

Adequacy of Employee Whistleblower Protection (EWP) in Malaysia

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Abstract—This article examines the adequacy of the legal protection available to employees who whistle-blow on their employers in the light of the newly enacted Whistleblower Protection Act 2010 by the Malaysian Parliament. Some comparison would also be made with the legal protection afforded to employee whistleblowers in other countries to support the recommendations put forth in this article to strengthen employee whistleblower protection.

Keywords- *employee whistleblower, Whistleblower Protection Act 2010, contract, dismissal*

I. INTRODUCTION

The existence of fraud and other serious breaches of law would hamper the trust and confidence of investors in any business environment. A comprehensive system of detection and prevention of fraud and other wrongdoing must be adopted to ensure continuous support of investors. In relation to companies, the board of directors, auditors, legal advisers and the Companies Commission of Malaysia, to name a few, play a monitoring role on companies to ensure that the management of companies are in compliance with the law. However, these so-called ‘monitors’ of companies are only able to detect or prevent any wrongdoing if the company involved provides the necessary information to them. Yet, human nature is such that the management of the company may not wish to provide the necessary information for fear of severe repercussions on the reputation of the company if any investigation is taken upon it. Thus, there may be instances where the wrongdoing of the company goes undetected. Another possible better method of detection of wrongdoing would be to rely on whistle-blowing by employees who usually have first hand information in relation to any possible wrongdoing of their employer. If these employees are willing to come forward and report their suspicion on the possible wrongdoing of their employer, this would result in a much earlier detection or maybe, prevention of wrongdoing. But there is a great inertia against employees disclosing incriminating information about their employer. The possible retaliation meted out by their employer against them sparked fear on them to ensure that they continue to maintain their silence. As such, the government must take necessary efforts to remove such inertia as much as possible by providing legal protection for employees who make disclosure of their employer’s wrongdoings to boost their trust and confidence that the legal system is able to protect them.

The purpose of this article is two-fold, first, to examine whether the present law in Malaysia provides adequate protection to employees who blow the whistle on their employers. Secondly, this article would discuss the possible solutions to cater for the inadequacies of the law, if any.

II. LEGISLATIVE PROTECTION FOR WHISTLEBLOWERS IN MALAYSIA

The Malaysian Parliament provides protection for whistleblowers through a few Acts of Parliament.

A. *Companies Act 1965 (Act 125) and Capital Services Act 2007 (Act 671)*

In order to detect and prevent corporate fraud, the Parliament has inserted whistleblower protection provisions in the Companies Act 1965 (‘CA 1965’) and Capital Markets and Services Act 2007 (CMSA 2007). Section 368B(1) CA 1965 provides that an officer of a company who has reasonable belief of any matter which may or will constitute a breach of CA 1965 or its regulations may report the matter in writing to the Registrar of Company (‘Registrar’). The company (officer’s employer) is prohibited by s.368B(2) from removing, demoting, discriminating or interfering with the officer’s lawful employment due to the report that he made to the Registrar. No legal action or tribunal process can be taken against an officer who makes a report to the Registrar in good faith. The scope of whistleblower protection found in the CMSA 2007 is similar to s.368B. However, s.321 CMSA 2007 only provides protection to a chief executive, internal auditor, company secretary or any officer responsible for preparing or approving financial statements or information who makes disclosure to the Securities Commission or the stock exchange of any information relating to the breach of any of the provision in the securities law or rules of the stock exchange or any matter which adversely affects to a material extent the financial position of a listed corporation.

B. *Whistleblower Protection Act 2010 (Act 711)*

The Malaysian government ratified the United Nations Convention against Corruption in September 2008. In line with its commitment to fight corruption and fraud, the Malaysian Parliament has enacted the Whistleblower Protection Act 2010 (‘WPA 2010’) [1]. However, the WPA 2010 has not come into effect yet. The major difference between WPA 2010 and the other legislations as discussed in

the preceding section of this article is that the former applies generally to any person who provides information on any breach of law in the public or private sector.

