Written evidence from Public Concern at Work

Introduction

1. We welcome the opportunity to contribute to this consultation.

2. Our response will focus on how the introduction of employment tribunal fees has both affected access to justice and volume and quality of cases brought. We are providing this response specifically in relation to claimants pursuing a claim before the employment tribunal under the Public Interest Disclosure Act 1998 (PIDA) and the effect the new regime is having on whistleblowing claims and the issue more generally.

3. We previously submitted our response to the Ministry of Justice consultation on ‘Charging Fees in Employment Tribunals and Employment Appeal Tribunal’ in March 2012.\(^1\) In our response, we highlighted that the proposed fee regime would not take into account the public policy aims that underpin PIDA. We expressed our view that the proposed fee system would create a barrier to justice in an environment in which a significant inequality of arms between workers and employers already exists. We were concerned that both the proposed fee structure and associated remission framework were too complex. We asserted that these measures would put an additional weight on litigants in person, who often lack the legal knowledge to navigate the system, which may impact on their decision to pursue a claim.

Background to Public Concern at Work

4. Public Concern at Work (PCaW) is an independent charity and legal advice centre.\(^2\) We were set up in response to a series of scandals and tragedies in the late 1980s and early 1990s which included the sinking of the Herald of Free Enterprise ferry in which 193 people died in 1987, the Piper Alpha oil rig explosion and the collapse of the BCCI amidst widespread fraud in 1990. The various official inquiries that followed these disasters revealed that all too often staff had known of dangers but were either too scared to speak up or, if they did, that they did so in the wrong way or to the wrong person, and were ignored and/or dismissed.

5. Launched in 1993, we have campaigned for whistleblowing to be recognised as a good governance and risk management tool in the UK and abroad. We provide a confidential advice line for individuals with whistleblowing dilemmas, professional support to organisations and campaign on public policy where it impacts upon whistleblowing law and practice.

The Public Interest Disclosure Act 1998

6. The Public Interest Disclosure Act 1998 (PIDA) is the UK’s whistleblower protection law.\(^3\) PCaW were instrumental in getting PIDA on the statute books. PIDA’s public policy aims are to encourage workers who have witnessed wrongdoing, malpractice or a safety risk in their workplace to raise their concerns at the earliest opportunity. It achieves this by providing protection for workers who have been victimised for raising concerns via compensation from the Employment Tribunal. This creates both a safe space for workers to raise their concern, as well as having a deterrent effect on bad behaviour by employers.

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\(^2\) PCaW is regulated by the Charity Commission and the Solicitors’ Regulation Authority

7. PIDA sets out a tiered disclosure regime, which most readily protects workers who raise concerns with their employer, with regulators and/or with a member of parliament. The legislation also recognises the need for wider accountability, providing protection for individuals who make disclosures of information externally to the police, campaigning NGOs and to the media in certain circumstances.⁴

8. In 2012 and 2013 we campaigned for improvements to PIDA. Some of our campaign points led to legislative improvements to PIDA, through the Enterprise and Regulatory Reform Act 2013. Since then we have continued to lobby for more robust legal protection for whistleblowers. To this end, PCaW also established the Whistleblowing Commission to examine the effectiveness of whistleblowing in the UK and to make recommendations for change.⁵ The Whistleblowing Commission published its report in November 2013.⁶ The key recommendation of the Commission is the creation of a statutory Code of Practice which could be taken into account by courts and tribunals considering whistleblowing issues.

OUR RESPONSE TO THE CONSULTATION

How have the increased court fees and the introduction of ET fees affected the volume and quality of cases brought?

Fall in volume and quality of cases brought

9. It can be seen from the table below that the introduction of fees is having an impact on the number of whistleblowing claims being issued. 2,744 PIDA claims were received and accepted by the ET during 2012-13. This figure fell by almost 20% to 2,212 during 2013-14.

<table>
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<th>The number of applications made to an ET under the Public Interest Disclosure Act (1998)⁷</th>
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10. Figures we have received about the outcomes of applications to Employment Tribunals under PIDA. Nineteen percent of claims that proceed to a full hearing were successful in 2013/2014, compared to 17% of claims that proceeded to a full hearing in 2012/2013. If one of the purposes of the fees regime is to block unmeritorious claims, we would expect the success rate to have increased much more significantly. The fact that the success rate increased by a mere two percentage points suggests that the fees are not effectively targeting unmeritorious claims.

11. We have spoken to a client from our advice line who represented himself at ET and successfully pursued a claim under PIDA prior to the introduction of fees. He said: ‘I thought I worked for a good, supportive organisation. Being dismissed turned my world upside down and took away all my

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⁴ Although the provision for wider accountability is an important component in the legislation, it is rarely used in practice. Ninety-one percent of whistleblowers first raise their concern internally. In cases where whistleblowers raise their concern more than once, the employer is the final recipient in 81% of cases (Is the law protecting whistleblowers? A review of PIDA claims, May 2015, http://www.pcaw.org.uk/files/PIDA%20REPORT%20FINAL.pdf)

⁵ See our website for a full list of Commission members, http://www.pcaw.org.uk/whistleblowing-commission


confidence. My employers told me repeatedly that they had taken legal advice throughout the
process, and they were completely sure of their position. I believed them. I had to be persuaded by
my friends and family to take my case to a tribunal. If any kind of fee had been involved I would not
have done it. I had no income.’ 8 This confirms our concerns that claimants with meritorious claims
may well be discouraged from enforcing their legal rights because of the cost of fees.

