



**LEGISLATIVE PROTECTION FOR
WHISTLEBLOWERS IN BRITAIN**

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INTRODUCTION

The term “whistleblower” is frequently used to describe an employee who discloses wrongdoing within an organization, by either the employer or a fellow employee. After having made a disclosure, the whistleblower may suffer retaliation by being dismissed, demoted or punished in some other way. The main purpose of whistleblower protection legislation is to safeguard employees who blow the whistle against these kinds of employment reprisals. Not only does such legislation encourage whistleblowers to come forward with information on wrongdoing, but it also discourages wrongdoing because of the increased risk of being found out.

In Canada, as in certain other jurisdictions, most notably the United States, a number of statutes, particularly those covering environmental or occupational health and safety matters, protect whistleblowers who report misdeeds under the statutes. Governments in Canada, however, at both the federal and provincial levels, have thus far generally declined to enact broader whistleblower protection legislation for either public sector or private sector employees.⁽¹⁾ In the United States, legislation at the federal level applies to public sector employees; legislation in many of the States applies primarily to public sector employees but in some cases to private sector employees as well.

Britain is one example of a Commonwealth jurisdiction where, until recently, whistleblowers were in much the same position as in Canada; legislation existed to protect whistleblowers in certain limited situations. However, there was no equivalent to the formal complaint system established in the United States through specialized whistleblowing legislation. An observer once described the situation in Britain as “a combination of restrictive government guidelines and inadequate legal protection [which] conspire to silence any employee from

(1) The writer is aware of only one Canadian jurisdiction where specific legislation on the subject is in force; see section 28 of New Brunswick’s *Employment Standards Act*, which applies to both public and private sector employees. In December 1993, Ontario enacted specific legislation on the subject to protect public sector employees (Part IV of Ontario’s *Public Service Act*) but this has never been proclaimed in force.

revealing matters of public concern and leave the employer free to punish them.”⁽²⁾ Operating under legal constraints, courts did not generally have the power to protect whistleblowers against employment reprisals. In response to the limited protection available to legitimate whistleblowers, a number of support groups and services, such as Freedom to Care and Public Concern at Work, were established.⁽³⁾ However, with the coming into force, on 2 July 1999, of the *Public Interest Disclosure Act 1998* (hereinafter referred to as the PIDA 1998), the legal situation regarding whistleblowers in Britain has totally changed; it appears that they may now be among the best protected in the world. Following is a description of the legislation which generally sets out the persons who are protected, with respect to what kinds of disclosures, and in what circumstances.

DESCRIPTION OF LEGISLATION

The PIDA 1998 consists of 18 sections, most of which add new sections to, or amend current sections of, Britain’s *Employment Rights Act 1996*⁽⁴⁾ (hereinafter referred to as the ERA 1996). Subject to limited exceptions, the PIDA 1998 protects workers under contracts of employment (i.e., employees, including Crown servants); those who work personally for someone else (under a “worker’s” contract) but who are not genuinely self-employed; homeworkers; certain agency workers; National Health Service (NHS) professionals such as general practitioners, certain dentists, pharmacists and opticians; and certain categories of trainees.⁽⁵⁾ Generally, the only workers who are not protected under the legislation are those who are genuinely self-employed, volunteers, police officers, those ordinarily working outside Britain, and those in the armed forces or in the security or intelligence services.⁽⁶⁾

(2) J. Cooper and D. Green, “Whistleblowers,” *Solicitors Journal*, 20 November 1992, p. 1166.

(3) As described in: Australia, Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest*, 1994, p. 21-4.

(4) 1996 chapter 18: <http://www.legislation.hmsso.gov.uk/acts/acts1996/1996018.htm>.

(5) For a definition of a “worker” for purposes of Part IVA of the ERA 1996, see section 1 of the PIDA 1998 adding, among other new sections, section 43K to the ERA 1996; also see section 10 of the PIDA 1998 amending section 191 of the ERA 1996 (Crown employment).

