valid reason for dismissal.

³⁶s 104 ERA 1996 (previously s 60A EP(C)A 1978, introduced by TURERA 1993)

³⁷s 104 (2) ERA 1996 (previously s 60A (2) EP(C)A 1978)

³⁸s 2(2) RRA 1976, s 4(2) SDA 1975 and s 55(4) Disability Discrimination Act 1995.

³⁹Michigan's Whistle-blowers' Protection Act section 15.362

Instead, where the employee's allegation turns out to be wrong, protection should usually be available only where there were reasonable grounds for the belief in misconduct. Where disclosure is made internally, or to an appropriate external regulatory body, however, a genuine belief should be sufficient⁴⁰. If the allegation is correct, protection should be provided even though the employee was acting on a suspicion that would have been difficult to substantiate at the time of disclosure⁴¹.

This will deny employees certainty of protection if they suspect wrongdoing but are unsure whether they have what will be later held to be reasonable grounds for the suspicion. If such employees make disclosures, they will be taking a risk that they will be unprotected if the allegation turns out to be untrue and not based on reasonable grounds. As a result, some public interest disclosures may not be made. However, the alternative subjects employers to unacceptable risks from misguided employees, and so this compromise is necessary.

A slightly different problem is posed by the employee who raises a concern, but who remains dissatisfied with any action taken to put the matter right. If such an employee continues to raise the concern, she will be protected if her concern turns out to be valid. However, if a court later agrees that the matter was adequately dealt with, she will have difficulty in showing that the concern was reasonable, given that the employer had taken action to remedy the situation. Similarly, if a concern is raised with a regulatory body which does not take the matter up, it will be difficult to show that any further disclosure was based on a reasonable belief in misconduct. Protection will then depend on a finding that the allegation was correct.

⁴⁰This is discussed further below.

⁴¹This represents the current position in relation to breach of confidence and the public interest defence; see *Re a company's application* [1989] 2 All ER 248 and *Attorney-General v Guardian Newspapers (No. 2)* [1988] 3 WLR 776.

Such an approach, whilst leaving the employee with some uncertainty and risk, should deal with the fear that protection of whistleblowers will allow misguided employees repeatedly to make unfounded allegations, and involve employers in the expense of refuting them.

3.1.3 Proof that a dismissal was linked to disclosure

As was seen in relation to protection for those who raise concerns about race or sex discrimination, a major difficulty in providing protection for the employee lies in showing that dismissal was causally linked to a disclosure. Employers have succeeded in showing that dismissal was not linked to the raising of a concern, but rather was caused by a breach in company rules involved in raising the concern⁴², or because the manner in which the concern was raised was disruptive⁴³. If the causal link between dismissal and disclosure can be broken so easily, the potential for employees to be protected will be seriously impaired.

Instead, courts need to take a more generous approach to the issue of causation, following the example of the protection in the USA. In relation to the wrongful discharge tort, the *Mount Healthy*⁴⁴ test is used. The disclosure needs only to be *a substantial reason* for the dismissal, not *the reason*; and employers only have a defence if they can show that, even without the disclosure the employee would have been dismissed. This allows the employer a defence if a separate fair reason for dismissal exists,

⁴²*British Airways Engine Overhaul Ltd v Francis* [1981] IRLR 9 EAT

⁴³*Re York Truck Equipment Ltd*, Industrial Relations Legal Information Bulletin 20 February 1990, p 11.

⁴⁴*Mount Healthy City School District Board of Education v Doyle* 97 S. Ct 568, 429 U.S. 274 (1977). The test is in two parts. First, was the public interest disclosure a substantial reason for the decision to dismiss; second, if so, could the employer show that the employee would not have been dismissed but for the disclosure.

thus preventing employees from making disclosures in order to gain protection from otherwise justifiable dismissal. It also means that employees cannot be dismissed because of the manner in which the concern was raised; in such a case the employee can say that but for the disclosure there would not have been a dismissal. However, it does allow dismissal where the employee makes repeated false allegations against the employer. In effect, the second stage of the test only works in the employer's favour where an incident, separate from the public interest disclosure, was the reason for the dismissal.

