

Parliamentary Briefing on amendments to the Employment Bill (HL) 2008
Extended briefing for MPs

Report Stage & Third Reading on 4 November 2008
Amendments tabled by Ian McCartney MP

Resolution of public interest disclosure cases

To move the following clause-

Resolution of public interest disclosure proceedings

Mr Ian McCartney

NC12

To move the following Clause:—

(1) Where proceedings concern a claim for unfair dismissal made under section 43B of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998, cl. 23), the President shall, after disposal of the claim, send a copy of any relevant papers to the Secretary of State.

(2) For the purposes of sub-section (1), "relevant papers" shall include:

- (a) A copy of the claim form;
- (b) A copy of any response to the claim form;
- (c) A copy of any judgement or order;
- (d) Any other document relating to the claim which the President considers should be included; and
- (e) Any other document which the Secretary of State may notify the President that he requires for the purpose of his functions under this section.

(3) The Secretary of State shall review the relevant papers as soon as is reasonably practicable.

(4) Upon review of the relevant papers, where the Secretary of State considers they relate to a matter which it would be reasonable for a person prescribed under s43F of the Employment Rights Act 1996 to investigate the Secretary of State shall communicate the papers to that person.

(5) The Secretary of State shall report to Parliament annually on the operation of this section.

(6) In this section, "President" has the same meaning as in section 7A(3) of the Employment Tribunals Act 1996 (cl.17)"

Open justice - civil procedure rules

Mr Ian McCartney

NC13

To move the following Clause:—

'Proceedings in public interest disclosure cases

Parliamentary Briefing on amendments to the Employment Bill (HL) 2008
Extended briefing for MPs

In the Employment Tribunals Act 1996 (c.17), after section 8 (procedure) there is inserted—

“8A Publication of information

(1) Where proceedings include a claim under the Public Interest Disclosure Act 1998 (cl.23), the president shall, within 28 days from receipt of the claim, publish electronically and without charge the names of the parties and the relevant regional office.

(2) A person who is not a party to those proceedings may obtain from the tribunal a copy of such documents from the proceedings as he may obtain under the Civil Procedure rules where proceedings are brought in a court.

(3) In this section, “President” has the same meaning as in section 7A(3).”’.

Summary

Two amendments to the Employment Bill (HL) 2008 have been tabled by Ian McCartney MP for debate at the Report stage on 4 November 2008 aim to address a long-standing concern held by Public Concern at Work and numerous others that the lack of transparency in the operation of the Employment Tribunal is compromising the public interest by preventing scrutiny of matters before the Tribunal, and particularly by allowing matters of public concern to be ‘buried’ in settlements which do not reach determination.

The amendments aim to address this concern by proposing that the open justice approach applied in others areas of the law be extended to the Employment Tribunal or, that at the very least, there should be a duty on the President of the Tribunal to refer claims made under the Public Interest Disclosure Act to the Secretary of State for BERR for assessment and referral to an appropriate regulator for further investigation where the level of public interest so warrants.

This paper sets out the background to this issue, provides a briefing on recent relevant developments and information on the Northern Ireland Fair Employment Tribunal, which operates a public register without evident detriment to parties involved in proceedings before it.

The Public Interest Disclosure Act 1998 (“PIDA”)

When enacted, PIDA was praised “for so skilfully achieving the essential but delicate balance in this measure between the public interest and the interests of employers” and most readily protects concerns raised with an employer. PIDA gives protection to individuals to go outside in certain circumstances when the concern has been covered up or not addressed. PIDA is ultimately about accountability and it follows that for this to work it must be possible for those responsible to be held to account for their conduct. This provides an incentive for organisations to deal openly and well with any potential wrongdoing when first raised by an employee.

Parliamentary Briefing on amendments to the Employment Bill (HL) 2008 Extended briefing for MPs

Background to the current issue

In 2006-07 there were 1356 PIDA claims made to tribunals. The statistics for the previous years show that over two thirds of PIDA claims are settled or withdrawn. Until and unless a tribunal claim is heard and a decision issued, no information about the claim is available on the public record. Whilst the claim will be about the treatment of the worker who raised the concern the employee only has a claim because he says he has disclosed information in the public interest.

