

Lack of Protection for Whistleblowers at the Workplace in Nigeria: Drawing Lessons from Selected Jurisdictions

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Abstract

The Nigerian government has created anti-corruption agencies, such as the Economic and Financial Crimes Commission and the Independent Corrupt Practices and other related offences Commission (ICPC), to contend with corruption. In 2015, the Federal Ministry of Finance introduced the whistleblowing policy. The policy enables corrupt practices in any workplace, either private or public, to be exposed. However, following the policy, there is no legal framework for the implementation nor protection of the whistleblower. This article adopts doctrinal and comparative methodology to examine the utilitarian values and the propriety of whistleblowing vis-à-vis the employee's obligation to act in good faith under Nigeria's labor jurisprudence. It relies on primary and secondary data. It discusses the challenges confronting whistleblowing at the workplace in Nigeria. It also examines the practice in Britain, India, South Africa, and Ghana to be compared with Nigeria. It reveals that whistleblowing is an effective tool to combat corruption/malpractices in the workplace. Unlike in Britain, India, South Africa, and Ghana, there is no specific legislation on whistleblowing in Nigeria. It recommends awareness of the need for Nigerians' active participation in whistleblowing and enactment of a subject-specific law to protect whistleblowing and whistleblowers as in ones in Britain, India, South Africa, and Ghana.

Keywords: corruption, employee, a whistleblower.

A. Introduction

In an employer-employee relationship, the employer must provide work and necessary tools for the employee.¹ The obligation is not absolute, sacrosanct, or untrammeled.² The rationale is that for as long as the employer remunerates the employee, the employer does not have any obligation to provide work.³ However, If the employee earns payment based on workload, it is necessary to sharpen the

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¹ Gladys Eyongndi and John Ebokpo, "The Employer's Unshifting Duty to Provide Work: Nigerian Labour Law through the Eyes of Chinonye Amanze v. Union Bank," *The Gravitas Review of Business and Property Law* 12, no. 4 (2021): 25-34.

² *Collier v. Sunday Referees Publishing Co.*, 2 KB 647, 1941.

³ *Collier v. Sunday Referees Publishing Co.*, 2 KB 647, 1941.

skill and knowledge of the employee.⁴ Once an employee is hired, the employee is expected to faithfully render the service to the employer, ensuring that the employer's interest is protected and advanced within the legitimate bounds of the law.⁵ The employee has an obligation to render faithful services and to obey the employer's lawful instructions.

Situations could arise where the interest of the employer is likely to or endangers public interest. It requires the employee to protect public interest over that of the employer. For instance, where the business practice(s) of an employer poses serious health or financial concern to the society especially where it involves financial impropriety or ethical shortcomings, the employee's duty to render faithful service and be loyal to the employer would become subservient to that of protecting the public. In such a situation, the employee is expected to report such impropriety activity to the appropriate government agent/agency. This practice is what has come to be known as whistleblowing or public interest disclosure.⁶ Thus, whistleblowing is a colloquial term used to describe the raising of concern by a member of an organization or any other person who is aware of fraudulent conduct or some grave infractions by an organization or an individual within an organization.⁷ It is a culture that encourages members of an organization/workplace and neutral third parties who are aware of any wrongdoing being perpetuated by the organization to expose same to the appropriate government agent or agency to rid the society of malfeasance.⁸ Acts/omissions of an organization that may require whistleblowing may range from tax invasion or underpayment, mismanagement, misappropriation, unbudgeted expenditures, diversion of funds, insider trading, financial scandals, sexual harassment and discrimination, corruption, health and safety issues, regulatory guidelines/policy breach, employment racketeering, unethical conducts, contract splitting, contract padding, nepotism, etc. An employee who engages in whistleblowing against his/her organization or any person within it risks a lot as whistleblowing by its nature, is a risky venture.⁹ Such an employee may be victimized (through demotion, stagnation, or refusal of discretionary entitlement) and harassed or even have his/her employment terminated.¹⁰

⁴ Chioma K Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Lagos: Concept Publications Ltd., 2011), 117-118.

⁵ Bimbo Atilola, *Recent Development in Nigerian Labour Law*, (Lagos: Hybrid Consult Ltd., 2017), 73.

⁶ Sirajo Yakubu and Mohammed Kyari Dikwa, "Combatting economic crimes in Nigeria through whistleblowing: a shift from policy to legal framework," *Journal of Money Laundering Control* 23, no. 4 (2020): 819-832.

⁷ Sylvester Ndubuisi Anya and Gabriel Iwanger, "The Role of Whistle Blowing Policy as an Anti-Corruption Tool in Nigeria," *Journal of Law and Criminal Justice* 7, no. 1 (2019): 35-50.

⁸ Habeeb A Salihu, "Whistleblowing Policy and Anti-Corruption Struggle in Nigeria: An Overview," *African Journal of Criminology and Justice Studies* 12, no. 1 (2019): 55-69.

⁹ Wasiu Abiodun Makinde "Whistleblowing in Nigeria: Issues and Challenges," *International Journal of Politics and Good Governance* 9, no. 3 (2018): 1-14.

¹⁰ Michael Davis, "Some Paradoxes of Whistleblowing," *Business and Professional Ethic* 15, no. 1 (1988): 147-148.

This whistleblowing policy is promoted in Nigeria by the President Muhammadu Buhari's administration. The Economic and Financial Crimes Commission (EFCC) initiated the policy to intensify corruption eradication. Although whistleblowing is relatively new in Nigeria, the courts had encouraged Nigerians to engage in it. In *Fajemirokun v Commercial Bank Nig Ltd & Anor*,¹¹ the Supreme Court urged that every citizen is duty-bound to report to the commission of criminal offences. The Court of Appeal re-echoed this in *Dododo v The Economic and Financial Crimes Commission (EFCC) & Ors*¹² that a duty is imposed on every citizen to report allegations of corruption to the anti-graft agencies. However, it has its challenges. One of them is the lack of a comprehensive legislation according to protection to whistleblower from reprisal action from the reported individual or organization.¹³

B. Examining the Circumference of the Employee's Duty to Act in Good Faith

From the outset, the employee's duty to act in good faith is the foundation upon which whistleblowing be interrogated. The intention is to evaluate and advance the position that the general obligation to report wrongdoing by an employee (which is in the interest of the public), outweighs any common law duty, particularly that of faithful service/good faith expected from an employee as the discussion on whistleblowing is within the scope of employment. It places a limitation on the employee's loyalty to the employer as general good supersedes individual benefit.¹⁴

Uvieghara¹⁵ states that "*an employee is under a duty to serve his employer with good faith and fidelity*". It aligns with the dictum of Greer J in *Wessex Dairies Ltd. v Smith*,¹⁶ if the Law Lord held that during the subsistence of his employment, an employee must act in the interest of his employer. Every employment contract contains the obligation, and the facts and circumstances of each case will determine what act (s)/omission(s) of the employee be viewed as an infraction of the duty to act in good faith or render faithful service.¹⁷ At the root of an employment contract, the employee is bound to render services to the employer in accordance with the terms and conditions of the employment contract, whether oral or written. Notwithstanding the agreed employment terms and conditions, the

¹¹ *Fajemirokun v Commercial Bank Nig Ltd & Anor* [2009] 5 NWLR (Pt 1135) 588 SC.