The test in the 1989 Whistleblower Protection Act is even more generous to the employee⁴⁵. This requires only that the employee show that the whistleblowing was a contributing factor to the dismissal. This can be shown by pointing to circumstantial evidence, such as that dismissal followed swiftly after disclosure and that the employer knew of the disclosure. The burden of proof then shifts to the employer who can only avoid liability by showing, by clear and convincing evidence, that the dismissal would have taken place in the absence of the whistleblowing activity by the employee.

Both tests improve the position of the employee seeking protection from reprisal for making a public interest disclosure, whilst affording the employer protection against the employee who discloses information in order to gain protection against legitimate disciplinary action. The 1989 WPA test is to be preferred as it creates an easier test for the employee to meet⁴⁶.

⁴⁵See Whistleblower Protection in the U.S.A., above.

⁴⁶See for example, *Nagarajan v Agnew* [1994] IRLR 61 EAT and *O'Neill v Governors of St Thomas More Upper School* [1996] IRLR 372 discussed in Chapter Five above.

As has been noted above, the courts are already taking a more generous approach to questions of causation in sex discrimination cases, however, the scope for an amendment to the legal test to solve the problems whistleblowers face in proving causation should not be exaggerated. The experience in the USA indicates that even after the test had been changed in the employee's favour, proving causation remained a major hurdle for employees.

3.1.4 Internal disclosure as a precondition of protection

In considering the protection in the USA it was noted that some states protect only external reporting, some only internal reporting and some protect both modes of disclosure. The argument for restricting protection to external disclosure is that internal reporting allows employers to cover up wrongdoing. Such a model is based on the view that protection is given because it is in the public interest that disclosure be made; hence the disclosure ought to be public (or at least to some outside body). Another justification for this model is that dismissal for internal whistleblowing is regarded as a private matter for the company and outside the remit of court intervention.

The shortcomings of such an approach are obvious. Whilst the public interest may be better served by public disclosure, this is not a reason to limit protection to employees raising concerns publicly. Dismissal for disclosing public interest matters internally remains unjust and should not be condoned. Although using an internal procedure allows the employer to keep any wrongdoing concealed, it also allows good employers to take action to remedy any wrongdoing and address any concerns without having to be involved in damaging publicity. For these reasons, although external disclosure may in some circumstances be preferable, this is no reason to confine protection to external reporters.

Equally, the employer's interest in protecting against vindictive or misguided disclosures is not strong enough to outweigh the public interest in external disclosure where appropriate. Instead, any automatically unfair dismissal protection must cover both internal and external reporting whilst providing some safeguards for the employer. The most obvious way to do this is to require that, if external disclosure is to be protected, employees first attempt to raise concerns internally. If a concern is not dealt with, then the employee can raise the matter externally and still come within the protection provided.

However, there will be circumstances where the public interest is such that information needs to be disclosed externally in the first instance. At this point it is necessary to distinguish between external reporting to appropriate regulatory bodies and wider disclosure, for example via the media.

3.1.4.1 Disclosure to a regulatory body

Where illegal or improper conduct at work is involved, there should be no restriction on the freedom of the employee to refer the matter to an appropriate investigative body. For example, where an employee suspects tax improprieties, she should be able to refer the matter to the Inland Revenue without fear of reprisal. It is then up to the Inland Revenue to investigate the claim. If it is upheld then action can be taken; if not, then the matter can be dropped. There seems to be no reason to prevent the employee from raising such concerns directly with the regulatory body.

The only risk to the employer is from vindictive or misguided employees making false allegations. However, as long as the matter is treated in confidence by the Inland Revenue whilst it is being investigated, the employer, even if falsely accused, should suffer no great loss, apart from the loss of the time involved in any investigation. The public interest in

preventing criminal behaviour may justify the risk of this loss to the employer. It is unlikely to occur repeatedly to the same employer, unless a vindictive employee is involved. In such a case, the regulatory body should be trusted to be able to distinguish between vexatious reporting and genuine concerns, and to minimise any loss to the employer. On the other hand, there is no reason why an employee who repeatedly refers matters to an external body, out of malice, should continue to be employed, and such an employee may find that any resulting dismissal was fair, as the dismissal would not be for raising the concern in the first place but for raising it repeatedly without good cause, after it has been investigated and dismissed by a regulatory body.