(6) See generally, section 11 of the PIDA 1998 amending section 193 of the ERA 1996; section 12 of the PIDA 1998 amending section 196 of the ERA 1996; and section 13 of the PIDA 1998 amending section 200 of the ERA 1996.

Section 1, the main provision of the PIDA 1998, inserts a new Part IVA entitled *PROTECTED DISCLOSURES* (comprising sections 43A to 43L) into the ERA 1996. Section 43A describes a “protected disclosure” as a “qualifying disclosure” that is made by a worker in accordance with any of sections 43C to 43H. A “qualifying disclosure” as defined in section 43B(1) contains information that, in the reasonable belief of the worker, suggests the occurrence now, in the past, or in the future, of one of the following:

- a criminal offence;
- a failure to comply with a legal obligation;
- a miscarriage of justice;
- a danger to the health or safety of any individual;
- damage to the environment; or
- deliberate concealing of information tending to show any of the preceding five matters.

For the purposes of the above, it is immaterial whether the relevant incident took place in the United Kingdom or elsewhere or whether the law applying to it is the law of the United Kingdom or any other country (section 43B(2)). As well, worker disclosure is not deemed to be a qualifying disclosure if by making it the worker commits an offence; an example would be if the disclosure was prohibited under the *Official Secrets Act 1989* (section 43B(3)). Where the information is protected against disclosure because of legal professional privilege, and the person disclosing it has received the information from someone seeking legal advice, the disclosure is not a qualifying disclosure (section 43B(4)).

In order for a “qualifying disclosure” to constitute a “protected disclosure” certain requirements of sections 43C to 43H of the ERA 1996 must be met; these generally have three aspects:

- what the disclosure is about;
- to whom it is made; and
- the state of mind of the worker who makes it.

According to section 43C of the ERA 1996, a qualifying disclosure is protected provided it is made in good faith to the worker's employer (either directly or in accordance with a procedure authorized by the employer for that purpose) or to another person who the worker reasonably believes to be legally responsible for the relevant failure. There is no other requirement. Presumably, where an employer has an internal, readily accessible procedure that employees are encouraged to use, concerns are more likely to be disclosed first to the employer, rather than to an outside party.

Pursuant to section 43D of the ERA 1996, a qualifying disclosure is deemed protected if it is made in the course of obtaining legal advice. There are no other conditions attached.

A qualifying disclosure is deemed protected if it is made in good faith by a worker to a Minister of the Crown where the worker's employer is an individual appointed under any statute by a Minister of the Crown, or a body whose members are so appointed (section 43E).

Section 43F(1) of the ERA 1996 protects a qualifying disclosure made in good faith by the worker to a person listed in an order made by the Secretary of State for the purposes of the section, where the worker reasonably believes that this is the correct person to receive the allegations and that these allegations are substantially true. The *Public Interest Disclosure (Prescribed Persons) Order 1999*⁽⁷⁾ prescribes the appropriate persons and bodies and the matters that can be disclosed to them (section 43F(2)). A copy of the Order is included as an Appendix to this paper. For example, breaches of health and safety regulations can be brought to the attention of the Health and Safety Executive or to the local authority responsible for the enforcement of health and safety legislation, while environmental dangers can be brought to the attention of the Environment Agency.

According to section 43G of the ERA 1996, a qualifying disclosure is a protected disclosure provided that the worker makes it in good faith and without hope of personal gain, and reasonably believes that the information disclosed, and the allegations contained in it, are substantially true. In addition, one or more of the following conditions must be met:

(7) Britain, Statutory Instruments 1999 No. 1549.

- at the time of making the disclosure, the worker must reasonably believe that he or she would be subjected to reprisal by the employer if disclosure were to be made to the employer or in accordance with section 43F (i.e., to a prescribed person or body);
- where no person or body has been prescribed for the purposes of section 43F in relation to the relevant failure, the worker must reasonably believe that disclosure to the employer would likely result in the destruction or concealment of the information;
- the worker must previously have disclosed substantially the same information to his or her employer or in accordance with section 43F (i.e., to a prescribed person or body).

