Whistleblowing and Doctors

Whistleblowing Law

WHISTLEBLOWING – Protection or Illusion?

Whistleblowing is one of those words bandied around as if the meaning was obvious. Often people think it means they can raise all sorts of complaints about the goings on in the workplace or elsewhere under this heading and not suffer any consequences.

In these times of austerity it is also very easy and understandable for employers to seek to cut corners as a way of saving money and possibly jobs. With heightened awareness of the general public through the use of social media we are all more likely to have an opinion, even if ill-informed, on what should or should not have happened in certain situations.

Whistleblowing is one approach to dealing transparently with concerns. However it's focus under the law only covers the raising of complaints and concerns specified under the initial legislation, the Public Interest Disclosure Act 1998 (PIDA), and as set out in amendments to the Employment Rights Act 1996 (ERA). These acts were subsequently strengthened by the Enterprise and Regulatory Reform Act 2013 (ERRA) including a right not to suffer a detriment by a colleague, or agent of their employer and an extension of the meaning of "worker" to include casuals, freelancers, executive directors and even some self employed people.

The underlying principle of the legislation is to provide

protection from detriments is to the whistleblower.

The aim is for workers/employees/contractors to first report their concerns internally (most often to their employer) rather than going to the press, the police or by using social media.

This aim could be seen as keeping the lid on matters, which should be given a public airing, e.g. concerns about a hospital's cleanliness. However an important thing to remember is that "washing one's dirty linen in public" could easily lead to alleged breaches of contract concerning confidentiality, disciplinary action and possible dismissal whereas using the protection offered by the whistleblowing legislation is generally a much safer course of action.

Concerns can also be raised with those are not employers but are known as "prescribed persons". This includes regulatory bodies such as the GMC, GDC, NMC, FCA, the Care Quality Commission, Local Authorities, and even the National Assembly for Wales. We would always suggest taking detailed advice from qualified lawyers before reporting matters to such bodies.

The sort of issues one can raise issues about (known as qualifying disclosures) are defined under section 43 B (1) ERA as "any disclosure of information" relating to one of the specified categories of relevant failure.

The six categories of Qualifying Disclosures are:

1. That a criminal offence has been committed, is being committed, or is likely to be committed (this category is straightforwardly easy to identify in most cases but more problematic say in a case of alleged gross negligence manslaughter by a doctor)

2. That a person failed, or is likely to fail to comply with any legal obligation to which he or she is subject ("legal obligation" is not defined although decided cases have

included issues such as breaches of the Equality Act, Road Traffic Acts and breaches of employment contracts).

3. That a miscarriage of justice has occurred, is occurring or is likely to occur (examples can include both civil and criminal).

4. That the health and safety of any individual has been endangered, is being or is likely to be endangered (cases include complaints about lack of urgent care in residential homes. It is also noteworthy that employees are in any event duty bound to report such matters under existing Health and Safety regulations).

5. That the environment has been damaged, is being, or is likely to be damaged.

6. That information tending to show that any matter falling within any one of the above has been, is being, or is likely to be deliberately concealed (this is a catch all category concerning deliberate cover ups).

Any relevant disclosure must be one where there is a "reasonable belief" held by the worker making it (i.e. what they thought, not what a reasonable person might think, although rumours, gossip, and suspicion will not be enough) and it must be in the "public interest". At first glance it may seem obvious that any issue raised under the categories above would be in the "public interest". However the term is not defined in the legislation and thus it is open to courts and tribunals to clarify if required. The public interest test was brought in by the government to prevent workers, who were really involved in private employment disputes, from hijacking the legislation.

Where the alleged failure took place is irrelevant as far as protection of the worker is concerned. Thus it could occur outside of the UK as long as it is connected with the UK. A claim of alleged failure can also be made about a client or a

third party rather than just the employer.

Although it is best to make a disclosure in written form (including by way of letter, grievance, memo or potentially a recording) as long as it contains facts it can be deemed to be a disclosure. Most public sector employers have a whistleblowing policy, which needs to be followed, but a failure to do so does not make a complaint invalid. We would always advise a whistleblower to take some advice before making their disclosure. This could be from a well informed colleague, a Citizens Advice Bureau, a local trade union or from a qualified lawyer depending on the complexity of the concerns.

Unfortunately it is our experience at Doctors Defence Service that **doctors**‘ otherwise valid concerns can often be brushed aside by those receiving them (such as employers), because they are poorly expressed, omit the dates when matters became known, or are made anonymously.

We also advise employers in receipt of concerns how best to respond, so as not to fall foul of the law.

However it needs to be stressed that if a worker discloses matters outside of these categories then they will not be protected against ‘detriments’.

Those who qualify as workers as indicated above include (s43K ERA) agency and similar workers, home-workers, freelancers, trainees (except when the course is being run by an educational establishment), former workers and NHS practitioners. The term NHS practitioners includes the NHS Commissioning Board, Local Health Board, Health Authority or replacement bodies carrying out the same functions.

If a whistleblower is picked on as a result, or disciplined, or dismissed i.e. suffers a detriment a claim may be lodged in the Employment Tribunal (s47B, s111 ERA). Fees are no longer payable to the tribunal for lodging such claim or for any

hearing (this is a recent change which may encourage more workers to raise such complaints). However again legal advice should be obtained before lodging a claim/or attending a preliminary hearing in order to avoid mistakes in presentation or the case being struck out before a substantive hearing. We provide advice and representation throughout this process.

A copy of the claim is sent to the employer for their response but may also be sent to a regulatory body if appropriate (we also handle such third party matters). Such claims have to be made within the normal Tribunal three months time limit. The Tribunal normally has a preliminary hearing before fixing a substantive hearing of the case. Remedies in a successful claim may include an award of financial compensation in relation to the infringement to which the complaint relates (s49 (2) (a)) and any loss which is attributable to the act, or failure to act which infringed the complainant's right not to be subjected to a detriment (s49 (2) (b)). The loss payable is not limited by any cap or to the actual financial loss suffered, and can also include a sum for injury to feelings and personal injury. Costs as in other Employment Tribunals can be awarded but this is not the norm.

In summary it is most important that workers are able to feel confident that they will be no worse off or lose their jobs if they decide to pursue a whistleblowing complaint. However if unfortunately they do suffer detriments then providing they act without delay and obtain good advice then their complaints should be given due consideration, and hopefully lead to improvements in the workplace. Employers should also welcome such issues being raised and not see those who raise them as troublemakers. A last thought, perhaps the Grenfell Tower tragedy could have been prevented had there been those willing to put their head above the parapet and act as whistleblowers.

Other Whistleblowing Sources

The NHS website on whistleblowing sets out the NHS's position

and pathway for whistleblowers to follow:

NHS England on Whistleblowing (Website)

NHS Scotland on Whistleblowing (PDF)

NHS Wales on Whistleblowing (Website)

UK Government Whistleblowing Guidance (Website)

NHS Northern Ireland – exploration of Whistleblowing polices in the year2016 (PDF)

Article on Whistleblowing in Northern Ireland by Amy Barr (Website)

If you would like to discuss a **whistleblowing** matter with a lawyer at Doctors Defence Service, in strict confidence and without obligation, call us on: **0800 10 88 739**

Article by David Welch

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