If an employee is not vindictive, but just misguided, there may be different problems. If a concern is raised once with a regulatory body, this should not give rise to dismissal or discipline, even if the concern is not valid. If, however, different false concerns are raised repeatedly, this may of itself give a fair reason to dismiss. More problematic is where the employee refuses to accept the judgement of the regulator and continues to voice the concern, perhaps via the media. Here the employee may claim protection because she will first have attempted to raise the concern through more appropriate channels. If the concern is found to be in the public interest, then disclosure to the media is appropriate, if the matter has not already been dealt with satisfactorily. If the concern is not in the public interest, then the employee will not be protected. Any requirement that an employees belief in the conduct must be reasonable will not be fulfilled where the concern has been dropped by an appropriate regulatory body after investigation.

3.1.4.2 Disclosure to the media

In *Lion Laboratories Ltd v Evans*⁴⁷ (where information disclosed cast doubt on the reliability of breathalyser machines), the courts confirmed that there are occasions where disclosure direct to the media is appropriate. For example, where concerns are urgent, particularly on matters of health and safety, disclosure via the press offers the quickest way to reach the widest number of people. Where the public interest is served, the employee should not suffer reprisal for raising the matter directly with the media.

Alternatively, employees may justifiably choose to disclose to the media where there is no relevant regulatory body, and internal disclosure would give the employer a chance to cover up any wrongdoing. In such cases, the fact that disclosure was not first made internally should not prevent the disclosure from being protected.

Where disclosure via an internal mechanism or to a regulatory body has not resulted in the resolution of the matter, or where the employee has reason to believe that reporting via these channels would be futile, disclosures directly to the media should be protected. Clearly in these cases the employee will be running a risk. Taking the example of disclosure to regulatory bodies, if the courts agree with the employee's view that the regulatory body had not adequately dealt with the matter, then protection will be granted; if the court confirms the regulatory body's decision not to proceed with the matter then the employee may find it hard to show that her personal belief that any allegation was correct was held on reasonable grounds. Although this may cause hardship to an employee acting in good faith, to provide protection on the basis only of the employee's view that media disclosure was appropriate would be to make employers too

⁴⁷[1984] 2 All ER 41

vulnerable to breaches of confidence on a wide scale by misguided employees.

Restricting protection for media disclosure to cases where matters are first raised internally except in the circumstances mentioned above, should not cause the watchdog whistleblower too much difficulty. Concerns can be raised internally, or via an appropriate external body, and where neither of these resolve the matter, with the press.

However, protesters face greater difficulties. Although it cannot be in the public interest for employees to be vulnerable to reprisals for participating in debate on matters of public importance, the types of concern raised in protest are less likely to be of the urgent nature traditionally seen as requiring disclosure on a wide scale. On the other hand, the concerns of the protester cannot, by their nature, be raised internally, nor will there be any appropriate regulatory body. According to the approach considered above, disclosure straight to the media is therefore appropriate, as long as it serves the public interest. If, in determining whether the public interest is served by any particular speech, courts consider the public interest in its widest context, as advocated above, this difficulty should be largely overcome.

3.1.5 The position of the employee within the organisation

Where employees seek legal protection of their rights to freedom of speech at work, it may be that the position of the individual within the organisation is relevant. In the USA, employees whose jobs have a confidential or policy-making nature are excluded from the protection of the Whistleblower Protection Act 1989. It is arguable that senior employees take on a level of confidentiality and loyalty above that of the ordinary worker, and that dismissal for disclosure by such employees is more easily justified.

It is difficult to see why this should be the case in relation to watchdog whistleblowers. If an organisation is involved in illegal or unsafe practices, this information should be in the public domain. Indeed, in some cases, those in senior positions have access to the information that reveals the most serious wrongdoing. There is no reason to require senior employees to protect such organisational secrets by depriving them of protection.

