A Global Approach to Public Interest Disclosure

What can we learn from existing whistleblowing legislation and research?

Edited by **David B. Lewis**

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Preface

It is worth noting that the manuscript for this book is being submitted in the same month as the twenty-fifth anniversary of the world's worst industrial disaster. This took place in Bhopal, India and is estimated to have led to the deaths of over 20 000 people with a further 80 000 still affected by the aftermath. As in other major accidents, safety risks and defects had been reported well before the gas explosion occurred but those responsible chose not to deal with them. While it is not claimed that whistleblower protection laws would have prevented this catastrophe, it is asserted that effective confidential reporting policies and procedures which provide for external disclosures of information where appropriate can play a significant role in disaster management. It is hoped that this book will stimulate further debate about the value of, and mechanisms for, establishing a whistleblowing culture in modern society.

David Lewis
16 December 2009

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1. Introduction

Professor David B. Lewis

This book is based on the papers presented and the issues discussed at a two-day international conference on whistleblowing organized by and held at Middlesex University, London on 18 and 19 June 2009. As the title 'Ten years of public interest disclosure legislation in the UK: what can we learn from experiences at home and abroad?' suggests, this event was planned to coincide with the tenth anniversary of the UK's Public Interest Disclosure Act 1998 (PIDA 1998) coming into force.[1] The conference attracted speakers and delegates from 11 countries and the debates that ensued have helped to shape the contents of this book. However, in order to ensure that the work is of relevance to the widest possible audience, not all the conference papers have been converted into chapters. In particular, the editor has tried to ensure a balance between inputs based on the law and other disciplines and to avoid placing undue attention on the situation in the UK. Although the authors have written in the light of their experiences of whistleblowing laws and/or research in particular locations, they have attempted to generalize their conclusions and recommendations. It is therefore hoped that the end product will be of value internationally to scholars and practitioners who are interested in discussing the principles upon which whistleblowing legislation might be based and the areas in which future research might be conducted.

In Chapter 2, His Honour Judge McMullen assesses the impact of PIDA 1998 during its first ten years. He starts by placing the legislation in the context of employment rights generally and notes that employment tribunals also hear cases under other statutes concerned with the disclosure or non-disclosure of information, for example, the Human Rights Act 1998 and the Freedom of Information Act 2000. Judge McMullen identifies some key drivers affecting the whistleblowing legislation, including an increasingly questioning culture and a radically changing economic climate brought about by recession. Having emphasized the desirability of settlements being reached, he points out that the protection of whistleblowers has been treated by the UK courts as an issue of discrimination and that this is important as a matter of principle. According to Judge

McMullen, there are five main problems in handling public interest disclosure cases which are all fact-sensitive. These are: deciding between the competing reasons of the employer and the employee; the mixed motives of the employee; the power of the chronology; causation; and reasonableness of belief. He concludes: 'Ten years on from the enactment of these advanced rights, the law should have been clarified by the courts so as to allow employees to know where they stand, and employers to respect their right to raise issues in the public interest'.

Chapter 3 offers an assessment of whistleblowing protection elsewhere in Europe and, in doing so, Dr Vandekerckhove uses a three-tier model derived from the structure of the UK legislation. He argues that, although the sole stated purpose of PIDA 1998 is to protect the whistleblower, the successive recipient tiers for disclosure make previous tiers accountable for investigating and dealing with suspected wrongdoing. In stage one the information does not leave the organization but at the second stage it becomes known to an agent (proxy) acting on behalf of wider society. However, stage two will only be invoked if the organization fails to correct the malpractice for which it is responsible or does not deal adequately with the concern being raised and/or the person raising it. The third level 'is a watchdog over the second tier should it not take its deterring or rectifying duties seriously'. According to Dr Vandekerckhove, this model has the following crucial characteristics: the whistleblowing scheme must include all three levels; the second tier must have a controlling mandate with regard to the first-tier organization, derived directly or indirectly from a political representation of society; and whistleblowers' accessibility to the second and third levels (in terms of employment status and subject matter of their concern) should be the same as to the first tier. Dr Vandekerckhove concludes his wide-ranging review by commenting that there is not much whistleblower protection in Europe and that the legislation that exists is extremely diverse. He also accepts that 'the normative content of the three-tiered model is not resonating in Europe'.