¹² *Dododo v The Economic and Financial Crimes Commission (EFCC) & Ors* [2013] 1 NWLR (Pt 1336) 468 CA.

¹³ Edmund Amaechi Egboh and Kelechi Gift Akobundu, "Whistle Blowing Policy and Fight against Corruption in Nigerian Administrative System," *International Journal of Research and Innovation in Social Science* 4, no. 9 (2020): 285-291.

¹⁴ Oluwakemi Omjola, "Whistleblower Protection as an Anti-Corruption Tool in Nigeria," *Journal of Law, Policy and Globalisation* 92 (2019): 174.

¹⁵ Edgerton E Uvieghara, *Labour Law in Nigeria* (Ibadan: Malthouse Press Ltd., 2001), 38.

¹⁶ Greer J in *Wessex Dairies Ltd. v Smith* (1935) 2 KB 80, 84.

¹⁷ Elizabeth Ama Oji and Offornze D Amucheazi, *Employment and Labour Law in Nigeria* (Lagos: Mbeyi and Associates (Nig.) Ltd. 2015), 131.

employee also has an obligation to give loyal, diligent, and faithful service to the employer and there need not be an express provision in the employment contract. Among other things, it requires employee to act with utmost good faith in continuance of employer's interests.¹⁸ Consequently, during the continuation of the employer-employee relationship, the employee must channel energy towards and look after the employer's interest in business.¹⁹ The duty entails several vital issues. It requires employee, to the best of ability/knowledge, to deploy skills, knowledge, and expertise to the promotion and advancement of the employer's business.²⁰ It also requires that employee shall not place self-interest at variant or diametrically opposed, no matter the degree to the interest of the employer in any matter pertaining to, or arising from, the employment contract.

The employee's obligation to render faithful service requires employee to report information about anything in the course of employment or arising therefrom, or reasonably ought to know is injurious to the business interest of employer or take necessary and reasonable steps to prevent any potentials.²¹ The duty requires employee to use time exclusively to foster employer's interest. This is contingent because employer pays employee. Thus, employee cannot engage in private endeavor(s) during the time meant for the employer's business.²² If employee seeks to use private time in the service of an adverse employer or competitor, employer can restrain such attempt through an injunction.²³ Hence, absence from work by employee, without the permission of employer, to pursue private business is considered misconduct since it infracts the duty of faithful service (fidelity).²⁴ The Supreme Court of Nigeria in *Asaolu v Olaiya Fagbemigbe Ltd. & Anor*²⁵ states that the employee's duty of fidelity requires the employee to report to the employer if the employee discovers detrimental things to the employer's interest. Any failure to do so is a breach of the obligation. The employee must not misappropriate the employer's money for personal use for any reasons. This duty requires total honesty from the employee to the employer in all dealings pertaining to or arising from the employment contract.²⁶

If an employee, in the course of the employment, makes a discovery that is facilitated by the employer's work, the duty of faithful service requires that such a

¹⁸ Wolf, Baldin & Associates P.C., "An Employee's Duty of Loyalty to an Employer in Pennsylvania," accessed April 12, 2022, <https://www.wolfbaldwin.com/articles/employment-articles/an-employees-duty-of-loyalty-to-an-employer/>.

¹⁹ Edgerton E Uvieghara.

²⁰ Oladosun Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (Lagos: Folio Publishers Ltd., 2004), 95.

²¹ *Bell v Lever Brothers Ltd.* (1932) A.C. 161; *Swain v West (Butchers) Ltd.* (1936) 3 All E.R. 261.

²² *Bell v Lever Brothers Ltd.* (1932) A.C. 161; *Swain v West (Butchers) Ltd.* (1936) 3 All E.R. 261.

²³ *Hivac Ltd. v Park Royal Scientific Instruments Ltd.* (1964) 1 All E.R. 350.

²⁴ *Taliet Sule v Nigeria Cotton Board*, ANLR 291, 1985; *Charles Udegbunam v Federal Capital Development Authority*, 30 WRN 111, 2003.

²⁵ *Asaolu v Olaiya Fagbemigbe Ltd. & Anor* (1982) 1 F. N. R. 88.

²⁶ *P. O. Mahah v Standard Bank (Nig.) Ltd.*, 6 ECSLR 199, 1976.

discovery must be reported to the employer to whom it generally belongs. The reason is that if the employee were to retain ownership of the invention, it will negate good moral judgment and is diametrically opposed to equity save the circumstances requires otherwise.²⁷ This foregoing will be applicable where the invention directly arises from the work being done or is ancillary to it in the employer's employ.²⁸ If the employee's use of the invention will amount to a breach of trust and confidence, its ownership belongs to the employer as was held in *British Syphon Co. Ltd. v Homewood*²⁹ However, If the employee, by the schedule of his work, is not expected to demonstrate creative ability or the invention is not associated with the employer's work but the time and resources or parts/materials used are that of the employer, both of them will share ownership or proceeds of the invention.³⁰ In *Abukugho v African Timbers and Plywood Ltd. (A. T. & P.)*,³¹ an employee stole his employer's oil and petrol and was dismissed upon discovery. His action violated his duty to render faithful service to the employer. The employee is obliged to render faithful service and to keep confidential the employer's trade secret and other confidential information that may come by virtue of the employment contract.³²

If an employee violates any obligations to render faithful service to the employer, it is considered misconduct warranting dismissal as opposed to termination of contract of employment, according to the Supreme Court in *Anslem Osakwe v Nigeria Paper Mills Ltd.*³³ It is pertinent to note that while the obligation to render faithful service is appropriate, the same is not without justifiable limits because an employment contract is not a contract of *uberrimae fidei* (i.e. a contract of utmost good faith). The implication is that an employee is not expected to disclose the wrongdoing to an employer as was held in *Bell v. Lever Brother Ltd.*³⁴ It will not be an infraction of the obligation to render faithful service if an employee uses spare time to work for another employer to earn extra income, provided in doing so, the employee does not violate the employment contract or anything to harm the employer's business.³⁵

Despite the foregoing, the employee's obligation to render faithful service within all ramifications is not absolute, sacrosanct, or untrammelled. It is amenable to permissible exceptions. Thus, if the actions/omissions of employer run contrary to a statute, government policy, regulation, public interest, or safety, employee has a greater duty to report or expose. It will not be a violation on the obligation of

²⁷ *Sterling Engineering Co. Ltd. v Patchett*, A. C. 534, 1955.

²⁸ *British Reinforced Concrete Co. Ltd. v Lind* 116 L. T. 243, 1917.

²⁹ *British Syphon Co. Ltd. v Homewood* (1956) 1 W.L.R. 1190.

³⁰ Section 2(4) of the Nigerian Patents and Design Act Cap. P7 Laws of the Federation of Nigeria, 2004.

³¹ *Abukugho v African Timbers and Plywood Ltd. (A. T. & P.)* (1966) 2 All N. L. R. 87.

³² *Chioma K Agomo*, 123-124.

³³ *Anslem Osakwe v Nigeria Paper Mills Ltd* [1998] 10 NWLR (Pt. 568) 1 at 13.

³⁴ *Bell v. Lever Brother Ltd* (1932) A. C. 161.

