



Effective whistleblower programmes and their impact on ethics, culture and conduct

In Risk & Compliance magazine's expert forum, FTI Consulting's Wayne Anthony and Piers Rake discuss the importance of whistleblower programmes and how to ensure whistleblower confidentiality while conducting an effective investigation with Novartis' Robert Sikellis and Withers' Meriel Schindler and James Hockin.

Sikellis: Could you explain why having a whistleblower programme has become so important for companies?

Schindler: Without proper protection and systems for whistleblowers, companies lose the early warning signal when a whistleblower spots that something is not right. The whistleblower charity 'Protect' was founded after the Clapham rail crash, the collapse of BCCI and the sinking of the Herald of Free Enterprise. In each case, employees had known that something was amiss but been too frightened to come forward. Indeed, in the case of Enron, Sherron Watkins wrote to the chief executive, Ken Lay, raising concerns about accounting irregularities in the firm's financial statements and concerns that he was being deceived by several high-level subordinates. Instead of investigating, he buried her letter and inquired about how he could get her fired months before the company's collapse. It is essential to have a culture backed up by proper policies and training to encourage people to come forward when they believe that there is wrongdoing. That is vital for the health and success of a business as it reduces risk exposure, including avoiding whistleblowing claims

from those who blow the whistle but are retaliated against for doing so.

Rake: Time and again we see high-profile cases hitting the press, where significant financial and reputational damage has been caused to companies and institutions, because companies have not had an effective whistleblowing programme, where the culture within the organisation has resulted in people being afraid to speak up, or where the whistleblowing case has been mishandled. Shareholder value has been wiped out almost overnight, and law enforcement and regulatory scrutiny has resulted in significant censure and fines, as well as a flood of associated legal action. In the most egregious of cases, steps have been taken by senior management to suppress, hide or downplay the allegations made by the whistleblower, so that the board has not been made aware of the issues. If companies were in any doubt of the importance of an effective whistleblower programme, and the consequences of failing to embed these programmes into the culture of the organisation, they need only look at the press around recent scandals, where historic whistleblower concerns were not been handled appropriately. Many companies see

their whistleblowing framework as their ‘eyes and ears’, and this mindset can ensure that threats are identified before they crystallise.

Sikellis: How would you describe the evolving landscape of legal requirements concerning whistleblowers? What key developments would you highlight?

Hockin: English law has traditionally made it difficult for whistleblowers who suffer detriment or dismissal as they have to have suffered detriment or dismissal before they can bring a claim and face numerous, technical hurdles to establish their claims. However, three recent cases have served to lower those hurdles to justice and businesses need to be aware of them. The case of *Osipov* established that it is open to an employee to bring a claim against an individual co-worker for subjecting him or her to the detriment of dismissal if that person was the decision maker in the dismissal. Such a claim has a lower threshold in order to be successful and opens up senior staff to direct claims against them, for which their employer will be vicariously liable. The case of *Jhuti* involved the termination of an employee by a decision maker who had relied, in good faith, upon a reason for dismissal which had been invented by a member of staff in relation to Ms Jhuti’s whistleblowing. And the case of *Rihan v EY* imposed a new duty of care on employers to protect against economic loss – in the form of loss of future employment opportunity – by providing an ‘ethically safe’ work environment, free from professional misconduct.

Sikellis: Upon receiving a whistleblower report, to what extent might companies need to take a different approach based on the nature of that report, such as whether or not it has been made anonymously, whether it has been made by a current employee, former employee or third party, and whether the individual has retained counsel?

