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PCaW Response to Ministry of Justice consultation on 'Charging Fees in Employment Tribunals and the Employment Appeal Tribunal'

Introduction

We are providing this response to the Ministry of Justice consultation on '*Charging Fees in Employment Tribunals and the Employment Appeal Tribunal*' where it specifically relates to claimants pursuing a claim under the Public Interest Disclosure Act (PIDA) and the likely affect the proposed reforms will have on whistleblowing generally. We start by arguing that public interest principles which underline the policy thinking behind PIDA should be taken into account when applying criteria to any proposed fee structure. On this basis we argue PIDA claims should be exempt from the fee proposals or that there should be a means by which a fee can be suspended or waived if it is in the public interest to pursue your claim. Alternatively, that the level of fees charged should be reduced so as to avoid a chilling effect on whistleblowing in the future.

While we understand that the function of the consultation is not "if" but "how" fees are to be introduced, we cannot submit our response without stating that we view the proposed fee system as an inappropriate bar on access to justice in an already uneven playing field. Overall we are in agreement with the introductory submissions provided in the response to this consultation by the Law Society¹. We are concerned that either of the fee structures and associated remission framework are in fact complex and will put an additional weight on advisory services that are already underfunded, in assisting claimants as they seek to navigate the system and assess whether or not they wish to pursue a claim. The proposals seek to reduce litigation, however in our experience individuals with valid claims will be deterred from pursuing their rights as frequently as those with unmeritorious claims. Additionally informed claimants who are unemployed and wish to avoid any fees will put in their claim before securing further work. This will in essence work against the goals of the proposal and Government aims to "encourage early resolution of workplace disputes" before litigation commences. This could also create delay on the part of a claimant to secure other work and mitigate their loss.

Conversely, it is likely that the cost of the application will form part of settlement negotiations, placing much of the burden on employers. Employers keen to avoid such costs may settle before action. While this may be beneficial on some fronts it is likely that weak claims will not be resisted.

Background to Public Concern at Work

Public Concern at Work (PCaW) is an independent charity and legal advice centre². Launched in 1993, we have led developments on whistleblowing as a good governance and risk management

¹ <http://www.lawsociety.org.uk/influencinglaw/policyinresponse/view=article.law?DOCUMENTID=445872>

² PCaW is regulated by the Charity Commission and the Solicitors' Regulation Authority.

making **whistleblowing** work

tool in the UK and abroad. We provide a confidential advice line for individuals with whistleblowing dilemmas; professional support to organisations and policy advice to Government and Members of Parliament. We also have a public education programme.

PCaW was 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 car 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 after each of these disasters revealed that all too often staff had known of dangers but were 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.

The Public Interest Disclosure Act 1998 (PIDA)

The Public Interest Disclosure Act most readily protects concerns raised with an employer, but also gives protection to individuals to go outside their employer in certain circumstances when the concern has been covered up, not addressed or the individual fears victimisation. PIDA is ultimately about accountability and it follows that for this to work it must be possible for those responsible within an organisation to be held to account for their conduct. The law provides an incentive for organisations to deal openly and well with any potential wrongdoing when first raised by a worker.

RESPONSE TO THE CONSULTATION

Question 1 – Are these the correct success criteria for developing the fee structure? If not, please explain why?

We are concerned that the current proposals do not take into account the public policy aims that underpin PIDA. 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.’³ The key policy aim is to protect those who witness wrongdoing, malpractice or a safety danger in their workplace so they can raise their concerns at the earliest opportunity. Without this reassurance of protection from reprisals, whistleblowers may not feel encouraged to come forward, which could result in a chilling effect on whistleblowing.

We recommend that added to the proposed criteria is that the proposals should not adversely affect or prejudice the public interest.

Question 2 – Do you agree that all types of claims should attract fees? If not, please explain why.

We are concerned the current proposals include PIDA claims in the tribunal fee scheme and our primary proposal is that PIDA claims should be entirely exempt from the fee structure on the basis of the above additional criteria. Please see our answer to 29 for our proposed alternative solution.

