



**Society
of Labour
Lawyers**

Whistling in the wind: suggestions for reform of whistleblowing legislation

John Bowers QC
24th March 2021

Introduction

Whistleblowing is essential to the rule of law. Whistleblowers must be protected. The Council of Europe say that “Whistleblowing is a fundamental aspect of freedom of expression and freedom of conscience and is important in the fight against corruption and tackling gross mismanagement in the public and private sectors”.

Britain had one of the strongest legal protections in the world when the Public Interest Disclosure Act was passed in 1998 but it now needs to be reviewed not least because the legislation has turned out to be complex, clunky and now only 12% of cases which go to an employment tribunal are successful.

The All Party Parliamentary Group on Whistleblowing state that “The UK regulatory framework of protection is complicated, overly legalistic cumbersome obsolete and fragmented”. The APPG also states that there are alarmingly high rates of whistleblowing concerns simply being ignored by employers (41%), and still far too many whistleblowers (20%) being dismissed.

The whistleblower

Whistleblowers have all sorts of motives for doing what they do ranging from pure public spiritedness to (in a few cases) enmity towards the employer and/or something which is mercenary. Blowing the whistle can lead to trauma for the whistleblower; many feel the legal system fails them and there is loneliness like the long distance runner: for example, the whistleblower Aaron Westrick says “If there’s one word that describes being a whistleblower its loneliness. Even your friends don’t really get it”.

Some of the claims made by whistleblowers are verifiable; some are wild.

What is clear is that the hurdles placed in the way of the genuine whistleblower are too great and the rewards too few (although some have been feted and received sympathetic portrayals in Hollywood films)..

Too often, whistleblowers present (or are represented) as “trouble”. The imbalance of power is huge. Retaliation against the whistleblower is a common theme. The tactics used by many employers may be summed up as the approach of “deny, delay, destroy”.

The reaction of the employer often follows several themes- ‘turning a blind eye’, ‘turning a deaf ear’, and ‘blaming the messenger’. The latter is the big problem which the law could tackle. It is typical that a whistleblower was told by a recruiter “I’ve googled you and you come out as a whistleblower and I don’t want to jeopardise my relationship with my clients”.

Current regime; The problem

The only way for a whistleblower to gain redress at present is through an employment tribunal claim but this can take years (particularly with the current pandemic backlogs) to go through the system (many such cases are appealed) and very rarely results in an employee getting their job back (and for some of course that will be the last thing they actually want).

There is also a markedly different levels of protection dependent on whom you tell, with greater protection for those who tell their employer than those who go straight to the media. This is as it should be, but the various hurdles are complex because there is a rigid hierarchy of protection.

The whistleblower often wants a regulator to intervene and investigate his or her complaint but there is a serious fragmentation of the regulatory framework. We lack a duty on employers or regulators to investigate whistleblowing concerns and feedback the findings to the whistleblower. Further, the whistleblower cannot make a direct legal claim against a regulator for mistreatment. Whistleblowers need to know they will be supported and not victimised.

Reform proposals

There were few concrete proposals for reform until recently. Dr Philippa Whitford MP’s Bill Public Interest Disclosure (Protection) Bill received its Second Reading on September 25 whilst Baroness Kramer’s has not been discussed yet. Protect has its own draft Bill.

These matters should be considered:

1. there should be a legal standard on employers to bring in whistleblowing arrangements, including a requirement to give whistleblowers feedback on the concerns raised.

2. There should be a criminal penalty regime where a company or organisation might be fined or sanctioned for breaching the whistleblowing standards. Criminal penalties will however be a blunt tool unless the prosecuting authorities pursue this with vigour.
3. There should be some protection for whistleblowers against costs penalties in employment tribunals by way of cost protection orders; some whistleblowers have encountered bankruptcy for their pains.
4. there should be a wider protection of more people e.g. Non-executive Directors (NEDs), volunteers, self-employed workers and job applicants. It might be rendered unlawful to discriminate, victimise or harass an individual for a protected disclosure so that the panoply of discrimination rights would be given to the whistleblower.
5. There should be some form of Whistleblowing Commissioner – a new independent body to investigate a concern, or unfavourable treatment of the whistleblower, set standards and administer penalties.
6. This should be linked with Whistleblower champions on boards or management teams ideally appointed from amongst the whistleblower community who could give of their lived experience.

This body would in the proposal of the All Party Parliamentary Group:

“develop standards of practice for whistleblowing policies and procedures and monitor the compliance of organisations with those standards. Such standards would include how issues should be investigated, and organisations would be expected to show what action they had taken to address cases. The standards would stipulate prospective protection of the whistleblower from detriment, from the point of their making a disclosure.”

Protection by the law is necessary in this area but not sufficient. Legal support for the whistleblower can only go so far; equally important is the culture of the particular working environment in which the whistleblower operates and indeed in society more generally. Changes in attitude must accompany changes in the law.

JOHN BOWERS QC

Principal Brasenose College, Oxford; Co Author of Whistleblowing; The Law, 3rd edition, OUP.

For more information visit
societyoflabourlawyers.org.uk