Disclosure of Wrongdoings and Protection of Employee Whistleblower under the Malaysian and Nigerian Law

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ABSTRACT

This article is a doctrinal legal research that employs comparative approach to analyse and explore employee whistleblower protection in Malaysia and Nigeria and under the common law as well. Employee whistleblowers who reported the misconduct of a fellow employee or superior within their organisation frequently face reprisal or retaliation, sometimes at the hands of the employer or the group which they have accused. While the article considered related instruments in the two countries under consideration in the analysis, the focus is on the Whistleblower Protection Act 2010 (WPA, 2010) and the Whistleblower Protection Bill 2011 (2011 Bill) in Malaysia and Nigeria, respectively. The article finds that the bulk of the present regime of whistleblower protection in Malaysia is contained in WPA 2010. The common law applies subject to the Act and other restrictions under the legal system of the country. In the case of Nigeria, on the other hand, as the 2011 Bill is still pending, the common law applies generally in guiding whistleblower protection in the country. The article further finds that the concept of whistleblowing is wider in common law than under the WPA 2010 in Malaysia or the 2011 Bill in Nigeria. The conclusion of the article is that while legislation is desirable for the promotion of whistleblower protection in the countries under consideration to accord protection against the fluid position of common law, the legislation should not be unduly used to limit the scope of the protection such as in terms of defining the authorities to whom the disclosure is to be made as suggested by both the WPA 2010 and the 2011 Bill and classification of persons that can make
disclosure as in the 2011 Bill and which is not in line with the modern trends in whistleblowers protection.

Keywords: Whistleblower; disclosure of; protection; malpractices

INTRODUCTION

This article examines protection of employee whistleblower for disclosing wrongdoing as contained in the Whistleblower Protection Act 2010 (WPA 2010) in Malaysia and the relevant instruments in Nigeria. It also surveys the position under the common law as applicable body of law in the two countries under consideration. The two countries, one African and the other Asian, were chosen for comparison due to a number of reasons bordering on their similarities and differences. In terms of the similarities, firstly, both countries belong to the common law world and are members of the commonwealth. Secondly, the legal system of both countries is pluralist, shaped by English law, Customary law and the Islamic law. However, the English law is the predominant law as far as the regulation of employment and industrial relations is concerned in the two countries. Thirdly, both countries are emerging economies that aspire to be one of the top players in the world economy in the near future. A country that seeks to be an important player in the world economy should of course ensure, among others, that her policies, laws and practices bearing on labour are robust, effective and efficient enough to attract both local and foreign investors. On the differences, Malaysia and Nigeria have different historical, cultural and socio-economic experiences. Though both countries are federal in structure with written constitutions, Malaysia operates the parliamentary system of government with constitutional monarchy, whereas Nigeria operates the presidential system of government. Unlike Nigeria, Malaysia has never experienced military rule and unitary system of government. Development of employment and industrial relations has been steady though slow in Malaysia compared to Nigeria due to a number of factors. The factors responsible for relatively more rapid development of employment and industrial relations in Nigeria than in Malaysia include ratification of all core International Labour Organisation (ILO) conventions by Nigeria, military intervention in Nigeria, drastic development in the area of employment and industrial relations in Nigeria ever since democracy was restored in the country in 1999. These developments include enactment of the National Industrial Court Act 2006, repeal and replacement of pension and workmen compensation legislations, amendment of Trade Unions legislation and amendment of the Constitution of the Federal Republic of Nigeria 1999 to constitutionally recognise National Industrial Court as a superior court of record. Despite these laudable developments in Nigeria, the country (unlike Malaysia), is yet to have a piece of legislation on the protection of whistleblowers. Such a legislation has a tremendous effect on modern employment and industrial relations.
It is against this background that this article examines employee whistleblower protection in the two countries as part of their employment and industrial relations in a way. The article is concerned with an employee, about his or her legal and moral obligations to disclose or report wrongdoings perpetrated by co-employees or the employer. The wrongdoings may be in forms of non-observance of established rules, regulations, principles and standards in corporate affairs, which may result in fraud and other unlawful conducts and even crimes such as insider-trading, theft and maltreatment of corporate stakeholders including third party stakeholders. Emphasis however is placed on the protection of the employee from adverse treatment or victimisation as a result of the report or disclosure he or she makes.