³⁵ *Elizabeth Ama Oji and Offornze D Amucheazi*, 132-133.

compliance or obedience within the bounds of the law.³⁶ The interest of the public always supersedes that of employer. It is within the limit that whistleblowing operates. Thus, Wood VC states in *Gartside v Outram*³⁷ that “*there is no confidence as to the disclosure of iniquity*”. Lord Denning MR has fortified the foregoing unassailable position in *Initial Services Ltd. v Putterill and Another*³⁸ that no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare. The practice of whistleblowing or public interest disclosure is encouraged and practiced, and it does not run afoul the duty to render faithful service or loyalty owed the employer.

C. Challenges Confronting Whistleblowing at the Workplace in Nigeria

It is clear that whistleblowing could be regarded as a civic responsibility of every employee against the malfeasance of employer mainly for the benefit of the society. Thus, due to its utilitarian value and ability to disrupt an unscrupulous employer’s establishment, it faces several challenges in Nigeria. Ifejika has captured the precariousness of whistleblowing amidst its necessity that it is a risky venture.³⁹ Whistleblowers are exposed to retaliatory attacks such as witch-hunting, outright dismissal or termination of employment, denial of work-related benefits enjoyed by other employees, lawsuits, threat to their lives and properties or that of their family/loved ones, denial or delayed promotion, punitive transfer, etc. The foregoing gloomy representation requires a comprehensive protective mechanism to promote whistleblowing and protect whistleblowers from the trajectories inherent in the good venture. In addition, citizens’ knowledge about the obligation is necessary for gainful engagement. It is not only a truism that abuse is inevitable if the purpose of a thing is not known but active participation is impaired by ignorance. Thus, protection of citizens could be considered extremely important to the thriving of whistleblowing.

Whistleblowing was formally introduced into Nigeria in 2016 by the Federal Ministry of Finance (FMF) of Nigeria.⁴⁰ According to the FMF, the whistleblowing policy was ushered in to encourage citizens with information pertaining to any form of violation of financial regulations, impropriety, mismanagement of public funds and assets, fraud and theft, misappropriation, financial malpractices, etc. within the public or private sector to report to an appropriate government agency

³⁶ Tolu Lawal and Ogunro K Victor, “Combating Corruption in Nigeria,” *International Journal of Academic Research in Economic and Management Sciences* 1, no. 4 (2012): 1-7.

³⁷ *Gartside v Outram* [1856] 26 L.J. Ch. 113, 114, 116.

³⁸ *Initial Services Ltd. v Putterill and Another* [1968] QB 396.

³⁹ Solomon I Ifejika, “The Need for statutory protection for Whistleblowers in Nigeria,” *Journal of Anti-Corruption Law* 3, no. 1 (2019): 59.

⁴⁰ Akintunde Kupoluyi, “Whistle-Blowing Using ICT: Why the Whistle may not Blow in Nigeria” in *Babcock University Essays on Contemporary Legal Issues*, 2nd Ed., ed. Isaac O Agbede and Ayoyemi Arowolo (Babcock University: School of Law and Security Studies, 2018), 183.

for investigation and where culpability is established, sanctions are melted.⁴¹ The policy was introduced by President Muhammadu Buhari's administration. It aims to combat financial corruption in the fulfillment of the election manifesto. The FMF operates an online portal where anyone with useful information on any form of financial malpractice can log in and submit a complaint.⁴² In accordance with the policy, a whistleblower who leads to the recovery or voluntary return of funds or assets is entitled to between 2.5 to 5 percent of the recovered or returned funds or assets. The policy further provides that any member of the public who has useful information pertaining the commission of graft or malpractice (s) by anyone or organization, is permitted to report and need not necessarily be an employee *per se*. To qualify for a reward, the whistleblower must provide new information; and the recovery or voluntary return of the assets or funds must be the impact of the information.⁴³

Despite the utility of whistleblowing in combating malpractices, there is no specific federal or state statutory/institutional protective mechanism on the subject in Nigeria save the policy put in place by the FMF.⁴⁴ The absence of legal and institutional framework promoting whistleblowing and protecting whistleblowers can compel an employee with useful information that may safeguard public interest to remain silent since no protection by the law. Ifejika underscores the position.⁴⁵ Findings from previous studies show that based on feelings of helplessness, fear of victimization and other risks associated with whistleblowing, without adequate protective mechanisms in place for whistleblowers, employees are generally dissuaded from volunteering information on wrongdoings either at present or in the future.⁴⁶ Thus, it is doubtful that the statutory regulation providing requisite protection may not be a clog in the wheel of realizing the inherent benefits of whistleblowing in Nigeria.⁴⁷ In the absence of statutory protection, the anachronistic common law principles regulating master-servant employment, which requires unalloyed loyalty from the servant to the master apply.

Nonetheless, Nigeria's government has attempted to promote whistleblowing and protect whistleblowers. However, none of the efforts had a concrete outcome.

⁴¹ Akintunde Kupoluyi.

⁴² Complaints could be submitted via the Ministry online portal at <https://whistle.finance.gov.ng/>.

⁴³ Fola Adeyemo "Whistle Blowing: The Position of Nigerian Legislation in Banking," *Journal of Law, Policy, and Globalization* 41 (2015): 143-146.

⁴⁴ Don Okereke "Nigeria's Whistleblowing Policy: Urgent Case for Whistle Blowers Protection Law," accessed June 20, 2022, <https://thenigerialawyer.com/nigerias-whistleblowing-policy-urgent-case-for-whistleblowers-protection-law/>

⁴⁵ Solomon I Ifejika, 62.

⁴⁶ Anastasia Chi-Chi Onuorah and Ebimobowei Appah, "Accountability and Public Sector Financial Management in Nigeria," *Arabian Journal of Business and Management Review* 1, no. 6 (2012): 7.

⁴⁷ Silk Ugwu Ogbu, "Whistleblowing Policy as a Mechanism for Energizing the War against Corruption in Nigeria," *International Journal of International Relations, Media and Mass Communication Studies* 3, no. 4, (2017): 18.

In 2008, the Whistleblower Protection Bill was sponsored by Senator Solomon Olanrewaju Ganiyu. It aims to protect whistleblowers both in the private and public sector. The Bill was introduced to the senate of the National Assembly of Nigeria. The Bill did not receive the attention and was canceled. In 2009, another Bill was submitted to the Senate. The Bill sought to lay down procedures for which employees in both private and public sectors may disclose information of corruption/misconduct or criminal activities in organization for necessary action to be taken by the appropriate government authority. The Bill makes provisions for the protection of whistleblowers from reprisal attacks and all forms of occupational detriments/reprisal from the employer, co-employees or any person affected by the disclosure.⁴⁸ Unfortunately, neither of these Bills was given the requisite legislative attention despite their importance. Hence, they were never enacted into law, although in 2015, the Whistleblower Protection Bill was passed by the Senate. It is presently before the House of Representatives awaiting its passage and the subsequent assent of the President to become a law.⁴⁹

Therefore, the imperativeness of subject-specific legislation on whistleblowing and protection of whistleblowers in Nigeria cannot be overemphasized. The Freedom of Information Act (FOI Act) 2015 requires public institutions/agencies or personnel who are custodians of any information to make available to any member of the public upon fulfilment of certain conditions. It may be regarded as a step in the right direction. However, the provisions of the FOI Act in relation to whistleblowing and whistleblower protection is inadequate since the legislation has no explicit provision on whistleblowing. It only compels public bodies/officials to make information available to inquirers. One may argue that section 36 of the 1999 Constitution of the Federal Republic of Nigeria⁵⁰ (the 1999 CFRN), which guarantees freedom of speech, gives impetus to whistleblowing. The position may be correct but it the possession of the right of freedom of speech/expression, as contained in section 36(1) of the 1999 CFRN, is too general. It has no explicit direction on whistleblowing and protection needed by whistleblowers facing reprisal or detrimental attack on a whistleblower either through outright dismissal, termination of employment, interdiction, refusal or delayed promotion, witch-hunting, blacklisting, victimization, harassment, or any other unfair/inhumane treatment amounts to unfair labor practice.