Rake: Reports should be triaged on receipt to understand exactly what has been alleged, and what further information is required to complete that initial assessment. Whistleblower reports may be submitted by a former employee or a third party, but the process that is followed should be the same. The recipient of the report – the ‘investigator’ – should be trained on and understand the different options available to them, based on the content of the report, the nature and seriousness of the allegations and who is alleged to be involved. This is particularly important if the allegations involve senior managers, executives or board members. Moreover, confidentiality

must be maintained at all times, irrespective of whether or not the whistleblower report is made anonymously, and the investigator may need to involve, or exclude, other individuals from the business, to obtain technical or subject-matter knowledge or to seek legal advice. It may be appropriate to pass the complaint to another team, if, for example, the allegation is one that is not covered by the whistleblowing framework – where the complaint is a personal grievance – it may be appropriate to refer the case to human resources. This initial assessment may not be straightforward or clear-cut – further information is often needed, and there can be some level of overlap between the scope of different grievance and complaints policies and procedures. There are also increased requirements on businesses operating in some regulated sectors. For example, for financial institutions, there are specific regulatory requirements to have a whistleblowing framework that covers not only allegations of a criminal or public interest nature, but also ones relating to a breach of the firms’ policies and procedures, and behaviour that harms or is likely to harm the reputation or financial wellbeing of the firm. So, the whistleblowing framework needs to clearly ‘signpost’ how different complaints or disclosures should be handled, and those involved in the process need to be trained on their practical application as well as how different grievance and complaints policies and procedures interact with one another.

Schindler: A good litmus test for whether a company has an effective whistleblower programme and culture is whether it treats all reports as serious and worthy of investigation. It should not be the case that companies pick and choose which to address or which to take seriously based on an employee’s seniority and whether they have instructed a lawyer. Sometimes it can be the most junior employee who does not have legal representation who notices and reports issues at an early stage, perhaps via a line manager at first. If a company’s programme helps identify issues at that early stage, then that is likely to stand the company in good stead to address problems before they become a major threat to the business. In the same way, anonymity should not influence the seriousness which a company places on dealing with a whistleblowing disclosure. In companies where anonymous whistleblowing is routine, that is likely to be a symptom of a bad culture where individuals fear coming forward on a named basis for concern that they will face retaliation.

Sikellis: How can companies appropriately ensure whistleblower confidentiality while still conducting an effective investigation?

Hockin: In many cases, whistleblowers are concerned about coming forward and engaging in a process, particularly if they are part of a small company or team. An effective whistleblower programme will be one which supports an employee from the start and, where possible, is led by the employee in terms of how it addresses the concerns raised. Although absolute confidentiality cannot and should never be promised to employees, it can be possible to maintain confidentiality in a larger organisation, and that should always be the preference wherever possible. However, regardless of whether that is possible, it is critical for the company to reassure the employee that they will not face retaliation for engaging in the process. Employers need to guard against retaliation, as experience tells us that that is the natural response for managers or colleagues faced with an individual raising concerns that go to their own conduct or handling of a situation.

Anthony: It is imperative that the identity of the whistleblower is protected and that they will be free from reprisals for reporting any suspected wrongdoing. At the same time, you need to undertake an effective and timely investigation. This can be a difficult balancing act and must be considered at the very outset of the process. Organisations will need to consider the nature of the report, what is being alleged, against whom and by whom, if known. If there is any connection to anyone forming part of your investigation team you should consider bringing in outside advisers to conduct the investigation to ensure their identity is protected. Establishing a confidential or anonymous two-way communication protocol – which allows whistleblower confidentiality to be protected and enables the investigators to gather essential information for the investigation – will also help conduct an effective investigation. If the whistleblower is willing to meet the investigation team to provide further information, consider conducting these meetings outside work hours and offsite. Meeting an employee who has been willing to speak up in an interview at 10am in the company's boardroom will do nothing to help protect their identity.

Sikellis: What additional considerations do companies need to make if they receive a whistleblower report from an individual who is already involved in a dispute with the company, such as an employment dispute? How should they manage this situation?