The objectives of the article are three. The first objective is to explore employee whistleblower protection under the Malaysian and Nigerian laws, as well as the common law as a general law in the two countries. The second objective is to carry out comparative analysis on employee whistleblower protection in Malaysia and Nigeria to bring to light the similarities and differences in the two countries. The third objective is to proffer recommendations for the improvement of employee whistleblower protection in the two countries under consideration.

**DEFINITION OF TERMS**

The words ‘employee’, ‘whistleblower’, ‘whistleblowing’, ‘disclosure’, ‘wrongdoing’ and ‘protection’ are essential to this discussion. It is imperative to explain these words and others related to them in the context of the discussion. This is to bring to light the ideas they convey to enable proper understanding of the analysis in the paper.

An employee is a counterparty in employer-employee relationship. Under the relationship, the employee provides dependent or subordinate labour for the employer as the other counterparty and receives wages in exchange. This unlike an independent labour provided by a self-employed or an independent contractor under principal-independent contractor relationship for a consideration that bears nomenclatures such as fee or contract sum. The employer and employee relationship is distinguished from any other similar relationship including agency, bailment, trust, sale and partnership relationships based on the civil law distinction between contract of employment or contract of service, which is used to be known as ‘master and servant contract’ on one hand, and contract for services or contract of commission or trust on the other (Hanami, 1979, 31).

Section 2 of the Employment Act 1955 (Act 265) of Malaysia and section 54(1) of the National Industrial Court Act 2006 of Nigeria define the terms ‘employee’ and ‘employer’. However, unlike the Whistleblower Protection Bill 2011 of Nigeria (2011 Bill), the Whistleblower Protection (Act 711) 2010 (WPA 2010) of Malaysia does not define the above two terms. Section 32 of the 2011 Bill defines employee to mean ‘a person who
works for another person, company or organisation or for the Federation and who is paid or entitled to be paid for organisation services rendered but does not include an independent contractor’. Definition of an employee in the bill is perhaps thought necessary because the bill expressly mentions employee as one of the persons qualified to make disclosure of impropriety. Definition of employee in the WPA 2010 is apparently unnecessary because the provisions dealing with persons entitled to make disclosure are not specified. As a corollary, the Bill defines an employer in the same section 32 to include ‘an individual, a body corporate or unincorporated of the Federation who or which engages the services of or provides work for any other person and pays for the services, and a person acting on behalf of or on the authority of the employer’.

Regarding whistleblowing, the term has been literally defined as ‘[exposing] something bad that someone is doing, especially by bringing it to the attention of other people’ (Cambridge, 2010, online). A whistleblower is thus ‘a person who informs people in authority or the public that the company they work for is doing [something] wrong or illegal’ (Oxford, 2005, online). There may not be a universally acceptable definition of the terms ‘whistleblowing’ and ‘whistleblower’ from the legal point of view. This is because of the uncertainties surrounding them, especially when it comes to determination of circumstances protected by the whistleblowing law. While reference is made to some legally oriented attempts to define the terms to at least have working definitions, it is important to note that what is important is not the definitions of the terms but the definitions of the circumstances and conditions of whistleblowing which enable whistleblowers, particularly employee whistleblowers, the focus of this paper, to be entitled to legal protection as whistleblowers.

Whistleblowing seems to be legally and technically defined in the following statements: ‘the reporting of a wrongdoing that needs to be corrected or terminated in order to protect public interest’ (Asian Institute of Management, 2006, 15); ‘a colloquial term usually applied to the raising of concerns by one member of an organisation about the conduct or competence of another member of the organisation or about the activities of the organisation itself’ (Dehn, 2003); ‘passing on information from a conviction that it should be passed on despite (not because of) the embarrassment it could cause to those implicated’ (Gilan, 2003, 37). Whistleblowing has recently started to be viewed as a culture. It involves ‘a culture that encourages the challenge of inappropriate behaviour at all levels’ (Cm 6407, Tenth Report, 2005). It is a culture of raising concern by a member of staff about wrongdoing or misdeed taking place in his place of work (Shipman’s Inquiry, 2005).

Regarding whistleblowers, they are described as persons (usually workers) who at their own risk, having been ‘motivated by a sense of personal, and/or public duty,
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may expose what they perceive as specific instances of wrongdoing, which may be within the private and/or public sector’ (Gilan, 2003). Broadly speaking, whistleblowers are those persons who speak out publicly or to prescribed authorities concerning wrongdoing detrimental to the public which manifests in any way. The wrongdoing may be in private or public sector. It may be perpetrated by a current or ex-employee of the organisation concerned or even by a member of the public who does not have any relationship with that organisation. The wrongdoing may cut across public wrongs (crimes) and civil wrongs ranging from financial scandal or cheat, corruption or mismanagement to health and safety issues that may bring about decline or total collapse of the organisation or an immeasurable danger to the public, if not checked.