³ Preamble to the Public Interest Disclosure Act 1996

When PIDA was enacted the legislation aimed to do two things, firstly to provide legal protection for workers who suffered reprisals for raising concerns in the public interest and secondly to facilitate a cultural change within the private, public and voluntary sectors so an alarm raised by a whistleblower will more likely be listened to. PIDA is viewed in a similar way to discrimination law, in that it is in the public interest to legally protect those who suffer reprisals for raising a serious concern about wrongdoing, malpractice or risk.

PIDA has been successful in achieving both these aims. In terms of accountability it has protected many workers who have suffered reprisal when they raised a public interest concern. Some of these cases have included the failure to clear dangerous chemicals on a public beach (*Collins v The National Trust* (2507255/05 (ET)), corrupt practice in the prison service (*Lingard v HM Prison Service* (1802862/04 (ET) 2004)) and giving a truthful statement as to a health safety danger in a personal injury case (*Glencross v Network Rail Infrastructure* UKEAT/0094/08)).⁴

We believe that applying tribunal fees will unfairly increase the financial pressure on whistleblowers already facing the uncertainty of an Employment Tribunal case. This increased level of uncertainty may well put off future whistleblowers from coming forward with public interest concerns in the first place and hence entrench a culture of silence. Ultimately PIDA must be allowed to operate in a way that encourages individuals to blow the whistle.

PIDA also signalled a cultural change towards whistleblowers with YouGov surveys for 2007, 2009 and 2011 showing the word 'whistleblower' is increasingly seen as either neutral or positive term in the UK.⁵ This change in attitude can also be seen amongst employers with 45% of respondents saying they were aware of their employer's whistleblowing policy (there has been a steady increase in these numbers from 29% in 2007 and 38% in 2009).⁶ Not only does PIDA protect workers from reprisal but it is also a de-regulatory measure because it seeks to enforce what is already considered best practice, rather than adding an administrative burden on employers or on government. This element of PIDA was best summarised during the parliamentary process by Iain Duncan Smith MP who stated- 'In many ways, this Bill (PIDA) is about enshrining the best practice that already exists. The Bill will not change that best practice, but simply says that, if those companies are doing it, so should others, and they should be encouraged to do so. This legislation does not say they should follow best practice, but that, if they do not, they obviously stand to lose considerably in the long run should problems arise.'⁷ We believe this cultural shift could be undermined by the current proposals as they will reduce the de-regulatory aims of PIDA by providing no incentive for those organisations that do not follow best practice to do so.

Regulators and PIDA – existing special procedures in the ETS

The serious nature of information that lies at the heart of PIDA claims has long been recognised and as such special treatment of how they are treated within the ETS is required. This was recognised during the passage of the Employment Bill 2008 (HL). In order to ensure that there was

⁴ For further details on the listed cases can be found in our 2010 review '*Where's Whistleblowing Now? 10 Years of Legal Protection for Whistleblowers*'.

⁵ For details see page 17 & 18 '*Whistleblowing: Beyond the Law 2011*' by Public Concern at Work.

⁶ Ibid.

⁷ Parliamentary Debates (Commons), 272, 1 March 1996, 1113.

appropriate oversight of such issues, regulations were laid in April 2010 that gave the ETS power to forward PIDA claims to a “prescribed person” where the claimant consents. In the first year of operation, the ETS forwarded 140 claims to relevant prescribed persons⁸. We do not have information on how many claimants gave consent, but this does demonstrate a significant number of PIDA claims have information that is of importance to regulators. To have a blanket fee based approach to those bringing claims under PIDA is dangerous to the wider public interest and inhibits regulatory oversight.

Interim relief

Any application for interim relief under PIDA should be exempt from the fee structure. By nature of the application the hearing will be set quickly after the application and reviewed by one judge. It is not a full hearing and may be a fast track to the resolution of a claim or an opportunity to rectify a mistake. For these reasons such an application should not be subject to any fee.

Question 4- Do you agree that the claims are allocated to the right levels (See Annex A in consultation document)? If not, please identify.