Finally, in all the circumstances of the case, it must be “reasonable” for the worker to make the disclosure, having regard to:

- the identity of the person to whom the disclosure is made;
- the seriousness of the relevant failure;
- whether the relevant failure is continuing or is likely to occur in the future;
- whether the disclosure breaches the employer’s duty of confidentiality to any other person;
- the action that has or might reasonably be expected to have been taken if a disclosure was made previously to the employer or in accordance with section 43F, to a prescribed person or body; and
- whether, in making the disclosure previously to his or her employer, the worker complied with any internal procedures approved by the employer.

Section 43H of the ERA 1996 stipulates that a qualifying disclosure is a protected disclosure for purposes of the provision if:

- the worker makes the disclosure in good faith;
- he or she reasonably believes that the information disclosed, and any allegations contained in it, are substantially true;
- he or she does not make the disclosure for personal gain;

- the relevant failure is of an exceptionally serious nature (this will be a question of fact in the circumstances of the particular case and not simply a matter of whether the worker believes the case to be exceptionally serious); and
- in light of all the circumstances of the case, it is reasonable for the worker to make the disclosure, having regard, in particular, to the identity of the person to whom it is made.

Any provision in an agreement between a worker and his or her employer that precludes the worker from making a protected disclosure under the Act is void. This includes an agreement to refrain from instituting any proceedings under the *Public Interest Disclosure Act 1998* or any proceedings for breach of contract.⁽⁸⁾

A worker has the right not to be subjected to any detriment by his or her employer for having made a protected disclosure⁽⁹⁾ and can file a complaint with an employment tribunal if subjected to a detriment for such reason.⁽¹⁰⁾ A detriment may take a number of forms, such as denial of promotion, facilities or training opportunities that the employer would otherwise have made available. Employees protected by the provisions who are dismissed for making a protected disclosure may make a claim for unfair dismissal. Workers who are not employees may not claim unfair dismissal if their contracts have been terminated because they have made a protected disclosure; however, they can make a complaint that they have been subjected to a detriment.⁽¹¹⁾

Where an employment tribunal finds that an employee's complaint of unfair dismissal is justified, it will order re-instatement or re-employment, or the payment of compensation.⁽¹²⁾ Where a worker who is not an employee makes a complaint that he or she has

(8) Section 1 of the PIDA 1998 adding section 43J to the ERA 1996.

(9) Section 2 of the PIDA 1998 adding section 47B to the ERA 1996.

(10) Section 3 of the PIDA 1998 amending section 48 of the ERA 1996.

(11) *Guide to the Public Interest Disclosure Act 1998*.

(12) *Ibid*; see also section 8 of the PIDA 1998 amending sections 112, 117, 118 and adding section 127B to ERA 1996. Calculation of the amount of compensation for employees dismissed for making a protected disclosure is done as prescribed by regulation.

been subjected to a detriment and the tribunal finds the complaint to be well-founded, it will make a declaration to that effect and may order the payment of compensation.⁽¹³⁾

CONCLUSION

Prior to the coming into force of the PIDA 1998, whistleblowers in Britain were not generally protected against employment reprisals. Operating under legal constraints, British courts did not have the power to provide such protection. The reason that legislation on the subject was not enacted until now was apparently because of “fears that it would lead to an epidemic of disloyal and aggrieved workers ‘ratting’ on their bosses about every perceived irregularity.”⁽¹⁴⁾ It has been observed that, in fact, the Act encourages workers to raise their concerns first with their employers and that it provides no protection for those workers who fail to act responsibly and reasonably. According to one commentator, “employers can dramatically reduce the risk that there will be an embarrassing public disclosure by implementing effective whistleblowing policies, thereby demonstrating to their workers a clear commitment to eradicate malpractice in the workplace.”⁽¹⁵⁾

Since the legislation has been in force for only a short period of time, it is too early to know the types of problems that might arise under the Act or what developments in case law could affect the rights of whistleblowers under the legislation. In any event, the Act appears to provide much needed legal protection for whistleblowers in Britain by ensuring that problems are brought to the attention of the appropriate person while at the same time encouraging whistleblowers themselves to act responsibly.

