Whistleblowing White Paper

Business People Brilliant People
Whistleblowers have always been a source of fascination and intrigue. Ranging from the political whistleblowers of the past who brought down leaders, to the likes of Edward Snowden; the same action by the same person can make them either a political hero or a traitor, depending on whose view is sought. Famous acts of whistleblowing have been made into films and our fascination with them shows no sign of abating.

It's also a topic of interest to businesses as whistleblowing is inextricably linked with policies and attitudes on bribery, corruption and ethics in the workplace. Increasingly, globalisation means that even businesses who don’t consider themselves corrupt (or who operate in countries not traditionally thought of as such) run the risk of having their reputations tarnished by a global network involving countries with serious corruption problems, as per the long running investigation into Rolls Royce.

Nevertheless, international corruption is not necessarily the only difficulty. The fallout from the VW emissions scandal highlights a serious ethical issue within a well-known and trusted business. The cost of this is still growing, but was estimated earlier this year to involve approximately 11 million vehicles and a cost of circa $25 billion to VW. Recently it has emerged that the whistleblower was Stuart Johnson, Head of VW's Engineering and Environmental office in Detroit.

The VW scandal indicates the worst possible outcome for an organisation; namely an individual going to the outside regulator. Employees are the eyes and ears of an organisation and when employees are encouraged to speak up it provides organisations with the opportunity to deal with issues and nip them in the bud. People are the first line of defence, but often whistleblowing within organisations is poorly handled or poorly understood.

The VW emissions scandal involved an estimated 11 million vehicles and a cost of circa $25 billion
The UK legal background

The Public Interest Disclosure Act was introduced in the UK in 1999 against a background of allegations of corporate misconduct in the US and health and safety disasters in the UK such as the sinking of the Herald of Free Enterprise. The whistleblowing protection inserted safeguards into the Employment Rights Act 1996, protecting workers reporting malpractices by their employers or third parties from victimisation or dismissal.

Whistleblowing blossomed to become a lucrative area of employment law; being attractive for litigation as there are no qualifying periods for claims and there was no cap on compensation so businesses felt the need to defend the cases due to the publicity and reputational risk. Case law developed to the extent that an individual could bring a claim simply about a breach of their own employment contract which opened up the possibility that almost any internal grievance might amount to a protected disclosure. The government sought to reverse this by an amendment in the Enterprise and Regulatory Reform Act 2013 which provided that a protected disclosure had to be made “in the public interest”.

Commentators predicted that there would be a sharp decline in the number of whistleblowing cases and while that was true initially, they are gaining momentum once again. The restrictions envisaged by the 2013 legislation are being slowly eroded by case law and the legal test of what amounts to being in the “public interest” is a matter under scrutiny in the Court of Appeal at the time of writing.

Individuals are finding new and innovative ways to bring issues before the Courts, and of note is a claim brought by Dr Chris Day against the Lewisham and Greenwich Hospital, which has extended again the remit of who is protected under whistleblowing legislation. Dr Day was placed with the London Deanery who in turn placed him with a variety of NHS Trusts as part of his training. When at Lewisham and Greenwich Hospital, Dr Day was seriously concerned about understaffing in the hospital and complained to the hospital and to the London Deanery. He claims that after raising his concerns he suffered a detriment and sought to bring a claim leading to a technical legal issue as to whether he could properly bring an allegation of whistleblowing.

