Whistleblowing in the NHS

A Guide for Advisors and Employee Representatives in the Royal College of Nursing

1 INTRODUCTION

This seminar is aimed at RCN legal advisors and representatives and is designed to give some practical guidance on representing members who may have or intend to "blow the whistle" on issues they encounter at work in the NHS.

The specific procedure for bringing a whistleblowing claim under the Employment Rights Act 1996 ["ERA"] is similar to many other claims brought in the Employment Tribunal. It is assumed that those attending this seminar are familiar with this and therefore I propose to focus primarily on the particular features of a whistleblowing claim, to highlight some common pitfalls and to offer some practical tips.

2 INTRODUCTION TO PIDA

Statutory protection for whistleblowers began with the Public Interest Disclosure Act 1998 ["PIDA"] which introduced new protections for employees into the ERA, specifically s47B and s103A (discussed below). There were further changes in 2013 following the introduction of the Enterprise and Regulatory Reform Act 2013 ["ERRA].

These provisions will be discussed in greater detail below, but to summarise the protections :-

1. If an employee is dismissed because the reason or principal reason is because s/he made a protected disclosure, the dismissal is automatically unfair [s103A ERA}.
2. A worker has the right not to suffer detriment done on the ground that s/he made a protected disclosure [s47B ERA].

3 WHISTLEBLOWING IN THE NHS

The importance of whistleblowing protection for NHS workers and employees was put into sharp focus following the Mid Staffordshire NHS Foundation Trust Public Inquiry.

The final report from Robert Francis QC was published on 6th February 2013. Whilst the report was at pains to point out that the NHS was a service of which the country should be justly proud, staffed by thousands of dedicated staff and managers, it also confirmed that, within a decade of the introduction of the PIDA, conditions of appalling care were able to flourish in the main hospital serving the people of Stafford and its surrounding area.[1] The final report built on the conclusion of an earlier Inquiry which was set up by Andy Burnham MP, then Secretary of State for Health in 2009, following concerns raised by an HCC report into the Trust's higher than average mortality rates.

[1] Mid Staffordshire NHS Foundation Trust Public Inquiry, p7.

The conclusions of the Francis report were wide-ranging. Few agencies and professional bodies escaped criticism, including the Royal College of Nursing. It led to 290 recommendations. It is not the purpose of this seminar to rehearse the findings of the Francis report but in the context of whistleblowing in the NHS, it highlighted that there was a lack of openness and transparency when it came to raising concerns about patient safety.

> *"Whistleblowing – It is clear that a staff nurse's report in 2007 made a serious and substantial allegation about the leadership of A&E. This was not resolved by Trust management. These issues were not made known by the Trust at the time to any external agency, but they were known to the Royal College of Nursing (RCN) because of its involvement with the personnel involved."*[2]

The report called for the replacement of this negative culture with a new culture of openness, transparency and candour. It recommended that all contracts and policies should be reviewed to bring them in line with these principles, including a prohibition on "gagging" clauses which seek to limit legitimate public interest disclosure of issues surrounding patient safety and care. It recommended that a duty of candour obligation be enshrined in statute.[3]

> "The common culture of caring requires a displacement of a culture of fear with a culture of openness, honesty and transparency, where the only fear is the failure to uphold the fundamental standards and the caring culture"

On the same day the Francis report was published, the Prime Minister announced that he had asked Sir Bruce Keogh to review the quality of care and treatment provided by those NHS trusts and NHS foundation trusts that were persistent outliers on mortality indicators. A total of 14 hospital trusts were investigated as part of the review and 11 of those were placed into Special Measures due to concerns about the quality of care provision. Whilst this has led to some improvement, the 1 Year On Review published on 4th August 2014 still raised questions as to what progress had been made in relation to employees' ability to raise concerns. Contrast the two examples below :-

<u>Basildon and Thurrock University Hospitals NHS Foundations Trust</u>

"Staff felt encouraged to speak up, raise concerns and be involved in the Trust."[4]

