

# Whistleblowing – legal issues

13 March 2024

Sian Bond, Partner  
Laura Horovitz, Legal Director

# What we will cover

## ■ Whistleblowing:

1. the law
2. tricky issues
3. practicalities

# 1. The law

- Public Interest Disclosure Act 1998
- Two levels of protection
  - Automatic unfair dismissal (including constructive dismissal) for employees
  - Right for workers not to be subjected to any detriment **on the ground** that a worker has made a protected disclosure
  - Includes former workers and employees
- Interim relief
  - High test – C likely to win on all elements of whistle-blowing
  - Bad news if R loses – accelerates bad publicity / settlement
  - IR applications must be held in public unless Rule 50 order restricting publicity is made – *Queensgate Investments LLP v Millet* 2021 (EAT)

## What constitutes a whistleblowing complaint?

- Is there a ***qualifying*** disclosure?
  - Disclosure of information
  - Subject matter – a relevant failure
  - Reasonable belief
  
- Is the qualifying disclosure also a ***protected*** disclosure?
  - To whom was the disclosure made?
  - Public interest

**Qualifying  
disclosure –  
subject matter –  
relevant failure**

- Six defined categories of wrongdoing
  - Criminal offences
  - Breach of any legal obligation
  - Miscarriages of justice
  - Danger to the health and safety of any individual
  - Damage to the environment
  - The deliberate concealing of information about any of the above

## Qualifying disclosure – reasonable belief

- Reasonable belief only - a worker does not have to prove that the facts or allegations disclosed are true, or capable in law of amounting to one of the categories of wrongdoing listed in the legislation
- ***Babula v Waltham Forest College [2007] CA***
- Teacher thought another was guilty of inciting racial hatred
- Was not an offence at the time
- Court of Appeal said employee was protected
- Sufficient that employee has **reasonable belief** in
  - criminal offence
  - breach of legal obligation
- Offence or breach does not need to actually exist

## Protected disclosure – made to right person?

- There are a variety of potential routes
  - Worker's employer
  - Legal adviser in course of obtaining legal advice
  - Minister of the Crown where employer is appointed by any enactment by a Minister
  - A prescribed person – regulatory authorities
  - Other cases where subject to a detriment if made to employer
  - Exceptionally serious failure – local or national press

## Public interest requirement

- Since June 2013, disclosure only protected if in the public interest
- Removes “Parkins v Sodexho loophole”
  - Not a qualifying disclosure if breach of individual’s contract of employment
- No definition of “public interest”
  - Likely to lead to litigation
- What if individual breach has wider implication e.g. equal pay?



## Public Interest Chesterton Global Ltd v Nurmohamed [2017]

- Court of Appeal – highest level decision on this issue
- ET and EAT found 100 managers = public interest
- CA found that other factors should be looked at – the nature of the wrongdoing disclosed, the nature of the interests affected
- Judge was not prepared to rule that the number of workers affected alone can never satisfy the public interest test

## Which of these are likely to be whistleblowing complaints?

1. Healthcare assistant submits a grievance to employer (a care home) about lack of PPE following issues with supplies.
2. Family member of a hospital in-patient complains whether manual handling of patients is being safely done.
3. Doctor on personal social media complaining that medicines are not safely secured.
4. Nurse speaks to the ward manager during a break and mentions concerned about staff to patient ratios following high levels of sickness absence.

## Having made a protected disclosure – types of protection available (1)

### Dismissal

- Who can bring this claim?
- Is two years' service required?
- “reason or the principal reason”
- Burden on employee to show reason for dismissal

## Having made a protected disclosure – types of protection available (2)

- Detriment
  - Was there a detriment?
  - If so, burden on employer for proving the reason for treatment
  - If there was a detriment, was it caused by the protected disclosure.
  
- Detriment claim cannot include dismissal. However detriment claim for decision to dismiss can be brought against named Respondents (individuals rather than the employer). More on that in case law section!

## Employer liability for whistleblowing

- Vicarious liability for detrimental treatment of whistle-blowers
  - “Reasonable steps” defence
- Employees who victimise whistle-blowers have personal liability
- Brings in line with discrimination litigation
- Difficult defence to rely upon. Employer can’t rely on “stale” training or generic training.

