Whistleblowing in the NHS

This year marks the 25th anniversary of the Public Interest Disclosure Act 1998, the legislation which incorporated protection for workers who report wrongdoing into the Employment Rights Act 1996.

To mark World Whistleblowers' Day on 23 June 2023, we look at whistleblowing in the NHS.

History of whistleblowing in the NHS

Whistleblowing in the NHS is a recurring hot topic, and not just on World Whistleblowers' Day: a safe and fully functioning National Health Service is a life and death matter.

Whistleblowing in the NHS in nothing new. Over recent years numerous enquiries have been established to investigate significant issues within certain Trusts. The most well-known of these was the Francis Review. This arose following the failings at the Mid-Staffordshire Hospital where it was estimated that between 400 and 1,200 patients died between 2005 and 2009 as a result of poor care. It is often described as one of the worst examples of hospital care of recent times. In the review, Robert Francis QC found that "*Staff who spoke out felt ignored and there is strong evidence that many were deterred from doing so through fear and bullying*." Systemic issues of poor care and management, large budget cuts and an environment of fear of speaking out about issues led to the serious failings at the hospital.

Following the Francis Review, various recommendations were made and implemented. One of the most important was the ‘Freedom to Speak Up’ and the requirement for each NHS Trust to have a Whistleblowing ‘Guardian’ to whom concerns could be raised. This initiative was created to develop a more open and supportive culture that encouraged staff to speak up about any issues of patient care, quality or safety. It was intended to enable a cultural change within the NHS with respect to whistleblowing – for this to not only be encouraged but for there to be an active duty on part of medical professionals to raise concerns and for these concerns to be welcomed as part of a healthy discussion over patient care, rather than seen negatively.

Professor Don Berwick was then asked by the Prime Minister at the time to advise on how to improve the quality and safety of care in the NHS following the outcome of the Francis Review. The review recognised that in some instances clear warning signals were ignored, including the issues at Mid-Staffordshire Hospitals, and that fear of raising concerns and/or the fear of retaliation faced as a result of raising concerns was toxic to both safety and improvement.

The Report recommended the system must:

- recognise with clarity and courage the need for wide systemic change
- abandon blame as a tool and trust the goodwill and good intentions of the staff

- recognise that transparency is essential and expect and insist on it

- ensure that responsibility for functions related to safety and improvement are vested clearly and simply

- make sure pride and joy in work, not fear, infuse the NHS

- ensure the NHS becomes a learning organisation and that its leaders should create and support the capability for learning, and therefore change, at scale, within the NHS; and

- ensure supervisory and regulatory systems should be simple and clear. That they should avoid diffusion of responsibility and should be respectful of the goodwill and sound intention of the vast majority of staff, so that all incentives should point in the same direction

So, have these reviews encouraged more staff to blow the whistle and/or improved the experience of whistleblowers within the NHS since?

Whilst it is unfair to tar all NHS Trusts with the same brush, it is fair to say that whistleblowers often feel they are viewed negatively by management and/or colleagues and are not afforded the protection they should be. This is evidenced most recently by surveys conducted during the Coronavirus pandemic and by the findings of the review into the culture at the University Hospitals Birmingham in 2023.

Whistleblowing and Covid-19

Whistleblowing in the NHS was again in the limelight due to the Covid-19 pandemic. Concerns were raised about the availability and use of personal protective equipment ("PPE") by front line workers and the release of individuals into care homes, amongst other issues. There have been numerous reports that healthcare workers have been actively discouraged from raising concerns and in some cases subjected to intimidation from senior managers and/or their NHS Trusts.

In 2020, a survey conducted by the Doctors Association UK of 150 healthcare staff found the following:

- Just under 50% of those questioned had been told not to raise concerns or speak to the press about access to PPE during the Covid-19 pandemic – by Trust management and senior colleagues;
- 75% of respondents had concerns about not having access to PPE;
- A third had reported they had been bullied for raising concerns; and
- 50% did not feel confident about raising concerns within their Trust for fear of reprisal.

Further, the above statistics are likely to be worse for NHS professionals from ethnic minority backgrounds.

The British Medical Association (the organisation which represents doctors in the UK) (the "BMA") has reported that ethnic minority doctors are twice as likely to report that bullying and harassment is a problem within their workplace. Furthermore, the BMA's surveys during the Covid-19 pandemic show that these individuals were two and a half times more likely not to have spoken out about whistleblowing issues out of fear of reprisals.*

University Hospitals Birmingham (UHB)

A more recent example of the continuing problems with whistleblowing in the NHS is highlighted in the major issues found at UHB. A major review was announced following a BBC Newsnight probe into allegations that there was a climate of fear at UHB which was putting patient safety at risk and that staff were being punished by management for raising patient safety concerns.

The report also looked into the horrific case of a suicide of a junior doctor, Dr Vaish Kumar, who had left a suicide note blaming the hospital where she worked.

The first phase of the review was published in March 2023. It found that there was a continuing bullying culture affecting morale within UHB and preventing staff from raising concerns. It found the organisation was '*culturally very reluctant to accept criticism or to acknowledge the adverse views expressed by us*.'

Findings into parts 2 and 3 of the review, into governance and culture within the Trust, are expected to be published later this month.