<u>North Cumbria University Hospitals NHS Trust</u>

"Poor culture with multiple whistleblowers forthcoming during the CQC inspection……At the time of the Keogh Review there were concerns about the lack of support for staff and effective, honest communication from middle and senior management level. This remained an issue. Staff reported being fearful of raising issues with managers and a number of staff were visibly upset when talking to us."[5]

[2] Francis Report, Summary of Findings, p42
[3] p75-76
[4] Special Measures: one year on, p20
[5] Special Measures: one year on, pp35-38

4 FREEDOM TO SPEAK UP

On 11th February 2015, two years on from the publication of his report into appalling standards of care in Mid Staffordshire, Sir Robert Francis QC published a further report following the Freedom to Speak Up review. The review was set up in June 2014 in response to continuing disquiet about the way NHS organisations deal with concerns raised by NHS staff and the treatment of some of those who have had the courage to speak up.

In his summary of the report, Francis made a number of observations[6] including :-

- Whistleblowers had provided convincing evidence that they raised serious concerns which were not only rejected but were met with a response which focused on disciplinary action against them rather than any effective attempt to address the issues they had raised.
- Whilst recent measures such as the duty of candour and the fit and proper person test may have encouraged staff to speak up, many of the contributions the review had received were recent and current
- There were shocking accounts of the way in which some whistleblowers had been treated. The genuine pain and distress felt by contributors was every bit as serious as the suffering he witnessed by patients and families who gave evidence to the Mid Staffordshire inquiries.
- Legal advisors to NHS organisations have tended to be influenced by an adversarial litigation culture with a focus on pre-empting an Employment Tribunal claim rather than to assist in the prioritization of the public interest, or to help to resolve a dispute informally by sitting round a table.

There were a number of recommendations arising from the report, most notably that the Government should review the protection afforded to whistleblowers with a view to including discrimination in recruitment by employers on the grounds of making a protected disclosure and that each NHS organization should appoint a local guardian (reporting directly to the Chief Executive) whom staff can approach to raise concerns.

In March 2015, the Secretary of State published a consultation paper on the report's recommendations and also tabled an amendment to the Small Business, Enterprise and Employment Bill in March 2015 to protect whistleblowers from discrimination by future NHS employers. Section 149 of the Small Business, Enterprise and Employment Act 2015 inserted Section 49B into the ERA :-

> **49B Regulations prohibiting discrimination because of protected disclosure**
>
> (1) The Secretary of State may make regulations prohibiting an NHS employer from discriminating against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.
>
> (2) An "applicant", in relation to an NHS employer, means an individual who applies to the NHS employer for—
>
> (a) a contract of employment,

[6] Freedom to Speak Up, Executive Summary, February 2015

(b) a contract to do work personally, or

(c) appointment to an office or post.

(3) For the purposes of subsection (1), an NHS employer discriminates against an applicant if the NHS employer refuses the applicant's application or in some other way treats the applicant less favourably than it treats or would treat other applicants in relation to the same contract, office or post.

The Act also introduced a regulation making power to impose a duty on prescribed persons (such as the CQC, Monitor and the professional regulatory bodies) to report annually on whistleblowing disclosures made to them.

The consultation closed on 4th June 2015 and on 16th July 2015 the Government published its response, "Learning not Blaming". Among the conclusions and proposals for implementation were that an Independent National Officer be appointed by the CQC by December 2015. Once in place the Independent National Officer will produce guidance on local implementation of the Freedom to Speak Up Guardian role and how this role will develop.