Section 6 WPA 2010 provides that a person may make a disclosure of improper conduct [2] to any enforcement agency [3] based on his reasonable belief that an improper conduct has been, is being or going to be engaged upon. Any provision in an employment contract which seeks to exclude the making of disclosure of improper conduct would be void. There are three types of protection provided to a whistleblower as laid down in s.7 WPA 2010. First, any information about the improper conduct and personal details of the whistleblower would be kept confidential. A whistleblower is also entitled to immunity from any civil and criminal action for making the disclosure of information. No person should take any detrimental action (action causing injury, loss or damage, harassment or interference with the lawful employment or livelihood) against him or any person related or associated with him due to his disclosure of information. However, there are some circumstances which would cause a whistleblower to lose his protection under the WPA 2010 such as where the allegation of improper conduct is vexatious or frivolous [4]. A whistleblower who suffers any detrimental action can complain to any enforcement agency which would then investigate the complaint and claim remedies for him. Alternatively, the whistleblower can bring a legal action himself to claim remedies against those who take detrimental action against him. The employer bears the burden to prove that any detrimental action taken against the whistleblower is not in reprisal of the disclosure of information. The types of remedies available for a whistleblower are damages, reinstatement, injunction and any other relief that the court thinks fit. The court is entitled to grant an order to pay costs and compensate the whistleblower for any pain and suffering arising from the detrimental action [5]. In addition, anyone who takes any detrimental action against the whistleblower commits an offence under the WPA 2010.

III. EVALUATION OF CA 1965, CMSA 2007 AND WPA 2010

One of the main problems with the current legislative protection of whistleblowers is that the protection is not available to employees who make a report of any wrongdoing or suspected wrongdoing to their employers. Here lies the dilemma for employees. In order to receive legislative protection, they must make the report to an external body comprised of the various government agencies entrusted with the power of investigation and enforcement of the law. An employee may prefer to inform his own employer i.e going through the internal mechanism of reporting wrongdoing as prescribed by his employer rather than to go to an external body to report any wrongdoing or suspected wrongdoing. An employee may be influenced by his loyalty to the company and fear that any report to an external body would result in severe repercussion to the company. Any investigation conducted on the company may damage the good reputation earned by the company along the years and lead to financial losses. Furthermore, any

disclosure of information relating to the employer to outsiders may give rise to claims of breach of confidence and fiduciary duties owed by the employee. To avoid all these problems, an employee may want to resort to the employer's internal mechanism of whistle blowing particularly, where the employee's intention behind the disclosure is to assist his employer to deter or prevent any wrongdoing in the future.

It is also undeniable that the protection afforded by CA 1965 and CMSA 2007 is restricted in some aspects. First, the protection is available only for disclosure of wrongdoing amounting to breach of CA 1965 or CMSA 2007 respectively. The wrongdoing alleged must be committed by the whistleblower's employer or by its officers. As such, protection is not granted to those who whistle blow on the wrongdoing of his employer's client, business partner, supplier, creditor or debtors [6]. In addition, protection may not be available for those who whistle-blow on the wrongdoing of the employer's subsidiary due to the principle of separate legal entity where the subsidiary is considered to be separate and independent of its parent company.

IV. OTHER MECHANISMS TO PROTECT EMPLOYEE WHISTLEBLOWERS

Due to the limitation of the legislative protection for employee whistleblowers, it is necessary now to determine whether there are any other available legal mechanisms to protect employees who report wrongdoing of his colleagues or his superior to the management of his employer from any vilification by his colleagues or his superior (for employees who work in private entities). The two alternative legal mechanisms to protect such employees are found in the law of contract and the law of dismissal of employees. These two legal mechanisms would be discussed in turn.

A. Law of Contract

The Securities Commission of Malaysia [7] and the Bursa Malaysia encourages companies to introduce and maintain whistle blowing policy. The Corporate Governance Guide – Towards Boardroom Excellence issued by the Bursa Malaysia to assist listed companies to put in place best practices of corporate governance provides that the 'board (of public listed companies) should ensure appropriate whistle-blowing policies are in place by which employees may, in confidence, raise concerns about possible misdemeanours' [8].

As a result of the Corporate Governance Guide issued by the Bursa Malaysia, many public listed companies have incorporated whistle blowing policy into their code of conduct, code of ethics or employment handbook. For instance, para 6.1 of the Code of Ethics of the Bursa Malaysia states that:

Any employee, who makes a report of a breach which he/she reasonably believes to be true, and from which breach he/she has no personal gain, will be given protection under whistle blower procedure. This implies that Bursa Malaysia will not discharge, demote, suspend, threaten, harass or

in any manner discriminate against any employee in the terms and conditions of employment based upon any lawful actions of such employee with respect to the reporting of such a breach.