Turning to the United States, in Chapter 4 Professor Terry Dworkin outlines the major recent developments in whistleblowing laws and explains why they are often ineffective in achieving their aims. In doing so she focuses on three significant issues: dealing with financial fraud; rewards as a spur to whistleblowing; and protection for public employee whistleblowers. Professor Dworkin explains the rationale for the Sarbanes-Oxley Act 2002 and outlines how it operates before providing evidence of its failure. Similarly, she describes how the False Claims Acts have offered financial incentives for whistleblowing before suggesting that 'even this most successful whistleblowing law has significant problems'. Finally, protection under the Whistleblower Protection Act 1989 and the US Constitution is

discussed. Professor Dworkin concludes that since there is only an illusion of protection, whistleblowers need the tools to look after themselves. Her proposed solution is the education and empowerment of employees and the provision of rewards.

In describing the Australian experience of whistleblowing legislation in Chapter 5, Peter Roberts and Professor Brown point out that, at the time of writing, the Commonwealth government is on the threshold of introducing more comprehensive measures than currently exist in the eight states and territories. Even so, this is likely to be confined to the public sector only. In assessing how well current legislation is achieving its objectives, the authors point out that, while there is a high level of reporting, there are significant shortcomings at the organizational level in the way in which the relevant statutes are being interpreted and whistleblowers protected. Undoubtedly the very existence of legislation sends a clear symbolic message to the community. However, findings from the 'Whistling while they work' (WWTW) research project indicate that many public sector bodies only meet the minimum requirements necessary to satisfy the particular state government.

As Professors Miceli and Near observe in Chapter 6, after almost 30 years of empirical research, we now know quite a lot about why people blow the whistle when they suspect wrongdoing. However, many US findings are counter-intuitive and the authors suggest that this has led to the dissemination in the media of the following six myths: whistleblowers usually have purely altruistic motives; internal whistleblowing to authorities inside the organization is not true whistleblowing; wrongdoing is rampant in organizations today; most workers who observe wrongdoing report it; wrongdoing harms only those workers who are directly affected; whistleblowers have personalities or dispositions that differ from those of people who observe but do not report wrongdoing.

In their chapter Professors Miceli and Near offer a definition of whistleblowing and summarize a model of the process. They review the empirical findings in the US relevant to the myths and then restate them in a way that is more consistent with the evidence. Thus, most whistleblowers have mixed motives for their actions, including altruism; most use internal channels to report wrongdoing; the majority of those who use external channels have first used internal channels; the incidence of wrongdoing varies with the organization and there is no empirical evidence that it is worse now than in the past; most workers who observe wrongdoing do not report it; wrongdoing harms many workers aside from those who are directly affected; research is mixed and incomplete concerning the ways in which whistleblowers have personalities or dispositions that differ from those of workers who observe but do not report wrongdoing.

In Chapter 7, Doctors Skivenes and Trygstad build on their research in Norway in order to demonstrate the importance of roles and perceptions of loyalty in the whistleblowing process. They suggest that one reason for the high rate of reporting could be that Norwegian workers regard themselves 'as empowered and autonomous in the sense that they have high job security, different channels for "voice" inside the organisation, and State arrangements that provide extensive welfare services'. This chapter discusses whether employees should be loyal to their employer, professional standards, service users, co-workers, their local community, their own moral standards or their own self-interests. The authors shed light on the loyalty dilemmas that employees might face and how this might influence their propensity to whistleblow. Doctors Skivenes and Trygstad use a theoretical model consisting of three different roles that employees can identify with: employee, professional and citizen. Each has different perspectives, orientation and loyalty obligations, and is considered in the light of empirical data from Norwegian whistleblowing studies.

The authors draw the following conclusions about what is to be gained from applying the role model in whistleblowing research. First, it is a tool to identify different obligations of loyalty, values and standards. Second, the model makes it possible to understand how the same situation can be assessed very differently by employees, depending on the type of role they adopt. Finally, the chapter suggests that more positive outcomes for whistleblowers may be one of the benefits of a labour relations system where communication and democratic participation are important components.

In Chapter 8, based on experience in South Africa, Professor Uys considers whistleblowing as an example of organizational citizenship. Having examined the possible forms of such behaviour, she attempts to explain why employers might respond negatively to expressions of 'voice'. She then outlines the way in which the Protected Disclosures Act 2000 works and draws attention to some of its limitations. Subsequently, she turns to the issue of organizational culture and its implications for whistleblowing. In particular, she explains the concept of *ubuntu* and notes that this South African collectivist value may reinforce the notion that disclosures of wrongdoing should be discouraged as acts of disloyalty. Professor Uys asserts that whistleblowers can only act as organizational citizens if a culture is in place which promotes the reporting of wrongdoing. She concludes by calling for further research on the social and cultural context of whistleblowing legislation.

