

# Whistleblowing in the health-related professions

Gerald Vinten

## Introduction

The correspondence and publicity following the disciplining and subsequent settlement in his favour, prior to an Industrial Tribunal, of Stockport Health Authority Charge Nurse Graham Pink, suggested that the urge to blow the whistle was at almost epidemic proportions in the British National Health Service (NHS). It might be surmised that the only device which kept this under control was the fear of discipline and dismissal. This fear has been increased by the contracts of employment of the NHS Trusts which have outlawed whistleblowing. There are similar pressures for those working in other health-related professions, and in health and safety, and environmental protection<sup>1</sup>.

It is important to question whether such severe strictures are in the public interest, or whether they are there to make the life of senior managers easier, or to make it possible to ensure that doctors, nurses and other caring professionals and support staff conform to budgetary constraints without resort to campaigning.

## Definition

Despite the considerable discussion on whistleblowing it is rare to find an exact definition. The first time 'whistleblowing' was used was the 1963 publicity on Otto Otopka<sup>2</sup>. He gave classified documents on security risks in the new administration to the chief counsel of the Senate Subcommittee on Internal Security. The Secretary of State, Dean Rusk, dismissed him from his job in the State Department for conduct unbecoming an officer. Alternative terms may be conscientious objector<sup>3</sup>, ethical resister<sup>4</sup>, mole or informer<sup>5</sup>, concerned employee<sup>6</sup>, rats<sup>7</sup> or licensed spy<sup>8</sup>.

My own definition is: 'The unauthorised disclosure of information that an employee reasonably believes evidences the contravention of law, rule or regulation, code of practice, or professional statement, or that involves mismanagement, corruption, abuse of authority, or danger to public or worker health and safety.'

This lack of authorisation can apply to internal or external whistleblowing. The internal variety refers to bypassing the normal managerial hierarchy such as one's immediate boss or reporting to another department

Gerald Vinten, Professor of Business Policy, University of Luton, Editor, *Managerial Auditing Journal*, 82 Speed House, Barbican, London EC2Y 8AU, England

or to a general manager when there are other available channels. This variety is open to manipulation and suppression. External whistleblowing refers to going to those outside the organisation - the media, a member of Parliament or a professional body. It indicates a serious breakdown of communication between employer and employee and may lead to dismissal.

## The legal situation

Does the law side with the whistleblower or with the employer? English law has an implied common law duty not to misuse confidential information belonging to the employer and this duty may continue after the employment has finished. Since there are practical problems in taking legal action against ex-employees, the employer's best option is to seek from employees an express restraint clause.

An exception is made when disclosure is in the public interest. In the 1968 case of *Initial Services Ltd. vs Putterill*, Putterill had resigned as sales manager and then handed to the *Daily Mail* documents providing details of an unlawful price protection ring involving the employers and of price rises attributed to employment tax in order to disguise higher profits. Lord Denning held that the public interest exception to the duty of confidence extended to '...any misconduct of such a nature that it ought to be disclosed to others... The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation.'

The only legislation to support whistleblowing concerns oil rigs<sup>9</sup> - The Offshore Safety (Protection against victimisation) Act 1992. Offshore workers dismissed for raising valid concerns could now make a complaint of unfair dismissal to an industrial tribunal.

## The law: whistleblower protector?

Is the law on the side of the whistleblower? A series of stringent filters need to be passed for the public interest defence to be upheld. These include:

1. Serious misdeeds or serious public harm.
2. The whistleblower acted reasonably and in good faith.
3. The information should be communicated to an appropriate recipient. (Who is an appropriate recipient remains unclear.)
4. The way in which the information was acquired was

not more of a threat to the public than the value of what was revealed.

Is the way ahead unproblematic? Again, the answer has to be 'No'. Apart from the ambiguities and crudities of employment law, there are practical aspects. In 1973, in the wake of a number of well-publicised hospital scandals to which attention was drawn by whistleblowing, the Committee on Hospital Complaints Procedure, chaired by Sir Michael Davies, added realism: 'We have never had any doubt that in the hospital service the investigation and satisfaction of complaints is primarily a function of management. But in the past there have undoubtedly been occasions when management has not discharged this function... It would be unrealistic to suppose that there will never be breakdowns in the future.'