# Compensation

- Dismissal
  - Just and equitable
  - No limit
  - Cannot include injury to feelings award
- Detriment
  - Injury to feeling based on Vento - £1,100 - £56,200
  - Detriment up to point of dismissal may be compensated
- Reduction in compensation if disclosure not made in good faith

## Other consequences of legal breach

- Reputational damage for employer
- Increased sickness/absence levels
- Resignations / loss of talent
- Disruption to service and patient care
- CQC/NHSE scrutiny

## Protection in NHS recruitment

- Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018
- Protects from less favourable treatment if have previously blown the whistle
- Follow on from 2017 pilot scheme/consultation
- “Reasonable steps” defence



## 2. Tricky issues

## Negative coverage

- Beware about responding – potential whistleblowing claim
- But distinction between protected and false disclosures
- *Jesudason v Alder Hey NHS Trust* (2020)

# Manner of complaint

## Case 1

- **Dray Simpson v Cantor Fitzgerald Europe (2020)**
- C said he was dismissed for making 4 protected disclosures in 37 separate communications
- ET dismissed claim
  - Very critical of C and his complaints
  - His motivation was his commission payments
  - None of C's disclosures were PDs
  - It was “utterly fanciful” to suggest that they were the reason for his dismissal
  - C was dismissed because he had become “utterly impossible” to work with and lack of trust was “corrosive” and beyond repair

# Manner of complaint – case 2

- **Macanovic v Portsmouth Hospital NHS Trust**
- *“It is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest.”*

# Manner of Complaint – case 3

- **Kong v Gulf International Bank (UK) Ltd [2022]**
- K made a protected disclosure and was later dismissed by reason of her behaviour, manner and approach with colleagues.
- ET dismissed her claims –
  - dismissed on the basis of the manner in which she raised the matter, not because of the protected disclosures itself.
  - Ms Kong's dismissal should not be attributed to GIB pursuant to Royal Mail Group Ltd v Jhuti (where the real reason for dismissal is hidden from the decision-maker behind an invented reason, the hidden reason can be attributed to the employer)

# Confidentiality

- Problems with anonymity
- Problems with promises of confidentiality
- Alternatives

# 3. Practicalities

# Understand the issues

## ■ What you need to understand

- Culture
- The extent of the issue
- The risk factors
- What you already have in place – and is it working?
- What stops people from speaking up?

## ■ How to find out

- Conduct an anonymous staff survey?
- Audit any cases where WB concerns and/or any detriments have been reported

## ■ Analyse the results and identify what needs to change

- Work with your FTSU guardian
- Set up a working group?

## ■ Action Plan

- Timeframes
- Accountability
- Keep under review



## What to put in place (1)

- Board oversight and commitment to speaking up culture - key to culture change
- Training for contacts/managers
  - how to spot whistle-blowing – what is the concern really about?
  - how to deal with a complaint
- Have clear procedures and reporting structures in place – ensure consistency in approach
- Designated person to contact within organisation –Freedom to Speak Up Guardian
- Have a whistleblowing policy
  - Ensure it is compliant with national guidance/AfC
  - Easily accessible
  - Promote policy regularly among staff

## What to put in place (2)

### Working with your FTSU guardian

- Importance of joined-up working
- Access to senior leadership team
- Ensure aware of organisational issues
- Promote across organisation – visibility
  - presentations, posters, walkabouts, blogs etc
  - Dedicated FTSU page – regularly updated
- Ensure appropriate training/support
  - Regional/national networks/meetings

## What to put in place (3) Just culture guide

- Supports staff involved in patient safety incidents
- Enables conversations between managers and staff
- Supports staff to be open about mistakes and removes blame culture
- Duty of candour
- Individual or wider issue? Note - the emphasis on systemic failures is still important but not at the expense of identifying when there may be an individual who is culpable

## How to respond to WB concerns(1)

- Take them seriously – don't dismiss them or label those reporting as 'troublemakers'
- Act quickly
  - Robert Francis: where patient safety is concerned there must be urgency in dealing with the matter
- Is informal/ formal action a necessary, proportionate and justifiable response?
- What does policy say about process and roles?
- Communicate with, support and involve the WB in the process and after its conclusion – coming forward is not a decision people take lightly.
- If want to show 'zero tolerance' for WB detriment, must act accordingly
- If the WB is leaving or isn't directly employed, that's not a good reason to fail to address the concerns