It is instructive to note here from the definitions of ‘whistleblowing’ and ‘whistleblower’ given that they tend to focus on employee whistleblower. Other possible whistleblowers are reflected only when the definitions are couched in broad terms. It is also important to note from the definitions that the wrongdoing contemplated may take various forms that are open ended. The wrongdoing is apparently perpetrated by insiders to the organisation. It can also involve outsiders where the insiders connive with them to perpetrate the wrongdoing. Wrongdoing may be harmful to the organisation concerned and/or the general public. Serious wrongdoings or even minor wrongdoings perpetrated over time may result in loss of reputation, competitiveness, diminished productivity and even ultimate failure and collapse on the part of an organisation. The negative impact of wrongdoing on the public may manifest in many forms such as low quality or even harmful goods and services and unemployment with its accompanying social evils.

Indeed, the term ‘wrongdoing’ is so central to the issue of whistleblowing that it features in attempts to define the terms ‘whistleblowing’ and ‘whistleblowers’ including those considered above. The concept of whistleblowing itself is basically about control of wrongdoing. The term ‘wrongdoing’ is therefore defined in both the WPA 2010 and the 2011 Bill. The instruments however adopt other nomenclatures rather than the term ‘wrongdoing’. The term ‘improper conduct’ is used in section 2 of WPA 2010 as equivalent to the term ‘wrongdoing’ and central term in the definition of whistleblower to mean ‘any conduct which if proved, constitutes a disciplinary offence or a criminal offence’. Section 2 of the WPA 2010 therefore defines a ‘whistleblower’ as ‘any person who makes a disclosure of improper conduct to the enforcement agency under section 6’. On the other hand, the equivalent of the term ‘improper conduct’ in the WPA 2010 is ‘impropriety’ in the 2011 Bill. Impropriety is defined in section 1(2) of the Bill as ‘a conduct which falls within any of the matters specified in subsection (1).’ A whistleblower is therefore defined in section 1(3) of the 2011 Bill as ‘a person who makes a disclosure of impropriety.’
It is instructive to note that in the definition of whistleblower in both the WPA 2010 and the 2011 Bill, the term ‘disclosure’ appears. This shows that the term is central to the definition of whistleblower. It is equivalent to the term ‘reporting’ that features in the non-statutory definitions of ‘whistleblowing’ and ‘whistleblower’ as considered earlier. The disclosure or reporting by a whistleblower in the context of whistleblowing is therefore that of wrongdoing, ‘improper conduct’ or ‘impropriety’. As a corollary, the term ‘law’ used in the title of this topic signifies the legal protection of whistleblowers for whistle-blowing in disclosing or reporting wrongdoing, improper conduct or impropriety as the case may be in the jurisdictions under consideration, namely, Malaysia and Nigeria.

THEORETICAL AND METHODOLOGICAL FRAMEWORK

Whistleblowing policy or mechanism is used by modern organisations as part of their internal control system to prevent or mitigate wrongdoings arising from conflicts of interest so as to achieve good corporate governance practices (Meng & Fook, 2011). Agency theory foresees conflicts of interest in the running of affairs of corporate entities and thus advocates for mechanisms that will ensure that such conflicts are prevented or minimized. Therefore, whistleblowing mechanism, among other corporate mechanisms, is put in place to ensure that wrongdoings arising from conflicts of interest in the running of the affairs of corporate bodies are prevented or mitigated. The classical agency theory foresees conflicts of interest between managers and shareholders of companies. It presumes tension between shareholders and corporate managers and presupposes control mechanisms in the running of companies. The basic assumption of the classical agency theory is that managers will act opportunistically to further their own interest before that of the shareholders (Tsegba, 2011). By the modern approach to agency theory, conflicts of interest do not only arise between shareholders and managers of companies. They also exist among shareholders, particularly between majority and minority shareholders, and between the corporate entity and other stakeholders of the entity such as employees, creditors, customers and even the public at large (Kraakman et al., 2009, 2). Whistleblowing mechanism is designed not only to protect the interest of particular corporate stakeholders such as shareholders or employees but the public interest at large in both private sector and public sector organisations. Disclosure by an employee whistleblower may be about a wrongdoing that is injurious to the public at large as opposed to a wrongdoing against employees as a class of corporate stakeholders or any other particular class of the stakeholders. Employee whistleblowers serve public interest in drawing the attention of the authorities to corporate wrongdoing being perpetrated against public interest so that proper action can be taken to stop it and prevent future occurrence (Apinega, 2015).
This article is a doctrinal legal research that employs comparative approach to examine protection of an employee against disclosure of the employer’s corrupt acts or any form of malpractices such as fraud, health and safety violations or any acts that are injurious to certain persons or the organisation in general. The analysis of primary and secondary sources of law from the jurisdictions under consideration, Malaysia and Nigeria; the primary sources are statutes and cases/common law whereas the secondary sources are the articles and text books explaining the primary sources as used in the article.

WHISTLEBLOWING UNDER THE WPA 2010 AND THE 2011 BILL

As highlighted in the preamble to the Act, the WPA 2010 provides for whistleblower protection and for other incidental matters. The preamble describes the Act as “An Act to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector, to protect persons making those disclosures from detrimental action, to provide for the matters disclosed to be investigated and dealt with and to provide for other matters connected therewith”. The Act is divided into seven (7) parts: preliminary; administration; whistleblower protection; dealing with disclosure of improper conduct; complaints of detrimental action and remedies; enforcement, offences and penalties; and general.

On the other hand, the preamble to the 2011 Bill describes the bill as a bill for “An Act to provide for the manner in which individuals may in the public interest disclose information that relates to unlawful or other illegal conduct or corrupt practices of others; to provide for the protection against victimisation of persons who make these disclosures; to provide for a fund to reward individuals who make the disclosures and to provide for related matters”. The Bill is subdivided into six (6) parts: protected disclosure; procedures for disclosure; action by person who receives disclosure of impropriety; protection of whistleblowers; offences and penalties; and miscellaneous.

However, it should be noted at this juncture that direct and indirect provisions relating to whistleblowers have existed in the Malaysian and Nigerian body of law and practiced long before the enactment of the WPA 2010 and emergence of the 2011 Bill, respectively.

In the case of Malaysia, provisions in the Companies Act 1965 (CA 1965) and Capital Markets and Services Act 2007 (CMSA 2007) illustrate pre-WPA 2010 whistleblower protection in the country. Section 368B(1) of 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 Companies (the Registrar). The company concerned is prohibited by section 368B(2) from removing, demoting, discriminating
or interfering with the officer’s lawful employment due to the report the officer made to the Registrar. Legal action or tribunal process cannot be taken against an officer who makes a report to the Registrar in good faith. The CMSA 2007 contains similar provisions in section 321. However, the provisions in section 321 of the CMSA 2007 limits the protection to a chief executive, internal auditor, company secretary or any officer responsible for preparing or approving financial statements or information who makes the disclosure to the Securities Commission or the stock exchange of any information relating to the breach of any provision in the securities law or rules of the stock exchange or any matter which adversely affects the financial position of a listed corporation to a material extent and other provisions in other legislations on whistleblower protection are now complemented for example, sections 320 and 321 of the Capital Market and Services Act 2007 are now supplemented by the WPA 2010.

On the other hand, in the case of Nigeria, whistleblowing provisions have existed in one form or the other. The provisions of the Freedom of Information Act 2011 (FIA 2011) and that of some codes of corporate governance in the country bear on whistleblowing. Section 28 of the FIA 2011 provides that: (1) Notwithstanding anything contained in the Criminal Code, Penal Code, the Official Secrets Act, or any other enactment, no civil or criminal proceedings shall lie against an officer of any public institution, or against any person acting on behalf of a public institution, and no proceedings shall lie against such persons thereof, for the disclosure in good faith of any information, or any part thereof pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act, if care is taken to give the required notice. (2) Nothing contained in the Criminal Code or the Official Secrets Act shall prejudicially affect any public officer who, without authorisation discloses to any person, any information which he reasonably believes to show: (a) a violation of any law, rule or regulation; (b) mismanagement, gross waste of funds, fraud, and abuse of authority; or (c) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Act. (3) No civil or criminal proceedings shall lie against any person receiving the information or further disclosing it.

