WHISTLEBLOWING: SYMPOSIUM & RESEARCH PAPER DEVELOPMENT WORKSHOP
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NHS employer reprisals against whistleblowers – time for a cost:benefit analysis

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Abstract
In recent years an apparently growing number of cases of whistleblowing by UK National Health Service (NHS) staff have reached the public domain. Exact numbers are not known because reliable statistics do not exist. This is despite a 2015 recommendation from the House of Commons Health Committee *'that there should be a programme to identify whistleblowers who have suffered serious harm and whose actions are proven to have been vindicated, and provide them with an apology and practical redress'*.

At a time of austerity, tight finances and skills shortages it is pertinent to question the value-for-money of the actions of NHS employers who embark on disciplinary action against staff who raise concerns in the public interest. Something of a whistleblowing industry has developed in recent years, driven partly by the 2015 *Freedom To Speak Up* Review which led to the creation of large number of Freedom To Speak Up Guardians and other new NHS posts. Dealing with whistleblowing cases creates substantial work for NHS HR, managerial and legal teams. Furthermore large sums of money are paid in legal fees, of both respondents and claimants, when employment disputes lead to litigation. For example it has been revealed in a recent case that over £700,000 of taxpayers' money has already been spent in attempting to defend a patient safety case brought by a junior doctor – including attempting to deny him protection under legislation intended to protect whistleblowers. Meanwhile staff who have raised concerns have to somehow fund their own legal support. There is a huge, and in the eyes of many, iniquitous inequality of arms when whistleblowers subject to disciplinary action seek justice through employment tribunals – which are an additional drain on the public purse.

It is time to ask who benefits from the current system, and how much it costs.

Introduction:

I should declare an interest at the outset. I worked for the UK National Health Service (NHS) for over 30 years before being unfairly dismissed. I had become aware of a patient safety and legal compliance problem, and was seeking to introduce relatively low-cost healthcare improvements to address these issues. Even though I received support from the medical director and was the trust's subject matter expert in this area, newly appointed hospital managers suppressed my concerns. They instigated a disciplinary action against me which resulted in my dismissal. I went to a solicitor who said that this was best dealt with under whistleblowing legislation. I had inadvertently become a whistleblower. From my perspective I was simply doing my job.

An employment tribunal confirmed that I had been unfairly dismissed, and moreover that I had made a large number of protected disclosures over a number of years. Nevertheless I have lost my career. I have come to the firm conclusion that employment tribunals are an inappropriate forum for dealing with whistleblowing cases. In my experience, and that of others, they stoke up animosity between employers and staff and contribute to what others have described as toxic culture underlying the current NHS workforce crisis. They are also expensive. I think that it is legitimate to question whether they promote truth, justice, and reconciliation. And if not, why not?

I have been invited to be a panel member during a session (*Whistleblowers: are we making a difference?*) within a Symposium on economic crime in September. Speakers and panellists at this Symposium (*The Thirty-Seventh International Symposium on Economic Crime*, Cambridge, 1-8 September 2019) are encouraged to submit written papers in one of two journals associated with the annual symposium (the *Journal of Money-laundering Control* and the *Journal of Financial Crime*).

I would like to take up this opportunity, and am minded to write a paper with a working title of *NHS employer reprisals against whistleblowers – time for a cost:benefit analysis*, probably for submission to the *Journal of Financial Crime*. I would greatly welcome comments and suggestions.

Background - the national landscape

The scandal of appalling patient care at the former Mid Staffordshire NHS Foundation Trust was a watermark event. Staff must have known about the dreadful situation there. Whilst some did speak up (but were ignored/penalised), many did not (out of fear/complacency/sense of futility). The Department of Health realised that this was wrong, and commissioned Sir Robert Francis QC to undertake a review – the *Freedom To Speak Up* (FTSU) review[1].