The review makes for very concerning reading and whilst is not representative of all Trusts, in our clients' experiences, there is still a pervading culture of blame when raising whistleblowing concerns within the NHS. Our clients often say that wholesale cultural change is required so that raising concerns, and the use of Datix's and SIRI's, should be an opportunity for learning and developing, as opposed to apportioning blame.

Common backlash faced by Whistleblowers

Despite 25 years of legal protection, whistleblowers still find themselves on the receiving end of retaliation. And all too often, the backlash faced by some whistleblowers is astonishing in its form, gravity and long-term consequences.

In its report, '*Whistleblowing: The Personal Cost of Doing the Right Thing and the Cost to Society for Ignoring it'*, the All-Party Parliamentary Group on Whistleblowing described the 'Cycle of Abuse' suffered by whistleblowers. This cycle often includes the following forms of retaliation:

- isolation of the whistleblower- e.g. by excluding them from the process once a concern is raised and/or by turning other members of staff against them,

intimidation and harassment;

- closer Scrutiny of the whistleblower – e.g. of their performance or conduct, being set up to fail with impossible workloads, demands or deadlines;

- counter-accusations being raised against the whistleblower – e.g. in respect of their conduct or performance, often the first steps to a 'character assassination';

- disciplinary action;

- demotion; and

- dismissal or forced resignation.

A report by the University of Greenwich, commissioned by the All Party Parliamentary Group for Whistleblowing, '*Making Whistleblowing Work for Society',* examined 600 Employment Tribunal outcomes between 2015-2018. It found that in 2018 nearly 40% of whistleblowers reported going on sick leave.

Unfortunately, even when whistleblowers do seek a legal remedy and even when they are successful in their claims against their employer, they can still suffer harmful consequences.

We have acted for whistleblowers who have faced years of uncertainty whilst their Tribunal cases are decided, who have developed mental health problems as a result of their

treatment and who have ultimately lost or been forced out of their jobs, even where their claims have been successful. Financial compensation is often not enough to compensate them properly for the impact the experience has had on their private and professional life.

Practical steps for whistleblowers to consider

Clearly the wholesale cultural change towards raising concerns within the NHS envisaged and recommended by both the Francis and Berwick Reviews has, for the main part, not yet happened. It will be interesting to see the findings and recommendations of the latest review into UHB and whether this will provide further impetus for the change needed.

In the meantime, if you have concerns about practices being adopted by your employer which you reasonably believe might impact the health and safety of patients or other staff members, or is potentially unlawful, then you should consider the following steps:

1. Take time to understand what amounts to a whistleblowing disclosure before raising concerns – this will better enable you to properly identify whether your concerns are about wrongdoing, malpractice or unlawful conduct in the workplace (known as ‘protected disclosures’) and so fall within whistleblowing protection.

2. Further to above, understanding the law means you can better formulate your concerns in a manner which is more likely to afford protection under whistleblowing laws. You should seek to relate the activity you are concerned

about to one of the examples of malpractice afforded by whistleblowing law. For example, stating factually '*I am concerned that X practice is occurring which I believe is presenting or may present harm to the health and safety of patients*' would amount to a protected disclosure. Stating '*X is doing this*' will not.

3. Ensure you read your employer's whistleblowing policy so that you are raising your concerns in the right forum and to the right individuals.

4. Ensure you behave reasonably and responsibly at all times – employers often try to argue that any detrimental treatment meted out was not on the grounds of what an employee said or did, but the way in which they said or did it.

5. Aligned to the above is to ensure you raise concerns factually, without unnecessarily apportioning blame or throwing around accusations. You also do not need to conduct your own investigations in alleged wrongdoing; simply flag the issues factually and leave it to your employer to investigate these concerns further.

6. In the event your concerns are not investigated, dismissed out of hand or if any findings reached are unfair or unreasonable, then you can escalate the matter if necessary. Just be careful who you escalate to (generally it is better to keep things in-house rather than reporting to external organisations or the press – albeit that can be reasonable in some situations), how you escalate it and how often you escalate it. Otherwise you are in danger of providing your employer with the arguments set out in point 4 above.

7. Take time to understand the protections afforded by whistleblowing law – this will enable you to better identify when you may have been treated detrimentally on the grounds you raised protected disclosures and/or in cases where your employment is terminated, whether the reason or principle reason for that dismissal was that you made a protected disclosure.

8. Research the time limits involved in bringing whistleblowing claims. You generally have 3 months less one day from the date your employment terminated to start Acas Early Conciliation (the first mandatory step for initiating Employment Tribunal proceedings). Or, if you remain in employment, within 3 months less one day of the date of the act or omission you are complaining about, or if there have been a series of similar acts or omissions, the last date of them.

9. Keep records – it is so important to evidence the protected disclosures made, but also any detrimental treatment you have faced. This can assist your employer to investigate your concerns, any retaliation faced as a result and ultimately if you bring an Employment Tribunal claim to enforce your rights.

10. It helps to have expert support in place. You may want to seek advice and support from your trade union, the BMA or the whistleblowing charity Protect who run a free helpline for whistleblowers. In some circumstances, it will make sense to take specialist legal advice.

BDBF is a leading employment law firm based at Bank in the

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*Source: *https://www.bma.org.uk/news-and-opinion/doctors-must-be-free-and-protected-to-raise-concerns-without-fear*