Despite this recognition, the path of the whistleblower is never easy<sup>10-14</sup>. Conduct and character come under scrutiny and many begin to wonder that the matter seems to have been turned on its head with the whistleblower now in the dock. The whistleblower may find that the normal courtesies of the organisation have been withdrawn and every infraction of rules and procedures, howsoever petty, is acted upon.

The trouble with whistleblowing is that there is plenty through which to blow. Gerald Mars shows that occupational crime, sometimes referred to as 'part-time crime'<sup>15</sup> is an accepted part of everyday jobs<sup>16</sup>. Covert rewards are so intimately connected with some occupations that it is impossible to understand sections of the economy without reference to them. It is necessary to be highly selective to avoid becoming a professional full-time whistleblower.

In a survey of 87 American whistleblowers from the civil service and private industry, all but one experienced retaliation, with those employed longer experiencing worse reprisal. Harassment came from peers as well as superiors and most of those in private industry and half of those in the civil service lost their jobs. Of the total, 17% lost their homes, 8% filed for bankruptcy, 15% got divorced and 10% attempted suicide<sup>17</sup>.

A similar result emerged from a six year long US study of 64 whistleblowers, ethical resisters who felt impelled to speak out because they had witnessed a serious violation of legal and ethical standards. Most were in their thirties or forties and were conservative persons devoted to their work and organisations. They had built their careers by conforming to the requirements of bureaucratic life. Most had been successful until they were asked to violate their own standards of workplace behaviour. Whistleblowing resulted in economic and emotional deprivation, disruption of careers and personal abuse<sup>18</sup>.

There could be few instances more tragic than that of Stanley Adams, a former executive with Swiss pharmaceutical manufacturer Hoffman La Roche. Adams was imprisoned under Swiss law for exposing, in 1973, the company's illegal price-fixing methods to the European Commission. His wife's probable suicide, the financial ruin of the family and lack of support from the European Commission are portrayed in the film *Song for Europe*. With an ironic twist, Adams was arrested at Bristol railway station in 1993 for plotting to kill his new wife.

Not all favour whistleblowing. Peter Drucker views it as 'informing' and shows that Western societies that encouraged informers were bloody and infamous tyrannies - Tiberius and Nero in Rome, the Inquisition in the Spain of Philip II, the French Terror and Stalin. Drucker feels that there is no mutual trust, no interdependency and no ethics when whistleblowing prevails. Milton Friedman is also of this school of thought. Their views have not gone unchallenged. 'But informing is itself a value-laden interpretation, not a neutral description, of whistleblowing. It is by no means self-evident that whistleblowing is informing and Drucker offers us no support for his claim. Such support requires as its basis rigorous normative reflection; and it is reflection of this kind that is precisely the province of business ethics.'<sup>19</sup>

It can be argued that evading questions about the ethical implications of one's actions constitutes moral negligence<sup>20</sup>. Sound ethical thinking must be based on as full an understanding of a situation as it is possible to obtain and there is also a need to consider unintended or undesirable consequences of decisions<sup>21</sup>. Any view of life that stops short of a rigid totalitarian attitude must make allowances for the legitimacy of individuals asserting alternative moral standpoints and occasionally, in extremis, blowing the whistle. There are comparisons between whistleblowing and civil disobedience<sup>22</sup>. A text on strategic management includes a chapter on business ethics and suggests that whilst thoughtless observers may criticise whistleblowing as squealing, in fact, any enforcement of law and ethics must rely partly on whistleblowers<sup>5</sup>. Public good emanates from whistleblowing. The problems with the cargo doors on DC-10 aircraft in the 1970s were highlighted thus<sup>23</sup>.

A procedural point over which whistleblowers need to take particular care is that when they report abuse, there is no delay in making the report. Trained members of the staff whose responsibilities include the reporting of such incidents are likely to face disciplinary action themselves if their reports are made long after the abuse.

#### *The outcome*

Even assuming near saintliness and a cast-iron

psychological constitution capable of withstanding considerable pressures on self and family, there remains the question as to what exactly will be the outcome of whistleblowing.

An industrial tribunal can order an employer who has wrongfully or unfairly dismissed or victimised an employee to compensate the employee for his losses. Awards are low in relation to the economic harm and damage to career suffered and rarely exceed £2,500.

Reinstatement can be ordered but this actually occurs only in about 1% of cases. The reason is that relations between employer and the whistleblower have invariably deteriorated to the extent that it is easy for the employer to convince the tribunal on the impracticality of re-instatement. The employee too is usually not willing to re-enter a hostile work environment.