The position may be different for protest whistleblowers. The difficulty here is that where senior employees speak publicly about a matter of more general concern, they may be thought to speak on behalf of the organisation, and this may cause difficulty, depending on the content of the speech. For example, the European Commission on Human Rights has held that dismissal for political activity on behalf of party hostile to presence of foreign workers in the Netherlands was not an infringement of the right to freedom of speech, because the employee involved was the director of an immigration centre, and the speech was clearly incompatible with his job⁴⁸.

Where senior employees are involved it may be that some forms of protest are not compatible with continued employment, for example if a marketing manager denigrates the quality of her employer's products. However, although the option needs to be open for a court to say that dismissal was fair because of position of the employee makes the expression of particular views incompatible with continued employment, care would need to be taken not to conclude too often that this is the case. For example, senior medical staff carrying out predominantly medical work should be allowed to voice opinions on the state of the NHS, as such views do not interfere with the continuation of their medical duties, even if the seniority of the staff member causes added embarrassment to the employing trust. Pitt

⁴⁸*Van Der Heijden v the Netherlands* 11002/84 (1985) decision of 8 March

suggests that speech should only be restricted where the employee acts as a spokesperson for the organisation, or where, because of her position, her speech will be regarded as that of the organisation⁴⁹. Otherwise, speech should not be restricted because of the position of the employee within the organisation. It is submitted that this is the correct approach.

3.1.6 Remedies

The current remedies for employees who are unfairly dismissed are clearly inadequate. Compensation levels are subject to a maximum that has failed to keep up with rising pay levels. Even if the maximum compensation is awarded, true compensation for the employee's losses is unlikely, especially as the employee dismissed for making a disclosure may find it hard to find new employment. The other remedies, reengagement and reinstatement are rarely awarded; where they are, the cost to the employer will not be very high. All in all, the remedies that can be granted to the employee mean that it is fairly easy for the employer to pay off an employee, by giving him the maximum compensation. The case is then never heard, and the employee, who may still be without a job, has no further redress. The remedies thus fail adequately to compensate, nor do they pose a serious disincentive to employers.

For any employee protection to be effective the remedies must be strengthened. One option is to remove the upper ceiling on compensation, as has been done for sex and race discrimination cases, so that actual losses can be compensated. Alternatively, additional remedies could be allowed, as they are where dismissal is for trade union activity and dismissal for activities as a health and safety representative. Punitive compensation could

⁴⁹see Pitt, *Rights and Employee Rights - the Case of Free Speech*, in *Understanding Human Rights*, Geary and Tomkins eds. (1996) Mansell, London, p. 393

be awarded against employers found to have dismissed for a public interest disclosure, and refusing to reemploy, as it can be for dismissals for trade union activity⁵⁰. Further protection would be provided by allowing employees who are dismissed for public interest disclosure to claim interim relief; a tribunal, having found that the employee is likely to succeed in her claim could then order reinstatement pending a full hearing, or that the contract (and therefore pay) continues during such a period⁵¹.

The extension of remedies beyond those available for straight unfair dismissal claims could improve the position of employees dismissed for making public interest disclosures. Allowing tribunals to compensate losses fully will at least benefit the dismissed employee, and may also act as a deterrent to employers.

It might be argued that these improvements to remedies are needed for all dismissal cases, raising the question of whether there is anything about public interest disclosure dismissals that warrants special treatment. One answer to this is that unfair dismissal protection would be greatly enhanced by an improvement in remedies to reflect the real costs to employees of unfair dismissal and to encourage the use of reinstatement and reengagement as remedies. However, given that wholesale reform of remedies is unlikely, a special case for public interest disclosure dismissals can be made. Where dismissal of individuals is unfair either because there is no fair reason or because the dismissal was carried out with an unfair procedure, an injustice is done to the individual employee, which should be compensated. Where a person is dismissed for making a disclosure that is in the public interest, not only is an injustice done to the individual, but the public interest is harmed, particularly as others may be deterred from bringing similarly important information to public attention. Such conduct,

⁵⁰ss 156 -158 TULR(C)A 1992

⁵¹ss 161 - 166 TULR(C)A 1992

involving public as well as private interests, therefore deserves particular protection⁵².