In the penultimate chapter, some key findings from the 'Whistling while they work' project in Australia are discussed by Dr Cassematis and Professor Mazerolle. In terms of demographics, non-reporters do not

appear to be fundamentally different from whistleblowers. This suggests that there may be other factors that influence whistleblowing choices. The WWTW findings illustrate that the relative positioning of the wrongdoer to the whistleblower materially influences the nature of the post-report experiences. Another important contextual issue often overlooked in previous research is that co-worker support and solidarity may provide a buffering mechanism against public sector misconduct engaged in by supervisors.

The WWTW results also shed light on the finding that adverse treatment in the workplace may be contagious and foster a climate of fear and intimidation. The strong predictive relationship between management and co-worker behaviour suggests that great care must be taken to ensure that the post-report treatment of whistleblowers by managers is not negative. By preventing this the further development of an excessive climate of poor behaviour by co-workers can be avoided. In short, avoiding treating whistleblowers badly in response to their reporting is likely to reap many benefits for both whistleblowers and their organizations.

In the final chapter, the book's editor suggests that, in the light of experience to date, it may be inappropriate to strive to create a model whistleblowing instrument. Indeed, he notes that currently there is no consensus about what the purpose or objectives of such legislation should be or what amounts to relevant wrongdoing. In these circumstances he calls for a debate about the principles upon which legislation might be based and whether any overarching principles can be identified, for example, coverage of both the public and private sectors. This includes discussion about whether workers (and others) should have a duty as well as a right to raise concerns, and whether employers should have a legal obligation to establish procedures. Other key issues are: the definition of reportable wrongdoing; the relevance of motive and the appropriateness of offering rewards to potential whistleblowers; and whether or not it is desirable to establish a specialist public interest disclosure agency. Finally, the editor raises the possibility of using collective agreements or individual contracts as an alternative to legislation.

The book concludes with some suggestions about an agenda for future research. Perhaps the fundamental issue here is the legitimacy of using particular methods. Unless sufficient resources are made available by funding bodies it seems inevitable that there will be a temptation to continue with small-scale trials and simulations rather than comprehensive studies of real situations. Finally, it is acknowledged that what is included in the proposed agenda is unlikely to be definitive and may well be quite contentious. Anyone wanting to engage in the debate is invited to join an international whistleblowing research network which is currently being

coordinated by the editor at Middlesex University. Those wanting further information can email d.b.lewis@mdx.ac.uk

NOTE

1. The legislation came into force on 2 July 1999.

2. Ten years of employment protection for whistleblowers in the UK: a view from the Employment Appeal Tribunal

His Honour Judge Jeremy McMullen QC[1]

The Employment Appeal Tribunal (EAT) offices in both London and Edinburgh provide us with a constantly changing view of people at work. What follows is a reflection from these vantage points on some of the important issues raised by the introduction of public interest disclosure law in the UK. I will concentrate on practice at the expense of black letter exegesis which can be found elsewhere (see Bowers et al., 2007; Lewis, 2008).

In terms of context, there have been more and more Employment Tribunal and EAT hearings on a trio of statutory measures which deal with the disclosure and non-disclosure of information, namely the Public Interest Disclosure Act 1998, the Human Rights Act 1998 and the Freedom of Information Act 2000. The number of cases brought to employment tribunals in Great Britain in 2006–07 rose by 15 per cent, from 115039 in 2005–06 to 132577. The total number of complaints 'accepted' increased by 18 per cent to 238546. A single claim can include complaints relating to a number of jurisdictions so the number is roughly two for one. The number of cases disposed of during 2006–07 also rose, by 19 per cent, from 86083 to 102597. There was an increase of 26 per cent in multiple cases and a 3 per cent rise in single cases in 2006–07, that is, claims against the same employer. Multiple cases now make up 60 per cent of all cases received, compared with 36 per cent in 2004–05.