The present secrecy causes four problems:

1. It enables an employer to 'buy off' a genuine whistleblower as the cheaper alternative to addressing the underlying wrongdoing and in this way it allows the public interest to be traded for private gain and the Act to be abused;
2. It means that there is little that deters an employee / adviser from using PIDA to initiate a nuisance claim;
3. It is not possible to monitor how PIDA is working in the tribunals system - in over two thirds of claims, there is no information about the nature of the concern, the disclosure or the reprisal; and
4. The enhanced transparency, accountability and awareness that an open justice approach would generate are not available.

How a lack of transparency undermines effective governance

Organisations are unlikely to victimise the messenger where the concern raised has been handled properly and the issue resolved. Organisations that choose to deal with the messenger rather than the message often have the greater vested interest in settling any claim in private to avoid having to answer any questions about any potential malpractice and if or how they are addressing the issue. It is likely that claimants can be bought off by an employer who is keen to ensure that their claim does not come out if the contents of the claim hold a risk of damage to their reputation. In a system strongly based on individual enforcement the inequality of bargaining power and the increased preference for conciliation to save costs on litigation may mean that an employee will settle and is under no obligation to raise that matter elsewhere, subverting the public interest purpose of PIDA.

Conversely an employee with potentially damaging or embarrassing information on their employer is provided with a useful cover to effectively extort as large a settlement as possible from their employer. This is likely to happen in organisations that have an anxiety about information being placed in the public gaze and it is unlikely in these circumstances that the organisation will have dealt well with any underlying issue.

In light of the current economic climate and the drive for improved regulation the present position begs the question - can we afford not to know? A more open position promotes:

- Accountability
- Transparency
- Good governance and better regulation

The absence of a public register disables wider scrutiny of any failure of organisations to address or cover up any wrongdoing and in turn provides little incentive for organisations to keep their house in order. This lack of scrutiny has created a situation whereby information is being held on a de facto register maintained by a public body that is not accessible by regulators, MPs, the media or any third party contains information about serious wrongdoing or malpractice that could be a risk to the wider public. The inability to access and review

Parliamentary Briefing on amendments to the Employment Bill (HL) 2008 Extended briefing for MPs

any relevant information in these claims reduces the window of opportunity for regulators or government to address any outstanding risk at an early stage to prevent or limit any ensuing damage.

Any information about such a risk will only enter the public domain in the 30% of cases that reach a full hearing at an employment tribunal. The tribunal does not rule on whether or not the concern raised was right - only whether or not the employee had suffered a detriment. Reporting and access to decisions has not caused an issue. However a number of decisions have contained information that would be of interest to regulators that may not have come to light were it not for the PIDA claim. These have included: hospital hygiene, airline safety, procurement and abuse in care.

Attempts to apply open justice

PCaW's starting point has long been that the normal rules on open justice should apply to PIDA claims. This is that the key information about the claim should be on the public record in the same way that information about court claims is still on the public record. This was the assumption of those promoting the legislation when PIDA was enacted and this was confirmed as correct by the High Court in 2000.

Regulations were subsequently introduced to reverse the effect of that High Court decision and since then this issue has remained a cause of disagreement between PCaW and officials in DTI/BERR. It was also the subject of a critical report from the Parliamentary Ombudsman which resulted in the DTI paying PCaW £130,000 in compensation for maladministration.

It is worth noting that for the first six years PCaW was given the clear and repeated impression that DTI ministers were supportive in whole or in part of an open justice solution for PIDA claims (though not for employment claims generally). Business and unions were publicly supportive or neutral of PCaW's case for open justice as to PIDA claims. The obstacles appeared to be with DTI officials (though the silence of employment lawyers suggested they were not allies).

Recent developments

Following intervention by Ian McCartney MP and Lord Borrie QC, BERR agreed to revisit the issue earlier this year and Lord Borrie pressed the case hard in the Lords in the Employment Bill, with cross party support, but to no avail. For the first time during consideration of this issue, business interests were opposed to an open justice solution fearing that that open justice would mean untested and damaging allegations about business would be freely and readily covered in the media. There was also strong opposition from Lord (Digby) Jones.