The FTSU review found a serious problem of retaliation/reprisals by hospital managers against staff who had raised concerns in the public interest, and made a number of recommendations intended to change culture in this respect. This has led to creation of what has been described as a whistleblowing industry, with NHS employers (hospital trusts, arm's length bodies, and in the future primary care employers) required to appoint *Freedom To Speak Up Guardians* (FTSUGs). Controversially these FTSUGs report to the employers themselves, prompting questions to be raised about their independence. In addition to the local FTSUGs, there is a National Guardian Office. Separately there is a so-called NHS Whistleblower Support Scheme (WSS), which in reality is focused on seeking to provide alternative employment to staff, rather than addressing the underlying issues. This 'whistleblowing industry' has created jobs for a substantial number of people, though by and large not for whistleblowers themselves.

Following the Mid Staffs scandal, the UK government introduced a *'Fit and Proper Persons Test'* (FPPT) for directors of NHS trusts. This was intended to weed out individuals unfit to undertake these roles. However experience has shown that the FPPT has failed to prevent the employment/ re-employment of some individuals who are clearly not fit and proper, including fraudsters in a number of notorious cases. Tom Kark QC was invited in 2018 to review the FPPT. He met a number of people before presenting his report in October 2018. It was published in February 2019, with the government's response.

(Declaration of interest: I contributed to the Kark Review, initially through a face-to-face meeting, with others, in August 2018, followed up with a written contribution in September 2018[2]. I also made a written submission to the House of Commons Department of Health and Social Care Committee Inquiry into the Kark Review (March 2019)[3].)

Whistleblowing in the NHS is becoming increasingly topical. A recent meeting at the Royal Society of Medicine (Spotlight on Whistleblowing, 26.3.19) is an example of this. The related topic of bullying within the NHS (in respect of employer reprisals against whistleblowers) is also in the news, with high levels of bullying reported in staff surveys, and some 30% of staff not confident that it is safe to speak up in their organisation. The NHS is currently in the process of developing a *Workforce Implementation Plan* to improve staff experience, as part of its *Long Term Plan*.

NHS employer response to whistleblower disclosures – a disturbing pattern

There is a disturbing pattern of creation of employment disputes by NHS employers against staff who raise concerns in the public interest. This creates, and is clearly intended to create,

ostracisation and isolation of whistleblowers. It is part of what has been described as the 'chilling effect' of managerial retaliation against whistleblowers.

Such disputes not infrequently lead to dismissal of staff who have spoken up. Staff who find themselves in this position then discover that the law which supposedly protects them (ERA/PIDA[4]) is weak and ineffective. They are funnelled into employment tribunals, in which they are likely to face a massive inequality of arms. They may have to fund their own case. If they are lucky they may have legal expenses insurance cover, but this is limited, and in practice is unlikely to cover all their legal costs. By this stage they may well have no income. Even if they are members of unions, experience from multiple cases shows that unions (and professional bodies) do not provide the support which members expect. By contrast, their employers (or more likely by this stage their former employers) are funded by taxpayers. They have access to public funds. Cases have come to light where NHS employers have spent literally millions of pounds unsuccessfully attempting to defend themselves – an example being the case of Dr Raj Mattu. In another more recent case, Freedom of Information requests have elicited information that some £700,000 was spent by NHS employers unsuccessfully arguing (in the Chris Day case) that Parliament did not intend junior doctors to have whistleblower protection.

What does the current system of dealing with whistleblower disclosures cost?

No one knows the true cost of the current approach towards NHS whistleblowers. Full costs go well beyond purely financial costs, which in turn are much greater than legal expenses.

Under the ERA/PIDA regime, whistleblowers are known as claimants, and employers as respondents. NHS employers are able to call on very large sums of public funds, funded by taxpayers. Claimants are not.