Currently, while there is no subject-specific and comprehensive legislation on whistleblowing, there is certain legislation that could be interpreted purposively to provide a palliative degree of protection to whistleblower. It is not ideal considering the utilitarian value of whistleblowing and its grave predilection to

⁴⁸ Sunday Felix Taiwo, "Effects of Whistleblowing Practices on Organisational Performance in the Nigerian Public Sector: Empirical facts from Selected Local Governments in Lagos and Ogun State," *Journal of Marketing and Management* 6, no. 1 (2015): 45.

⁴⁹ Solomon I Ifejeika, 70.

⁵⁰ 1999 Constitution of the Federal Republic of Nigeria Cap. C23 Laws of the Federation of Nigeria, 2004.

adverse outcomes. For instance, Section 5.3.1. of the Central Bank of Nigeria (CBN), in its Guidelines for Whistleblowing for Banks and Discount Houses, states that banks shall have a whistleblowing policy and made known to employees and other stakeholders. The policy shall contain mechanisms, including assurance of confidentiality that encourages stakeholders to report any unethical activity to the bank or the CBN. Section 27 of the Freedom of Information Act⁵¹ (FOI Act) protects public officers from criminal and civil proceedings for disclosures made in good faith pertaining to information relating to financial crimes, abuse of authority, violation of laws and danger to health and safety. Section 64 of the Independent and Corrupt Practices and other Related Offences Act⁵² provides that the information and identity of a person from whom information is received by an officer of the Commission shall be kept secret between them and all other circumstances relating to the information. Section 33 of the Terrorism (Prevention) Act, 2013 provides for the protection of identity and life of a person who gives information to law enforcement agencies in investigating and prosecuting offences under the Act. The issue is that these laws are neither comprehensive nor specific about whistleblower's protection. They do not cover a whistleblower's wide range of vulnerabilities that requires ample legal protection.

Successive governments have made efforts to enact a subject-specific legislation providing a legal and institutional framework on whistleblowing. For instance, in 2008, the Whistleblower Protection Bill was introduced. It is made up of twenty-two sections to provide the way individuals may in the interest of the public, disclose information that relates to unlawful or other illegal conduct or corrupt practices of others; and to provide for protection against victimization of disclosers. In 2009, the Safeguarded Disclosure (Whistleblowers, Special Provisions, etc.) Bill, was introduced. It made provision for the procedure in terms of which persons employed in public or private sectors may disclose information regarding unlawful and other irregular practices and conduct in a workplace; and to provide protection against any occupational detriment or reprisals against the discloser. However, both Bills were abandoned as the Legislature could not complete the process of making them into Acts of the National Assembly. Thus, in 2017, the Senate passed the Witness Protection Program Bill into an Act. Subsequently, it was consolidated into the Whistleblower Protection Bill. It aims to promote law enforcement by facilitating the protection of persons directly or indirectly involved in helping law enforcement matters in relation to information. Unfortunately, the House of Representatives did not pass the Bill into an Act for it to be forwarded to

⁵¹ Freedom of Information Act, 2011.

⁵² Independent and Corrupt Practices and other Related Offences Act, 2000.

the President for assent. The Bill did not materialize until the expiration of the tenure of the 8th National Assembly in 2015.⁵³

In 2019, the Senate reintroduced the Whistleblower and Witness Protection Bill.⁵⁴ The Bill seeks adequate protection of whistleblowers from reprisals, victimization, job losses and humiliation, which are some of the consequences of whistleblowing. The Bill makes provision for financial rewards to encourage citizens to expose corruption and malpractices. It makes provision against victimization, reprisal attack and loss of job by citizens who exposes corruption against their employers, co-employees or third parties. It provides stringent penalties including a term of imprisonment not exceeding five year or a fine of Ten Million Naira only against anyone that victimizes a whistleblower by taking an action or making an omission that is prejudicial to personal interest. The Bill also seeks to create and operate a program that protects witnesses who provide vital information, evidence, or render assistance to law enforcement agencies in certain investigations, enquiries, or prosecutions from all forms of reprisal attack or prejudicial treatments. The Bill is indeed an ambitious piece of legislation. It could have assuaged the fears of whistleblowers by giving statutory coverage but legislative laziness and peradventure bottleneck did not permit its actualization.

Despite the failure of legislative attempts, another Bill was introduced in 2020. The Public Interest Disclosure and Protection (Enactment) Bill 2020 seeks to repeal the Public Complaint Commission Act. It aims to provide legal and institutional framework for the regulation and management of public interest disclosure and protection of disclosers; encourages and facilitate disclosure of wrongful and unlawful activities that impacts on management and administration of public offices or authority. It also makes adequate provision for persons making public disclosures whether civil/public servants or whistleblowers. The Public Interest Disclosure and Complaints Commission (PIDCC) is established under the Bill to oversee its implementation. Section 22(1) of the Bill regulates that, for a public interest disclosure to be made, the discloser must have reasonable cause that the disclosure is true or may be true but it must not be for personal gain. Section 23(1) regulates that a disclosure may be made either in writing, oral or any other means capable of understanding. The PIDCC has the obligation of receiving disclosures/complaints. By virtue of sections 33, 34 and 49(1), all employees of the PIDCC shall treat with utmost confidentiality and secrecy; all disclosures are made to guarantee the safety of the discloser identity. Anyone that gains information while administering the Bill, whether a staff or not, is under a duty to keep such information confidential.

⁵³ Herbert Eti Best, "Legal Mechanism for Blowing the Whistle against Incidence of Tax Haven in Nigeria," *OIDA International Journal of Sustainable Development* 12, no. 4 (2019): 42.

⁵⁴ Queen Esther Iroanusi "Senate Reintroduces Whistleblower and Witness Protection Bill," accessed December 5, 2022, <https://www.premiumtimesng.com/news/more-news/364096-senate-reintroduces-whistleblower-and-witness-protection-bill.html>.