### Case studies

Ken Callanan, student nurse in a psychiatric hospital, reported a charge nurse for constantly abusing patients. Callanan was discriminated against by management, other staff and the trade union. Forced to resign by such behaviour, he received compensation in a tribunal for constructive and unfair dismissal.

Dr. Helen Zeitlin appealed successfully at a special hearing at the Department of Health in London against her redundancy, which came on the heels of her comments at a public meeting about inadequate resourcing of certain services in her health district in Redditch.

Dr. Chris Chapman, biochemist at the Leeds General Infirmary, exposed fraud relating to medical research and additional waste of public money. He was sacked the day before his 50th birthday to avoid paying him pension. He was re-instated following his legal victory.

Desmond Smith, a black health visitor, won damages of £27,000 against the racism of which he complained in his health authority.

### Utilising the services of whistleblowers

Whistleblowers can act on faulty perceptions. A few manipulate to their advantage after being justifiably accused of a disciplinary offence. This counter-attack is the converse of a tactic often adopted by employers against their whistleblowers. Research shows that most whistleblowers are not habitual troublemakers. Rather, they are of the type that forms the bedrock of any organisation. Devoted, loyal and, if anything, conservative, they are spurred to blow the whistle only by intense disquiet on witnessing unethical action.

The best approach is for the institution to invite comments, observations and criticism with proof to back the statements made. Managers with foresight will

ensu-re that they learn about nasty problems in their organisations before these stories hit the media by setting up hotlines and encouraging employees to use them.<sup>24</sup> The US has passed Whistleblower Protection Acts for the public sector with a compensation fund of up to \$500,000 per individual. This country recognises that whistleblowers have an important contribution to make. They can save lives, increase efficiency and effectiveness.

### A code of ethics for whistleblowers

Norman Bowie lists his requirements of justifiable acts of whistleblowing:

1. The whistleblowing stems from the moral motive of preventing unnecessary harm to others.
2. The whistleblower has used all the available internal procedures for rectifying the problem before making public disclosure. (This may be precluded under certain special circumstances.)
3. The whistleblower has 'evidence that would persuade a reasonable person'.
4. The whistleblower perceives serious danger from the violation.
5. The whistleblower acts in accordance with responsibilities for 'avoiding and/or exposing moral violations'.
6. The whistleblower's action has reasonable chance of success.

Others have suggested practical points to ponder:

1. How comprehensive is the worker's knowledge of the situation? Is the worker's information accurate and substantial?
2. What exactly are the unethical practices involved? Why are they unethical? What public values do these practices harm?
3. How substantial and irreversible are the effects of these practices? Are there any compensating public benefits that justify these practices?
4. What is the employee's obligation to bring up such practices by working within the organisation or by going outside it? What probable effects will either 'alternative have on the company's practices? On society? On the firm? On the employee?'<sup>26</sup>

Sisela Bok sees three cascading levels of conflict. Is whistleblowing in the public interest? The professional ethic requiring collegial loyalty clashes with responsibility to the public. Third is the fear of retaliation.<sup>27</sup> Jenson asks whether the whistleblower has a low tolerance for shortcomings and asks how often and with what intensity does one blow the whistle.<sup>28</sup> Jenson also contrasts one's obligation to the organisation and colleagues with that to the profession the family, oneself, the general public and to basic values such as truth, independence, fairness,

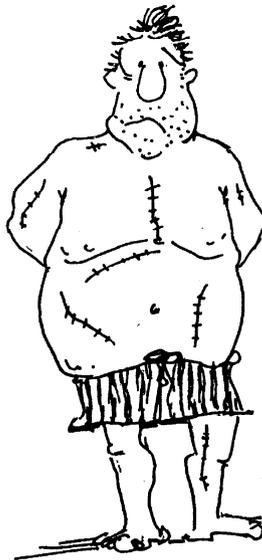
cooperation and loyalty .

The Government Accountability Project in Washington D.C. has produced a survival guide for whistleblowers which suggests that 'A well planned strategy has a chance of succeeding but unplanned or self-indulgent dissent is the path to professional suicide.'

Whistleblowers may never have it easy. Career mortality and occupational morbidity should be maintained at the lowest possible level. Positive whistleblowing should be recognised as being intended for the general good. Increasing awareness of health ethics will improve the quality of debate and action.

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