Some claimants resort to crowdfunding to fund their cases, and this has been successful in raising hundreds of thousands of pounds in a small number of cases involving doctors. Other healthcare professionals have struggled to raise much smaller sums to cover their legal expenses. Claimants are almost invariably at a huge disadvantage in the legal arena – the scales are very substantially weighted against them. A number of claimants (litigants in person) are not represented, and have to present case themselves in an inherently adversarial, alien and hostile environment, against a team of highly paid solicitors and barristers out to discredit them.

Costs paid from the public purse include:

- Respondents' legal fees
- Costs of maintaining the tribunal system (including salaries of judges and other tribunal panel members involved not only in original tribunals, but also in appeal tribunals, and Courts of Appeal)
- The cost of the time spent by numerous managers, HR staff and other trust staff being paid to sit in on Employment Tribunals
- The cost of the time spent by innumerable managers, HR staff and trust staff taking part in creating employment disputes and resultant bureaucratic processes, manufacturing cases against whistleblowers, conducting internal investigations and participating in disciplinary hearings and related matters.
- Costs associated with preparing employment tribunal 'bundles'
- Cost to the NHS of the loss of skilled people unfairly dismissed – particularly important when so many services are short-staffed
- Costs of recruitment of staff to replace unfairly dismissed whistleblowers

It is difficult to quantify emotional and personal costs of the unfair treatment of staff who speak up, and the effect on staff morale. Certainly there are very real psycho-social costs, impacting on both whistleblowers and employers. These include reputational costs, paid by individual whistleblowers, local organisations, and the NHS as a whole (not to mention wider society).

In considering costs, it is relevant to note that a particularly nasty intimidatory tactic which has been used in a number of whistleblower cases, in which employers threaten whistleblowers with applications for them (the whistleblower concerned) to pay their costs (i.e. costs incurred by the employer). Typically such threats are made shortly before, or even during tribunal proceedings, with the timing clearly being deliberate, to increase the pressure on claimants at a time when they are already under huge stress[5]. Given the unpredictability of tribunal panels, this raises serious risks of bankrupting claimants.

Health costs should also be taken into consideration. Reprisals against whistleblowers almost always has an adverse effect on the mental (and in some cases physical) health of themselves, and in many cases their families. It also has an adverse effect on the organisation, encouraging an uncompassionate culture and having a chilling effect on the willingness of others to speak up. There are unquantifiable dehumanising costs.

A comprehensive cost:benefit analysis should also take into account costs of the 'whistleblowing industry' that has been created in recent years, and should carefully evaluate claimed benefits. This should extend to local FTSU Guardians, the National Guardian Office, the NHS Whistleblower Support Scheme, and involvement of regulators, arms length bodies and others.

None of this would be necessary if, when problems are identified, employers were to respond properly, rather than shooting the messenger.

Who benefits from the current approach to NHS whistleblower disclosures?

A proper cost:benefit analysis would consider who benefits from the current system, and not shy away from identifying vested interests. These include hospital managers, HR staff, lawyers, judges, tribunal panel members and others for whom work is created by the current approach.

Who does not benefit from the current approach to NHS whistleblower disclosures?

- Patients
- Whistleblower
- Taxpayers

Conclusions

I have seen a side of the NHS that I previously did not know exists. A change to the current approach towards staff who raise concerns in the public interest is long overdue. A cost-benefit analysis which sheds light on the effectiveness of current policy in this area is needed.

[1] http://freedomtospeakup.org.uk/
[2] Wilkins, H. *Contribution to the Kark Review of the Fit and Proper Persons Requirement* (Sept 2018)
[3] Wilkins, H. *Written submission regarding the Kark report reviewing the Fit and Proper Persons Test (FPPT)* (March 2019). Accessible via https://www.parliament.uk/business/committees/committees-a-z/commons-select/health-and-social-care-committee/inquiries/parliament-2017/kark-report-inquiry-17-19/publications/
[4] ERA: Employment Rights Act 1996 (as amended); PIDA (Public Interest Disclosure Act 1998 (as amended)
[5] Particularly bearing in mind that claimants may not be able to disclose the fact of such threats if they are deemed to be without prejudice.