The incorporation of whistle-blowing policy by companies is significant to strengthen the legal protection of employee whistleblowers. If the employer fails to fulfill its promise to protect the whistleblower from any adverse acts against the latter, it is arguable that he should be able to hold the employer responsible for breach of contract of employment and claim the necessary remedies such as damages. The limitation period for a claim of breach of contract is six years from the date of the contract is breached [9].

By comparison, in the United States, there is a string of cases where the employee whistleblower was denied any protection under the whistle-blowing provisions in the Corporate and Auditing Accountability and Responsibility Act 2002 (commonly known as the Sarbanes-Oxley Act). However, the courts allowed the employee whistleblower to sue his employer for breach of contract for failure to adhere to the company manual or code to prevent any retaliatory actions taken against the employee on the ground of disclosure of wrongdoing or suspected wrongdoing. In *Brady v Calyon Securities* [10], the employee (Brady) was an equity analyst. He made statements to the management of Calyon relating to breaches of securities rules by his immediate superior. Subsequently, his employment with Calyon was terminated and he brought a legal action against Calyon. The court in *Brady* held that the employee could establish a legal action for breach of contract as Calyon's Employee Compliance Manual ("the Manual") expressly encourages its employees to report any wrongdoing or misconduct to the management. The Manual also provides protection to employees who submit such report as follows:

A complaint made in the reasonable belief that a matter warranting a complaint has occurred, or may occur, even if not confirmed by subsequent investigation, will be entitled . . . protection. Calyon shall not discharge, demote, suspend, harass or in any manner discriminate against an employee in the terms and conditions of employment based upon any lawful actions of such employee with response to good faith reporting of Complaints or participation in a related investigation.

There are a number of arguments to support the imposition of contractual liability on a company who fails to protect their employees from detrimental action due to whistle blowing. First, the activity of whistle blowing assists the company to detect and prevent fraud or any other wrongdoing within the company before matters go worse. Secondly, the provision of a whistle blowing policy enables the company to comply with the Bursa Malaysia Corporate Governance Guide. It also helps the company to build or secure the confidence of investors, creditors and members of the public as to the company's commitment in achieving

good corporate governance practices. Due to the benefits reaped in by the company as a result of the incorporation of whistle-blowing policy, it is justified that the company is held accountable for any breach of the policy. Thirdly, employees have relied on the terms of the whistle blowing policy to give them the confidence and assurance that they would be protected if they report any suspected or actual wrongdoing [11]. Thus, they should be entitled to enforce the whistle-blowing policy against their employer if they suffer any harm due to their whistle-blowing. Fourthly, the activity of whistle-blowing also serves public interest. It is always in the public interest that any wrongdoing, particularly crimes or those wrongdoings which affect public safety is exposed or prevented at the earliest stage possible. It is therefore necessary to protect those who have reasonable grounds to report any such wrongdoing. The law should provide a redress mechanism for employee whistleblowers who are discriminated upon and suffer losses. The availability of such mechanism would prevent the stifling of efforts taken to change the mindset of the public in relation to whistle blowing to encourage more people to come forward and report any wrongdoing encountered by them in the course of their work.

There are some difficulties in relation to a claim of breach of contract faced by an employee whistleblower. First, the employee bears the burden to prove on a balance of probabilities that the employer has breached the contract. It may not be easy for the employee to secure evidence or witnesses detailing the reasons justifying his whistle blowing or that the retaliatory acts taken against him are in response to his disclosure of information (this difficulty exists generally to all legal redresses available to a whistleblower). This is so as the employee's colleagues may refuse to testify in court in fear of any backlash of actions taken by the company against them. Secondly, the types of remedies available for breach of contract are also limited. The usual remedy granted in a legal action for breach of contract is damages for loss of contractual benefits. However, damages obtained for breach of contract of service as a general rule does not include damages for loss of reputation or injury to feelings [12]. Unfortunately, loss or reputation or injury to feelings is usually suffered by an employee whistleblower as a result of retaliatory actions taken by his immediate superior or management of the employer. Besides, as a general rule, the remedy of specific performance is not applicable to a dispute of breach of contract of employment [13]. As such, the remedy of reinstatement in cases where the employee has been wrongfully discharged from his employment is not available. Thirdly, the employee who wants to bring a legal action against his employer must also consider the issue of costs. If he loses the case, he has to bear the legal costs incurred by his employer.