Dr Day’s case failed at the initial stages but he progressed to the Court of Appeal having raised funds to do so by way of crowd funding. Dr Day set out his cause as seeking a change to the law so as the careers of junior doctors would be protected by whistleblowing law. His crowdfunding page went on to raise over £140,000, and he succeeded at the Court of Appeal, with the case being remitted. That, along with the current case of Chesterton Global Limited vs Nurmohamed which is set to clarify the public interest aspect of whistleblowing, indicates that this area of law has again widened and we can expect claims to rise, funded in increasingly innovative ways.
UK background

For whistleblowers to be protected in UK law they have to make a protected disclosure. That means that the individual making the disclosure has to believe that disclosure is in the public interest and shows one or more of the following:

a) a criminal offence has been committed, or is likely to be committed
b) a person has failed to comply with a legal obligation
c) a miscarriage of justice has occurred
d) the health and safety of any individual has been, or is likely to be endangered
e) the environment has been or is likely to be endangered; or
f) matters falling within the points above have been deliberately concealed

The law encourages the individual to make the qualifying disclosure to his employer or another responsible person. The list of third parties is limited so as to encourage internal disclosure and direct allegations to those who can properly deal with them.

A “worker” can bring a claim, which has wide ranging legal implications. Further in 2006 case law decided that allegations were not contained to the duration of the employment relationship, but could be brought where an individual believed that they were being subjected to a detriment even if they had left employment. The case of Woodward vs Abbey National PLC paved the way for individuals to make allegations of detriment on the grounds of detriment arising a significant period of time after the protected disclosure. Mrs Woodward was employed by Abbey National's Treasury Services as Head of Financial Institutions from February 1991 until she was made redundant in November 1994. In 2003 she made an application to the Tribunal that she had suffered detriment on the grounds that she had made a protected disclosure.

The detriments alleged arose long after her employment had terminated and related to alleged failures to provide references or appoint her as a consultant. The basis of Mrs Woodward’s whistleblowing complaint as set out in the case report was that “throughout her time with the Respondent the Applicant was obliged to voice her concerns on regular occasions as to what she reasonably believed to be the reckless and / or negligent manner in which the Respondent was handling the funds of its institutional investors, and / or the breaches of fiduciary duty of its Directors … and / or breaches by the Respondent… of section 47 of the Financial Services Act 1997.” The Court of Appeal found that Mrs Woodward should be allowed to have her claims heard.

Whistleblowing claims are easy to allege but difficult to win, however the reputational fallout means it is in every organisation’s interest to try to avoid them.

We would argue that a whistleblowing policy should go beyond simply protecting the business from litigation. Indeed, the approach to whistleblowing should go beyond simply putting a policy in place. Encouraging whistleblowing and utilising the eyes and ears of the organisation to protect the organisation is a cultural issue which, when harnessed properly, can bring huge organisational benefits.
Any organisation reviewing its whistleblowing process needs to consider the global impact. That which is a legally compliant and a rigorous policy in the UK may not be effective in other countries. The US and the UK arguably lead the way in terms of whistleblowing protection but legal protection varies in scope and effect globally.

For those countries which have specific whistleblowing protection, 50% encourage internal reporting and less still encourage external reporting. Outside of the UK and US there is little encouragement for Board and management investigation of disclosures and the protections vary from specific protections against dismissal, to increasing limited protection against retaliation / detriment depending on the country involved.

An organisation reviewing their whistleblowing process needs to consider whether they want to:

- simply put in place a series of protections for the business
- go further and provide incentives to employees to blow the whistle to try to utilise that knowledge and protect the business
- go so far as to proactively attempt to change the organisational culture

**US & UK**

arguably leading the way in terms of whistleblowing protection
What does your business want or need?

Human Resources advocates, employment lawyers and those organisations which support whistleblowers would always point to the latter option; namely a complete change to organisational culture in relation to whistleblowing, encouraging people to speak up and organisations to hear them.

That in itself is no mean feat. However in August 2016, a five-year review carried out by Public Concern at Work identified that four out of five whistleblowers reported a negative outcome, with 29% being victimised, 28% being dismissed and 24% having resigned from their organisations. It seems, therefore, that many paid dearly for blowing the whistle.

The potential problems are also wide and vary enormously according to country culture as well as organisational culture. Transparency International’s Corruption Perception Index identified 68% of countries as having a serious corruption problem, half of which are within the G20. It also identified that clean countries were regularly at risk of international corruption. Even those businesses that do not have a global remit can be severely impacted by their supply chain. The Modern Slavery Act 2015 requires large businesses to produce a statement each year, setting out the steps they have taken to ensure that their business and supply chains are slavery free. This tends to be thought of as far reaching supply chains outside of the UK, but in late December 2016 a Kent based gang master couple agreed to a landmark settlement worth more than £1 million in compensation and legal costs for a group of migrants who were trafficked to work on farms producing eggs for high street brands. The Lithuanian workers were sent to work in supply chains producing premium free-range eggs for McDonalds, Tesco, Asda, M&S and the Sainsbury Woodland brand. The farms they cleared of chickens also produced eggs sold under the Freedom Food brand.

Modern slavery, ethical issues, bribery and corruption are all areas where a robust whistleblowing policy can be of benefit to an organisation.
This is all very well, but there are a number of significant problems to implementing such an approach with the three main ones being:

- avoiding creating a wholly undesirable situation where employees feel obliged to spy on one another
- the risk of malicious claims
- the cultural resistance to speaking out against somebody powerful.

Malicious claims pose a very real risk. In 2014 the Nottingham Employment Tribunal dismissed claims from a senior Rolls Royce engineer who alleged that he was sacked for blowing the whistle on problems with the company’s jet engines. The Tribunal concluded that he was not dismissed for raising his concerns but for his unacceptable behaviour in failing to accept internal investigation findings that his claims were unfounded. The Tribunal found “he believed, and still does, that from his Line Manager to the Chief and Board of Directors … everyone is corrupt. He makes the most serious allegations against all of these people. We are satisfied there is not a shred of evidence to substantiate them”. The Judge found that despite Rolls Royce having spent four years investigating the individual’s complaints in great detail, the Claimant continued with allegations of corruption without foundation, motivated by personal antagonism.

A policy therefore needs to get the right people to speak up. Those motivated by personal antagonism are not going to be of benefit to the organisation but getting the right people to speak out can be difficult.

A report published in Harvard Business Review as to why employees are afraid to speak up identified that employees were “more often… inhibited by broad, often vague, perceptions about the work environment” concluding that encouraging speech isn’t a matter of simply removing obvious barriers nor is it a matter of simply putting formal systems in place such as hotlines and suggestion boxes but instead making employees feel safe enough to contribute fully, which “requires deep cultural change that alters how they understand the likely costs (personal and immediate) verses benefits (organisational and future) of speaking up.”

Modern slavery, ethical issues, bribery and corruption are all areas where a robust whistleblowing policy can be of benefit to an organisation.
What to do?

For any business operating in the UK there is an absolute need to address whistleblowing legislation and revise any existing whistleblowing policies in light of recent changes and the current direction of case law.

The organisation can decide whether to simply make it a policy issue, or whether to try to put in place a process encouraging the right kind of disclosure, which will benefit the organisation. Ultimately it is the choice of the business and that choice must be made against the balance of the global remit they operate in and the existing culture of the organisation, combined with whether or not there is a real leadership will to change. If there is not, then the system is doomed to failure and there is little merit in wasting time implementing anything other than the basics required by law.

For those organisations who do wish to go further then making the policy really relevant to the organisation and implementing it appropriately is absolutely key. The implementation should include training for those who are going to be at the forefront of the receipt of claims. The best and most robust systems we have seen in operation have nominated and well-trained individuals, capable of dealing with whistleblowing claims in place. The individuals must also be sufficiently brave and skilled to enable them to separate out what are in fact individual grievances and direct those back to the appropriate policy, whilst then pursuing whistleblowing complaints as a serious and separate investigation. The best investigations we have seen have been when those complaints have been directed to an entirely independent department, usually Legal, with actions taken as a result of those reports.

Whistleblowing protection is here to stay and litigation in this area is on the increase. It will be a matter for each individual organisation as to whether they harness it as a force for good and cultural change, or decide only to keep to the policy minimums required in each jurisdiction. At the least, there should be a positive organisational decision as to the route to follow, if nothing else.