It is clear from the above section 28 of the FIA 2011 that the protection provided is limited to public officers and to the disciplinary or judicial actions they may be otherwise liable under relevant instruments. Reprisal or retaliatory actions by employers or senior officers against the public officers are not envisaged by the section or the FIA 2011 as a whole. It is the retaliatory actions that place in forms of harassment, discrimination and other similar acts that are contemplated under whistleblower policy or mechanism.

While the FIA 2011 provides for some limited whistleblower protection and in an
It is instructive to note that the above article 32 which provides for whistleblowing policy in the SEC Code 2011 merely makes recommendation for companies to have whistleblowing policies and establish and maintain whistleblowing mechanisms. The article is silent on whistleblower protection against reprisals or retaliatory actions by employers or senior officers of the companies let alone the agency to which the whistleblower may report to where he or she suffers victimisation.

It is pertinent to consider the following questions:

(i) the person who can make disclosure of wrongdoing;
(ii) the basis to make disclosure; and
(iii) conditions for whistleblowing protection.

In relation to the above question (i), the WPA 2010 does not limit who can make disclosures. This suggests that any person can make a disclosure provided that he or she satisfies the conditions discussed under question (ii). The 2011 Bill however, does make classifications as to persons who can make the disclosure. Section 2 of the Bill provides that “disclosure of impropriety may be made-(a) by an employee in respect of an employer,(b) by an employee in respect of another employee, or (c) by a person in respect of another person, or an institution”. It can be said that this classification by the 2011 Bill to single out employees in items (a) and (b) is not necessary since item (c) suggests that any person can make a disclosure. Perhaps the classification is deemed
necessary to emphasize the significant role of employees in whistleblowing as insiders are the ones presumed to be better informed about any wrongdoings that may be perpetrated in their organisations, either by co-employees or some other persons. The non-classification in the WPA 2010 is in line with modern trends. Many definitions relating to whistleblowing and whistleblowers including some of those the authors considered in part two of this paper suggests that the person reporting or disclosing the wrongdoing to be employee or ex-employee of the organisation concerned and not a journalist or even ordinary member of the society. The modern approach as reflected in many whistleblowing protection statutes across jurisdictions is to consider any person a whistleblower by his or her actions, not necessarily identified by the organisation concerned in any way (Meng & Fook, 2011).

Meanwhile, in answering the second question on the condition of making disclosure, section 6 of the WPA 2010 provides that:

“(1) A person may make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct: Provided that such disclosure is not specifically prohibited by any written law. (2) A disclosure of improper conduct under subsection (1) may also be made: (a) although the person making the disclosure is not able to identify a particular person to which the disclosure relates; (b) although the improper conduct has occurred before the commencement of this Act; (c) in respect of information acquired by him while he was an officer of a public body or an officer of a private body; or (d) of any improper conduct of a person while that person was an officer of a public body or an officer of a private body. (3) A disclosure of improper conduct under subsection (1) may be made orally or in writing provided that the authorized officer, upon receiving any disclosure made orally, shall as soon as it is practicable, reduce it into writing. (4) A disclosure made in relation to a member of Parliament or a State Legislative Assembly shall not amount to a breach of privilege. (5) Any provision in any contract of employment shall be void in so far as it purports to preclude the making of a disclosure of improper conduct.

It would be appropriate to set out herein the counterpart provisions in the 2011 Bill and thereafter discuss the two sets of provisions together. Section 1(1) of the Bill provides that:

“A person may make a disclosure of information where that person has reasonable cause to believe that the information tends to show- (a) an economic crime has been committed, is about to be committed or is likely to be committed; (b) another person has not complied with a law or is in the process of breaking a law or is likely to break
a law which imposes an obligation on that person; (c) a miscarriage of justice has occurred, is occurring or is likely to occur; (d) in a public institution there has been, there is or there is likely to be waste, misappropriation or mismanagement of public resources; (e) the environment has been degraded, is being degraded or is likely to be degraded; or (f) the health or safety of an individual or a community is endangered, has been endangered or is likely to be endangered.”