Fees as a barrier to the development of the law and strategic litigation

12. PIDA is continuously being developed through interpretation in the courts. Last year, for example,
the Supreme Court held that members of limited liability partnerships are workers for the purposes
of whistleblowing protection.9 Similarly, the Employment Appeals Tribunal (EAT) held that an
individual working for his own company and hired through an agency to work for another company
is a worker for the purposes of PIDA.10 The previous year, whistleblower protection was also
extended to workers who disclose wrongdoing or malpractice post-termination.11

13. We are concerned the fees regime will discourage individuals from pursuing cases like the above
which could be deemed unlikely to succeed at an ET. This may hamper future development of the
law.

Fees in the context of wider barriers to justice

14. We identified a worrying increase in the number and size of costs ordered against claimants in our
review of 2011-2013 ET whistleblowing judgments.12 The total amount of costs ordered against
claimants bringing PIDA claims was £753,135, which is significantly lower than the £138,992
awarded against respondents. These figures do not take into account the many cases we came
across that were referred to the county court because the size of the costs ordered exceeded the
capped amount the ET can award.

15. The situation has also been exacerbated by significant changes to civil legal aid in England and Wales
which came into effect in 2013. These changes have meant that legal aid is no longer available in
whistleblowing claims. This is particularly worrying because our research has found that claims that
have legal representation are far more likely to have a successful outcome to their claims compared
to claimants who do not have legal representation.13

16. Claimants now face not only ET fees but also a greater risk of draconian cost orders. The odds are
stacked to a great degree against workers and the cost of justice is far too high.

How have the increased court fees and the introduction of ET fees affected access to justice?

The policy objectives underpinning PIDA

17. We remain concerned that the fees regime does not take into account the public policy aims that
underpin PIDA. When PIDA was enacted the legislation was designed to provide legal protection for

8 ‘The Public Interest Disclosure Act: are the odds stacked against whistleblowers?’ (Press Release) available at <
9 Clyde & Co LLP and another v Bates van Winkelhof [2014] UKSC 32
10 Keppel Seghers UK Ltd v Hinds [2014] ICR 1105
11 Onyango v Berkeley (t/a Berkeley Solicitors) [2013] IRLR 338
12 ‘Is the law protecting whistleblowers? A review of PIDA claims’ available at <
http://www.pcai.org.uk/files/PIDA%20REPORT%20FINAL.pdf
13 p15 Ibid p.15
workers who suffer reprisals for raising concerns about wrongdoing, malpractice or risk witnessed in their workplace.  

18. PIDA’s overriding policy goal is to encourage workers to raise their concerns at the earliest opportunity to prevent incidents of wrongdoing, malpractice or risk developing into a more serious situation. This means PIDA is not only about protecting the rights of workers who are victimised for raising concerns, but it is also in the public interest to provide this protection.

19. Examples of some of the concerns raised from PIDA claims include physical abuse in a care home (Ball, Gomez Soto v Improving Prospects Ltd), asset stripping and insider trading (Best v Medical Marketing International Group Plc ‘in voluntary liquidation’) and structural defects on public bridges (Harlock v Mouchel Limited).

20. We believe that tribunal fees increase the financial pressure on whistleblowers already facing the uncertainty of a legal claim. This increased level of uncertainty may well put off whistleblowers from coming forward with public interest concerns in the first place and hence entrench a culture of silence. This is alarming as workers are the eyes and ears of an organisation and are often the first to find out about risk, malpractice or wrongdoing.

Fees as a barrier to regulatory oversight and wider accountability

21. The serious nature of the information that lies at the heart of many PIDA claims has long been recognised and as such special treatment within the Employment Tribunal Service (ETS) is required. This was recognised during the passage of the Employment Bill 2008 (HL). In the absence of an open register of ET claims, and to ensure that there was appropriate oversight employment claims, regulations were laid down in 2010 that gave the ETS power to forward PIDA claims to a regulatory body where the claimant consents. A claimant who wants his or her claim form forwarded to a prescribed person is able to tick box 10 on the ET1 form.

22. An ET hearing also provides a public forum and judgments handed down are public documents. As a forum the ET offers many individuals the opportunity to shine light on public interest concerns. This can be used to pass the judgment on to an enforcement or regulatory body, or the media can freely report on the case, as was seen in the case of consultant cardiologist Dr Kevin Beatt. This is important in the context of heavy handed confidentiality provisions in employment contracts and settlement agreements (otherwise known as ‘gagging clauses’).

23. To have a blanket fee to those bringing claims under PIDA is dangerous to the wider public interest and potentially inhibits regulatory oversight and wider accountability.

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14 PIDA was summed up in its preamble as ‘an act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.’

15 Error! Hyperlink reference not valid. Ibid n.12

16 PIDA holds a list of recognised regulators and enforcement bodies known as “prescribed persons”, a disclosure to these bodies carries fewer legal tests for whistle-blowers to gain protection then is required for a disclosure to a body not on this list (e.g. NGO’s and media organisations). Bodies on this list include the large regulators such as the Care Quality Commission, the Financial Conduct Authority etc but also includes other bodies that a worker may approach outside their workplace to report malpractice or wrongdoing such as MPs, professional bodies and the NSPCC.

17 K Baker, ‘Whistleblowing heart consultant was unfairly dismissed by hospital trust in bid to damage his reputation, tribunal finds’ (Daily Mail, 3 December 2014) available at <http://www.dailymail.co.uk/news/article-2858783/Tribunal-finds-whistle-blowing-heart-consultant-unfairly-dismissed.html>
Conclusion

24. We argue that PIDA claims should be entirely exempt from the fee structure, or at the very least excluded from the higher rates of fees that can be charged. In the alternative, we would suggest that on application to the ET, if an individual is making a PIDA claim they are able to apply for a waiver of the fee, or alternatively a suspension, pending outcome, on the basis that the claim contains disclosures of information made in the public interest. We would suggest this be made a feature or a tick box on the fees section of the ET1 so that an individual can make the application.

30 September 2015