(13) *Ibid.*, see also section 4 of the PIDA 1998 amending section 49 of the ERA 1996 and placing a limit on the amount of compensation available in such a case.

(14) C. Camp, “Openness and Accountability in the Workplace,” *New Law Journal*, Vol. 149, January 1999, p. 46 at p. 50.

(15) *Ibid.*

APPENDIX

1999 No. 1549

TERMS AND CONDITIONS OF EMPLOYMENT

**The Public Interest Disclosure (Prescribed Persons) Order
1999**

<i>Made - - - - -</i>	<i>5th June 1999</i>
<i>Laid before Parliament</i>	<i>8th June 1999</i>
<i>Coming into force</i>	<i>2nd July 1999</i>

The Secretary of State, in exercise of the powers conferred on him by section 43F of the Employment Rights Act 1996(a), hereby makes the following Order:—

Citation and commencement

1. This Order may be cited as the Public Interest Disclosure (Prescribed Persons) Order 1999 and shall come into force on 2nd July 1999.

Prescribed Persons

2.—(1) The persons and descriptions of persons prescribed for the purposes of section 43F of the Employment Rights Act 1996 are the persons and descriptions of persons specified in the first column of the Schedule.

(2) The descriptions of matters in respect of which each person, or persons of each description, specified in the first column of the Schedule is or are prescribed are the descriptions of matters respectively specified opposite them in the second column of the Schedule.

5th June 1999

Ian McCartney
Minister of State,
Department of Trade and Industry

(a) 1996 c. 18. Section 43F of the Employment Rights Act 1996 was inserted by the Public Interest Disclosure Act 1998 (c. 23), section 1.

SCHEDULE

Article 2

<i>FIRST COLUMN</i> <i>Persons and descriptions of persons</i>	<i>SECOND COLUMN</i> <i>Descriptions of matters</i>
Accounts Commission for Scotland and auditors appointed by the Commission to audit the accounts of local government, and health service, bodies.	The proper conduct of public business, value for money, fraud and corruption in local government, and health service, bodies.
Audit Commission for England and Wales and auditors appointed by the Commission to audit the accounts of local government, and health service, bodies.	The proper conduct of public business, value for money, fraud and corruption in local government, and health service, bodies.
Building Societies Commission.	The operation of building societies.
Certification Officer.	Fraud, and other irregularities, relating to the financial affairs of trade unions and employers' associations.
Charity Commissioners for England and Wales.	The proper administration of charities and of funds given or held for charitable purposes.
Lord Advocate, Scotland.	The proper administration of charities and of funds given or held for charitable purposes. Serious or complex fraud.
Chief Executive of the Criminal Cases Review Commission.	Actual or potential miscarriages of justice.
Chief Executive of the Scottish Criminal Cases Review Commission.	Actual or potential miscarriages of justice.
Chief Registrar of Friendly Societies.	The operation of credit unions, clubs, housing associations, co-operatives and other industrial and provident societies, benevolent societies, working men's clubs and specially authorised societies.
Assistant Registrar of Friendly Societies for Scotland.	The operation of clubs, housing associations, co-operatives and other industrial and provident societies, benevolent societies, working men's clubs and specially authorised societies.
Civil Aviation Authority.	Compliance with the requirements of civil aviation legislation, including aviation safety.
The competent authority under Part IV of the Financial Services Act 1986(a).	The listing of securities on a stock exchange; prospectuses on offers of transferable securities to the public.
Commissioners of Customs and Excise.	Value added tax, insurance premium tax, excise duties and landfill tax. The import and export of prohibited or restricted goods.
Commissioners of the Inland Revenue.	Income tax, corporation tax, capital gains tax, petroleum revenue tax, inheritance tax, stamp duties, national insurance contributions, statutory maternity pay and statutory sick pay.
Comptroller and Auditor General of the National Audit Office.	The proper conduct of public business, value for money, fraud and corruption in relation to the provision of centrally-funded public services.
Auditor General for Wales.	The proper conduct of public business, value for money, fraud and corruption in relation to the provision of public services.
Data Protection Registrar.	Compliance with the requirements of legislation relating to data protection.

