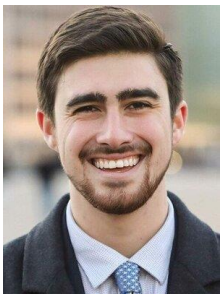
UK Whistleblowers Flock To The US For Good Reason

By **Benjamin Calitri and Kate Reeves** (March 5, 2024)



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On Feb. 13, Nick Ephgrave QPM made headlines when, during his first speech as director of the U.K.'s Serious Fraud Office, he expressed a desire to pay awards to financial fraud whistleblowers in the U.K.[1]

In his speech, he pointed to the success of U.S. whistleblower award laws and noted that over 700 U.K. whistleblowers have made their disclosures to U.S. authorities in recent years.

His comments have brought renewed attention to the differences between the U.K. and U.S. whistleblower regimes and how these differences, which extend beyond the offering of monetary awards, cause U.K. whistleblowers to flock to U.S. authorities.

According to data published by the U.S. Securities and Exchange Commission between 2011 and 2021,[2] whistleblowers in the U.K. utilize the SEC whistleblower program[3] more than whistleblowers from any other country outside North America. U.K. whistleblowers submitted 783 tips to the SEC over just those 10 years.[4]

Why do U.K. whistleblowers flock to the U.S. to report? The answer is simple: The U.S. whistleblower regime under the Dodd-Frank Act[5] encourages anybody with information on wrongdoing to file a tip, whereas the U.K. whistleblower regime under the Public Interest Disclosure Act of 1998, or PIDA,[6] limits those who are eligible to blow the whistle and does not incentivize whistleblowers with awards, thereby making whistleblowing a risky endeavor.

Whistleblower Protection: Anti-Retaliation vs. Anonymity Protections

PIDA's most salient failure is that it does nothing to protect whistleblowers before retaliation occurs, thereby not supporting whistleblowers in their goal of stopping fraud and corruption.

There are no rights to anonymous or confidential reporting[7] within the Public Interest Disclosure Act. The only protection for whistleblowers under PIDA is the right not to suffer detriment.

Under Section 47B(1) of PIDA, "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure." If the principal reason for a whistleblower's dismissal is that they blew the whistle, the whistleblower can claim unfair dismissal to receive compensation.

However, entitlement to compensation does nothing to prevent a whistleblower from suffering detriment. Rather, whistleblowers must suffer detriment — and prove this detriment was due to their whistleblowing — to be eligible for any compensation.

When whistleblowers in the U.K. face retaliation, the compensation they are entitled to under PIDA is extremely difficult to obtain. Whistleblowers must take their case to the

employment tribunal, where the burden of proof is on the whistleblower to establish retaliation for whistleblowing rather than any other reason.

Financial crime whistleblowers must fight legal battles against Goliath corporate legal teams who know how to strategically frame a whistleblower's demotion or firing as a product of poor performance or companywide dismissals. Successfully bringing a case to the tribunal alone costs a whistleblower at least £40,000 ($50,821)[8] and years of litigation drain more financial resources from whistleblowers who are already financially vulnerable.

Of all whistleblowing claims brought before the employment tribunal, only 4% succeed.[9]

This reality creates a cruel cycle: Potential whistleblowers are less likely to speak out about crimes they witness because it could ruin their lives, and companies are more likely to retaliate against whistleblowers knowing that it is easier to win legal battles where they already have the upper hand than to address the root cause of whistleblowing — fraud and corruption.

PIDA proves that the idea that rights to damages protect whistleblowers is a myth. The best protection for whistleblowers against retaliation is for them not to be retaliated against at all. Whistleblowers need anonymity when they report so that corporations cannot retaliate against them.

Under the transnational Dodd-Frank Act, whistleblowers can report anonymously,[10] no matter the strength of their claim. Trained investigators handle this sensitive information without revealing whistleblowers' identities. They need not risk their personal and financial stability to report information of strategic value to the U.S. government.

Under PIDA, whistleblowers make qualifying protected disclosures to a fragmented regime of prescribed persons — usually regulatory agencies — as well as other entities like employers, none of which are under a statutory obligation to protect whistleblower anonymity.

Corporate whistleblowers reporting issues like fraud, money laundering, bribery or corruption in the U.K. generally would likely disclose to either the SFO[11] or the Financial Conduct Authority[12] if reporting to a prescribed person. Both of these agencies recently have made statements that they protect the identities of whistleblowers.[13]

The SFO whistleblower program states on its website that they "do not disclose the identity of individuals providing [them] with information unless you have given your consent. If [they] do not have [the whistleblower's] consent, [they] will ensure that any report sharing your information does not identify [the whistleblower] or the fact it has come from a whistleblower or confidential reporter."[14] The FCA program states that they can protect identity upon request. However, these are mere statements, not statutory protections upon which whistleblowers can rely.

Furthermore, unlike anonymous tips to the SEC in the U.S., whistleblowers who submit anonymously to the FCA and SFO are not represented by attorneys who protect their interests and liaise between them and the enforcement agency. This lack of representation removes accountability for the agency to act on the tip, and it also leaves the whistleblower more vulnerable to retaliation if the agency does further investigate it, as carefully investigating an anonymous tip requires taking deliberate, informed steps so as not to reveal the source of the information.

In the absence of specific statutory protections for the anonymity and confidentiality of whistleblowers, whistleblowers may face severe consequences for blowing the whistle, and the risk may deter potential whistleblowers.

Whistleblower Compensation: Damages vs. Rewards

Compensating corporate whistleblowers for their valuable information makes blowing the whistle worth the risk. The only compensation provided in PIDA is for damages incurred from whistleblowing, which, as established earlier, are extremely difficult to prove.

A mere 4% of whistleblowers in the U.K. win their employment tribunal cases, and even these lucky few still come out of their legal battle in financial ruin — it is too little, too late.

In a speech in Parliament in December 2022, whistleblower champion Baroness Kramer told the story of Dr. Raj Mattu, who, despite being awarded £1.22 million in damages, incurred a legal bill of £1.48 million to clear his name in his seven-year employment tribunal.

A study of all PIDA cases that reached employment tribunal from 2007 to 2014 by the Thomson Reuters Foundation and Blueprint for Free Speech found that the median compensation awarded to whistleblowers in employment tribunal was £17,422, which is a measly compensation when one considers the average salary of any employee, in particular executive corporate employees most likely to be reporting financial crimes like fraud and corruption.[15]

£17,422 seems even more inadequate when considering the legal fees incurred over 2.5 years, or 20 months, the median duration of a claim in 2007-2014. By granting successful claims to so few whistleblowers who file and then giving them inadequate damages, the employment tribunal provides only illusory compensation for damages.

Consistent with its treatment of whistleblowers as an effective anti-corruption strategy, the SEC whistleblower program under the U.S. Dodd-Frank law offers whistleblowers monetary rewards, financially incentivizing whistleblowers with valuable information to come forward. Qualifying whistleblowers[16] are eligible for rewards between 10% and 30%[17] of the sanctions collected if they voluntarily submitted original information, which resulted in a sanction of at least $1 million.[18]

Rewards provisions[19] complement existing U.S. retaliation protections.[20] Rewards are important because compensation for damages only helps whistleblowers after they have already suffered — first from retaliation and then from the burden of court. Damages do nothing to protect whistleblowers proactively, nor do they do anything to deter corporations from engaging in fraud and corruption because they do not incentivize more whistleblowers to come forward.

Rewarding whistleblowers for the value of their information instead incentivizes whistleblowers to provide valuable information.

In conjunction with the anonymity provisions, the rewards system minimizes the financial and personal risk involved in whistleblowing. By transforming whistleblowing into an economically logical decision, reports skyrocketed — evidenced by the revolution in reports of fraud and corruption that began when the Dodd-Frank Act passed and the SEC and Commodity Futures Trading Commission implemented their respective whistleblower rewards programs.

When tips go up, fraud and corruption go down[21] — both because more companies are held accountable for committing these crimes and because the fear of an internal whistleblower deters them.

Whistleblower Framework: Employment Issue vs. Counter-Corruption Strategy

PIDA lacks the protections and incentives contained in Dodd-Frank because the two laws have fundamentally distinct purposes.

PIDA is under the U.K.'s Employment Rights Act, treating whistleblowing as an employment dispute. Its goal is to manage disputes between employees and employers by enumerating the rights of whistleblowers, and therefore, the law innately limits the scope of corporate whistleblowing in the U.K.

By contrast, the SEC whistleblower provisions are part of the larger Dodd-Frank Act, a response to the 2008 financial crisis designed to better regulate corporations. The Dodd-Frank Act treats whistleblowers as a counter-corruption strategy, allowing and incentivizing anybody with original, enforceable information to submit a tip.

In order to qualify for a protected disclosure under PIDA, a whistleblower must be an employee of the company and not violate any nondisclosure agreements through their whistleblowing. Section 43A of PIDA specifies that protected disclosures must come from a worker, which includes employees, agency workers and people in training with employers. It excludes persons outside a company who observe wrongdoing, such as journalists, industry experts and civil society.

Another major obstacle to whistleblowing created by PIDA is Section 43B(3), which states that "[a] disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it." This clause suggests that whistleblowers may not qualify for a protected disclosure if blowing the whistle violates a restrictive nondisclosure agreement signed as part of a contract or severance agreement.

By limiting protected disclosures to those made by workers and criminalizing those who break contractual obligations in blowing the whistle, PIDA restricts the number of potential informants and makes it difficult for otherwise eligible whistleblowers to do the right thing.

Whistleblowing under Dodd-Frank in the U.S. succeeds because it treats whistleblowing as a desired outcome for an effective counter-corruption strategy rather than an externality in the labor market. Under Dodd-Frank, employees, and analysts who do not work at the company qualify as whistleblowers eligible for rewards.[22]

The Dodd-Frank Act also makes it illegal for companies to prohibit employees from reporting potential securities violations to the SEC.[23]

Not only does the SEC consider such agreements unenforceable when considering employees' rights to blow the whistle, but the SEC has increased enforcement and sanctions[24] against both private and public companies for including restrictive nondisclosure agreements[25] in various contracts from employment agreements, severance agreements, and employee handbooks, to even settlement agreements with investors.

This commitment to accepting all whistleblower tips and sanctioning those who illegally silence their employees maximizes the number of tips the SEC can receive.

Whistleblower Enforcement: Underutilized vs. Incentivized

So why do the differences between PIDA and U.S. Dodd-Frank matter? They clarify that effective protection and incentivization of whistleblowers is at the root of effective enforcement. London is known as the "dirty money capital of the world";[26] however, sanctions and recoveries by U.K. financial enforcement agencies pale compared to those made by the SEC.

From April 1, 2022, to March 31, 2023, the SFO Intelligence Division managed 250 whistleblowing disclosures.[27] This number is up from 156 whistleblowing disclosures from April 1, 2021, to March 31, 2022,[28] but still significantly less than the amount covered by the SEC Whistleblower Office.

In fiscal year 2023, the SEC received 18,354 whistleblower tips and awarded nearly $600 million in 40 covered actions to 68 different whistleblowers.[29] That means the SEC finalized 40 cases that resulted in sanctions of over $1 million, for which at least one whistleblower provided sufficient information to receive an award.

Since whistleblower rewards amount to 10% to 30% of the sanction brought about by the whistleblower tip, that means that the total recoveries from the SEC in fiscal year 2023 from only cases brought from whistleblower tips amount to at least $2 billion and up to $6 billion. Meanwhile, the SFO closed five criminal cases in the 2022-2023 year and recovered £95.2 million in connection to crimes investigated by the SFO and partner agencies.[30]

In fiscal year 2022-2023, the FCA imposed financial penalties of £215.8 million.[31]

In 2023, the SEC awarded one whistleblower $279 million,[32] meaning the amount awarded to a single whistleblower was almost as much as the entire annual recoveries and penalties from the SFO and FCA combined.

PIDA does not activate whistleblowers as anti-fraud tools because PIDA lacks an enforcement provision built into the law. None of the entities accepting qualifying disclosures are under a statutory obligation to act on whistleblower reports, and there is no mechanism through which whistleblowers can learn whether their report is under investigation.[33]

Conclusion

There is an inverse relationship between the safety of whistleblowers and the safety of corrupt actors.

The SEC whistleblower program works well for corporate whistleblowers because it prioritizes their safety and enables them to report through anonymity protections and rewards. It functions as an anti-corruption tool, meaning whistleblower tips result in effective enforcement action.

The suffering faced by U.K. whistleblowers fuels a negative feedback loop. They are deterring potential whistleblowers from blowing the whistle while companies continue to commit fraud, bribery and money laundering.

In order to seriously protect whistleblowers and combat fraud, U.K. whistleblower laws need to be improved by providing statutory guarantees for anonymity and confidentiality and

adding award provisions for whistleblowers based upon the information they provide, rather than only seeking to protect them after they experience harm.

The U.K. must also establish an Office of the Whistleblower dedicated to accepting anonymous tips and handling enforcement. The best opportunity to do this is passing the Protection for Whistleblowing Bill, recently reintroduced in Parliament.[34]

While the bill would not institute a whistleblower award system comparable to the Dodd-Frank system, it would repeal PIDA and establish an Office of the Whistleblower with the power to fine and penalize companies who retaliate against whistleblowers and to establish minimum standards for whistleblowing policies, procedures and reporting structures. Notably these minimum standards could include strong anonymity and confidentiality protections.

Currently, however, reporting to U.S. enforcement agencies may be a better and safer option for U.K. whistleblowers, one that genuinely rewards and protects whistleblowers rather than only giving false hope and illusory protection.

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