Without prejudice to our answer to Question 2, and/or if our primary policy position is not accepted by those undertaking this consultation, we recommend PIDA cases should be charged at a lower rate than the consultation currently proposes. Charging PIDA claims on the basis that they consume more judicial and administrative resources than other general claims may undermine the original purpose behind enacting PIDA. As detailed in our answer to Question 2 PIDA was designed to protect workers from reprisals where they have come forward as witnesses to wrongdoing, malpractice or a health and safety danger in their workplace. To charge fees for PIDA claims at the highest rate may well have a chilling effect on whistleblowers coming forward in the future. Our recommendation would be for any scheme to take this principle into account when deciding what level PIDA claims should be charged at. We recommend two changes:

- 1) PIDA claims should be charged at a level 1 rate, rather than a level 3.
- 2) Interim Relief applications for PIDA claims should either not attract any fee or should also be charged at a level 1 rate.

Question 6 – Do you agree that the unsuccessful party should bear the fees paid by the successful party? If not please, explain why.

Encouraging workers to raise their concerns in a timely manner is one of the key principles behind the enactment of PIDA (see Question 2 for details). We are concerned that the current proposals create a financial risk for any whistleblower trying to gain legal redress for suffering reprisals. This may act as a deterrent for potential whistleblowers and thwart the original purposes of PIDA.

We are also concerned that the current proposals on repayment of fees may financially penalise a whistleblower who loses their ET case but nonetheless raised concerns on issues of a public interest. Equally it makes little sense to seek an award of fees against a respondent that loses a PIDA claim but who actually dealt with the public interest concerns behind the breakdown in employment relations.

⁸ HM Courts and Tribunal Services (FOI request response of 16 June 2011)

One recommendation we have would be to make PIDA claims exempt from this part of the tribunal fees proposal.

If this recommendation is not possible then we would suggest, as an alternative, the employment tribunal should take into account certain whistleblowing best practice principles before deciding whether an unsuccessful party should pay the other side's tribunal fee, or at what level the fees should be.

We suggest the tribunal take the following issues into account:

1. Whether the organisation has a whistleblowing policy that complies with best practice (BSI Whistleblowing Arrangements Code of Practice);⁹
2. Whether the whistleblowing policy had been followed by either side;
3. Whether the policy is effective in practice and trusted by employees, which can be assessed by looking at evidence as to how the organisation has addressed whistleblowing concerns in the past;
4. The response of the organisation to the wrongdoing disclosed;
5. The seriousness of the any relevant failure; and
6. Whether the claimant had knowingly made an untrue allegation.

In Response to a Preference for Option 1 or Option 2 (Questions 12, 15, 24 and 25)

As we shall explain in our answer to Question 16 we prefer the wider policy aims of Option 2 as opposed to Option 1. That said as stated in our answer to Question 2 and 4 regardless of which option is adopted by the Government we believe that PIDA claims should be excluded from any proposed fee arrangement, that there is discretion to waive or suspend a fee if the claim is in the public interest or alternatively PIDA cases should be charged at a lower rate than currently proposed. We would also apply the same principles to multi-claimant actions under either option.

Question 16- Do you prefer the wider aims of Option 2 fee structure? Please give reasons for your answer.

The wider aims included in Option 2 are welcome, it makes a lot of sense to build into the tribunal process a system that gives anyone using it a clearer idea of the strength of their claim or the risks in terms of liability. What we would point out is that a truly effective way of achieving these aims in relation to PIDA cases would be to prevent litigation in the first place. Best practice whistleblowing arrangements are key to driving down workplace disputes and avoid costly litigation. Although we campaign for strong whistleblower protection laws, we focus on early, preventative advice, promoting whistleblowing as a deterrent to wrongdoing which demonstrates good governance and competent risk management. In 2008, we worked in partnership with the British Standards Institute to produce *PAS 1998 Whistleblowing Arrangements Code of Practice*, which sets out good practice for the introduction, revision and review of effective whistleblowing arrangements. From the information we have gathered from cases in our advice line database, 40% of concerns are initially ignored by line management and 31% of callers prefer to raise their

⁹ See *PAS 1998 Whistleblowing Arrangements Code of Practice*

concerns with a senior manager or executive. If good whistleblowing arrangements are in place and staff are trained in how to deal with whistleblowing concerns, then the deterrent effect of whistleblowing will drive up standards as well as increasing general trust and confidence in the workplace. If good practice is followed then an organisation is better placed to safeguard against a PIDA claim arising in the first place.

We recommend better guidance and promotion of best practice whistleblowing arrangements to all businesses. We would consider it more appropriate to introduce a fine on organisations who have failed to put into place adequate, well promoted, whistleblowing arrangements or have been in breach of their own procedures, and for this to be an administrative fee payable to the employment tribunal service.

Question 18 – Do you think it is appropriate that a threshold should be in place and that claims above this threshold attract a significantly higher fee? Please give reasons for your answer.

According to our own research the average award for a PIDA claim is £58,000, far above the proposed threshold¹⁰. Parallels are often drawn between PIDA and discrimination law with one of the similarities being that there is no cap on damages that can be awarded in either case. This principle is important to the operation of PIDA as a cap on damages is seen as a deterrent to well paid workers who would be financially worse off if damages were capped – this is particularly important if whistleblowing is to be encouraged in the City, a vital message in the post financial crisis era. Uncapped damages are also in recognition of the fact that in some industries (particularly in the construction industry¹¹) those who question malpractice are blacklisted and may never work within that industry again. We draw attention to the case of *Lingard v HM Prison Services*¹², a case in which a prison officer was compensated £477,000 in recognition that she had in effect been deprived of her career. One can imagine a similar circumstance of a whistleblower in the police force struggling to find work again due to the stigma of being a “successful” PIDA claimant. Given the public policy principles that underpin PIDA to impose a threshold on damages could potentially creating a chilling effect on future whistleblowers.

We would recommend PIDA cases be exempt from the proposed fee structure.

Question 20 – Fewer than 7% of ET awards are for more than £30,000. Do you think £30,000 is an appropriate level at which to set the threshold?

We think that the proposed threshold for PIDA is too low and this may prevent future whistleblowers coming forward as it will create uncertainty. This uncertainty will be further increased by the different compensation awards that have been made to PIDA claimants- the highest award for a PIDA case compensation payout in the private sector is £3.8m, £800,000 is the largest public sector compensation payout with the average being £58,000.¹³

¹⁰ For details see page 13 & 14 ‘*Whistleblowing: Beyond the Law 2011*’ by Public Concern at Work

¹¹ See *The Telegraph* 06 May 2009 ‘Firms Accused Over Union Worker ‘Blacklisting’

¹² 1802862/04 (ET) 2004

¹³ For details see page 13 & 14 ‘*Whistleblowing: Beyond the Law 2011*’ by Public Concern at Work and pages 7 & 8 of ‘*Where’s Whistleblowing Now? 10 Years of Legal Protection for Whistleblowers*’ by Public Concern at Work 2010.

In the alternative, without prejudicing our recommendations found in Question 18; we recommend the level is increased to £58,000 (the average award for PIDA claims) and rises in line with inflation.

Question 22 – Do you agree with our view that it is generally higher income earners who receive awards over £30,000? Please provide any evidence you have for your views.

When PIDA passed through the legislative process a cap on damages was not included as it was felt that this may put off workers in the city from coming forward with concerns. But this is not the whole picture, the principle of uncapped damages is also in recognition that unfortunately there is still a risk for whistleblowers at any level in an organisation that they may never work in their industry again once they have suffered reprisals for raising concerns. This risk is not reserved for those whistleblowers with access to financial resources. Substantial compensation awards have also been given to public sector workers, including £800,000 compensation (the highest from the public sector) for a Chief Executive of an NHS hospital, plus the sums of £477,602 and £32,500 respectively for two prison officers who tried to raise concerns about corrupt practices in the prison they worked in¹⁴ (please see our answer to questions 18). Our conclusion is this assumption is not borne out when it comes to PIDA cases. Without prejudicing our answer to Question 22, we suggest this assumption is dropped when PIDA cases are being considered as part of the threshold proposals.