(a) 1986 (c. 60).

<i>FIRST COLUMN</i>	<i>SECOND COLUMN</i>
<i>Persons and descriptions of persons</i>	<i>Descriptions of matters</i>
Director General of Electricity Supply.	The generation, transmission, distribution and supply of electricity, and activities ancillary to these matters.
Director General of Fair Trading.	Matters concerning the sale of goods or the supply of services which adversely affect the interests of consumers. Matters relating to consumer credit and hire, estate agency, unfair terms in consumer contracts and misleading advertising. The abuse of a dominant position in a market and the prevention, restriction or distortion of competition.
Director General of Gas Supply.	The transportation, shipping and supply of gas through pipes, and activities ancillary to these matters.
Director General of Telecommunications.	The provision and use of telecommunication systems, services and apparatus.
Director General of Water Services.	The supply of water and the provision of sewerage services.
Director of the Serious Fraud Office.	Serious or complex fraud.
Environment Agency.	Acts or omissions which have an actual or potential effect on the environment or the management or regulation of the environment, including those relating to pollution, abstraction of water, flooding, the flow in rivers, inland fisheries and migratory salmon or trout.
Scottish Environment Protection Agency.	Acts or omissions which have an actual or potential effect on the environment or the management or regulation of the environment, including those relating to flood warning systems and pollution.
Financial Services Authority.	The carrying on of investment business or of insurance business; the operation of banks, deposit-taking businesses and wholesale money market regimes; the functioning of financial markets, investment exchanges and clearing houses; the functioning of other financial regulators; money laundering, financial crime, and other serious financial misconduct, in connection with activities regulated by the Financial Services Authority.
Friendly Societies Commission.	The operation of friendly societies and industrial assurance companies.
Health and Safety Executive.	Matters which may affect the health or safety of any individual at work; matters, which may affect the health or safety of any member of the public, arising out of or in connection with the activities of persons at work.
Local authorities which are responsible for the enforcement of health and safety legislation.	Matters which may affect the health or safety of any individual at work; matters, which may affect the health or safety of any member of the public, arising out of or in connection with the activities of persons at work.

<i>FIRST COLUMN</i>	<i>SECOND COLUMN</i>
<i>Persons and descriptions of persons</i>	<i>Descriptions of matters</i>
Investment Management Regulatory Organisation.	The activities of persons regulated by the Investment Management Regulatory Organisation.
Occupational Pensions Regulatory Authority.	Matters relating to occupational pension schemes and other private pension arrangements.
Personal Investment Authority.	The activities of persons regulated by the Personal Investment Authority.
Rail Regulator.	The provision and supply of railway services.
Securities and Futures Authority.	The activities of persons regulated by the Securities and Futures Authority.
Treasury.	The carrying on of insurance business.
Secretary of State for Trade and Industry.	Fraud, and other misconduct, in relation to companies, investment business, insurance business, or multi-level marketing schemes (and similar trading schemes); insider dealing. Consumer safety.
Local authorities which are responsible for the enforcement of consumer protection legislation.	Compliance with the requirements of consumer protection legislation.
A person ("person A") carrying out functions, by virtue of legislation, relating to relevant failures falling within one or more matters within a description of matters in respect of which another person ("person B") is prescribed by this Order, where person B was previously responsible for carrying out the same or substantially similar functions and has ceased to be so responsible.	Matters falling within the description of matters in respect of which person B is prescribed by this Order, to the extent that those matters relate to functions currently carried out by person A.