However, recent economic developments and concern over regulatory shortcomings, especially with regard to the financial services sector may have altered the political climate in which this matter would now be debated. It could be argued that increased transparency and the wider application of open justice to encompass the operations of the Employment Tribunal so that matters of public concern may be expeditiously identified and acted upon is necessary to support the work of regulators and avert public detriment.

Parliamentary Briefing on amendments to the Employment Bill (HL) 2008 Extended briefing for MPs

On October 2, 2008, the Information Commissioner's Office (ICO) ordered the Department of Business Enterprise and Regulatory Reform (BERR) to disclose details of respondents to all employment tribunal claims lodged since October 2004. The ICO found that, on balance, the public interest was best served by disclosing the information. A summary of this case can be found at Annex1.

Attempts to monitor PIDA claims

In October 2004 DTI officials wrote to the trustees of Public Concern at Work suggesting a scheme whereby Public Concern at Work would monitor PIDA claims. During the debate for the above regulations in the 1st Standing Committee on Delegated Legislation the officials suggested that rather than a public register, Public Concern at Work could monitor PIDA cases, subject to confidentiality and forward any cases of concern to the appropriate regulator. PCaW were unable to agree to play this role in such a scheme and stated in response

"While we remain ready to do what we can to help the Government, the scheme you propose would impose legal risks and administrative complications for this charity which would impact significantly on our current operations, future work and general approach. For these reasons, I am sorry to say that we are not able to accept this particular proposal."

BERR suggested such a scheme again in January 2008 stating that

"DTI recognised there was an issue to be addressed concerning those employers who retained their anonymity despite possibly carrying on undesirable or illegal practices. As a result, PCAW were offered the opportunity to receive information regarding employers who were cited as respondents in employment tribunal PIDA claims on a confidential basis, but rejected this opportunity. The idea, not fully worked up, would have been for PCAW then to pass on the details of the employer in question to the appropriate enforcement agency, which might be the health and Safety Executive, the Food Standards Agency, local government or environment inspectors or possibly the police...The conclusion reached was that, once the Joint Workplace Enforcement Pilot (involving the National Minimum Wage Inspectors, HSE, HMRC and other inspection bodies) had been evaluated and the Data Protection Act and other legal issues understood, a similar process could be considered with PIDA employment tribunal claims. In such an arrangement, details of PIDA respondents would be passed to the appropriate enforcement agency for consideration. This still seems to be the best and most efficient way forward, and the one least likely to cause detriment to innocent employers, while also maintaining the protections PIDA affords whistleblowers.

PCAW considered this proposal again, but concluded that its original reservations regarding its potential role in such a process still applied, and sought further discussions with BERR in October 2008 to discuss alternatives. A response to this request has not yet been received.

The solution

Clause 12

The first amendment aims to ensure that the substance to any underlying concern behind a claim under PIDA is addressed by an appropriate body. In summary the President of the Tribunal will forward the relevant papers of a claim made under PIDA to the Secretary of State for BERR who will then review the matter and pass the information on to the appropriate body when it is reasonable to do so.

Parliamentary Briefing on amendments to the Employment Bill (HL) 2008 Extended briefing for MPs

Having such a mechanism in place will:

- Address any serious wrongdoing raised by employees currently being buried in settlement without review
- Encourage businesses to address any underlying wrongdoing
- Assist the Government in delivering better regulatory oversight and enhance transparency and accountability
- Assist the Government to properly monitor the legislation
- Assist regulators to regulate in line with the five principles of good regulation as outlined by the Better Regulation Task Force.

The amendment is in line with the process outlined by BERR to PCAW in its 2004 and 2008 letters, while also addressing PCAW's concerns about where the duty should most properly be located.