3.1.7 Eligibility

Unfair dismissal protection is usually only provided once the employee has worked for the employer for two years. Where dismissals are for reasons that are automatically unfair, employees are usually protected regardless of the length of employment⁵³. This should apply to employees dismissed for raising public interest concerns. Apart from the fact that these dismissals deserve special protection for the reasons outlined above, this is particularly necessary as it is often the case that those who are new to an organisation see it more clearly, and may be in better position to notice matters that ought in the public interest to be disclosed, than those who have worked for an employer for a number of years who may be imbued with the culture of a workplace and may no longer notice issues of concern. Requiring employees to work for two years before providing protection may also encourage employers to dismiss any employees who do not seem happy to toe the line, before their two years have been served, again prejudicing the public interest as well as the private interests of the individual employee.

Given that the public interest is served by protected disclosures, other limits on eligibility should also be removed such as the lower and upper age limits. However, the final limit, that protection is limited to employees

⁵²The same argument can be applied to the special protection for trade union activities, which dates from a time when what was seen as at stake was not just the individual right to organise, but the collective rights of many.

⁵³E.G. for pregnancy related reasons, for trade union activity, for activities as health and safety representative, for exercising a statutory right. However, to be protected against a dismissal connected to a transfer of an undertaking (unless for an economic, technical or organisational reason entailing changes in the workforce) employees must have worked for two years.

cannot be lifted without fundamentally altering the nature of unfair dismissal protection.

3.2 The Limitations of Unfair Dismissal Protection

The limitation of protection to employees remains a serious obstacle to full protection for whistleblowers. There may well be occasions where casual workers, temporary workers, agency workers, or other self employed workers wish to raise concerns without having their contracts terminated. Even though they are not employees, the termination of a contract for services can have an adverse effect on a worker, which, as well as being unjust may well act as a deterrent to raising a concern. As with new employees, external contractors who work inside a workplace may well see matters with fresh insight, and may see that it is in the public interest that matters be raised either internally or externally. Leaving such workers unprotected may therefore harm their individual interests and the public interest.

Just as the remedies and eligibility rules can be altered and improved for dismissals that are against the public interest, it might be possible to extend protection to workers who are not employees. However to do so would be to introduce wholesale change to the nature of unfair dismissal protection. It is submitted that at this stage it would be simpler to change the basis of protection to enable the limitations to be met, rather than continue piecemeal alterations to unfair dismissal protection that change it out of all recognition.

This argument is fuelled by consideration of the fact that unfair dismissal protection only protects against dismissal. Full protection for public interest disclosure requires that action short of dismissal, such as demotion, failure to promote, unfair disciplinary action, and failure to employ, if they can be shown to be linked to public interest disclosure, should also be unlawful.

For these reasons, it may well be that automatically unfair dismissal legislation is not the best vehicle for providing protection for public interest disclosure. Instead, wider protection would be provided by using the model of anti-discrimination protection rather than that of unfair dismissal.

4 Creation of a right not to be discriminated against for exercising the right to freedom of speech

Protection against discrimination on grounds of race or sex in the employment sphere is fairly comprehensive. It includes protection against dismissal, disciplinary action, omission or refusal to employ, and access to training and other benefits. In addition, the protection extends beyond the traditional employment sphere, and includes protection for contract workers⁵⁴, and members of partnerships⁵⁵, as well as providing protection against discrimination in the provision of services.

Using a discrimination model to formulate protection for whistleblowers would have the advantage that any worker could be covered, not just employees; in addition, any adverse action short of dismissal could also be covered. Thus, the failure to employ a person because of past disclosures, or the fear of future ones, would be unlawful, as would a failure to promote, or the subjection of the worker to harassment because of a disclosure. Instead of being forced to resign and claim constructive (and unfair) dismissal in such circumstances, the worker would be able to claim

⁵⁴s 9 SDA 1975 and s 7 RRA 1976

⁵⁵s 11 SDA 1975 and s 10 RRA 1976

that she was being discriminated on the grounds of having exercised her right to freedom of speech.

The extension of protection to workers who are not employees has increased significance given current trends towards a flexible workforce, relying on contract workers, out-sourcing, home working and other forms of non-standard working relationships. In order for these and other workers to be adequately protected, protection should not be limited to employees.

