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Strengthening the protection of whistleblowers

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Employment analysis: Does the recent review of the protections of NHS whistleblowers highlight weaknesses in the general approach to whistleblowing in the UK? Shah Qureshi, a partner and head of the employment law team at Bindmans LLP, talks us through the legal minefield of whistleblowing and the key concerns raised by the review.

Original news

NHS whistleblowers to get legal protection, LNB News 11/02/2015 128

Those who speak up about poor care in the NHS will get new legal protections, following the announcement of plans in the Freedom to Speak Up review conducted by Sir Robert Francis. The review stated the NHS has a moral obligation to support and encourage its staff to speak out, to protect the integrity of the service as well as patient safety.

What are the key legal concerns raised by the Freedom to Speak Up review?

The review concluded that the law seeking to protect whistleblowers is based entirely in an employment context. Under UK law, in the Employment Rights Act 1996 (ERA 1996), as amended by the Public Interest Disclosure Act 1998 (PIDA 1998), a worker cannot be victimised or dismissed for whistleblowing if it is in the public interest, regardless of their length of service.

The legislation is intended to protect employees who blow the whistle, or make a 'protected disclosure' to their employer or other recognised person. If a worker does make a protected disclosure, they must reasonably believe that:

- what they are disclosing demonstrates that a criminal activity has or is being committed
- there is a breach of legal obligations by the employer
- there is a health and safety concern, or
- there has been a miscarriage of justice or that the environment is being damaged

Those who suffer detriments, such as being victimised by the NHS managers or lose their jobs as a result of making a disclosure can take a claim to an employment tribunal.

A key legal concern is that the legislation provides a remedy to detriments suffered by whistleblowers, rather than protection from them. Sir Robert describes it as reactive, rather than preventative--as such there is no evidence that bringing a claim in the employment tribunal prevents victimisation in the NHS.

The legislative protection whistleblowers have is 'after the event' and, where a claim is successful, is usually limited to compensation that is usually no replacement for someone's career or livelihood. A further issue is that whistleblowers have to satisfy so many legal hurdles to be able to bring a claim for that claim to be successful.

Additionally, employment judges are often not equipped to judge whether a disclosure has been handled appropriately or whether the concerns raised have been dealt with.

How does transparency in the NHS feed into legal disputes?

A key issue encountered within legal disputes, whether an unfair dismissal claim or a clinical negligence claim, is the ready availability of evidence to the claimant. Naturally, within any organisation, including the NHS, this lack of transparency creates suspicion and mistrust among NHS staff and patients.

In the whistleblowing context, this lack of transparency is likely to be a deterrent to raising concerns, on the basis that there is mistrust in the investigative process or a fear that the investigations could turn against the whistleblower. Anecdotally, this appears to have been the case with many NHS trusts. As a result, those concerns about patient safety or other practices that affect the public may not come to light until it is too late. When it comes to whistleblowers, this lack of transparency could feed into unnecessarily protracted legal disputes, which may be resolved if the findings of any investigations in the disclosure are shared with the person who raised the concern.

An open and transparent culture within the NHS, where people feel safe to raise concerns, could result in a lesser need for workers to blow the whistle on practices that are in the public interest, as information on the practices are readily and clearly available. This transparent process could feed into a reduction in clinical negligence disputes. Information gained from investigations into concerns for patient safety could be used as a way to improve services, learn from mistakes and to stop it happening again.

A concern raised by the Francis review is the use of settlement agreements in employment disputes and to the confidentiality clauses they contain. In employment law, any confidentiality clauses which prevent a signatory from making a protected disclosure are void. However, the review found that there were some clauses which contained restrictions that seemed unnecessarily draconian, which could be a hindrance to transparency. Francis recommends that greater care needs to be taken in the drafting of confidentiality clauses, which should only be included if they are genuinely in the public interest.

Does the reluctance to blow the whistle highlight the deficits in the legal protection of whistleblowers?

It is common to hear of whistleblowers in the NHS with disclosures relating to the standard of care of patients as well as financial irregularities. The treatment of whistleblowers in the NHS is a particular cause of concern, as highlighted in the Freedom to Speak Up review.