This is an area which will no doubt continue to develop and change across the coming months and years. In the Sections below, I will attempt to provide some pointers to enable advisors to successfully guide their members through the legislation which even Sir Robert Francis QC described as being "not easy to understand" and "limited in its effectiveness."[7]

5 QUALIFYING DISCLOSURES

Extracts from the relevant legislation can be found at the end of this paper. However, in summary, a disclosure is only a qualifying disclosure if :-

- There is a disclosure of information

- In the reasonable belief of the worker it tends to show that one or more of the following has been, is being or is likely to be committed:
  - a criminal offence
  - failure to comply with a legal obligation
  - a miscarriage of justice
  - endangerment of health or safety
  - environmental damage; or
  - o deliberate concealment of any of the above

- It is made in the public interest

[7] Freedom to Speak Up, Executive Summary, p9

- To:
    - the employer
    - the person believed to be responsible for the failure (if not the employer)
    - a prescribed person, e.g. the CQC or TDA, if the employee believes the disclosure is substantially true[8]; or
    - any other person, where it is reasonable for the employee to do so in all the circumstances; he reasonably believes that the information disclosed and any allegation made is substantially true; the disclosure is not made for personal gain; and either the employee reasonably believes he will be victimised for disclosing the information, evidence of breaches will be concealed, or the employer has already been told.

6 Disclosure of Information

This is frequently the first line of attack many employers will take in defending a whistleblowing claim. Has there really been a disclosure of information to the employer ?

A disclosure of information must involve communicating facts and not simply allegations or opinions. The difference was illustrated by the EAT in *Cavendish Munro Professional Risk Management –v- Geduld* [2010] ICR 325.

- The hospital wards have not been cleaned for the past two weeks (disclosure of information).
- You are not complying with Health and Safety legislation (an allegation rather than information).

In *Cavendish Munro*, following the removal of Mr. Geduld as a director of Cavendish Munro, his solicitor wrote 2 letters to the firm stating that he had given legal advice concerning the validity of a proposed shareholder agreement. Mr. Geduld was dismissed and alleged that this was because he had made a protected disclosure.

The EAT held that a letter from a solicitor instructed by Mr. Geduld did not convey facts but merely stated an allegation or position on the part of the employee and was therefore not a qualifying disclosure.

In *Goode –v- Marks and Spencer plc* UKEAT0442/09, 15 June 2010, the Claimant had expressed a view to both his manager and the Times Newspaper that proposed changes to the Respondent's redundancy scheme were "disgusting". The EAT held that the Tribunal was right to conclude that this was an expression of opinion as opposed to disclosure of information.

7 Reasonable Belief

The worker must reasonably believe, at the time of the disclosure, that the information "tends to show" one or more relevant failures. He does not need to believe that the information actually shows a

[8] A full list of prescribed persons can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/431221/bis-15-289-blowing-the-whistle-to-a-prescribed-person-list-of-prescribed-persons-and-bodies-2.pdf

relevant failure has occurred, is occurring or is likely to occur. This reflects that fact that whistleblowers may not have all of the relevant information at their disposal but nevertheless have real concerns.

"Reasonable" belief is to be judged both subjectively and objectively :-

- What did the worker/employee subjectively believe ?
- Was that belief objectively reasonable taking into account their personal circumstances ?

8 Disclosure In the Public Interest

In terms of disclosing information/facts about issues that would affect patient safety, there are likely to be few issues in terms of disclosure in the public interest.

The requirement that a disclosure be made in the public interest was inserted by s17 of the ERRA 2013 in order to reverse the effect of *Parkins v Sodexho Ltd*. The public interest test was introduced to prevent a worker from simply relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

In *Chersterton Global Ltd (t/a Chestertons) v Nurmohamed* (2015) UKEAT/335/14, the Claimant stated that he believed the Respondent was deliberately misstating £2-3 million of actual costs and liabilities through the entire office and department network which affected the earnings of 100 senior managers, including himself. In dismissing the employer's appeal, the EAT held that the tribunal had not erred in finding that the disclosures had satisfied the public interest test, despite potentially only Mr Nurmohamed and his fellow managers having been affected by the alleged accounts manipulation. A relatively small group may be sufficient to satisfy the public interest test. What is sufficient is necessarily fact-sensitive. In the present case, the tribunal had not erred in concluding that a section of the public would have been affected by the alleged account manipulation and that the public interest test had been satisfied.