I see the following drivers affecting the UK's whistleblowing jurisdiction. We live in an increasingly questioning culture encouraged by legislation and public awareness. The Human Rights Act 1998 has been at the forefront of awareness raising since its implementation in 2000. The range of human endeavour which is the subject of supervision and oversight in the hands of regulators and ombudsmen all contribute. There are now

wide areas for legal challenge, for example, parking, schools and social entitlement generally. There is less respect for old-style authority figures, for example, employer, teacher, local authority, doctor, bank manager, Member of Parliament, Employment Tribunal. In addition, there is a radically changing economic climate brought about by the recession in which the following features contribute to the challenging of executive and employer decisions and thence, almost automatically, it seems, to litigation. First is growing unemployment. With fewer jobs available, there is less inclination to shrug off harsh workplace decisions and walk, and more imperative to challenge them. Secondly, difficult invidious decisions have to be made between peers, for example, in a redundancy situation. The same applies to promotion choices. Employers have to act swiftly and sometimes robustly to avoid catastrophic consequences for their business. Challenges to pay decisions are made more frequently, for example, against what are seen to be the arbitrary withholding of bonuses, pay freezes and the lack of opportunity for overtime. Thirdly, the workload imposed on those who are left in work is increasing and felt to be unfair. More work, less pay, fewer staff.

Once cases reach litigation, parties face increasing Employment Tribunal intervention, itself spawning a whole new enterprise in interim applications and appeals. You can now expect rigorous case management across all tribunal jurisdictions with serious consequences for those who do not follow the directions. A new robust approach is being taken by employment judges in deciding issues at pre-hearing reviews. Substantial power is given in the rules to employment judges to resolve quite serious issues of jurisdiction, and to strike out cases which are misconceived and have no reasonable prospect of success. There is also more scope for conciliation now that Section 18(3) of the Employment Tribunals Act 1996 has been amended to give the Advisory Conciliation and Arbitration Service (ACAS) discretion to get involved at different stages of a claim. With the repeal of the statutory conciliation freeze, ACAS's duty to conciliate subsists throughout the proceedings until the tribunal delivers a judgment. I have yet to see any conciliation in a whistleblowing case, as to which I take a pessimistic view. I have never seen a case or an appeal settle. Rather sadly, many claimants have a dogged outlook based on the following syllogistic logic: I have discovered wrongdoing. I have suffered at work. The two are connected. The Tribunal's refusal to so find is a further cover-up by those in power.

Not surprisingly, in this and in all other jurisdictions where children are involved, very strong views are expressed. Take the case of Bernice Pinnington.[2] Ysgol Crug Glas school caters for pupils with severe and complex learning difficulties. She was employed as a school nurse until

she was dismissed on 3 July 1999, two days after PIDA 1998 took effect. Relations between Ms Pinnington and the head were not good for years. She began to make allegations about the resuscitation of terminally ill children at the school and about the adequacy of the medical room there. She alleged that there was a policy of non-resuscitation. An enquiry was ordered by the council, which found no basis for the allegations made. She claimed unfair and wrongful dismissal and that she was subjected to detriment on the ground that she had made a protected disclosure. The Employment Tribunal dismissed the claims after a nine-day hearing. We dismissed her appeal against the rejection of her claim for unfair dismissal but allowed her appeal against the rejection of her claim for protected disclosure detriment and directed a re-hearing. Both parties sought permission to go to the Court of Appeal.

Permission to appeal on the unfair dismissal point was refused. Both Keene LJ and Neuberger LJ agreed with us. They did, however, grant permission to appeal for the school on the protected disclosure point. They also referred to the good sense of a settlement between the parties as preferable to spending further and disproportionate costs on the appeal for which permission had been given. Keene LJ said:

> I am bound to comment that it would be most regrettable if there were to be further litigation on a point which is likely to be of little practical value to either party. The costs of a full Court of Appeal hearing seem certain to exceed to a huge degree any amount which is likely to be at stake or to turn on the outcome of this argument about detriment during those two days . . . I would strongly urge the parties to try to reach agreement on this aspect of the case, rather than letting it go to a hearing before the full court. It simply is not worth the cost.

Heedless, the school pressed on. In the Court of Appeal, Mummery LJ said: 'It is indeed a pity that no settlement has been reached.' In the end Ms Pinnington lost and the Employment Tribunal judgment was restored.

In my opinion, there are two approaches to whistleblowing. First, I have held that the protection of whistleblowers is a protection against discrimination. Actions against a person's status, such as gender, racial group, sexual orientation or disability are all strands of discrimination. It is a particular form of discrimination, since it protects not a category of person but acts done by a person in a particular mindset. To that extent the protection can be grouped with that afforded to those who carry out a trade union activity, and who raise a health and safety issue. I regard them all as forms of discrimination since action is made unlawful where it treats people differently for an irrational reason. This also explains why there has been such a substantial growth in this subject. Raising complaints of wrongdoing by those in authority is now developing from a boutique