B. Law of Dismissal of Employees

In Malaysia, every employee enjoys security of tenure. Every employee can only be terminated on just cause or excuse such as misconduct, poor performance, redundancy or closure or sale of business. If an employee is of the opinion that he has been unlawfully discharged from his

employment, he is entitled to make representations in writing to the Director General of Industrial Relations to be reinstated in his former employment in accordance with s.20(1) Industrial Relations Act (Act 177) ('IRA 1967'). Section 20(3) IRA 1967 states that if the dispute between the employer and employee is unresolved, the Minister of Human Resource, upon notification of the Director General of Industrial Relations, can refer the employee's representation to the Industrial Court for an award. For instance, if an employee whistleblower is selected for retrenchment as a result of any disclosure information to the management of his employer, he can argue that his retrenchment is without just cause. In the law of dismissal, the employer bears the burden to prove that the employee's dismissal is with just cause. Relying on the earlier example, the employer has to prove that the employee would be selected for retrenchment disregard of whether he whistle blows or otherwise.

The remedy under s.20 IRA 1967 applies to constructive dismissal as well. In Malaysia, there are four requirements that an employee has to satisfy to argue that he has been constructively removed [14]. First, there must be a breach of contract (implied or express terms) by the employer. Secondly, the breach of contract must be serious enough to warrant resignation of the employee or it must be the last incident in a series of events that led to the employee leaving his employment at that instance. Thirdly, the reason for the employee to leave his employment must be solely due to the breach of contract and not for some unconnected reasons. Fourthly, the employee did not delay in terminating the contract following the breach of contract by the employer. As such, if an employee whistleblower has suffered any unjust treatment [15] from his superior as a result of his complaint about any actual or wrongdoing of his colleagues or others to the extent that he is no longer able to work in such working environment, he may resign from his job and claim remedies from his employer on the ground that he has been constructively dismissed. However, for constructive dismissal, the burden of proof is on the employee to show that he has been constructively dismissed.

In the United Kingdom ('UK'), there are cases where an employee whistleblower had successfully argued that they had been constructively dismissed due to adverse actions taken by their employer as a result of their complaint about wrongdoings in the employer company. The list of cases are compiled by Public Concern at Work, an organization in the UK dedicated to putting whistle blowing on the governance agenda and in developing legislation in the UK and abroad [16].

Returning back to the discussion on s.20(1) IRA 1967, the time limit for an employee to file a representation in writing to the Director General of Industrial Relations is 60 days after the alleged constructive dismissal takes place [17]. In relation to the recourse provided under s.20(3) IRA 1967, the Industrial Court has the discretion to make orders with respect to costs and expenses [18]. Unfortunately, the established practice of the Industrial Court is that it does not order costs. Thus, both the employer and employee would bear their own legal costs in relation to a legal action under

s.20(3). The remedies that can be granted by an Industrial Court are reinstatement, compensation in lieu of reinstatement and backwages (up till 24 months) [19].¹

V. CONCLUSION

From the discussion above, an employee whistleblower who is not entitled to any protection of the WPA 2010 is still able to redress any grievances that they suffer through law of contract and law of dismissal. As explained in the preceding sections, there are limitations in relation to these legal mechanisms compared with the protection offered by the WPA 2010. For example, under the WPA 2010, an enforcement agency can claim remedies against any detrimental action suffered by the whistleblower. Thus, the employee whistleblower may be able to save the costs of bringing a legal action to redress his grievances. The WPA 2010 also expressly allows the courts to award compensation for any pain and suffering of the employee as a result of the detrimental action taken against him. There is also no limit as to the amount of compensation awarded to a whistleblower. Under the IRA 1967, recovery of backwages is limited to 24 months only. In addition, WPA 2010 applies more broadly compared to the entitlement of an employee to sue his employer for breach of contract for failing to adhere to the whistle blowing policy. This is due to the fact that not all employers incorporate whistle-blowing policy in their business. Therefore, it is lamentable that the WPA 2010 does not apply to employees who whistle blow to their employers. Recent whistle blowing legislations in other countries, unlike Malaysia provide protection to employee whistleblowers who report any actual or suspected misbehaviour to their employer. These countries include the United States (Sarbanes-Oxley Act 2002), United Kingdom (Employment Rights Act 1996), South Africa (Protected Disclosure Act 2000), New Zealand (Protected Disclosures Act 2000), Japan (Whistleblower Protection Act 2004) and Ghana (Whistleblower Act 2006). In conclusion, the state of legal protection afforded in Malaysia to employee whistleblowers is unsatisfactory and requires improvement to broaden the scope of protection to employees who resort to internal mechanism of whistle blowing rather than making a disclosure to an enforcement agency as required by the WPA 2010.