Despite the protections theoretically afforded by UK law, Sir Robert reported that many NHS staff wanted to speak up but feared victimisation or dismissal. He reported evidence of serious concerns being dismissed by managers, and the people who broached them facing disciplinary action. This means that staff may be reluctant to blow the whistle, fearing irreparable damage to their careers, personal life and health. The reluctance of staff to speak up and the fear of victimisation demonstrate the deficits in the protection of whistleblowers.

This is because, by the time the protections under ERA 1996 and PIDA 1998 kick in, much of the damage will already have been inflicted on the member of staff. The protection affords a remedy after the detriment. This can be meaningless to someone who has been suspended, bullied, victimised or dismissed. The report found that the NHS continues to handle disclosures poorly and that some staff members who were brave enough to speak up suffered from devastating effects on their well-being and career prospects. While they can seek ultimately recourse through the employment tribunal, this can be a very expensive, lengthy, and harrowing process.

Moreover, the law only applies to 'workers' as defined in PIDA 1998. It is possible for recruiters to avoid appointing those who are known to have left a previous job after blowing the whistle.

The Francis review found that more needs to be done to encourage resolution of issues through informal channels and to ensure systems are in place that support and protect staff who felt the need to blow the whistle. In his report, Sir Robert recommends the adoption of 20 principles, with a total of 38 supporting actions.

Some recommendations to improve the protection of whistleblowers include:

- 'Freedom to Speak Up' guardians in every hospital to help protect and support staff and to relay their concerns--this is welcomed, as NHS staff need someone to go to to raise concerns without fear of suffering any detriment
- a 'National Whistleblowing Guardian' working with the Care Quality Commission to review the most serious cases--this person must have the power to scrutinise the handling of any concern
- training for all NHS staff on how to report and handle such protected disclosures
- ensuring every NHS Trust 'actively fosters a culture of safety and learning in which all staff feel safe to raise concerns'
- requiring NHS Trusts to publish details of formal protected disclosures, and
- requiring the Health Secretary to review annually how these complaints have been dealt with

It is interesting to contrast the UK whistleblowing protection with that of the US. In the financial sector, the Dodd-Frank Act provides whistleblowers with financial rewards if the information they provide to the authorities leads to an enforcement action with damages that are above $1m. More generally, The False Claims Act allows private citizens to sue, on behalf of the government, those that commit fraud against government programmes such as healthcare providers. In compensation for the risk and effort of blowing the whistle and bringing the case, the whistleblower can be awarded a portion of the damages, typically between 15-25%.

Have there been any notable legal disputes arising from whistleblowing?

There have been numerous legal disputes arising from whistleblowing across all sectors, but perhaps more notoriously within healthcare and specifically the NHS.

One notable dispute is that between Dr Kim Holt, founder of whistleblowing campaigning group Patient's First, and Great Ormond Street Hospital (GOSH). Dr Holt, a consultant paediatrician attached to GOSH, raised issues about staffing levels and client care in 2006, and was subsequently investigated on spurious grounds and suspended for three years with full pay. Her concerns were ignored and eventually events culminated in the sad death of 'Baby P', whose injuries were not picked up by a locum consultant. She reportedly was offered £120,000 by GOSH to sign a settlement agreement with a confidentiality clause which she rejected. In 2011, Dr Holt eventually was able to return to work, but she was obliged to work in another clinical setting that was not linked to GOSH.

Shah Qureshi is a partner and head of the employment law team at Bindmans LLP. His practice covers all areas of employment and discrimination law, and he has particular experience in representing executives and professionals in both contentious and non-contentious work. He has enjoyed success in pursuing discrimination and whistle-blowing cases against large corporations and public bodies, and notably acted for Professor Heather van der Lely in the successful settlement of her high value whistleblowing claim against UCL. He was one of a number of lawyers consulted by Sir Robert Francis as part of the Freedom to Speak Up Review. He is also the author of the equal opportunities chapter of Tolley's Employment and Personnel Procedures, and has written legal articles for a number of publications including the Employment Law Journal, Employment Lawyers' Association, DLA Briefing and Sitra Bulletin.

Interviewed by Jane Crinnion.

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