Anthony: As with any whistleblower report, you need to respond quickly and consistently irrespective of the source of the report. There is no special considerations to be made as all reports need to be treated seriously and the same investigation protocol should be followed. However, it will be important that the investigation team is clearly briefed on the situation and considers the potential impact this will have on their investigation. Investigators should remain open minded, unbiased and independent, and ensure the whistleblower's confidentiality is maintained throughout the process.

Schindler: This can be one of the most challenging situations for a company to face. It is quite possible that disgruntled employees will finally feel able to blow the whistle on the concerns they have. Furthermore, it is not unusual for employees to raise concerns, including a history of having blown the whistle, in response to being downgraded on bonus, put on a performance plan or even fired. It is very common, therefore, for whistleblowing and an underlying dispute to go hand in hand. English law no longer requires a blowing of the whistle to be made in good faith and it is therefore important for an employer to investigate, regardless of what motives it thinks the employee has for blowing the whistle. In such a scenario, employers also need to be careful about how they treat employees who have blown the whistle, so that they avoid inadvertently causing detriment to the employee and thereby giving rise to a potential employment tribunal claim. In some cases, it might be appropriate to run an investigation into an employee's whistleblowing independently of other processes that are or need to take place with that same employee, whether it be a disciplinary or performance process. That can help avoid such legitimate processes being tainted by the whistleblowing.

Sikellis: What steps should companies take to manage an investigation when the whistleblower has taken, or threatens to take, the matter public?

Hockin: When a company is faced with a whistleblowing investigation, it needs to instil confidence that the investigation will not be a whitewash. While a whistleblower is free to bring a claim against their employer, which may later become public if it goes to a public hearing, it is not

lawful for whistleblowers to use the threat of ‘going public’ in the media as a bargaining chip to get their employer to hand over large settlement sums. The UK whistleblower regime is such that it does not encourage employees to go outside their organisation to blow the whistle and, in our experience, most whistleblowers do not want to go public. In 2018, Barclays’ boss Jes Staley was fined £642,000 by the Financial Conduct Authority (FCA) and forced to repay £500,000 in bonuses as punishment for trying to unmask a whistleblower. This gives an insight into the stigma that still attaches to those who blow the whistle. It is therefore the case that a whistleblower who goes public with their concerns – whether intentionally via the media or unintentionally by going to a public hearing – likely does more damage to their own future employability than they do to their current or former employer.

Rake: The main reason whistleblowers go to the press or threaten to report their concerns to an outside organisation or regulator, is either that they do not believe their concerns will be or have been taken seriously, or that they feel that they will be unfairly treated if they share their concerns internally. There are a number of steps that a company can put in place to mitigate these risks – including ensuring that an effective whistleblowing framework is in place, and that all staff in the organisation are made aware of and are familiar with the measures that are in place to ensure that a whistleblower is protected, and that their concerns will be taken seriously and investigated appropriately. Everyone in the organisation, from board-level down, should be made aware of the whistleblower framework, and receive regular training on it. This should include how important it is to speak up if you have a concern, what behaviours are expected of all employees, no matter who they are, what types of concerns are covered by the whistleblower framework, how confidential reports can be submitted, what protections are afforded to the whistleblower, and how the reports are handled and investigated on receipt. If a whistleblower has already reported their concerns to a regulator or to the press, the company will nevertheless need to ensure that the investigation is completed and documented, and that relevant legal advice is obtained.

Sikellis: What do you consider to be the hallmarks of an effective whistleblower programme? What policies and procedures should companies consider having around whistleblower protection, such as non-retaliation?

