



Paper

Swimming against the tide: getting whistleblowers on board

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'Swimming against the tide' is the title of IES's 2016 HR directors' retreat. It is also a much-used book title adopted by various novels and serious non-fiction works, with such subtitles as 'The New Independent Christian Schools and Their Teenage Pupils', 'The Diary of an Essex Copper', 'Restoring Salmon to the Tyne' and 'Trotskyists in German Occupied France'. As these books suggest, the concept of swimming against the tide implies battling against the odds, with various degrees of difficulty and significance.

In an employment setting, both individuals and organisations can stand out from the norm in a number of senses, such as:

- Employees publicly opposing what they perceive to be wrong doing – whistleblowing.
- People being martyrs to their cause in wider society.
- Organisations following a path which differs from others in their sector in some critical way (eg being more moral in their dealings with the environment or their customers, or choosing a new paradigm for business).
- Staff or organisations inventing or innovating (sometimes in a climate of scepticism or even hostility).

These are all worthy of detailed debate but in this article we will concentrate on the first of these topics – whistleblowing as something that organisations seem to find particularly difficult to deal with appropriately.

Whistleblowing has never been a more pertinent matter for organisations since, as information has grown in its accessibility, so individuals are more able to raise an issue publicly. Corporate failure can race across social media as misdemeanours are shared between contacts. The internet may have ruined a corporate reputation before the PR department has its press release agreed. When companies are slow in their response (eg Cadbury's and the discovery of salmonella in its chocolate bars in 2006) there can be even more negative media coverage and significant reputational damage.

The public debate

Whistleblowers almost by definition will produce opposing reactions. Those blowing the whistle (and their supporters) will justify their intervention on the basis of their values or principles. They are likely to be opposed by those threatened by the blast on the whistle. For example, depending upon your view, Edward Snowden, is a dangerous threat to national security and the confidentiality of private communications, or a champion of transparency, revealing the goings-on of government in the people's name.

Some people might start out seeing the whistleblower as a 'snitch' or 'a lowlife who betrays a sacred trust largely for personal gain,' but go on to change their minds once it is revealed what has been going on (Miethe, 1998). Some historic whistleblowing cases of

bribery and deception in corporate behaviour, and threats to public health through doubtful experimentation or deceitful research results reporting, are obvious crimes, but the reaction to others may depend on your political viewpoint – do the ends justify the means? Whilst most would now applaud Deep Throat's briefing of Woodward and Bernstein over President Nixon's team's burglary of his Democratic opponents' offices and subsequent cover up, there will likely be more dispute when the question relates to the rights of government to exercise its 'legitimate' powers. Take Clive Ponting who leaked documents about the sinking of the General Belgrano in the Falklands War. He was prosecuted for breach of the Official Secrets Act but the jury found him not guilty, accepting his public interest defence.

The mood of public opinion has generally shifted since Ponting's acquittal, such that greater protection is now afforded to those who challenge misdemeanours. UK law allows the public interest defence if wrongdoing is exposed (the Public Interest Disclosure Act, 1999).

Other European Union countries followed suit, underpinned by the common European Rights Act such that the European Court of Human Rights ruled in 2008 that whistleblowing was protected as freedom of expression. This reinforces the sense that there are in the eyes of many a set of universal values that need to be upheld in all circumstances. Schwartz' (1994) 'theory of basic human values', argued that there are a common set of 'values' (eg excitement, enjoyment, social justice, honesty) that influence our behaviours to seek the desirable and to avoid the undesirable. This idea of universality is pursued by bodies like the International Labour Organization, which reflects universal human rights in a system of labour standards, or the United Nations, with its Global Compact that asserts ten principles in the areas of human rights, labour standards, the environment and anti-corruption.

Even in the USA with its attachment to unfettered capitalism, corporate scandals have led to finding the means to stop impropriety. The Sarbanes-Oxley Act of 2002 (SOX) arose out of the corporate frauds at the turn of the century (eg Enron, WorldCom and Tyco), aiming to improve corporate responsibility, reduce conflicts of interest, and strengthen auditor independence. However, not everyone is convinced that the law is justified. Besides the obvious Republicans who think SOX should be repealed (like presidential hopefuls Newt Gingrich, Ron Paul and Mike Huckabee), there are also some liberal Democrats (eg Nancy Pelosi) who believe it is damaging to US business (Stanton, 2012). The fact that CBS could run a piece entitled 'Top 10 CEOs in Prison: Why'd They Do It?' (Tobak, 2010) is perhaps a salutary explanation of why legislation against fraud was thought to be necessary.

The organisational response

What does this all mean for employers? Firstly, the above account emphasises that there is no simple agreement over when whistleblowing is justified: it has varied over time, it varies by place and it is affected by context. Secondly, it suggests that each organisation

has to be clear about its values and which behaviours (over and above the criminal) are unacceptable (see article by Hirsh W, p.50). Thirdly, the organisation needs to face up to the fact there will likely be disagreement over whether any particular example of whistleblowing is acceptable or not. Organisations might do well to remind themselves that the knee-jerk reaction tends towards the defensive rather than the one most likely to be in the best long-term interests of the organisation, its employees or its customers.

Thus good governance is the key to negating bad behaviour, based on a set of organisational values that clearly describe what an organisation expects of its staff. The thinking through of values and how they are to be upheld requires organisations to consider deeply, not simply about how to handle whistleblowing against legal violation, but how to handle disagreements over the legitimacy of various actions, for example, concerning safety, disclosure, or operational procedures. As described previously, people can hold opposing views on what is right or wrong, especially if the company operates on a global basis where a wider range of cultures is involved. The facts of the case can be disputed, as is currently happening in the former Procurement Director's case against the Co-operative Group, where both sides believe they are upholding company principles (Lewis, 2016).