9 To Whom ?

A disclosure is a qualifying disclosure if it is made to :-

- The employer (s43C(1)(a) ERA)
- The person responsible for the failure (if other than the employer) (s43C(1)(b) ERA)
- A prescribed person (s43F ERA)
- Any other person, where it is reasonable for the employee to do so in all the circumstances; he reasonably believes that the information disclosed and any allegation made is substantially true; the disclosure is not made for personal gain; and either the employee reasonably believes he will be victimised for disclosing the information, evidence of breaches will be concealed, or the employer has already been told (s43G ERA)

Prescribed Persons in Healthcare

Care Quality Commission, General Chiropractic Council, General Dental Council, General Medical Council, General Optical Council, General Osteopathic Council, General Pharmaceutical Council, Healthcare Improvement Scotland, Health and Care Professions Council, Monitor, NHS Trust Development Authority, Nursing and Midwifery Council, Welsh Ministers (Welsh NHS bodies).

Any Other Person

Section 43G(3) of the ERA provides that in determining whether it is reasonable for the worker to make the disclosure to any other person, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

It is worth noting that in cases where an employee has previously disclosed information to his/her employer, a Tribunal will have regard to whether or not the employee has complied with the employer's whistleblowing procedure. So before reporting concerns to anyone else, it is certainly advisable to first assure yourself that the relevant procedure has been followed.

10 A QUICK "HOW TO" GUIDE

The final point to note is that whistleblowing protection only applies to the disclosure of the relevant information NOT the behaviour adopted by the employee or worker in communicating that disclosure.

In *Bolton School v Evans* [2006] EWCA (Civ) 1653, a teacher hacked into the school's network in order to demonstrate his concerns about data security and protections. He was issued with a formal warning and resigned claiming that this warning was a detriment for making protected disclosures. The Court of Appeal found that the protection offered by whistleblowing legislation applied only to the disclosure of the relevant information itself.

In *Panayiotou v Chief Constable of Hampshire Police and another* [2014] IRLR 500, the EAT held that s47B does not prohibit the drawing of a distinction between the making of a protected disclosure and

the manner or way in which an employee goes about the process of dealing with making protected disclosures. In that case, the employee was a police officer who the Tribunal accepted had made a number of protected disclosures. However, they concluded that the reason why the employer had acted as it did had been a combination of Mr Panayiotou's long absence through sickness coupled with the effort of dealing with the correspondence and complaints and the exasperation that he would never accept any answer save that which he had sought; Mr Panayiotou had become "completely unmanageable" and his dismissal had been "in no sense whatsoever" connected with the public interest disclosures.

TOP TIPS

1. Keep it calm and measured – Always consult and follow the Trust's whistleblowing procedure unless any of the exceptions in Section 43G ERA apply.

2. Check that the employee is actually disclosing information – not simply alleging a breach of health and safety or some other allegation or expression of opinion.

3. Use the WB procedure to ensure the disclosure is made to the right person. Do you have a Freedom to Speak Up Guardian in place ?

4. Assess whether the employee does have enough information/evidence to make the belief in a relevant failure reasonable.

11 INTERIM RELIEF

So – you've correctly advised your RCN member and they have followed the Trust's whistleblowing procedure to the letter. However, in an act of pure victimization, the Trust dismisses your client.

What can you do ?

One option is to make an application for interim relief pursuant to Section 129(1) ERA for an order for continuation of the contract of employment.[9]

It is true to say that most applications do not succeed. In order to do so the employee has to prove that s/he is likely that s/he will be able to show at final hearing that the reason or principal reason for dismissal was because s/he made a protected disclosure. "Likely" means a "pretty good" chance of succeeding.

[9] Section 130 ERA

You have to act fast as the tribunal will not entertain an application for interim relief unless it is presented before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).[10]

As an advisor, you will need to assess whether the evidence presented by your client gives them a pretty good chance of establishing that they were dismissed because of a protected disclosure. If you think the claims does have merit, then from the employee's point of view a continuing salary pending a final hearing is far better than none at all. You should also bear in mind that, win or lose, the Tribunal may well give a preliminary view on the merits which will enable both parties take a view on whether or not they wish to proceed to a full hearing.

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[10] Section 128(2) ERA