Additionally in PIDA claims an individual may make a claim for detriment and thus injury to feelings. This may be up to £25,000 and could also include an additional head of aggravated or exemplary damages. It would be wholly inappropriate for a person who had suffered detriment, had salt rubbed in the wound and then been dismissed to have to pay more to make a claim due to how poorly they had been treated.

Question 23 – Do you agree that we should aim to recover through fees a greater contribution to the costs of providing the service from those who choose to make a high value claim (and can afford to pay the fee)? Do you have any views on impacts you think this would have on claimants or respondents? Please provide any supporting evidence for your statement.

Please see our answers to questions 18 – 22.

Question 28 – What sort of wider information and guidance do you think is needed to help claimants assess the value of their claim and what issues do you think may need to be overcome?

Increasingly workers in the UK see whistleblowing as a positive thing, from a YouGov survey conducted in 2011, 85% of respondents said they would raise concerns about possible corruption, danger or serious malpractice in their workplace¹⁵. In the same survey 23% of respondents were aware that legal protection existed for whistleblowers. The issue is exacerbated by the chronic lack of information about PIDA cases¹⁶. The Government must change its approach to the access

¹⁴ For details see page 17 & 18 'Whistleblowing: Beyond the Law 2011' by Public Concern at Work

¹⁵ Ibid

¹⁶ Ibid

to information about claims and judgements under PIDA regardless of whether Option 1 or Option 2 is picked as a way forward. If this is not done, then access to justice for those who can not afford to pay for employment lawyers will be severely reduced given the recent decisions over legal aid cut backs.

To answer Question 28 specifically, without access to this basic information the respondent or claimants will be limited in their ability to judge the merits of their own position, without engaging with an employment lawyer. Given the proposed cuts to legal aid it becomes even more vital that guidance, support and better promotion of PIDA takes place as our research shows 34% of claimants are litigants in person. We would suggest that this number is likely to rise if PIDA cases are included in any tribunal fee proposal.

Given that the proposals are brought forward on the premise that such fees exist in civil courts, it would only be appropriate to provide the same service for litigants as exists in the civil courts, where any individual can apply to see the claim or defence form and judgments are publicly available.

As a side issue to this point, a lack of an open register of employment tribunal claims also means it is virtually impossible to judge whether there are any public interest issues that need to be addressed by regulators, the press or government departments.

We have three key recommendations relating to the provision of information for claimants and respondents alike:

1. In addition to guidance on statements of loss, there should be online guidance on how to draft an ET1 and ET3 for each head of claim that is within the jurisdiction of the Employment Tribunal System and specifically in relation to PIDA claims
2. An open register of ET1s and ET3s, of PIDA claims specifically, be re-established, as exists in the civil courts
3. An online database of employment tribunal judgements

By providing better information, early on in an employment dispute it is more likely that claimants will draft clearer ET1s, whether the claim is for sex discrimination, whistleblowing or unfair dismissal. In turn the respondent will be clearer about the liabilities they face in relation to the claim.

Our proposals will mean the claimant will be in a better position to be able to judge and outline the strength of their claim which will mean weaker cases are either not put forward or withdrawn, saving the tribunal service administration costs.

There may be some anxieties that individuals or organisations could face further stigma if their names are on a public register of claims. We would suggest in such situations, as exists for hearings that may be of a personal or commercially sensitive nature, that they can apply to have their name redacted or public access restricted.

Question 29 – Is there an alternative fee charging system which you would prefer? If so, please explain how this would work.