Clause 13

Open justice - a practical and proven solution:

This amendment provides that the same rule on open justice that exists in civil courts (appended to this briefing at page 6) should be adopted for those Employment Tribunal proceedings that include a claim under PIDA. In summary, this will provide that

- As a general rule a member of the public may obtain a copy of the statement of case (ET1) in proceedings under the Public Interest Disclosure Act. (*see rule 1 overleaf*)
- The general rule does not apply where the Tribunal has ruled, on the application of a party or person mentioned in the ET1, that the statement of case should (i) not be made available, (ii) only be available in a edited version, (iii) only be available to certain persons or classes of person or (iv) on such other terms as the tribunal thinks fit. (*see rule 4*)
- The general rule applies where (i) a response / defence has been filed or service acknowledged, (ii) the case is listed for hearing, or (iii) judgment has been given. (*see rule 3*)
- A member of the public may, if the tribunal permits, obtain other documentation related to the case (e.g. the defence, notice of settlement or withdrawal). (*see rule 2*)

Applying this rule to PIDA claims will mean the secrecy that presently conceals over 70% of information on claims brought under the Public Interest Disclosure Act can be lifted in cases where (a) a non-party makes a request for the statement of case and (b) the Tribunal has not accepted an objection made by either party.

The amendment meets key concerns raised by Lord Jones, the BERR minister and by the CBI and EEF at Grand Committee¹:

¹ *Hansard* HL 25 February GC 94-101. The amendment considered at Grand Committee had proposed that after conclusion of a PIDA claim (whether by decision, withdrawal or settlement) the claim, response and any decision or notice of withdrawal or settlement would be published electronically. This presumption would have been subject to (a) the existing statutory safeguards for employment tribunal proceedings involving national security, sexual misconduct and disability and (b) any ruling that particular information should be omitted or deleted from the papers.

Parliamentary Briefing on amendments to the Employment Bill (HL) 2008
Extended briefing for MPs

- i) It will not provide that tribunal papers about a PIDA claim are automatically published and freely available.
- ii) It enables the claimant or respondent to apply that the ET1 should not be made available at all, or only if edited.
- iii) It enables the claimant or respondent to apply that the ET1 be made available only to certain persons or classes of persons or on such terms as the court sees fit.
- iv) It avoids any concern - misplaced or otherwise - about data protection or infringement of copyright.

“Unproven allegations”

At Grand Committee, Lord Jones expressed concern that the amendment then considered would lead to the publication of unproven allegations as it was not part of the tribunal's procedures or decision to make findings as to the validity of the underlying concern. While he is correct that the tribunal process is to decide whether the employee was unlawfully victimised for whistleblowing rather than whether the wrongdoing concern was well-founded, tribunals are expected to - and do - consider the reasonableness of the employer's response to the wrongdoing concern. This is clear from the Court of Appeal decision last month in Roche v Kuzel² and consideration of this point is a guarantor of the legislation's public interest purpose.

Furthermore, if there be a serious objection that it is unfair to make available any information about the wrongdoing concern before it has been found to be substantiated, this objection would also hold good for the publication of any decision that a tribunal makes in a PIDA case. This is because, as the Minister has pointed out, the tribunal in a PIDA case will rarely make a finding about the substantive wrongdoing when it reaches and publishes its decision. Yet there is no evidence that the publication of this information in a PIDA decision has harmed an innocent employer and no business organisation has made the claim that publication of this same information in a decision is damaging, disproportionate or unfair.

Catherine Wolthuizen - Director
Francesca West - Senior Policy Officer



² <http://www.bailii.org/ew/cases/EWCA/Civ/2008/380.html>

BACKGROUND INFORMATION

Information Commissioner's decision

On October 2, 2008, the Information Commissioner's Office (ICO) ordered the Department of Business Enterprise and Regulatory Reform (BERR) to disclose details of respondents to all employment tribunal claims lodged since October 2004. The ICO found that, on balance, the public interest was best served by disclosing the information.

The ICO requested that BERR provide evidence of any harm that would be caused by releasing the information. BERR's response outlined a number of suggested factors, including:

- that respondents would be left at risk of unwarranted damage to their reputations (for example, by press coverage where ill-founded and misconceived complaints are made about the respondent);
- that organisations would be left open to direct marketing;
- that the release of this information would expose the existence of disputes publicly, reducing the chances of disputes being settled in advance of tribunal hearings; and
- that when the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 was passed, a decision was made regarding what information was and was not in the public interest to place into the public domain relating to employment tribunal claims, and that the respondent's detail, prior to a judgment, had been decided to be not in the public's interest.