Rake: With an increased focus on conduct, and ‘non-financial misconduct’ in regulated firms, many financial services institutions are struggling to obtain the right

level of comfort that their whistleblowing policy is actually ‘effective’. If there are no complaints, is that a good thing or a bad thing? If you have seen an increase in whistleblower reports, does that mean you have an effective whistleblower programme, or is something wrong? How do you assess the relative success of your programme, and what are the relevant benchmarks against which your organisation should measure or monitor its performance? These are all critical data points, which the business needs to have built into the design of its programme, so that this data can be converted into management information for senior managers, who are ultimately personally accountable for the effectiveness of the firm’s whistleblowing framework. Recent high-profile cases have demonstrated that mishandling a whistleblower case can be as damaging, or more damaging, than the allegations made in the report itself. Strong governance around the receipt and investigation of whistleblower reports is critical and everyone in the organisation, from the chief executive down, should understand the importance of the protections afforded to whistleblowers, and the need to ensure that whistleblower reports are handled in accordance with the whistleblower framework, without exception.

Schindler: Employers should not start from the standpoint that the whistleblower is a sneak and a troublemaker. In some cases that might require a gear shift in terms of culture, to ensure that openness is embedded in an organisation so that actual or potential wrongdoing can be challenged at every level. However, a positive culture is not likely to flourish if a company is reliant on a whistleblowing policy buried within a handbook, which in turn is hidden deep on an intranet and not widely known or accessible. Embedding a culture of openness starts with clear policies, but also requires ongoing training at each level of an organisation. Importantly, that training needs to reflect the law. Too often we see employers seeking to redefine the whistleblowing legislation. A prime example of that is when employers refuse to believe that an employee can blow the whistle to anyone of relative seniority in an organisation. Employers consider they must blow the whistle through the formal channels. But that does not reflect the law. Training of managers is therefore key in making sure whistleblowing that happens outside the ‘official’ channels does not go unreported or, worse still, employees are retaliated against for raising such concerns.

Sikellis: What advice would you offer to companies on the proactive steps they can take to encourage prompt, good faith whistleblower activity?

Hockin: Companies may have a so-called ‘speak up’ policy, but are managers trained to listen properly? Often it is a case of the manager not listening to concerns when they are first raised. It is important to have whistleblowing complaints investigated either by independent people outside the organisation or by independent people within the organisation who have been properly trained. Too often investigations are a whitewash and issues get brushed under the carpet, only to resurface months or years down the line as a much bigger problem for an organisation. In financial services, the FCA places a requirement on firms to have in place a ‘whistleblowing champion’ who is usually a senior person within the organisation. Financial services firms should ensure their whistleblowing champion is given a platform and support to succeed, while companies outside financial services should consider installing a whistleblower champion in their organisation. Whistleblowers rarely stay in their jobs or even their professions. It is time that companies changed that and rewarded those who come forward with genuine concerns. As a final warning, it is also worth bearing in mind that elements of the US whistleblower regime have effect globally. Certain US federal laws reward whistleblowers, regardless of nationality or location, with a percentage of the money that is recovered by the relevant regulator as a result of their tip. That has the effect of encouraging employees to go direct to the regulator, particularly where the employer does not have a culture that encourages employees to raise issues at an early stage within the organisation before it becomes a more serious problem.

Anthony: One of the key elements to an effective whistleblower programme is trust. To build trust and encourage prompt and good faith reporting companies should, as a minimum, have a variety of confidential reporting channels, ensure all employees are trained in how to make a report and the protection they will be given, and to have a robust investigation and response procedure. Setting the tone is key, and the chief executive or equivalent leader should be central to the communications campaign around the whistleblower programme. Some employees may be reluctant to raise concerns if the only reporting channel is to physically report to a senior member of management. Providing a range of internal and external confidential reporting channels will make it easier for employees to report any suspected wrongdoing and build trust by demonstrating the company is taking any concerns seriously. All employers, from the most junior to the chief executive, should be trained in the company’s ethical standards and what is expected of each and every one within the organisation – how and when they can raise their concerns, what will happen when a concern is raised and the protection that will be given to those who speak up. The other key element is to ensure that the company has a responsive investigation process with a clearly defined procedure for investigating the concerns raised. This will include a confidential communication protocol with the whistleblower to keep them informed on the progress of the investigation, giving assurance that the organisation is taking their concerns seriously and to gain further information if needed.

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