## How to respond to WB concerns (2)

- If formal action is to be taken:-
  - Investigate thoroughly
  - Resourcing - prioritise time to carry out investigations and allow time for proper responses from those involved
  - Ensure independence and objectivity is maintained at every stage
  - Board oversight?
  - Disciplinary panel role

## NGO Guidance & Resources

- <https://nationalguardian.org.uk/learning-resources/>
  - FTSU: guidance for NHS Trust and NHS FT boards (produced by NHS Improvement and National Guardian's Office)
  - National Training Guidelines
  - Access to e-learning package produced by NGO and HEE (speak up, listen up, follow up)
  - Self review tool for FTSU guardians
  - Settlement Agreements: Factsheet for Employers and Workers on Speaking Up (produced by NHS Employers and NGO)

## NHS Employers Guidance & Resources

- Guidance for Employers, managers and staff to foster a supportive speaking up culture
  - <https://www.nhsemployers.org/articles/raising-concerns-employer-actions>
  - <https://www.nhsemployers.org/articles/raising-concerns-guidance-managers>

## Further Guidance & Resources

NHS England

<https://www.england.nhs.uk/ourwork/whistleblowing/>

HEE

<https://www.hee.nhs.uk/news-blogs-events/news/whistleblowing-protection-detail>

CQC

<https://www.cqc.org.uk/guidance-providers/all-services/duty-candour-guidance-providers>

Protect

[Protect - Speak up stop harm - Protect - Speak up stop harm \(protect-advice.org.uk\)](https://protect-advice.org.uk)



Any Questions?

# Laura Horovitz



T 020 8780 4637  
E [laura.horovitz@capsticks.com](mailto:laura.horovitz@capsticks.com)

Admitted as a Solicitor  
2006

Qualifications  
LLaw Degree LLB  
(Hons)  
Cambridge University  
2002

Legal Practice Course  
from the Oxford  
Institute of Legal  
Practice 2004

Memberships  
Employment Lawyers  
Association

## ■ Experience

- After working in the City for four years Laura joined Capsticks in 2010 to specialise in employment healthcare law. She was promoted to Legal Director in September 2020. Laura conducts complex and sensitive cases, specialising in litigation work for Acute Trusts. She has also developed expertise in IR35 and doctors disciplinary issues and regularly provides training to NHS managers and HR professionals.

## ■ Expertise

- Laura advises on capability and conduct concerns about doctors, and manages high profile and complex Employment Tribunal cases (all types of discrimination, dismissal, whistleblowing and contract claims) and High Court proceedings. Laura has become a “go to” lawyer for clients on IR35 and MHPS issues, and matters involving tight deadlines, sensitive handling of witnesses, media attention and wider safety concerns.

## ■ CSR activity

- Laura has provided free employment law advice over a number of years at the pro bono clinic at the Wimbledon Guild.

# Sian Bond



T 020 8780 4720  
M: 07968 450812  
E sian.bond  
@capsticks.com

Admitted as a Solicitor  
2007

Qualifications  
LLB Law (Hons)  
King's College London 2003

Dip Legal Practice, College  
of Law London, 2005

Memberships  
Employment Lawyers  
Association

HPMA London Board

## ■ Sian is a Partner and Head of Employment Healthcare

### ■ Experience

- Sian has 16 years' experience advising healthcare providers and commissioners on employment law
- Sian has conducted some of Capsticks' most complex Employment Tribunal and High Court cases
- Sian advises NHS healthcare clients on all aspects of organisational change including joint working, TUPE, redundancy, and staff portability (particularly as the NHS moves to work collaboratively across ICSs)
- Sian regularly advises on NHS Terms and Conditions, doctor's disciplinary procedures under MHPS, Treasury approval processes, NHS redundancy
- Sian works with a number of Healthcare focused HR networks including NHS Employers' London region HRD network and the Healthcare People Management Association (HPMA) to provide advice and deliver training on the most pressing employment issues impacting healthcare organisations.