REFERENCES

- [1] Beside the WPA 2010, s.24(1) Anti-Money Laundering And Anti-Terrorism Financing Act 2001 (Act 613) in Malaysia provides that no civil, criminal or disciplinary proceedings shall be brought against a person who supplies any information in relation to any transaction involving the domestic currency or any foreign currency exceeding such amount as the competent authority may specify. However, protection under this Act is not available if the whistleblower acts in bad faith.
- [2] Section 2 WPA 2010 defines 'improper conduct' as any conduct amounting to a disciplinary offence or a criminal offence. This definition includes breach of code of ethics and breach of contract of employment. D. Lewis. and T. Uys, "Protecting Whistleblowers at Work – A Comparison of the impact of British and South African legislation [2007] Managerial Law 79-92.

¹ Second Schedule of IRA 1967.

- [3] Section 2 WPA 2010 defines ‘enforcement agency’ as any unit or body set up or established by the government having investigation and enforcement powers.
- [4] The list of situations amounting to revocation of whistleblower protection is found in s.11 WPA 2010.
- [5] Section 18 WPA 2010.
- [6] Tan, Pei Meng and Ong Seng Fook, ‘Whistleblower Protection in Malaysia’, paper presented at Tuanku Ja’afar Law Conference 2010 – International Conference on Corporate Governance and Corporate Responsibility, 19-20 October 2010.
- [7] In a speech entitled ‘Whistle-blowing: Subversive Spy or Responsible Corporate Citizen?’ delivered by Tan Sri Zarinah Anwar (now the Securities Commission Malaysia chairman) obtained from <http://www.sc.com.my/main.asp?pageid=375&menuid473&newsid=&linkid=440&type=> where she encourages more people to come forward with information relating to the commission of fraud or any other wrongdoing detrimental to companies and that companies must ensure that there are adequate mechanisms to deal with whistle blowing effectively.
- [8] Para 1.17 which is entitled ‘Fraud Risk and Whistle-blowing.
- [9] Section 6 Limitation Act 1953 (Act 254).
- [10] 406 F. Supp.2d 307 (2005). Brady was applied in *Fraser v Fiduciary Trust Company* 417 F. Supp. 2d 310 (2006). Similarly, in *Poulos v Summit Hotel Properties* 2010 U.S. Dist. LEXIS 95394, the court refused to dismiss a claim for breach of contract due to the alleged failure of the employer to protect its employee from retaliatory acts as a result of the employee’s whistle blowing. The employer’s duty to protect the employee was provided for in the employee handbook.
- [11] Employees are usually aware of the whistle-blowing procedures. New employees are given induction course when they begin their employment. Any changes in the company’s policy, would have been e-mailed to all employees or during any training session for the employees.
- [12] *Penang Port Commission v Kanawangi s/o Subramaniam* [1996]
- [13] *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan* [1997] 2 MLJ 361. Section 20(b) Specific Relief Act 1950 also provides that a contract that is dependent on the personal qualifications or volition of the parties (this would include a contract of service) cannot be specifically enforced by the courts.
- [14] *Projek Lebuhraya Utara Selatan Bhd v Mohd Shukri Ngah* [2001] 2 ILR 10.
- [15] Such conduct includes, among others, victimizing him for no reason, not supporting him in difficult work situations, transfer him at short notice or falsely accusing him of misconduct.
- [16] The list of cases is found in the publication by Public Concern at Work entitled ‘Where is whistleblowing now? 10 years of protection for whistleblowers’ available at http://www.pcaw.co.uk/policy/policy_pdfs/PIDA_10year_Final_PDF.pdf. Among some of the cases where the employee had successfully argued on constructive dismissal are *Boughton v National Tyres* (2000), *Bhatia v Sterlite Industries Connolly v Q Healthcare Ltd* (2007), *Lees v Abbey Dale Care Homes* (2008).
- [17] Section 20(1A) IRA 1967.
- [18] Regulation 5 of the Industrial Court Regulations 1967.
- [19] Second Schedule of IRA 1967.