The PIDCC, court, or any government agency/agent is prohibited from disclosing information that may reveal the identity of a discloser by virtue of section 42(1). By section 44(1), a person who makes a public interest disclosure is immune from civil and criminal liability, breach of duty of secrecy, reprisal attacks such as termination or dismissal from employment, victimization, delayed/denial of promotion/fringe benefits or any other prejudicial action/omission. Based on the Bill, a person, who threatens or takes a detrimental action against a discloser commits an offence and upon conviction, is liable to fine not less than Five Hundred Thousand Naira only or imprisonment of not less than two years or both. The penalty is necessary to serve as punishment for offenders and deterrence. However, the sum of Five Hundred Thousand Naira and two years' imprisonment term provided is not stringent enough to achieve deterrence. Fine for offences under the Bill and the need to encourage disclosure should not be less than five million naira with an imprisonment term of not less than five years imprisonment term. In addition, section 47 of the Bill makes further protection by providing that a threat to take a detrimental action or its actual taking against a discloser amounts to a tort of victimization, which the victim can sue through a civil suit and claim humungous damages. Section 51(1) regulates that an employee, who has been victimized owing to a public interest disclosure made, may appeal to the PIDCC, or apply for review. If an employee foresees that he/she may be targeted for victimization because of a disclosure made, the employee can apply to the employer for transfer. As laudable as this provision is, it is argued that it has limited utilitarian value. Unless the victimization is not from the employer, but for a management staff against the complaint, it is difficult to see how transfer will be a palliative measure. Moreover, an employer may not have more than one workplace, hence how will it be feasible for an employee who is mistreated in an employ to transfer to another workplace?

If a discloser has suffered deprivation because of a disclosure under the Bill, Section 48(1) makes the discloser entitled to compensation from the PIDCC, which shall be contingent on the type of adversity suffered. It aims to ensure the discloser, and the one who suffer injury therefrom, has no remedy. While it is pertinent to provide protection to disclosers, any discloser who fails and/or ignores request to provide information, in the manner prescribed by the person to whom the disclosure was made, forfeits the protection provided under the Bill. Sections 57(1) and 56(1) makes the PIDCC having obligation to protect the identity of a discloser, as well as ensure that a public servant who makes a public interest disclosure does not suffer any maltreatment. If it is suffered, adequate and prompt compensation is paid to the victim. Section 60(1) of the Bill regulates the effect that the duty to provide protection to a discloser subsists once it was done in public spirit and good faith, despite the fact that the person(s) against whom it was made, after investigation, was not found culpable. By the combined provisions of

sections 62 and 63, a person makes a public interest disclosure, which led to recovery of funds/assets, is entitled to compensation which is in accordance with the Guidelines put in place by the Attorney General after consultation with the PIDCC. This is to incentivize public interest disclosure. It is indisputable that whistleblowing is beneficial, however, unscrupulous element might explore it to the chagrin of others. Thus, sections 64, 65 and 66 of the Bill criminalize false whistleblowing done in bad faith to annoy or cause embarrassment to someone or aims to receipt of compensation.

It is obvious that this Bill is a trail blazing effort at enacting a legal and institutional framework for the encouragement of whistleblowing and protection of whistleblowers in Nigeria. It is important that the legislature make concerted effort to ensure the Bill not become another failed project. Regrettably, the applicability of the Bill is limited to public authorities. Hence, it is contentious whether under the Bill, disclosure can be made pertaining to the private sector as its provisions are mainly, if not totally, targeted the public sector. The Bill should be tinkered with before its passage to ensure its applicability to all levels of the society, both public and private.

Interestingly, the enhancement of the status and jurisdictional stature of the National Industrial Court of Nigeria (NICN) through the enactment of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 (the 1999 CFRN [Third Alteration] Act 2010), which vest the NICN with exclusive original civil jurisdiction over labor and employment matters including unfair labor practice,⁵⁵ affords an affected employee (where practicable), the opportunity to challenge any ill-treatment contingent on whistleblowing. The foregoing could be gleaned from the position advanced by Eyongndi and Onu⁵⁶ that any dispute arising from or connected to labor and employment matters is within the exclusive original civil jurisdiction of the NICN in affirmation of Section 254C(f) of the 1999 CFRN (Third Alteration) Act, 2010.⁵⁷ Thus, in *Mr. Olu Ibirogba v The Council, Federal Polytechnic, Yaba*,⁵⁸ the NICN set aside the suspension of the Claimant by the Defendant owing to the exposure of corrupt practices being perpetuated in the institution by a section of the management. The suspension was held to be *mala fide*, vindictive, oppressive, unlawful and an irrefutable case of unfair labor practice. The NICN through purposive judicial activism and dynamism is espousing the law to cure the limitations occasioned by the unavailability of adequate protective legislation. It is expected that the NICN will persist in this employee

⁵⁵ Section 254C (f) of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.

⁵⁶ David T. Eyongndi and Kingsley O. Onu, "Legal Diagnosis of the National Industrial Court of Nigeria Rules, 2017 as a Catalyst of Egalitarian Labour Adjudication," *Jimma University Journal of Law, Tanzania* 13, no. 1, (2021): 47-65.

⁵⁷ David T. Eyongndi, and Chi-Johnny Okongwu, "Interrogating the National Industrial Court Strides towards Attaining Safe Workplace for Nigeria's Female Worker," *Bangladesh Institute of Legal Development Law Journal* 6, no. 1 (2021): 122-146.

⁵⁸ *Mr. Olu Ibirogba v The Council, Federal Polytechnic Yaba* [2015] 63 N.L.L.R. (Pt. 223) 343.

protectionist stance against reprisal or retaliatory action meted at whistleblowers to promote the practice of whistleblowing.⁵⁹

Clearly, the availability of a robust legal and institutional framework regulating whistleblowing as well as providing protection to whistleblower is necessary as it infusing courage into the citizenry to actively participate in public interest disclosure. However, active participation by the citizens may not be achieved by merely putting in place legal protection. Unless and until the citizens are made to understand that whistleblowing is a civic obligation. Every responsible citizen ought to perform it towards the wellbeing of the society. The probability of docility towards whistling is high. Thus, it is equally important for the government and other stakeholders prosecuting the war against corruption and every act/omission of misconduct (being committed whether in the public or private sector) to rigorously enlighten the citizens on the need to be active participants in whistleblowing against corruption. Trade Unions or employees' associations should educate their members and put in place protective and reporting mechanisms to aid their members whistle whenever they have the reason.

D. Whistleblowing Practice in Selected Jurisdictions

Whistleblowing is not a practice that is exclusive to Nigeria. Some jurisdictions like Britain, India, South Africa, and Ghana have statutory and institutional mechanisms regulating the practice. This section examines statutory and institutional frameworks on the practice of whistleblowing at the workplace to be compared with Nigeria.

1. Britain

In Britain, the Employment Right Act (ERA) 1996 and the Public Interest Disclosure Act 1998 (PIDA), which came into effect on July 2, 1999, permits whistleblowing and provide protection for whistleblowers (employees) who disclose malpractices by their employers or third parties. Under the ERA, whistleblowing is known as a protected disclosure. Section 103A of the ERA states that if an employee is dismissed based on an act of whistleblowing, the dismissal would be regarded as unfair dismissal; and if an employee is selected and declared redundant, the redundancy will be declared as unfair labor practice which is null and void. Section 47B of the ERA protects an employee who blows the whistle against the employer for unlawful detriment. It states that employees shall not be subjected to any detriment by any act, or any deliberate failure to act by their employer because they have made a protected disclosure. However, the ERA does not define what detrimental treatment connotes hence. The Employment Appeal Tribunal (EAT)

⁵⁹ Omeiza Ajayi "Whistleblowing: 5yrs after Nigerians still afraid of reporting corruption, FG laments" accessed June 22, 2022, <https://www.vanguardngr.com/2021/12/whistleblowing-5yrs-after-nigerians-still-afraid-of-reporting-corruption-fg-laments/>.

determine act or omission that falls within the confines of unlawful detriment. Nevertheless, acts and omissions such as delayed promotion, demotion, refusal of fringe benefits, exclusion from workplace matters, unjustifiable redeployment, damage to career prospects, failure to process promotion after application, witch-hunting, unlawful discrimination etc. are considered unlawful detriments. Section 43J (1) of the ERA states that any provision in an employment contract prohibiting an employee from engaging in whistleblowing or any settlement agreement between employer and employee is not to institute proceedings against an employee is null and void and of no effect at all. Employees, which are protected by the ERA, are broader than the employees in the traditional master-servant employment relationship. It covers employees, agency workers; freelance workers, seconded workers; homeworkers; trainees; and non-executive directors.

Thus, in *International Petroleum Ltd. v Osipov*,⁶⁰ the EAT held that a Non-Executive Director falls within the meaning of 'employee' under the ERA and therefore protected from being prejudiced when engages in whistleblowing. In *Clyde & Co LLP v Bates van Winkelhof*,⁶¹ the Supreme Court held that members of a limited liability partnership come within the meaning of employee/workers under the ERA and therefore protected from any prejudicial treatment pursuant to their engagement in whistleblowing. Employees in a tripartite employment relationship are also protected since the employer can legitimately make a protected disclosure against either or both the Agent-Employer or/and End-User Employer as was held in *McTigue v University Hospital Bristol NHS Foundation Trust*⁶² and *Day v Health Education England, Public Concern at Work (intervener) and Lewisham and Greenwich NHS Trust (interested party)*.⁶³

A former employee is also protected from detrimental treatment owing to whistleblowing. A former employee/worker who makes a protected disclosure post-termination can bring a whistleblowing claim for post-termination detriment provided the detriment is linked to their former employment, especially in the case of a post-employment detrimental reference or evaluation.⁶⁴ The employer must ensure that a whistleblower is not a victim of reprisal from co-employees as was held in *Abertawe Bro Morgannwg University Health Board v Ferguson*.⁶⁵ If a whistleblower is subjected to detrimental treatment by a co-employee or agent of the employer, the employer will be vicariously liable.⁶⁶ However, if an employer shows that it took necessary steps to ensure that co-employees do not act in a way and manner that is detrimental to a whistleblower, a co-employee that engages in reprisal action, by the provision of section 47B (1D) of the ERA, will be personally

⁶⁰ *International Petroleum Ltd. v Osipov* UKEAT/0058/17/DA and UKEAT/0229/16/DA.

⁶¹ *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32.

⁶² *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] IRLR 742.

⁶³ *Day v Health Education England* [2017] IRLR 623.

⁶⁴ *Woodward v Abbey National Plc. (No. 1)* 2006 ICR 1436.

⁶⁵ *Abertawe Bro Morgannwg University Health Board v Ferguson* UKEAT/0044/13.

⁶⁶ *Fecitt and ors v NHS Manchester* EWCA Civ 1190, 2011.

liable in a claim for damages by an affected whistleblower. Once a disclosure is made in good faith, even if it turns out to be false, it is protected under the ERA as was held in *Trustees of Mama East African Women's Group v Dobson*.⁶⁷ The English Court of Appeal held in *Street v Derbyshire Unemployed Workers' Centre*⁶⁸ states that good faith means acting with honest motives. If the EAT finds that an employee has been dismissed because of whistleblowing, it can come to the conclusion that the dismissal carries with it infamy, stigmatization, or black-listing due to the negative publicity and its attendant effect to the whistleblower's ability to secure another employment in the same industry or rank.⁶⁹ Upon making such a finding, The EAT will be inclined to award substantial damages for loss of future earnings as was held in *Royal Cornwall Hospitals NHS Trust v Watkinson*⁷⁰ and *Lingard v HM Prison Service*.⁷¹ The EAT can award damages for injury to feelings in a case of detrimental treatment.⁷²

2. India

In recognition of the benefit of having in place an effective and efficient whistleblowing practice, India has incorporated whistleblowing into various statutes.⁷³ India Companies Act of 2013 has several provisions to checkmate incidence of fraud and financial malpractices by both public and private companies through whistleblowing. Thus, Section 177 (9) of the Companies Act 2013 and Rule 7 of the Companies (Meetings of Board and its Powers) Rules 2014 require every listed company, which either accepts monies through deposits from the public or borrows monies from banks, to put in place vigilance mechanisms to enable both directors and employees to report any form of unethical or financial impropriety. Sections 206 to 229 contain strict procedures, which are to be followed by a Special Investigator other than the Registrar of the company. It involves inspection of records of a concerned company through complete investigation, setting up a jury to determine the veracity or otherwise of a complaint by a whistleblower.⁷⁴

⁶⁷ *Trustees of Mama East African Women's Group v Dobson* UKEAT/0219/05.

⁶⁸ *Street v Derbyshire Unemployed Workers' Centre* [2004] IRLR 687 (CA).

⁶⁹ Jonathan Chamberlain and Connie Cliff, "Public Interest Disclosures: Workplace Whistleblowing in the UK," accessed April 15, 2022, [https://uk.practicallaw.thomsonreuters.com/w-018-959?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-018-959?transitionType=Default&contextData=(sc.Default)&firstPage=true)

⁷⁰ *Royal Cornwall Hospitals NHS Trust v Watkinson* UKEAT/0378/10/DM.

⁷¹ *Lingard v HM Prison Service* (ET/1802862/04).

⁷² *Virgo Fidelis Senior School v Boyle* UKEAT/0644/03. In *Local Government Yorkshire and Humber v Shah* UKEAT/0026/12, the EAT upheld an award of GBP 25, 000 for injury to feelings, stating that "the employment tribunal had correctly directed itself that detrimental action taken against whistleblowers should always be regarded as a very serious breach of discrimination legislation".

⁷³ Nishama Bhargava and Mani Madala, "An Overview of Whistleblowing: Indian Perspective," *International Journal of Innovative Research in Science, Engineering and Technology* 4, no. 2 (2015): 334-339.

⁷⁴ John P Keenan, "Comparing Indian and American Managers on Whistleblowing," *Employees Responsibilities and Rights Journal* 14, no. 2 & 3 (2002): 79-89.

Section 211 establishes the Serious Fraud Investigation Office, which has the obligation of investigating cases of fraud lodged against any company.⁷⁵ The Act also makes the Auditor duty bound to act as a whistleblower if, during their audit, financial malpractice is uncovered. The Securities and Exchange Board of India circular in 2003 amended its corporate governance principle and by Rule 49 mandated every company to put in place a mechanism for the employees to report to the management any case of fraud or unethical practice, or violation of any code of conduct in the management of the affairs of the company.⁷⁶ Pursuant to this, many companies in India have put in place the necessary whistleblowing mechanism.⁷⁷

In 2014, the Indian Parliament enacted the Whistleblowing Protection Act 2013 to accord whistleblowers protection and give general guidelines for managing incidence of whistleblowing. Section 4 of the Act empowers a public servant or a non-governmental organization, notwithstanding the provisions of the Official Secrets Act, to make a public interest disclosure before a competent authority as specified under section 3. Every disclosure shall be made in good faith with the complainant solemnly declaring the truth. According to section 5, the Competent Authority, under section 3 of the Act upon receipt of a complaint, shall cause an inquiry into same to ascertain its veracity. Section 11 of the Act covers the Central Government's duty to ensure that no one that has made a disclosure is victimized on the ground of the disclosure.⁷⁸ If a person who has blown the whistle is likely to or is being victimized, the person can file proceedings before a competent authority and seek redress against the victimizing party. Any decision made by the Competent Authority against a person or an authority engaged in victimization shall be binding and enforceable.⁷⁹ Witnesses and persons who give evidence to enable the Competent Authority to ascertain the veracity of a complaint by a whistleblower are equally protected from victimization.⁸⁰ The Competent Authority shall seek to conceal the identity of the whistleblower notwithstanding the provision of any law to the contrary.⁸¹

If any person, negligently or in mala fide discloses the identity of a whistleblower, the person commits an offence punishable with imprisonment of not more than three years or a fine.⁸² In addition, if a complaint is false or made

⁷⁵ Abhishek Choudhary, "Whistle Blowing Policy in India – Challenges and Suggested Reforms," *International Journal of Research in Engineering, IT and Social Science* 9, no. 3 (2019): 173.