Both the provisions of the WPA 2010 and the 2011 Bill are detailed and extensive. The basis for making disclosure in the WPA 2010 as stated above is “reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct” and in the 2011 Bill as also stated above is “reasonable cause to believe”. The phrases “reasonable belief” and “reasonable cause to believe” mean the same thing. Whether or not disclosure can be made in a given circumstances has been made open to subjectivity. It is for the court to ultimately determine whether or not there is ground for making disclosure in a given case. Unfortunately, there are no direct judicial authorities explaining the phrases in the context of whistleblowing in the jurisdictions under consideration namely, Malaysia and Nigeria. However, cases decided in other contexts determining similar phrases would be useful. For example, cases decided in determining what constitutes “reasonable suspicion” to allow an arrest in the context of criminal law would be useful. Cases considered in the discussion below on the position of common law would also be relevant. In a nutshell, to justify disclosure in all the circumstances highlighted in the above two instruments, the basis is “reasonable belief” or “reasonable cause to believe”, respectively.

In relation to question (iii) above, it is a condition for the enjoyment of whistleblower protection under the WPA 2010 and the 2011 Bill by virtue of section 2 and section 3 respectively that the report of the wrongdoing must be made to the appropriate authorities.

Upon satisfaction of the requirements discussed above relating to corporate wrongdoing and its disclosure, the whistleblower of a corporate wrongdoing would be entitled to whistleblower protection under the WPA 2010 and the 2011 Bill. By the provisions of section 2 of the WPA 2010, it is a protection against detrimental action that includes: (a) action causing injury, loss or damage; (b) intimidation or harassment; (c) interference with the lawful employment or livelihood of any person, including discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to a person’s employment, career, profession, trade or business or the taking of disciplinary action; and (d) a threat to take any of the actions referred to in paragraphs (a) to (c)”.
against victimization, court actions and application to court for assistance. The basic concern of most whistleblowers is how they can be protected against reprisals by their employers, reprisals in the form of unfair dismissal, job reassignment, pay cuts or loss of promotion. The WPA 2010 envisages such reprisals and thus provides that a worker should not be subjected to any detriment by reason of his disclosure as highlighted above.

THE COMMON LAW POSITION
The common law perceives the employer and employee relationship as ‘fiduciary’ in nature. There is an implied duty of fidelity and loyalty and secrecy owed by every employee to his employer. It requires that the employee must have undivided or utmost loyalty to the employer. By reasons of the fiduciary relations, the employee is required to render good and faithful service to the employer or duty of fidelity - a term which was recognised by the English Court of Appeal (Lamb v Evans, 1893). Since its inception, the duty of fidelity had been applied in many different circumstances. For example, the duty of the employee to render faithful and loyal service towards the employer; the duty to obey the lawful and legitimate instructions of the employer; duty to exert reasonable degree of competence and skill; duty to protect employer’s property and exercising trust placed on him by the employer; the duty not to dishonestly secure benefits at the employer’s expense; the duty not to accept commission, bribe and not to work in the spare time with a competitor of the original employer (Ashgar Ali, 2005, xxi). The employee is also under a duty not to disclose confidential information acquired during the course of employment (Agomo, 2011, 122; Ahmad, 2012, 57-60).

Apart from the above, it is also a fundamental duty for the employee to obey all the lawful and reasonable orders and instructions of the employer. The employee is not entitled to disobey the order of his superior. Any refusal or disobedience of an order or instruction of a superior “will bring a chaotic situation to any organization in terms of discipline, performance as well as industrial peace (Ngeow Voon Yeans v Sungei Wang Plaza Sdn Bhd & Anor, 2004). “Wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally” (Laws v London Chronicle (Indicator Newspapers) Ltd., 1959).

However, a dismissal allegedly on grounds of the employee’s refusal or failure to obey an illegal order of the superior would be deemed unlawful. In JT International Trading Sdn. Bhd. v Mat Kamel Jusoh & Ors, it was stated: “Obedience to the orders of a supervisor is not without limits and hence it is not a defence for an employee to carry out any act instructed by a supervisor that is illegal or unlawful”. For example, in Morrish v Henlys (Folkestone) Ltd (1973),
the refusal to obey the superior order to falsify the account books at the garage where he worked was held not to be in breach of the contract. Again, in Gregory v Ford (1951), the refusal of the employee to take on the road a vehicle not covered by third party insurance was again held not to be in breach of the contract. It must be noted that in relation to an employee who was sick, he will only be excused from performing orders rendered impossible by the illness (Marshall v Alexander Sloan & Co Ltd., 1981).