We would suggest on application to the employment tribunal, 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 is a feature or a tick box on the fees section of the ET1 if an individual wishes to make the application. The move would firmly place the public interest at the forefront of PIDA claims and, if this is incorporated on either option 1 or 2, it will benefit the ETS in a number of ways:

1. There has been a long standing concern that the first instance decision in *Parkins v Sodhexo*¹⁷ allowed for individuals to make a PIDA claim if they had been victimised for making a disclosure about a breach of their own employment rights. On our analysis of PIDA judgments from 2011, we identified that 10% of all PIDA judgments involved disclosures about a breach of an individual's own employment rights. Vince Cable announced on 23 November 2011 at the Engineering Employers Federation that the Government were seeking to remove this loophole in PIDA. The introduction of a public interest test alongside the fee arrangements would deter such litigants and ensure litigants with genuine public interest claims are able to proceed without a fee.
2. It would discourage PIDA claims as an additional bolt-on claim if an individual was making multiple claims – thus saving all parties time and money.
3. Low paid workers will not be deterred when their claims contain disclosures in the public interest. As an example, the highest number of calls we receive from any one sector is from the care sector. These cases are often the most harrowing and frequently involve serious abuse. Given the concerns that have been brought to light in the media, such as the Panorama expose of Winterbourne view, it is vital that largely low paid workers and not precluded from taking a claim on the basis of cost. It is likely that many of these care workers will not be eligible for remission given the low income threshold currently proposed and the likelihood that, due to the nature of the care market, they quickly secure other work. In an environment where vulnerable workers are speaking up for vulnerable people it is of acute public interest that this information does not remain buried in private settlement, or more likely never raised due to the fluidity of the labour force in the care sector. It is worth noting that the highest number of PIDA claim referrals to any one regulator between April 2010 and April 2011 was to the Care Quality Commission¹⁸. A decrease in PIDA claims could lead to a reduction of regulatory intelligence and deter care workers from raising a concern if a claim under PIDA is inaccessible due to cost. One individual who sought advice from PCaW had reported serious abuse at a care home, including dragging adults with learning disabilities across the floor and physically threatening them. The worker was dismissed and made a PIDA claim. The £750 he received in settlement was a significant sum to him, one that it is unlikely he would have pursued had he faced the fees proposed.

¹⁷ [EAT/1239/00](#)

¹⁸ HM Courts and Tribunal Services (FOI request response of 16 June 2011)

We would also recommend that even if an individual were unsuccessful at hearing, if they had brought important public interest information to light the tribunal should have the discretion to waive any fee. This solution would be particularly effective in protecting the public interest if it operated in conjunction with an open register of claims and employment tribunal judgments.

Question 30 – Do you agree with the simplified fee structure and our fee proposals for the Employment Appeal Tribunal? If not, please explain and provide any supporting evidence.

In line with our answer to Question 2, 4 and 29 our preferred option for Question 30 would be for PIDA claimants to be exempt from the fee scheme for the Employment Appeal Tribunal (EAT), or that Claimants should be able to apply to have the fee suspended or waived. If this is not possible then we propose that a reduction that is at a similar level to the reduction we propose in our answer to Question 4.

Summary of Recommendations

1. When developing the criteria for the basis of the fee structure we recommend that in relation to PIDA cases the question as to whether the proposals discourage or encourage whistleblowing should be taken into account.
2. PIDA and interim relief claims should be exempted from the fee proposals. Alternatively there should be an application process so that the fee is suspended or waived if the claim contains disclosures made in the public interest. Alternatively, they should be charged at a level 2 claim rate.
3. PIDA claims should be exempt from the higher threshold of compensation. Alternatively PIDA compensation threshold should be increased to £58,000.
4. PIDA cases before the EAT should either be exempted or fees should be charged at a rate that is in line with level 2 Employment Tribunal claims.
5. Employment tribunals should look at the response of the employer to any wrongdoing disclosed before deciding whether a losing party at ET should pay the other side's tribunal fees.
6. We would also recommend that even if an individual were unsuccessful at hearing, if they had brought important public interest information to light the tribunal should have the discretion to waive any fee.
7. There should be a proactive campaign by the Government to all business on what constitutes best practice whistleblowing arrangements in order to avoid expensive litigation in the first place.
8. In addition to guidance on statements of loss, there should be online guidance on how to draft an ET1 and ET3 for each head of claim that is within the jurisdiction of the Employment Tribunal System and specifically in relation to PIDA claims.
9. An open register of ET1s and ET3s, of PIDA claims specifically, be re-established, as exists in the civil courts.
10. An online database of employment tribunal judgements should be reinstated.

Public Concern at Work

16 March 2012