⁷⁶ Shivagi Dhawan and Anupret Kaur Mokha, "Whistle Blowing: Facing Challenges in India," *Asian Journal of Management* 8, no 3 (2017): 89.

⁷⁷ Rajeev Puri, Ruchi Trehan, and Hashima Kakkar, "Corporate Governance through Audit Committee: A Study of the Indian Corporate Sector," *The ICFAI University Journal of Corporate Governance* 9, no. 1 & 2 (2010): 47-98.

⁷⁸ Section 11 (1) Whistleblowing Protection Act, 2013.

⁷⁹ Section 11(2) Whistleblowing Protection Act, 2013.

⁸⁰ Section 12 Whistleblowing Protection Act, 2013.

⁸¹ Section 11 (2) Whistleblowing Protection Act, 2013.

⁸². Section 16 Whistleblowing Protection Act, 2013.

mala fide, the complainant commits an offence punishable with two years' imprisonment.⁸³ A whistleblower is not entitled to any reward upon a successful investigation of the complaint but may be given some benefit through discretionary powers. India has put in place a protective and promotional legal framework that caters for whistleblowing like Britain.

3. South Africa

The Constitution of the Republic of South Africa 1996, the Labor Relations Act No. 66 of 1995, the Companies Act No. 71 of 2008 and the Protected Disclosures Act No. 26 of 2000 make provisions for whistleblowing and provide protection to whistleblowers in the South Africa (SA). The Protected Disclosures Act (PDA) is the primary legislation that deals directly with whistleblowing by employees. The Act aims to make provisions for procedures through which workers in both private and public sectors may disclose information concerning illegal or irregular conduct by their employers or co-employees. It also makes provisions for the protection of employees who make public interest disclosures. Thus, the objectives of the Act as contained in section 2 include the protection of employee (despite the sector of employment) from being subjected to an occupational detriment due to a protected disclosure; make provisions for remedies if an employee is subjected to any form of occupational detriment contingent of making a protected disclosure; and establishes procedures through which an employee can disclose information regarding improprieties by employer in a responsible manner.

In *Grieve v Denel (Pty) Ltd.*, the Labor Court held that the Act is to create a culture that will facilitate the disclosure of information by employees related to criminal and other irregular conduct in the workplace.⁸⁴ Based on section 2(3), any term in a contract of employment or agreement between an employer and employee(s) of a trade union to exclude the application of the Act or relinquishment of the right to bring or continue an action against reprisal action by an employer or discourage employees from making disclosure in accordance with the Act is null and void and of not in effect. It ensures that no action by or between an employer and employee frustrates the implementation of the Act. Based on section 3 of the Act, an employer is prohibited from subjecting an employee to any detrimental treatment either partly or wholly on account of a protected disclosure. A protected disclosure could be made either to a legal adviser,⁸⁵ the employer,⁸⁶ a member of cabinet or Executive Council,⁸⁷ or to a public body.⁸⁸ The persons or authorities to whom a disclosure could be made as enumerated are also

⁸³ Section 17 Whistleblowing Protection Act, 2013.

⁸⁴ *Grieve v Denel (Pty) Ltd*, 4 BLLR 366 (LC) 368g, 2003.

⁸⁵ Section 5 of South Africa Protected Disclosure Act No. 26 of 2002.

⁸⁶ Section 6 of South Africa Protected Disclosure Act No. 26 of 2002.

⁸⁷ Section 7 of South Africa Protected Disclosure Act No. 26 of 2002.

⁸⁸ Section 8 South Africa Protected Disclosure Act No. 26 of 2002.

recognized under 159(3) (a) of the Companies Act. Any employee who is or likely to be prejudiced because of whistleblowing is statutorily permitted to seek legal redress from a competent court including the Labor Court established pursuant to section 151 of the Labor Relations Act⁸⁹ (LRA).⁹⁰ A dismissal consequent on whistleblowing, in accordance with section 187 of the LRA, shall be declared as unfair dismissal while any occupational detriment is regarded as an unfair labor practice.⁹¹ A disclosure is protected disclosure if it is made in good faith.⁹²

The right of freedom of expression enshrined in section 16 of the South African Constitution justifies the obligation of whistleblowing under the PDA. In CWU v Mobile Telephone Networks (Pty) Ltd,⁹³ the Labor Court affirmed that the definition of *disclosure* clearly contemplates that it only covers the disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct –the subject of protection under the PDA. Thus, the PDA is only applicable to employees under the LRA and other laws⁹⁴ but excludes independent contractors as was held in Niselow v Liberty Life Association of Africa Ltd.⁹⁵ The foregoing notwithstanding, the of Van Niekerk AJ in Discovery Health Limited v CCMA⁹⁶ is a possible catalyst for the expansion of the applicability of the protection under PDA. The Law Lord held as follows.

"The protection against unfair labor practices established by s 23(1) of the constitution is not dependent on a contract of employment. Protection extends potentially to other contracts, relationships, and arrangements in terms of which a person performs work or provides personal services to another. The line between performing work 'akin to employment' and the provision of services as part of a business is a matter regulated by the definition of 'employee' in s 213 of the LRA."

This position is appropriate since, under the PDA, detrimental treatment is regarded as an unfair labor practice. Thus, restricting the protection under the PDA to employees strictly may affect the realization of the objectives of the Act.⁹⁷ It is possible that contractors who have been engaged by an employer to execute a project may become aware of serious infractions or corrupt practices that a regular employee may not be privileged to know. If the restriction is to be applied, if such contractor workers make a disclosure, despite its usefulness and praiseworthiness,

⁸⁹ South Africa Labour Relations Act No. 66 of 1995.

⁹⁰ Section 4 (1) of South Africa Protected Disclosure Act No. 26 of 2002.

⁹¹ Section 4 (2) (a) and (b) of South Africa Protected Disclosure Act No. 26 of 2002.

⁹² Section 9(1) of South Africa Protected Disclosure Act No. 26 of 2002.

⁹³ CWU v Mobile Telephone Networks (Pty) Ltd, BLLR 741 (LC) 747a-b), 2003.

⁹⁴ Such as the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993, the Unemployment Insurance Act No. 63 of 2001 and the Skills Development Act 97 of 1998.

⁹⁵ Niselow v Liberty Life Association of Africa Ltd (1998 ILJ 752 (SCA).