Reverting back to the duty of fidelity, and in the context of confidential information, the duty of fidelity requires an employee not to disclose confidential information of the employer to a third party nor use the information obtained in the course of his or her employment to the detriment of the employer. The contract of employment would normally contain provision restraining the employee from misusing or disclosing confidential information of the company, its dealings, transactions and financial matters after the employment relationship has ended (Fong Kah Chan v Ibuza Corporation Sdn. Bhd., 2010). The above is also implied in the contract of employment (Schmidt Scientific Sdn Bhd v Ong Han Suan, 1997). In other words, it may be expressed or implied in the contract of employment that the employee shall not reveal any of the employer’s confidential information or trade secret to any third party without prior approval in writing from the company (Faccenda Chicken Ltd v Fourler, 1987; Merry Weather v Moore, 1892; Universal Thermosensors Ltd v Hibben & Others, 1992). The employer has the right to restrain an employee (Patrick Chin Beng Chew v Time Dotcom Berhad, 2009) or its former employee from misusing the confidential information acquired while in employment for his own benefit or divulging the confidential information to others (Chuk Chin Leong v Milimewa Superstore Sdn Bhd [2009]; Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd [1984] 1 CLJ 325; Tiu Shi Kian & Anor v Red Rose Restaurant SdnBhd [1984] 1 CLJ 325 Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32).

Any violation thereof would enable the employer to obtain legal redress and this includes an injunction to restrain the employee from disclosing or disseminating the employer’s confidential business information and trade secrets. It is worth mentioning that the information that the employer sought to be protected must be confidential in nature. “What makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process” (Saltman Engineering Co. Ltd, and Others v Campbell Engineering Co. Ltd., 1963). In relation to the obligation of a recipient of information, Megarry J in Coco v Clark (1969) noted that “if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would...
have realised that upon the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence”.

It must be added that the employees’ duty of fidelity or the contractual duty of confidentiality may be lifted in very exceptional circumstances for example where the disclosure is made in the interest of the public. Information concerning wrongdoings in the workplace such as pilfering or misusing company’s funds and gross mismanagement, by the company’s senior executive, may be disclosed when the employee has reasonable grounds to believe that such wrong has been committed. This exception applies notwithstanding it is not expressly stated in the contract of employment (Initial Services Ltd v. Putterill and Anor, 1968). In Gartside v Outram (1856), Wood VC states that “there is no confidence as to the disclosure of inequity”. However, certain requirements has to be observed before the disclosure could be made, i.e. the disclosure is done in good faith, with a reasonable belief that the information to be disclosed is substantially true and that the disclosure must be done to the right person or body in the organisation for example, health and safety issues to the health and safety executive. The employees are encouraged to follow their organisation’s internal procedures for reporting of a wrongdoing.

It is worth noting that in Houlihan v Douglas College Students’ Society (2002), a Canadian case, it was held inter alia, that an employee owes a general duty to the employer to report the fellow employee’s wrongdoing. In that case, the manager was found to be in breach of her duty of faithfulness when she failed to disclose to the employer of a suspected theft by a subordinate employee. In particular, it was stated that “by keeping silent about acts that may amount to dishonesty so as to protect other employees, she misled her employer and breached the faith interest to the work relationship”. An employee who comes forward reporting a fellow employee’s wrongdoing must be treated fairly and protected from reprisals such as dismissal, lay-offs, suspension, demotion or transfer, discontinuation or elimination of a job, change of work location, reduction in wages, changes in hours of work or a reprimand, among others.

CONCLUSION
It is undeniable fact that whistleblowing plays a positive function in enhancing accountability, transparency and good governance in any organization and the elaborate legislative regimes is aimed at deterring reprisals. In Malaysia the WPA 2010 is the applicable law as far as whistleblowers protection is concerned. The applicable rules in common law will apply in the country subject to the WPA 2010. In the case of Nigeria, however, the rules of applicable common law in the country apply in relation to the subject as the 2011 Bill is yet to be passed into law. The WPA 2010 and the 2011 Bill seek to concretize whistleblowers protection in the respective countries including in
relation to employees. However, defining the authorities to whom the disclosure is to be made as in both the WPA 2010 and the 2011 Bill and classification of persons that can make disclosure as in the 2011 Bill suggest restrictions on the protection. While legislations are desirable for the promotion of whistleblower protection and to address the fluid position of the common law on the issue, they should not be unduly used to limit the scope of the protection. We therefore recommend review of the WPA 2010 to remove the unnecessary restrictions and the passage of revised 2011 Bill that is free from restrictions including unnecessary classification of persons that can make disclosures which is not in line with the modern trends in whistleblower protection.

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