BERR cited Section 36 (conduct of public affairs) of the Freedom of Information Act, which sets out an exemption from the "right to know" if, in the reasonable opinion of a qualified person, the disclosure of the information would result in a specified prejudicial effect.

The Information Commissioner rejected these arguments. Although the Commissioner accepted that BERR could invoke the S.36(2)(c) exemption, the Commissioner did not accept BERR's weighing of the public interest considerations. Noting that the details of most cases are already in the public domain, the Commissioner concluded that the public interest in maintaining this exemption was 'very weak' and outweighed by the public interest in disclosing the information. Employment Tribunals are open to the public, with details of cases generally within the public domain, unless a good reason for confidentiality exists. The information sought by the complainant was made public via the Register from 1965 until October 2004 and BERR had not provided any evidence that disclosure of the information sought during this period did have any of the adverse effects that it now considers disclosure would have. The relevant information would therefore be disclosed.

The ICO has said that the ruling "paves the way" for material to be released routinely, in much the same way as has been previously undertaken in the Register of Employment Tribunal Applications. This register was in place for over three decades, until a Government decision in 2001 to cease publishing this information.

At the time of writing BERR has until 30 October to submit a notice of appeal to the Information Tribunal.

Parliamentary Briefing on amendments to the Employment Bill (HL) 2008
Extended briefing for MPs

Family Law changes

On October 20, Sir Mark Potter, President of the Family Division, called for greater transparency in family law proceedings. His comments come ahead of an anticipated November announcement by the Secretary of State for Justice of reforms to widen the application of open justice to include aspects of proceedings in the family courts. While the

Existing public registers

There is a precedent for a public register of claims in Northern Ireland. The *Fair Employment Tribunal* deals with claims of discrimination on the grounds of religious belief or political opinion. The statutory regulations governing its proceedings are The Fair Employment Tribunal (Rules of Procedure) Regulations (Northern Ireland) 2005. [click here](#) for the complete regs.

Details of claims to the Fair Employment Tribunal (sits in Belfast) and the decisions of the Tribunal are required by law to be kept in registers, which are held at the Office of the Tribunals and are available for inspection by the public free of charge during normal office hours (Mon-Fri 9.00am to 5.00pm)

The register of tribunal claims contains the following information:

Case Reference No.

Date the claim was received by The Office of the Tribunals

Name of the claimant

Name of the respondent

The type of claim brought (in general terms).

The claim is placed on the register once the secretary has accepted the claim or part of it. (Schedule 1)

The Fair Employment Tribunal (Rules of Procedure) Regulations (Northern Ireland) 2005

11 (1) The Secretary shall maintain a Register which shall be open to inspection by any person without charge at all reasonable hours.

(2) The Register shall contain -

(a) details of all claims in accordance with rule 2(2)(f) of Schedule 1;

(b) details of appeals in accordance with rule 3(a) of Schedule 2;

(c) details of applications for enforcement in accordance with rule 3(a) of Schedule 3;

(d) a copy of all decisions and any written reasons issued by any tribunal or chairman which are required to be entered in the Register in accordance with the rules in Schedules 1 to 3.

(3) The Register, or any part of it, may be kept by means of a computer.

The register of tribunal decisions contains the decisions of the Fair Employment Tribunal (searchable online).

Civil Procedure Rule 5.4C

- (1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of -
 - (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
 - (b) a judgment or order given or made in public (whether made at a hearing or without a hearing).

- (2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.

- (3) A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if -
 - (a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;
 - (b) where there is more than one defendant, either -
 - (i) all the defendants have filed an acknowledgment of service or a defence;
 - (ii) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;
 - (c) the claim has been listed for a hearing; or
 - (d) judgment has been entered in the claim.

- (4) The court may, on the application of a party or of any person identified in a statement of case -
 - (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
 - (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;
 - (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or
 - (d) make such other order as it thinks fit.

- (5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23.

- (6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission.