STIGMA AND WHISTLEBLOWING:SHOULD PUNITIVE SANCTIONS BE AVAILABLE IN RETALIATION CASES?

ABSTRACT

This article uses a range of disciplinary perspectives to examine what is meant by stigma and explains that it is a relational concept. It argues that there has been a shift from attributing social stigma to whistleblowing to regarding it as a form of prosocial behavior i.e. something which contributes to the well-being of others. This shift is evidenced by the attempts to establish supportive organisational cultures through the introduction of specialist employer policies and procedures, the existence of protective legislation and the coverage of whistleblowing in the media. Although it is questioned why stigma should still attach to whistleblowing, it is acknowledged that those who suffer reprisals may well seek stigma damages. Thus the article traces the common law and statutory origins of stigma awards and discusses the appropriateness of exemplary/punitive damages in the employment field. In the conclusion, it is advocated that Parliament expressly provides for exemplary/punitive damages to be awarded in employment cases. In addition, practical suggestions are made about how a more positive attitude to whistleblowing can be achieved, including a possible role for criminal sanctions. The author asserts that a more punitive approach is justified because whistleblowing is an important aspect of the human right to freedom of expression which must be fully protected in order to ensure the proper functioning of a democratic society.

1. INTRODUCTION

There is plenty of evidence that not all whistleblowers suffer reprisals or are stigmatized.[1] However, the UK courts recognise that those who suffer a detriment following whistleblowing may be compensated for injury to feelings and those who are dismissed for this reason may have a claim for stigma damages.[2] Stigma damages reflect the impact of the retaliatory dismissal on an employee's future employment prospects. But why would an unfairly dismissed person who has reported in the public interest be shunned by prospective employers? Indeed, demonstrating a willingness to speak up about wrongdoing can be regarded as a positive trait by organisations that are genuinely interested in corporate governance. Thus many employers have policies that encourage (if not require) staff to speak up in order to serve the private interests of the organization. Unfortunately, the effect of stigma is that others (including prospective employers) perceive a whistleblower as unable to sustain predictable patterns of interaction, which in turn is regarded as a threat to the perceiver's well –being.

In this article, Section 2 examines what is meant by stigma and suggests that some of its essential ingredients no longer apply to whistleblowers.[3] Section 3 outlines the coverage of whistleblowing in the media and queries whether public

[1] See R.Moberly, 'Whistleblowing and suffering' in A.Brown, D.Lewis, R. Moberly, and W.Vandekerckhove, *International Whistleblowing Research Handbook*. (Cheltenham: Edward Elgar,2014).

[2] The UK statutory provisions on whistleblowing are contained in Part IVA Employment Rights Act 1996 (henceforward ERA 1996).

[3] For the reasons stated below, the author does not regard those who knowingly supply false information as whistleblowers.

perceptions are in keeping with the contemporary journalistic approach. Sections 4 and 5 considers both the historic and contemporary impact of imposing a duty to report and assesses the conflicting messages that result from offering financial incentives. Sections 6 and 7 trace the common law and statutory origins of stigma awards and discuss the appropriateness of exemplary/punitive damages in the employment field. The concluding section argues that, in the twenty- first century, stigma should now attach to those organisations which fail to protect whistleblowers and to individual retaliators. The effect of shifting attention to organisations is that they should be motivated to avoid stigma because this leads to negative outcomes for them, for example a drop in share price and increased staff turnover.[4] In addition to advocating that Parliament expressly provides for exemplary/punitive damages to be awarded in employment cases, practical suggestions are made about how a more positive attitude to whistleblowing can be achieved, including a possible role for criminal sanctions. The author asserts that a more punitive approach is justified because whistleblowing is an important aspect of the human right to freedom of expression which must be fully protected in order to ensure the proper functioning of a democratic society.

2. WHAT IS STIGMA AND WHAT ARE ITS CONSEQUENCES?

[4] Enron would be an example in the US. The case of Barclays Bank in the UK provides a vivid illustration of the damage caused when the Chief Executive sought to unmask an anonymous whistleblower. https://www.theguardian.com/business/2018/apr/20/barclays-ceo-jes-staley-facing-fine-over-whistleblower-incident [last accessed 13/12/2020]

According to Goffman,[5] people are stigmatised if they are thought to be abnormal or *persona non grata* and they often suffer public condemnation as a consequence. He discusses three types of stigma – physical, demographic and character. However, it is the third form that is of particular interest here [6] because it includes situations where a specific organisation or worker is involved in discreditable behaviour. Whereas discredited characteristcs (physical deformities etc) are easily identifiable, discreditable ones (character blemishes) can be hidden. Goffman asserts that those who have become discredited (for our purposes, after whistleblowing), can manage their situation by downplaying the importance of the stigma, endeavouring to correct it or repudiating the label. Another important aspect of stigma is that it is relational: 'it should be seen that a language of relationships, not attributes is really needed. An attribute that stigmatises one type of possessor can confirm the usualness of another, and is therefore neither creditable nor discreditable as a thing in itself' (page 13).Thus whistleblowers may not suffer any stigma or may experience it when interacting with employers but be regarded as possessing laudable character traits by their colleagues, family, friends and wider society. This relational aspect of stigma is important because it can result in whistleblowers being regarded as traitors or heroes depending on who is making the classification.

[5] E. Goffman, *Stigma:Notes on the management of spoiled identity.* (Englewoood Cliffs,USA: Prentice Hall,1963)

[6] Described as 'blemishes of individual character perceived as weak will, domineering or unnatural passions, treacherous and rigid beliefs, and dishonesty'.(ibid p4).

Psychology literature also recognises a distinction between controllable and uncontrollable stigma.[7] Whereas the latter does not apply to particular individuals, the former can arise from the personal choice to raise a concern. Controllable stigma has serious consequences for whistleblowers for two reasons. First, 'they may feel responsible for negative outcomes that are associated with the stigma and blame themselves rather than others'.[8] Indeed, the negative economic[9] and psychological[10] consequences of whistleblowing have been well-documented. Second, those who suffer a character stigma associated with controllability may suffer more negative outcomes, for example, unemployability, than those who suffer an uncontrollable stigma. We see below that it is this aspect can justify the award of compensation in the UK when whistleblowers suffer reprisals.

Warren notes how organisations might engage in stigma-management activities.[11] One example is the case of Barings Bank. Here management was warned of the dangers posed by derivative

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[7] See B.Weiner, R.Perry, and J.Magnusson, 'An attributional analysis of reactions to stigmas'.(1988) 55 *Journal of Personality and Social Psychology* 738-748.

[8] J. Crocker, B. Cornwell, & B. Major, 'The stigma of overweight: affective consequences of attributional ambiguity'. (1993),64. *Journal of Personality and Social Psychology.* 60-70 at p 67. In the context of her discussion of recognition and guilt, Kenny uses the notion of self –violence. See: K.Kenny, *Whistleblowing: Towards a New Theory*.(Harvard,USA: Harvard University Press, 2019) 167-8.

[9] See K.Kenny and M.Fotaki, *Post –Disclosure Survival Strategies: Transforming Whistleblowing Experiences*.(Galway: NUI Galway 2019).

[10] See B.Bjorkelo, W. Ryberg, S. Matthiesen and S.Einarsen, 'When you talk and talk and nobody listens: a mixed methods case study of whistleblowing and its consequences.' (2008) *International Journal of Organisational Behaviour.* 18-40. More generally, see C. Alford, *Whistleblowers: Broken Lives and Organisational Power.* Ithaca, USA: Cornell University Press,2001).

[11] D.Warren,'Corporate scandals and spoiled identities: how organisations shift stigma to employees'.(2007) 17(3) *Business Ethics Quarterly.*477 -496

trader Nick Leeson's activities but took no action because he appeared to be earning vast sums for the organization. When things went wrong Leeson was an easy target for stigma and provided a simple explanation for the bank's collapse. Another example provided by Warren is the organization that condones the use of deceptive marketing practices. If the practices were exposed, the organization might allege that the marketing staff acted without its approval and shift the blame to them. Indeed, it is not unfamiliar for representatives of an organization to concede that wrongdoing has taken place but maintain that it was caused by one or two people and that the organization as a whole was a victim rather than a party to it. Additionally, it is possible that innocent staff with no intention of whistleblowing can be stigmatized simply because of their proximity to the wrongdoing or wrongdoer. Indeed, some jurisdictions recognize the problem of stigma by association and provide remedies accordingly.[12]

In an article published in 2012, Bjorkelo and Macko [13] discuss the concept of social stigma and point out that stigma lies in the reaction of others when a whistleblower reports wrongdoing. Thus where the social norm in an industry or workplace is a 'code of silence' there will be hostility towards those who break the code irrespective of whether the wrongdoing is of an individual or organisational nature. Thus potential whistleblowers may face a conflict of loyalties. Do they display loyalty to their employer by reporting wrongdoing and risk social sanctions or do they remain silent knowing that the

[12] This is discussed further in the concluding section.
[13] B. Bjorkelo, and M.Macko, 'The stigma of reporting wrongdoing at work : when doing right is perceived as wrong'. (2012) 43 *Polish Psychology Bulletin,* 70-75

wrongdoing may seriously harm the organisation? [14] It is this dilemma that is being addressed when Parliament and employers attempt to persuade workers that a greater stigma attaches to silence than speaking- up. As Pozner puts it:'stigmatisation arises not merely from spoiled identity or negative evaluation, but because society views that evaluation as a basis for exclusion'.[15] The process of stigmatisation involves the social construction of what is or is not acceptable behaviour and in advanced societies what constitutes an acceptable practice is often influenced by laws.

3. HAS THERE BEEN A SHIFT FROM SOCIAL STIGMA TO PROSOCIAL BEHAVIOUR?

Prosocial behaviour contributes to the well-being of others and has been explained by economic and psychological theories related to altruism and reciprocity. These theories are linked to a system of motivations, both intrinsic and extrinsic. Social norms play a crucial role in the motivation to behave prosocially and these norms may manifest themselves in legal interventions.[16] Since this article focuses on the work context, it seems appropriate to utilise Brief & Motowidlo's description of prosocial behaviour as something which is: '(a) performed by a member of an organisation; (b) directed towards an individual,

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[14] On loyalty and whistleblowing see D.Lewis,'Whistleblowing in a changing legal climate: is it time to revisit our approach to trust and loyalty at the workplace?' (2011) 20,*Business Ethics: A European Review*, 71-87.

[15] J.Pozner,'Stigma and settling up: an integrated approach to the consequences of organisational misconduct for organisational elites'. (2008) 80,.*Journal of Business Ethics,* 141-150 at 144.

[16] See R.Galbiati & P. Vertova,'How laws affect behaviour: obligations, incentives and cooperative behaviour'.(2014) 38, *International Review of Law and Economics*. 48-57.

group, or organisation with whom he or she interacts while carrying out his or her organisational role; and (c) performed with the intention of promoting the welfare of the individual,group or organization toward which it is directed'.[17] Whistleblowing would seem to fit comfortably within this definition.

It is argued that two obvious reasons for the shift away from the social stigma of snitching, ratting etc in the last couple of decades are the attempts to establish supportive organisational cultures through the introduction of specialist employer policies and procedures and the existence of protective legislation which emphasises the potentially prosocial nature of whistleblowing.[18] In order to encourage people to speak up about wrongdoing that might have the potential to cause physical or financial disasters, the ERA 1996 provides that whistleblowers should be protected if they can satisfy certain conditions (known as 'qualifying disclosures').[19] Indeed, a negative societal evaluation becomes more difficult to sustain when Parliament has declared that those who disclose information in the public interest to an appropriate recipient should not be treated unfairly.

In terms of endorsing whistleblowing as a prosocial behavior and shifting any stigma on to those who do not respect the processes of disclosing information about suspected wrongdoing, it is also relevant to discuss the potential impact of the EU

[17] A Brief, and S.Motowidlo, 'Prosocial organizational behaviours' (1986) 11, *Academy of Management Review*, 710-25 at page 711.
[18] See D.Lewis, 'Nineteen years of whistleblowing legislation in the UK: is it time for a more comprehensive approach?' (2017) 59(6) *International Journal of Law and Management.* 1126-1142.
[19] However, Part IVA ERA 1996 only applies to workers.

Directive 2019.[20] Although its effect on the UK may be in doubt at the time of writing, it will certainly have an impact on the Member States currently lacking bespoke whistleblowing legislation. This Directive, which applies to a broad range of people in a work-related context (Art.4), obliges Member States to ensure that employers: establish both internal and external reporting procedures (Arts 7-4) and keep records of reports received. It also requires Member States to prohibit any form of retaliation and take measures to protect reporting persons (Arts 19-21). In relation to penalties for reprisals, Article 23 specifies that these must be 'effective, proportionate and dissuasive'.

Prior to this Directive coming into force, it should be noted that employer policies and procedures have already had a significant influence. Thus senior management communications highlighting the importance of staff raising concerns, undertakings about non-reprisals as well as praise and rewards for those who have reported have all served to highlight the positive value of whistleblowing.[21] However, it should be observed that in order to remove any stigma associated with whistleblowing the shift does not have to be from 'snitch' to hero/heroine. For negativity to be removed, it is sufficient

[20] https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937. [last accessed 13/12/2020] The Directive must be transposed by December 2021. See D.Lewis,'The EU Directive on the protection of whistleblowers: a missed opportunity to establish international best practices'. (2020) 9(1) *EJournal of Comparative and International Labour Studies*. http://ejcls.adapt.it/index.php/ejcls_adapt/issue/view/73[last accessed 13/12/2020]

[21] See generally, K. Kenny, W. Vanderkerckhove, and M. Fortaki, *The Whistleblowing Guide: Speak-up arrangements, challenges and best practices.*(Chichester: Wiley.2019).

that society generally regards whistleblowers as ordinary people who raise concerns because they have a legal or moral obligation to do so.

In addition to the shift in power relations resulting from Government and employer actions in support of whistleblowers, there is also the impact of the media. Undoubtedly, one of the reasons for employers endeavouring to channel concerns through internal procedures is the knowledge that external disclosures have the potential to cause damage to both reputation and share value. Indeed, as a result of social media, many more people have become comfortable about airing their views and, perhaps misguidedly, less scared of the consequences.[22] However, it is to the approach of the traditional news media that we now turn.

3.1 EVIDENCE OF SHIFTING ATTITUDES TOWARDS WHISTLEBLOWING

A content analysis of newspaper coverage in the UK between 1997 and 2009 shows that whistleblowers were mostly discussed in positive or neutral ways - 54% of the newspaper stories examined described whistleblowing positively and only 5% were negative.[23] However, the question arises about whether the public has a similar view and a YouGov poll in 2007 showed that 20% regarded whistleblowing negatively, 40% neutrally and the same percentage

[22] In the UK, disclosures to the media are only legally protected if there is an exceptionally serious failure and the conditions set out in Section 43H ERA 1996 are satisfied.

[23] K. Wahl-Jorgensen and J. Hunt, 'Journalism, accountability and the possibilities for structural critique: a case study of coverage of whistleblowing'.*(*2012) 13(4)*Journalism,* 399-416

positively.[24] An online survey of UK public attitudes in 2012 [25] found that 81% of respondents agreed that 'people should be supported for revealing serious wrongdoing even if it means revealing inside information'. However, only 47% thought that 'in British society, it is generally acceptable for people to speak up about serious wrongdoing, even if it means revealing inside information'.[26] More recently, the 2015 YouGov survey revealed that 74% of workers in Britain regard the term 'whistleblowing' in either a positive or neutral light.

As researchers have frequently noted, attitudes to whistleblowing will reflect different cultures and traditions.[27] Thus a survey of 7000 people in seven South- East European countries [28] unearthed generally positive views in Albania, Croatia and Kosovo and comparatively weak support in Bosnia and Herzegovina, Montenegro and the Former Yugoslav Republic of Macedonia.[29] About two-thirds of respondents in the first three countries thought whistleblowers should be supported but only

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[24] Public Concern at Work, *What we do and why it matters: biennial report.*(London: Public Concern at Work, 2007).

[25] University of Greenwich and ComRes report available at: http:/ssrn.com/abstract = 2176193

[26] The comparable figure in Australia was 53%. See: World Online Whistleblowing Survey. Stage 1 Results Release – Australian adult population sample. 6 June 2012. https://people.eng.unimelb.edu.au/smilton/whistleblowing/ [last accessed 13/12/2020].

[27] H.Park, J.Blenkinsop, M.Oktem and U.Omurgonulsen, 'Cultural Orientation and Attitudes Toward Different Forms of Whistleblowing: A Comparison of South Korea, Turkey,and the U.K.' (2008) 82(4) *Journal of Business Ethics.* 929-939.

[28] Regional Cooperation Council, *Public attitudes to whistleblowing in South East Europe*. (Sarajevo: Regional Cooperation Council,2017). http://rai-see.org/wp-content/uploads/2017/04/2017-04-10-Whistleblowing-Web-Final.pdf [last accessed 13/12/2020]

[29] The results in Serbia were near the regional average of 56%.

four in ten in the last three countries.[30] In terms of the general acceptability in their society of reporting misconduct by revealing inside information, 51% of Albanian respondents believed this to be the case whereas only 27% in Montenegro did so.[31]

Turning to a country that has legislation which pays lip service to the UK model, in 2016 Transparency International Ireland commissioned a survey of employees and employers to assess (inter alia) attitudes to whistleblowing.[32] By way of context, more than one in ten employee respondents claimed to have reported wrongdoing at work and 78% of respondents who had blown the whistle indicated that they did not suffer as a result of reporting wrongdoing. In terms of barriers to reporting, 31% mentioned fear of losing their job, 13% feared harm to their career and the same percentage were concerned about being isolated by colleagues. When employers were asked if it was in the interests of their organization or industry for people to speak up about wrongdoing, 95% of the 878 respondents agreed strongly or slightly. However, when questioned about whether they would encourage an employee to report wrongdoing where the disclosure might harm the organisation's reputation, only 64% of employer respondents would be very likely or fairly likely to do so.

More directly relevant to our discussion of stigma is the fact that only 57% of employer respondents strongly agreed with

[30] Albania 68%; Croatia 68%; Kosovo 65%; Bosnia and Herzegovina 49%; Former Yugoslav Republic of Macedonia 41%;Montenegro 30%; Serbia 53%
[31] Croatia 39%; Kosovo 48%; Serbia 35%. The regional average was 38%
[32] Transparency International Ireland. *Speak Up Report.* (Dublin: Transparency International Ireland, 2017). https://www.transparency.ie/resources/whistleblowing/speak-report-2017 [last accessed 13/12/2020]

the statement 'I would employ someone who had blown the whistle on wrongdoing in a previous job'. Nevertheless, the employer attitudes were more positive than the employee responses. For example, only 36% of employees agreed strongly with the statement 'I would be happy to work alongside someone who had been a whistleblower in the past'. Additionally, 14% more employer than employee respondents were supportive of people revealing serious wrongdoing.[33] When asked to randomly associate three words with the expression 'whistleblower', the main three words offered by employees were informer/ informant; traitor /rat /grass/snitch; and policing/law enforcement. By way of contrast, the most commonly cited by employers were: policing; bravery and honesty. When prompted, only 17% of employee respondents associated the word 'whistleblower' with 'hero' compared to 47% of employers that did so. Unsurprisingly, the *Speak up Report* calls for more to be done to address the negative stereotypes of whistleblowing among employees.

Undoubtedly journalism shapes the extent and nature of reporting about whistleblowing and how whistleblowers are perceived. Thus to the extent that the media portrays whistleblowers as benign figures [34] and supports a culture of speaking-up about wrongdoing it might be argued that the traditional stigma about doing so is being eroded.[35] Indeed,

[33] 91% compared to 77%.

[34] It might also be argued that the journalistic tendency to personalise whistleblowers and portray them as heroes or scapegoats is not helpful to those who feel they have simply 'done the right thing' and want to get on with the rest of their lives.

[35] Hence it is no longer true to say that calling someone a whistleblower is potentially defamatory. See D.Lewis,'Whistleblowing and the law of defamation: does the law strike a fair balance between

Wahl- Jorgensen and Hunt detected a change over time, with negative coverage of whistleblowing at 10% in 1997.[36] Nevertheless, contemporary professional discussion about the need to protect sources of information might suggest that there is still stigma attached to 'leaking'. This leads to a more nuanced argument that today any stigma about whistleblowing may not attach to the reporting itself but to the way in which information is disclosed. Such a view is bolstered by the fact that certain methods of reporting alleged wrongdoing are legally protected and others are not.[37] For example, Part IVA ERA 1996 does not cover anonymous reporting and requires a public interest test to be satisfied for protection to be afforded. By way of contrast, employers might allow or encourage anonymous reporting as a last resort and impose no restrictions on the raising of concerns other than that the reporter has a reasonable suspicion about wrongdoing. As suggested earlier, many would think it unfair to stigmatise a person who discloses information either in accordance with the general law of the land or his or her employer's policies and procedures.

On the other hand, it might be argued that it is legitimate for people to stigmatise those who knowingly disclose false information. Research suggests that false reporting is not common and the possibility of such activity attracts

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the rights of whistleblowers, the media and alleged wrongdoers?'. 2018 47(3) *Industrial Law Journal.* 339-364.

[36] This shift will also reflect legal, political and social changes during the period covered.

[37] It almost goes without saying that employers prefer internal to external reporting of concerns. Such an approach is endorsed by most whistleblowing statutes and the EU Directive.

disproportionate attention.[38] Nevertheless, false information wastes the time and resources of disclosure recipients and inflicts stress on alleged wrongdoers. More generally, it also brings the very notion of 'whistleblowing' into disrepute. Thus the author would argue that such persons should not be regarded as whistleblowers. Inadvertently supplying false information can be an unfortunate side effect of a system that encourages people to speak –up about suspected wrongdoing. However, knowingly providing false information can cause serious harm and for that reason it can attract both civil and criminal law penalties.[39]

4. STIGMA AND A DUTY TO REPORT

Although a legal duty to report can cause practical problems,[40] for example premature reporting and the enforcement of breaches, it has the advantage of allowing whistleblowers to be viewed as reluctant disclosers who are driven by a legal obligation rather any personal motive.[41] To some extent statements by employers that those who suspect wrongdoing are expected to report may explain why whistleblowing has less stigma in some industries than others. For example, in the NHS and financial services whistleblowing is actively promoted as a moral obligation and is

[38] Transparency International: *The business case for speaking up.* (Berlin: Transparency International, 2017). https://www.transparency.org/whatwedo/publication/business_case_for_speaking_up [last accessed 13/12/2020].

[39] For example, tort actions for malicious falsehood and sanctions for wasting police time.

[40] A duty to report also raises historic questions about politics and the perception of whistleblowers. Thus German society stigmatised denunciations during both the Gestapo and Stasi periods and experience of the consequences of informing led to a general suspicion about anonymous reporting. Indeed, constitutional provisions were introduced to protect persons accused of wrongdoing rather than whistleblowers.

[41] A legal duty is contained in some UK legislation(for example, in relation to concerns about health and safety) but a contractual duty may be part of an employment relationship.

governed by detailed policies and procedures.[42] Even so, it is possible that whistleblowers will be stigmatised by fellow workers because there may be a workplace culture of not reporting or the information disclosed leads to colleagues being sanctioned for misbehaviour. Conversely, where a culture of raising concerns has been established, both employers and workers may stigmatise those who fail to report wrongdoing.

5. STIGMA AND FINANCIAL INCENTIVES

Whether we approve of them or not, financial incentives offered under the False Claims Act 1986 (henceforward FCA) and the Dodd –Frank Wall Street Reform and Consumer Protection Act 2010 (henceforward Dodd –Frank) seem to be effective enforcement tools in the US.[43] The FCA's unique *qui tam* measures allow a whistleblower to initiate a claim against an alleged wrongdoer on behalf of the government and share a portion of any financial recovery. Dodd-Frank established a programme to offer incentive awards to those providing the Securities and Exchange Commission (SEC) with information about securities regulations. The SEC investigates tips and decides whether to bring an enforcement action. If information results in monetary sanctions exceeding $1million, a whistleblower is entitled to receive 10-30% of the award imposed. However, the fact that payouts under Dodd-Frank do not apply to sums below $1 million might suggest that some societal stigma attaches to lower –value reporting.

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[42] See J. Lewis, J. Bowers, M. Fodder and J. Mitchell, *Whistleblowing Law and Practice.* Third Edition. (Oxford: Oxford University Press. 2017).

[43] In 2015 False Claims Act litigation led to the recovery of over $3.5 billion. By August 2016, SEC had received more than 14,000 tips, awarded over $107 million to whistleblowers and obtained more than $504 million in sanctions for committing fraud.

Interestingly, many advocates of the original False Claims Act 1863 did not view whistleblowers as heroes standing up to powerful forces but as rogues whose allegiances could be bought if the price was right. Indeed, the SEC Office of the Inspector General's report in 2013 was sceptical about the *qui tam* model under the FCA and thought it might result in 'frivolous litigation, collusion between plaintiffs and defendants, and delays in bringing a suit for the purpose of increasing the bounty award amount'.[44] Thus, although there would appear to be a clear public interest in promoting whistleblowing about financial wrongdoing, a stigma might attach to the whistleblower owing to his or her private interest in the outcome of litigation.

In the UK, Sections 43G and 43L ERA 1996 provide that a qualifying disclosure will not be protected if it is made for the purposes of personal gain unless a reward was 'payable by or under any enactment'.[45] In 2014 the Financial Conduct Authority undertook a review of the bounty model for whistleblowers and concluded that financial rewards could create both a perverse incentive and suspicion about the motive for whistleblowing. Indeed, the Government has indicated that 'it does not believe that using bounties to encourage whistleblowing is an appropriate model.' [46] By way of contrast, it could be argued

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[44] US Securities and Exchange Commission Office of Inspector General *Evaluation of the SEC's Whistleblower Program.* Report No.511. (Washington DC: US Securities and Exchange Commission, 2013) https://www.sec.gov/about/offices/oig/reports/audits/2013/511.pdf [last accessed 13/12/2020].

[45] Such rewards have traditionally been offered by the police and HM Revenue and Customs in specified circumstances.

[46] Letter from Department for Business, Energy and Industrial Strategy to Dr Minh Alexander. 4th October 2018 [on file with author].

that discretionary awards and other forms of positive recognition by employers [47] would promote a view of whistleblowers as prosocial actors rather than persons with discreditable character traits.

6. STIGMA DAMAGES IN EMPLOYMENT CASES

6.1 POTENTIAL CONTRACTUAL DAMAGES

Owing to the employer's ability to terminate a contract of employment by giving notice, the opportunity to receive compensation for future losses was thought to be restricted. Thus in *Addis v Gramophone Co Ltd* [1909] AC 488, Lord Loreburn stated that damages for wrongful dismissal 'cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment'.[48] This approach was revisited in *Malik v BCCI SA* [1997]IRLR 462 where former employees brought claims seeking damages for breach of the implied duty of trust and confidence that exists in employment contracts. Here it was argued that BCCI's business had been conducted so corruptly that potential employers in the financial sector would not wish to employ them because they had been tainted by their association with a corrupt employer.[49] The *Addis* case was distinguished on the basis that it involved a claim for injury to feelings arising from a wrongful dismissal whereas *Malik* was endeavouring to secure damages for future financial loss caused by the employer's

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[47] For example, the willingness to raise concerns and the ability to handle them could be taken into account during the appointment process, appraisals or promotion rounds.

[48] A*ddis v Gramophone Co Ltd* [1909] AC 488 at 491.

[49] The term 'stigma transfer' provides a suitable shorthand description of this situation.

behaviour while the contract subsisted. In *Malik*, the Supreme Court upheld the claim in principle but warned that in other cases problems of causation, remoteness and mitigation might be difficult to overcome.[50] Indeed, even though the situation in this case was extreme, the claim failed on the facts.

Thus in the related case of *BCCI SA v Ali (No.3),*[51] the question to be decided was what would a prospective employer have done but for the breach of the duty of trust and confidence and what would have been the outcome for the employee i.e. whether any stigma from a job-seeker's previous employment with BCCI had a real effect and, if so, its extent. In determining the effect of the stigma the whole history of the individual's job search was relevant. Although the Court of Appeal acknowledged that it would be unrealistic to expect prospective employers to provide evidence as to the impact of the stigma on a particular job application,[52] it was suggested that evidence may be sought about: how many jobs were applied for; whether the applications were properly targeted and well -presented; how many interviews were obtained and how they went; as well as any reasons for rejection that were given. In these circumstances many potential claimants will think that the obstacles to succeeding are insuperable and that, in practice, employers will be not be required to compensate for any stigma loss inflicted.

The trial judge in the *BCCI* case refused to admit anecdotal evidence because he did not think it was logically probative of the employees' case – the fact that another person was refused

[50] According to Lord Steyn, 'It is therefore, improbable that many employees would be able to prove "stigma compensation"'(page 471)
[51] *BCCI SA v Ali (No.3)* [2002] IRLR 460
[52] Indeed, the trial judge in this case had observed that 'the reasons given to an applicant by a prospective employer may be of limited guidance as to his true reasons.'(para 270).

work by a prospective employer because of stigma would not constitute evidence that others were also denied employment on this ground. However, Lord Justice Pill took the view that such evidence was, in principle, capable of assisting in deciding whether or not an inference favourable to the claimant could be drawn.[53] Another possibility recognised by Lord Justice Parker was for claimants to establish general prejudice in the labour market against the former staff of a defendant. In these circumstances a court might be invited to infer that, but for the prejudice, a claimant would have secured a job of a particular type or at a particular level. As noted in *Malik*, proof of handicap in the labour market may be more difficult for some occupations than others.[54] Thus the question arises as to whether whistleblowers can establish that there is prejudice either in the particular labour market or generally. In the writer's view, this may well be feasible in some industries or sectors, for example, the police, security and financial services. Inevitably, much will depend on the facts and it has been argued above that attitudes have shifted over the last two decades and that in other sectors it is possible that there is less employer prejudice or stigma against whistleblowers.

For the sake of completeness, it should be noted that, in *Johnson v Unisys Ltd* [2001]IRLR 279, a majority of the House of Lords ruled that, although stigma damages were not available in a wrongful dismissal action, they could be sought if an employee was suing the employer for breach of contract during employment. Thus, at least in theory, a whistleblower who suffered a

[53] Nevertheless, in this case he agreed that it was unjust to allow such evidence because it would result in a disproportionate increase in the trial length.
[54] The comparative example given in the *Malik* case was of messengers and senior executives.

detriment during employment could claim stigma damages. However, in practice proving loss is likely to be even more difficult than if a dismissal had occurred.

6.2 COMPENSATION UNDER THE EMPLOYMENT RIGHTS ACT 1996 AND THE EQUALITY ACT 2010.

In making a compensatory award for unfair dismissal, Section 123 (1) ERA 1996 requires tribunals to 'have regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'. While it is clear that the aim is to reimburse the employee rather than punish the employer, this wording does not appear to shut out claims to be compensated for distress, humiliation and damage to reputation. However, in *Dunnachie v Kingston upon Hull CC* [55] the House of Lords ruled that only pecuniary loss was contemplated rather than injury to feelings *per se*. Thus for compensation to be awarded it must be demonstrated that the complainant's future employment prospects were adversely affected.

By way of contrast, Section 124(6) of the Equality Act 2010 (EA 2010) provides that the compensation available under this statute 'corresponds to the amount which could be awarded by the county court or the sheriff….' Not only are the ordinary tort remedies available but specific mention is made in Section 119 (4) EA 2010 of injured feelings. Case law has established that aggravated damages are also available but not exemplary damages.[56] Clearly, compensation for injury to feelings could be sought in many discrimination claims and, in order to put limits

[55] [2004]IRLR 727.
[56] See *Alexander v Home Office* [1998] IRLR 190 and *Gibbons v South West Water Ltd* [1993]1 AER 609 respectively.

on the size of awards, the Court of Appeal introduced what are now called the *Vento* bands. [57]

A 'knock on' effect of this approach can be seen in the whistleblowing case of *Virgo Fidelis School v Boyle* [2004] IRLR 268 where detriment was alleged. If it is shown that a person making a protected disclosure was subjected to a detriment, Section 49(2)ERA 1996 provides that 'the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to— (a)the infringement to which the complaint relates, and (b)any loss which is attributable to the act, or failure to act, which infringed the complainant's right'.[58] In *Boyle's* case the EAT ruled that £25,000 could be awarded for injury to feelings since such treatment is a form of discrimination. In addition, the Appeal Tribunal awarded £10,000 in aggravated damages to reflect the employer's conduct.

However, in a subsequent sex discrimination case [59] the EAT reaffirmed that aggravated damages are not punitive. The circumstances in which such damages may be awarded relate to the manner in which the wrong was committed. The distress caused may be made worse by: (a) being exceptionally upsetting - for example, 'in a high-handed, malicious, insulting or oppressive way'; [60] (b) by motive - conduct based on prejudice, animosity,

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[57] See *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102. The amounts within these bands have been updated periodically.

[58] Section 49(3) ERA 1996 states: 'The loss shall be taken to include — (a)any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and (b)loss of any benefit which he might reasonably be expected to have had but for that act or failure to act'.

[59] *HM Land Registry v McGlue* UKEAT/0435/11/RN

[60] per Lord Reid in *Broome v Cassell* [1972]AC 1072.

spite or vindictiveness is likely to cause more distress provided the claimant is aware of the motive; (c) by subsequent conduct - for example, where a complaint is not taken seriously or there has not been an apology. Thus while aggravated damages may well be appropriate in some whistleblowing cases they are unlikely to be awarded very often. More recently, in *Small v Shrewsbury and Telford Hospitals NHS Trust* [2017] IRLR 889, the Court of Appeal ruled that employment tribunals should consider whether the claimant had a so-called '*Chagger*' claim on the basis that his or her future loss of earnings would continue after the date his or her employment ended owing to the stigma arising from being unfairly dismissed and having brought such a claim.

Chagger v Abbey National plc [2010] IRLR 44 was a Court of Appeal decision on race discrimination. Here it was acknowledged that it may be lawful for a third party to refuse to recruit someone who has sued another employer.[61] According to Lord Justice Elias, 'we see no reason why that would not be a loss flowing directly from the original unlawful act'. However, quantifying the loss causes severe practical difficulties. Adducing evidence about the steps taken by the claimant to mitigate loss may be fairly straightforward but determining how far difficulties in obtaining employment are the result of stigma rather than other factors will be tricky. If there is a genuine desire to make the claimant whole while only awarding compensation for losses that are proved with reasonable certainty, one way forward might be for Employment Tribunals and

[61] It should be noted that,except for posts in the NHS, Part IVA ERA 1996 does not protect whistleblowers from discrimination at the point of hiring.

courts to appoint an independent labour market expert to provide evidence.[62] There may be different opinions about a person's employability but specialist expertise is clearly preferable to ill –informed speculation. As pointed out in *Chaplin v Hicks* [63]: 'the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages'.

7. ARE EXEMPLARY/PUNITIVE DAMAGES APPROPRIATE IN EMPLOYMENT CASES?

In reality the question for ET's and courts is not whether there is stigma but simply whether economic loss has been suffered. Punitive/exemplary damages are not intended to compensate for such loss but they might serve as a deterrent to retaliation against whistleblowers. Thus by making those who victimize whistleblowers responsible for all financial losses resulting from this behaviour and adding a punitive element, potential retaliators might be made to think more carefully about how they respond to disclosers of information.[64] However, introducing punitive/exemplary damages as a remedy might be difficult because such damages are currently not normally available in employment cases. Indeed, when Parliament introduced additional financial penalties for the infringement of statutory employment rights in 2015 it insisted that the breach must have 'aggravating features'.[65] Although such a penalty is in addition to any financial award made by an employment tribunal, it seems

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[62] For reasons of time and costs, the author regards this as more desirable than allowing the parties to provide competitive expert testimonies.

[63] *[1911]* 2 KB 786 at 792

[64] As discussed below, the ERA 1996 provides for both personal and vicarious liability for detriment suffered by those who have made a protected disclosure.

[65] Section 12A was inserted into the Employment Tribunals Act 1996.

clear that what is envisaged is additional compensation rather than a truly punitive element.[66]

As regards the justification for exemplary/punitive damages, it might be argued that two of the three circumstances set out by Lord Devlin in *Rookes v Barnard* [67] could be met in whistleblowing cases. First, there may well be situations where the defendant's conduct was 'calculated' to make a profit. It must be shown that the defendant decided to proceed with the conduct knowing it to be wrong (or reckless as to whether or not it was wrong) because the advantages of going ahead outweighed the risks. Clearly, the need to prove an improper motive on the balance of probabilities may make such an approach problematic. Second, a statute could expressly authorise such damages.[68] In the *Virgo Fidelis* case discussed above, it was accepted that there was no reason in principle why exemplary damages should not be awarded in whistleblowing detriment cases, provided that the conditions in *Rookes v Barnard* (1964) AC 1129 are satisfied. Nevertheless, in the writer's opinion, the most desirable way forward would be for Parliament to expressly provide for punitive/exemplary damages in employment cases.

However, if such damages were to be reserved only for the most heinous circumstances, discrimination and retaliation on the grounds of protected characteristics would be obvious candidates for consideration. It is suggested that for these purposes, whistleblowing and union membership status might be

[66] A maximum of £20,000 can be imposed and a 50% discount applies if the penalty is paid within 21 days. The additional award for non-compliance with an ET re-employment order might be regarded as punitive but it cannot exceed 52 weeks'pay: Section 117 ERA 1996.
[67] *[1964]* AC 1129
[68] The other condition is 'oppressive, arbitrary or unconstitutional actions by the servants of government'.

treated as equivalent to protected characteristics under the Equality Act 2010.[69] Indeed, such legislative intervention would be entirely consistent with the EU objective of providing 'dissuasive' remedies for the infringement of rights.[70]

We turn now to some of the practical issues surrounding the possible introduction of exemplary/punitive damages. It is acknowledged that punitive awards must always be discretionary.[71] However, a number of factors seem relevant to both the availability of damages and their level. It is a prerequisite that the sum which an ET or court would otherwise award would be inadequate to punish the defendant for their outrageous conduct and to deter them and others from engaging in such behaviour and to mark the ET or court's disapproval.[72] In this respect the resources of the defendant, including the benefits an insurance policy, should be taken into account. The argument that plaintiffs might receive a windfall can be countered by the suggestion that such damages would be shared with a public agency.[73] Indeed, such an allocation would be an

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[69] It is worth noting that, in a recent report, the House of Commons Women and Equalities Committee recognised the value of exemplary damages in deterring employers from breaching the equalities legislation. See: *Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission*. (London: House of Commons. 2019). https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf [last accessed 13/12/2020]

[70] See Art 23 of EU Directive on the protection of persons who report breaches of Union Law.2019. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937

[71] See *Broome v Cassell* [1972] AC 1027.

[72] Thus exemplary damages are imposed as a last resort to inhibit employers who might otherwise think it worth risking purely compensatory awards being made.

[73] For example, a Whistleblowing Commission that provides advice, support and representation on whistleblowing. See note 78 below.

acknowledgement that exemplary damages reflect the public interest in punishing and deterring outrageous conduct.

Inevitably the circumstances in which punitive/exemplary damages are available will be varied because ET's will focus more on the nature of the employer's actions than the plaintiff's injury. However, awards need not be entirely unpredictable or inconsistent. Uncertainty can be mitigated by introducing statutory guidance principles, having award bands endorsed by the judiciary [74] and requiring ET's and appeal courts to give reasons for their assessments. One obvious response would be for employers to seek insurance to cover potential liability for exemplary awards. This would not necessarily frustrate their punitive effect as insurers are likely to insist that employers have systems in place which deter retaliation against whistleblowers.[75] Thus employers who do not have policies and procedures that are fit for purpose may find that insurance is unavailable or only at a very high price. This should be particularly worrying since Section 47B ERA 1996 imposes vicarious liability in protected disclosure cases.

Making exemplary damages more readily available is designed to underline the desirability of compliance with the law. However, in practice their impact might be limited since the experience of employment tribunals and courts in only compensating for proven loss suggests that they might be sparing when it comes to meting out punitive awards. Nevertheless, where it is clear that harm has been intentionally inflicted or there has been a reckless disregard for the welfare of the

[74] The *Vento* guidelines were mentioned above.
[75] For example, education and training with disciplinary sanctions against recalcitrant staff available as a fallback.

whistleblower, ET's may feel that it is morally right to impose a punishment

8. CONCLUSION AND RECOMMENDATIONS

Historically, attitudes towards whistleblowers have been characterised by starkly conflicting views of their motivations –altruism or selfishness. The first can be regarded as a positive stereotype -the hero serving the public interest - and the second as a negative stereotype. Such stereotypes are not helpful when the real need is for the creation of a culture whereby whistleblowing is viewed positively. Since stigma can arise because people fear what they do not understand and cannot control, efforts need to be made to explain why whistleblowing is important and how people raising a concern will be protected. Indeed, since stigma damages are difficult to obtain, the most constructive way forward is to have strategies for removing the stigma itself. Such strategies will involve the presentation of whistleblowing as important to all those living in a democratic society. This would require a range of positive measures, including the education of both the media and the public and encouraging whistleblowing as prosocial behaviour.

Undoubtedly the law has a direct impact on stigma when it protects only certain kinds of reporting. Thus raising concerns about wrongdoing that is specified by statute may be seen as an act of responsible citizenship and other kinds of reporting may be regarded as unnecessary over-reaction. This is particularly problematic where legislation imposes a public interest test. It is easy to see that stigma could attach to reporting that serves only the private interest of the whistleblower, for example, a purely personal grievance. More puzzling is why employers might attach stigma to the disclosure of information that they have

requested via a procedure that has been designed to serve their own private interests. Sadly, the reality is that whistleblowers may be stigmatised by employers for a variety of reasons. The most obvious of these are:(i)as a consequence of raising a concern (even though that may have been encouraged); and (ii) for challenging the employer's response to the whistleblowing via internal/ external procedures or legal proceedings.[76]

We have already indicated that there are serious obstacles to recovering stigma damages when a worker [77] is dismissed for blowing the whistle. While it might be tempting to suggest that this situation might be alleviated by designating whistleblowing as a protected characteristic and outlawing discrimination at the point of hiring, such a move is likely to have a limited practical impact for two obvious reasons. First, the problem of proving that the whistleblowing was the reason or the principal reason for refusing employment. Second, the need to speculate whether or not a job would have been secured if the fact of whistleblowing was discounted. Although the author believes that a duty not to discriminate at the hiring stage might be of some educative value, what is really needed to deal with the issue of stigma is a change in culture at societal level. We will now consider some ways in which this might be achieved.

First, relevant legislation, codes and practice and guidance notes should be widely publicised and perhaps promoted by a new independent whistleblowing agency.[78] Second, there

[76] We have seen above that the courts have acknowledged that employers may find it unattractive to engage people with a record of litigating.
[77] A non- worker might have a contractual claim if they could show that the other party owed them a duty of trust and confidence. Since this term is normally only implied into contracts of employment, reliance may need to be placed on an express term.
[78] See Part II of Dr Philippa Whitford's Public Interest Disclosure (Protection) Bill 2020 which identifies the functions and powers of a

should be new statutory provisions which underline the value to society of whistleblowing. For example, a duty on employers to prepare and publicise widely their whistleblowing policies and procedures and to train both managers and other potential users in their operation. In the author's opinion one important test of how whistleblowing is viewed in a country is whether adequate protection from retaliation is afforded. This does not manifest itself only in the form of compensation/ damages for detriment suffered but by practical measures to prevent reprisals occurring and, if there is retaliation, punishing those responsible. Thus Parliament might impose a statutory duty on employers to make risk assessments when a person has disclosed information about wrongdoing [79] and to take such steps as are reasonably practicable to prevent victimisation of whistleblowers, or those who assist them. Closely related to this is the issue of stigma by association i.e. being tainted as a result of having a particular relationship to a whistleblower. The relationship may be a work,[80] social or domestic one and the right of associated persons who suffer damage to be compensated needs to be recognised in whistleblowing legislation.[81]

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proposed Whistleblowing Commission. https://hansard.parliament.uk/Commons/2020-09-25/debates/20092514000001/PublicInterestDisclosure(Protection)Bill [last accessed 13/12/2020]

[79] Risk assessments are required by Section 59 Public Interest Disclosure Act 2013 (Australia).

[80] For example, friends and family might be working for the same employer.

[81] For example, Section 13(1) of the Protected Disclosures Act 2014 (Ireland) provides as follows: 'If a person causes detriment to another person because the other person or a third person made a protected disclosure, the person to whom the detriment is caused has a right of action in tort against the person by whom the detriment is caused.' Art 4 of EU Directive acknowledges that persons associated with a whistleblower also need to be protected.

A more radical measure would be to give whistleblowers protected status [82] so that any action taken against them would have to be approved in advance by a labour inspector or court. Such status might be certificated by a union official or independent whistleblowing agency. One advantage of such certification would be that it could be done fairly quickly and whistleblowers would not have to wait for an employment tribunal or court to declare their entitlement to protection.

Lastly, we turn to the desirability of making retaliation against whistleblowers a criminal offence so that societal stigma might attach to the person and/or organisation taking reprisals.[83] The criminal law already has a role to play in the field of employment, for example, the offences introduced under the national minimum wage and health and safety legislation. In addition, the Protection from Harassment Act 1998 has been a useful tool in dealing with a particular form of discrimination. One argument for imposing criminal sanctions rather than punitive damages on those who retaliate against whistleblowers is that, in effect, such damages amount to a fine and defendants should therefore be entitled to the criminal standard of proof. It is not being maintained that the criminal law would need to be invoked frequently. In this respect it might be argued that exemplary damages will also be needed as this civil punishment is sought by individual victims and does not depend on any state decision to prosecute.

[82] Article 20 of the EU Directive mentions the possibility of certified status being afforded to whistleblowers by Member States.
[83] For an example see Section 19 of the Public Interest Disclosure Act 2013 (Australia).