Apart from the fact that a discrimination model enables protection to be widened without altering the unfair dismissal protection out of all recognition, it also ties in with an increasing recognition that a new category of public or civil rights dismissals need protection, and that these should be based on the anti-discrimination model⁵⁶. The argument here is that unfair dismissal legislation has too narrow a remit. While recognising the importance of job security for individual workers and ensuring that any denial of that security is for one of a number of selected fair reasons and carried out using fair procedures, it is nevertheless predicated on maintaining managerial prerogative, particularly as evidenced by the "range of reasonable responses" test. Although some dismissals have been designated automatically unfair, this has been done for variety of different public policy reasons⁵⁷, some at behest of Europe⁵⁸, and with no real

⁵⁶Collins, *Justice in Dismissal*, (1992) Clarendon Press, Oxford; Collins, *The meaning of job security*, (1991) 20 ILJ 227; Deakin, *The Utility of 'Rights Talk': Employees' Personal Rights*, in *Understanding Human Rights*, Geary and Tomkins eds. (1996) Mansell, London; Pitt, *Rights and Employee Rights - the Case of Free Speech*, in *Understanding Human Rights*, Geary and Tomkins eds. (1996) Mansell, London.

⁵⁷Such as the protection of pregnant workers s 99 ERA 1996 (previously s 60 EP(C)A 1978), and the protection of trade union workers s 152 TULR(C)A.

⁵⁸For example s 100 (ERA (previously s 57A) (Health and safety representatives) and Regulation 8 TUPE 1981

overarching rationale. If it is felt necessary to provide protection against dismissal where human rights are in issue, it would be better to start afresh on a consistent and rational basis that discrimination for exercising human rights is unlawful, rather than by ad hoc amendments to the list of automatically unfair reasons for dismissal.

Given the competing interests at stake in any case of disclosure of sensitive information, any protection based on an anti-discrimination model would clearly need to include an employer defence where the discrimination was justified. For example, discrimination against an employee for a straight breach of confidence would be justified. In fact, all the restrictions on the right not to be dismissed, discussed above, such as the need to disclose internally first in most cases, would need to be incorporated into any employer defence of justification. Thus, discriminatory action against an employee who makes a false allegation to the press, without reasonable grounds for making it, would be justified.

In this way, any right not to be discriminated against on the basis of having exercised the right to freedom of speech at work would be subject to the same safeguards for the employer as those examined above in relation to the proposed automatic unfair reason for dismissal. The benefit is that protection would be broader, applying to any detrimental action taken against any type of worker. Framing protection as anti-discrimination legislation may also help the whistleblower as the model used would bring the protection into a tradition that views unlawful discrimination *prima facie* as a breach of a fundamental right, and thus interprets any justifications as restrictively as possible⁵⁹. Such an approach should aid the protester in particular, as it would mean the protection would be interpreted on the

⁵⁹*North Yorkshire CC v Ratcliffe* [1995] IRLR 439 provides a good illustration of the willingness of courts to look at wider social issues when deciding cases relating to equal treatment and equal pay.

assumption that the protester can speak, with justification only being established where some type of harm has been done to the employer.

5 An essential core of protection

Despite the arguments in favour of a rights based model, reform is likely to take the form of the creation of an automatically unfair reason for dismissal. The parliamentary debates on the 1996 Public Interest Disclosure Bill⁶⁰ demonstrate the level of opposition that any proposed protection would command⁶¹. An attempt to introduce full and comprehensive protection, for both watchdog and protest whistleblowers, is likely to be unsuccessful and would run the risk of jeopardising even the most basic protection in the process. It is thus worth identifying a core of protection that is most urgently needed, in the hope that its introduction would be less controversial. It may then pave the way for the introduction of more comprehensive protection at a later date.

In justifying the need for protection for freedom of speech, above, the discussion has often focused on the arguments in favour of protest whistleblowing in particular. However, this should not be taken to imply that protest whistleblowing is more important, but rather that the case is less self evident than the case in favour of allowing watchdog whistleblowing. Where employees engage in protest they come into conflict with well established principles of employee trust and loyalty, which are still closely adhered to, despite the arguments set out above demonstrating the public interest in protest on certain issues. The fear that protection will undermine such loyalty may mean that any move to introduce protection for protesters will lose support.