⁹⁶ Van Niekerk AJ in Discovery Health Limited v CCMA (2008 ILJ 1480 (LC) 1494 par 41.

⁹⁷ Pam Golding Properties (Pty) Ltd v Erasmus (2010 ILJ 1460 (LC).

they are not protected simply because they are excluded. This is not only illogical but capable of discouraging public interest disclosures.

4. Ghana

Ghana is a commonwealth Country in the West Africa sub-region like Nigeria, and both are members of the Economic Community of West African States (ECOWAS). Therefore, the two countries have several linkages. Ghana enacted the Whistleblower Act, No. 720 of 2006 to put in place a robust legal and institutional framework on whistleblowing and whistleblowers protection. The Act regulates how individuals may, in the public interest, disclose information that pertains to unlawful behaviors or corrupt practices of others. It also provides protection for whistleblowers against reprisal actions and funds to reward successful whistleblowers in a bid to encourage same. Section 1 of the Act specifies the types of information, which a disclosure could be made of. It includes information that tends to show that a financial crime has or is likely to be committed; there is non-compliance with the law or likelihood thereof; there is likely to be an injustice; misappropriation of funds, etc. According to section 2, despite the provision of any law to the contrary, a disclosure made in good faith is protected under the Act. Any employee is qualified to make a disclosure against the employer, or in respect of another employee, or by a person in respect of another.⁹⁸

According to section 3 of the Act, a disclosure could be made orally or in writing. If it is made orally, the recipient shall reduce same into writing for record purposes.⁹⁹ If a disclosure is made to any of the persons enumerated under section 3 of the Act, the person shall ensure that necessary details of the whistleblower and the incident being reported are taken.¹⁰⁰ These details shall be transmitted to the Attorney General where the person cannot investigate the report.¹⁰¹

Section 12 of the Act prohibits subjection of a whistleblower to any form of victimization by either the employer or another employee to make a disclosure. A whistleblower would be regarded as having been subjected to victimization if he/she is an employee and is dismissed, suspended, denied promotion, transferred against the whistleblower's will, harassed, intimidated, or declared redundant. From the tenor of the Act, acts/omissions that would be regarded as victimization against a whistleblowing employee are not exhaustive.¹⁰² A whistleblower, (whether an employee or not) who reasonably believes that he/she is being subjected to victimization, shall cause a complaint to be made to the Commission on Human Rights and Administrative Justice.¹⁰³ The Commission shall upon receipt

⁹⁸ Section 4(a) (b) and (c) Whistleblower Act, No. 720 of 2006.

⁹⁹ Section 5 Whistleblower Act, No. 720 of 2006.

¹⁰⁰ Section 6 Whistleblower Act, No. 720 of 2006.

¹⁰¹ Sections 7 and 8 Whistleblower Act, No. 720 of 2006.

¹⁰² Sections 12 Whistleblower Act, No. 720 of 2006.

¹⁰³ Section 13 Whistleblower Act, No. 720 of 2006.

of the complaint, conduct an inquiry and make necessary orders as the result of the inquiry demands. The orders could range from reinstatement of a dismissed or terminated employee, reversal of transfer or redundancy order, transfer of the whistleblower to any location that is favorable, etc. The order binds and is enforceable against the perpetrators and collaborators to the victimization.¹⁰⁴

In addition to lodging a complaint against victimization with the Commission, a victimized whistleblower may file an action at the High Court and claim damages for breach of contract or any other relief once the complaint has, first and foremost, been lodged with the Commission and made a determination.¹⁰⁵ If a hearing is before the Commission under section 14 of the Act, and the Commission is of the opinion that the whistleblower needs legal assistance, it shall issue a certificate directed to the Legal Aid Council to provide same.¹⁰⁶ If a whistleblower has reasonable cause to believe that his/her life or property or that of a member of his/her family is under threat, the police shall provide appropriate protection.¹⁰⁷ To encourage whistleblowing, the Act exculpates a whistleblower from both civil and criminal liability provided that the information contained in the disclosure was honestly believed to be true and equal was made in good faith.¹⁰⁸ A provision in an employment contract that inhibits an employee from making a disclosure is null and void and of no effect whatsoever.¹⁰⁹ Section 20 establishes a fund to reward whistleblowers which is an incentive to encourage whistleblowing. Thus, a whistleblower whose report leads to recovery of funds is entitled to a specified percentage of the recovered funds.¹¹⁰ If the rationale for giving incentive is clear, it is doubtful whether it should be encouraged since public interest disclosure is a civic obligation every citizen to perform in the interest of the society. It is necessary that if the reward is considered appropriate, it does not become the inspiration for participation but the desire to contribute to the safety and well-being of the society.

The Ghanaian law adequately protects whistleblowers, especially employees, and encourages whistleblowing against all forms of malpractices at the workplace, perpetuated either by the employer or an employee. It also rewards whistleblowers moderately and protects them from both criminal and civil liability if their act of whistleblowing is done in good faith, even if it turns out to be false. The legislation is a pathfinder and a welcomed development.

¹⁰⁴ Section 14(1) (a) (b) and (c) Whistleblower Act, No. 720 of 2006.

¹⁰⁵ Section 15 Whistleblower Act, No. 720 of 2006.

¹⁰⁶ Section 16 Whistleblower Act, No. 720 of 2006.

¹⁰⁷ Section 17 Whistleblower Act, No. 720 of 2006.

¹⁰⁸ Section 18 Ghana Whistleblower Act, No. 720 of 2006.

¹⁰⁹ Section 19 Ghana Whistleblower Act, No. 720 of 2006.

¹¹⁰ Section 21 Ghana Whistleblower Act, No. 720 of 2006.

E. Conclusion

Based on the analysis, in the interest of the public by an employee, whistleblowing is a permissible exception to the employee's obligation to protect the employer's interest while rendering faithful service. Whistleblowing helps to protect the public from acts/omissions of an employer that are likely or injurious to society. If an employee blows the whistle, giving the likely effect on the employer's business or the concerned personnel/third party, the whistleblower must be protected from reprisal attacks such as dismissal from employment, termination of employment, victimization, discrimination, refusal or delayed promotion, refusal of fringe benefits, stigmatization, etc.

Unfortunately, Nigeria has no subject-specific legal framework that regulates and protects whistleblowing and whistleblowers. Various legislations are inadequate. Thus, it is recommended that the Nigerian National Assembly should either enact or expedite action on the passage into law of the Safeguarded Disclosure (Whistleblowers Special Provisions, Etc.) Bill. The Bill should incorporate provisions such as those in the Indian legislation where police protection is made available for whistleblowers and their family members under appropriate circumstances. The reward system contained in the Indian Act should be incorporated into the Nigerian system. Protection against civil and criminal actions, according to whistleblowers, under British, South African, Ghanaian, and Indian law should also be incorporated into the Nigerian law. In addition, aside from putting in place a robust legal and institutional framework to regulate whistleblowing and provide whistleblowers protection, stakeholders prosecuting the eradication of corruption and vices in the society should engage in rigorous enlightenment of the citizenry of its civic obligation to get involved in whistleblowing against corruption and all forms of misconducts/unethical practices at workplace. Thus, trade unions or employees associations should enlighten their members of the need to be involved in whistling at their workplaces.

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