⁶⁰See H.C. Debs., 1st March 1996, cols. 1108 - 1175.

⁶¹Although the Labour Party has said that it will introduce whistleblower protection if elected. It would probably form part of an act to secure freedom of information.

In contrast, the case in favour of protecting the watchdog whistleblower is very strong, backed as it is by the examples provided by the disasters at Zeebrugge, Clapham Junction, and on the Piper Alpha oil platform. Core protection is clearly needed to protect those who raise concerns about immediate health and safety risks, and risks of serious financial malpractice; the argument that employers engaged in such hazardous activities are worthy of loyalty is hard to sustain.

In terms of the level of protection required, it has been suggested that it should ideally extend to any discrimination as a result of raising a public interest concern. However, any proposed legislation would stand a greater chance of success if the protection were limited to dismissal. Other forms of reprisal are objectionable, but leave employees with less stark choices than when faced with dismissal. After all, if an employee has action short of dismissal taken against her, she remains employed, if not on the terms or in circumstances that she would choose. If reprisal stops short of outright dismissal, but leaves the employee with no option but to resign, the law already provides that the employee can claim to have been constructively dismissed, and the core protection would therefore cover such circumstances⁶².

⁶²Given the need for a more pragmatic approach if legislation is to be introduced, it is not surprising that the Public Interest Disclosure Bill 1996 was limited to protecting watchdog whistleblowers against dismissal. The Bill contained a list of matters that could be disclosed, limited to offences or breaches of legal obligations, improper or unauthorised use of public funds, miscarriages of justice and dangers to health and safety or to the environment. Prior to amendment after committee stage, the original draft of the Bill contained a non-exhaustive list which also contained abuse of authority and maladministration.

6 Limitations of legal reform

Finally, whichever model of protection is used, whether core or comprehensive, the limited potential for the law to protect the individual whistleblower must be recognised.

The problem of proving a causal connection between the whistleblowing and any retaliatory action will remain regardless of where the burden of proof lies in any protection introduced. In the USA, where the burden of proof is weighted strongly in favour of the employee, the main hurdle for employees is still proving the connection between the employer's acts and the employees' disclosures⁶³. The tactics that employers may use to avoid the protection whilst retaliating against the employee are well documented and include moving employees to "bad" jobs, intensifying the employees workload, isolating the employee, suggesting that the employee has psychiatric problems, and asking the employee to solve the problem while not providing the resources to allow this to be done⁶⁴.

Given that it will be impossible to create a system that is risk-free for the employee without leaving an employer too vulnerable to unwarranted allegations, a level of risk that such action will be taken is inevitable. The public interest will only be served where employees are public spirited enough to speak out, despite this residual level of risk. What is necessary to encourage employees to take such risks in the public interest is the belief on the part of the employee that action will be taken to put right the wrong reported. In the US, it has been found that employees often do not report

⁶³*Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult*, October 1992, U.S. General Accounting Office.

⁶⁴Devin and Aplin, *Whistleblower Protection - The Gap Between the Law and Reality* [1988] Howard Law Journal, 223; Evans and Lewis, *Anti-Union Discrimination: Practice Law and Policy* (1987) 16 ILJ 88; Lennane, "Whistleblowing": a health issue (1993) 307 BMJ 667

concerns, despite the protection available, because they believe that concerns are not taken up, and in practice nothing changes after a report has been made⁶⁵. Where employees feel that concerns will be heard and acted upon then there is an incentive to speak up, despite the risks. Conversely, taking any risk to one's job if the wrong being reported will not be put right remains an empty gesture.

In order to tap into the resource represented by the employee, then, not only is legal protection needed but also a change in workplace culture. Employees' concerns need to be taken seriously and their capacity for making valuable contributions to the running of business and the protection of the public interest needs to be recognised. Only then will any protection provided by the law be able to work to its full potential to serve the public interest.

⁶⁵*Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection from Reprisal*. July 1992, U.S. General Accounting Office.

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APPENDIX

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