Sir Adrian Cadbury explained the requirement to acknowledge different stakeholder interests thus: 'Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals ... the aim is to align as nearly as possible the interests of individuals, corporations and society' (World Bank, 1999).

One can 'stress test' how the organisation would cope with difficult business situations by running through various challenging scenarios and playing out the organisational response. Improving the performance management process (and associated reward systems) can act to reduce risk of wrongdoing, as can investing in staff and management training in organisational ethics (as BP is doing post the Deepwater Horizon disaster) and ensuring selection processes take account of desired behaviours.

In one sense, the organisational aim is to prevent the need for whistleblowing by creating the right sort of workplace culture and by allowing people to raise questions quietly and change things, rather than by creating the means through which formal complaints can safely be raised. Organisations can turn to a variety of sources for advice on handling whistleblowing. These include the Code of Practice on Whistleblowing produced by the British Standards Institute, Xpert HR has a standard model policy and KPMG's Audit Committee Institute has an example policy¹. Essex County Council has produced a good

¹ <http://shop.bsigroup.com/forms/PASs/PAS-1998/>; <http://www.xperthr.co.uk/policies-and-documents/whistleblowing-policy/29740/?keywords=whistle>; and

policy document that ‘provides a framework for employees, consultants or contractors, to raise concerns which they believe are in the public interest and may relate to illegal, improper or unethical conduct².’ A health service example can be found on line from the Heart of England NHS Foundation Trust³.

The critical test for organisations is how they deal with real crises not those seen in simulated training exercises. The textbook example of good practice is how in 1982 Johnson & Johnson responded to the deaths of seven people in Chicago after taking Tylenol pills manufactured by a subsidiary that had been tampered with (Johnson, 1987). The company followed its *Credo*, a statement of its ethical operating principles, and removed the product from the shops, provided free replacements in a different form and assured the public of its commitment to safety.

Will these actions be enough?

It might sound contrary, but are your staff blowing the whistle enough? Are there poor practices that should be highlighted that are out of view from those at the top of the organisation – the ‘unknown knowns’ as Stefan Stern put it. Is the fact that whistle blowers have had to go public, evidence of the failure of internal governance processes? Was it too dangerous to try to raise issues internally, or was it that no one listened?

One just has to read the Francis Report on patient treatment at Mid-Staffordshire NHS Foundation Trust or hear the less-publicised account on patient safety at Walsgrave hospital to wonder if this was the case (Smith, 2014). The Francis report pointed to a culture of secrecy and defensiveness and failure to operate the checks and balances that should have been in place to protect vulnerable patients.

There are other corporate scandals where, with hindsight, one ponders how wrong doing could have gone on so long without intervention. For example, in Ford and Firestone tyres there were two separate cases of the car company ignoring internal warnings of faulty tyres. The second of these resulted in Ford announcing a recall and replacement of 3.5 million Firestone tyres in 2000. The BBC is examining just what people knew about Jimmy Savile’s abusive behaviour and why nothing was done and one might expect Volkswagen to investigate why no one blew the whistle earlier on cheating the emission tests. In these various cases it may be that some people did try to blow the whistle, but the ‘system’ stopped them as in the Walsgrave hospital case. More worryingly, employees

https://www.kpmg.com/RU/en/topics/Audit-Committee-Institute/Publications/Documents/toolkit/App%2015%20Example%20whistle%20blowing%20policy_eng.pdf

² https://www.essex.gov.uk/Your-Council/Strategies-Policies/Code-of-Governance/Documents/Whistle_blowing_policy.pdf

³ <http://www.heartofengland.nhs.uk/wp-content/uploads/Whistleblowing-Policy.pdf>

themselves might not have seen what they were doing as wrong or thought that the risk was worth taking. The significant power of conformity with the group may also play an important part⁴.

Or, it may be that organisations suffer from poor processes that make it hard to identify problems. Only recently, the Parliamentary and Health Service Ombudsman reported a continuing culture of secrecy in the NHS with two-fifths of Trusts operating sub-standard complaint investigations. And this is against a background of the Francis Report's challenge to the NHS to develop a more open culture.

Nevertheless, one is drawn to the conclusion that organisations rarely welcome the whistleblower. They regroup to defend themselves and ostracise those who dispute what they say and do. Organisations may twist facts and fight (all too frequently) to the bitter end.

This brings us back to putting good governance arrangements in place, ensuring that they work, and working hard to define and implement ethical principles. It also means that where organisations are proven to be at fault they celebrate the whistleblower's actions rather than move to marginalise them. Maybe there is a case for appointing a whistleblower's champion at senior level, whose role is to take a level-headed approach to any accusations of wrongdoing and avoid the automatic defensive response.

HR's role

Whilst it is often argued that HR should be the 'conscience' of an organisation (Reilly et al, 2007), a recent CIPD survey of HR practitioners (CIPD, 2015) found that half the respondents admitted that core values might be compromised or said these are 'nice to have, but not imperative'. Compromising organisational principles was most commonly due to 'current business needs' and 'pressure from business leaders'.

Maybe one should not be surprised by this result: many people work in situations where values and principles are hard to uphold or are contested in practice, if not in theory, for the reasons discussed in this paper. HR may not be that influential and may not be that powerful. Perhaps organisations should step back for a moment and allow HR (because of its corporate perspective (Newberry, 2016) and its lack of vested interest) to explore what being an ethical organisation means in the context of its operation. What does it mean in terms of paying corporation tax; helping protect the planet; employing staff on a socially acceptable basis; treating customers reasonably, etc? This might lead to the development or recasting of organisational values, but more importantly it might lead to

⁴ See Philip Zimbardo's famous 1971 Stanford Prison experiment: <http://www.prisonexp.org/>

a debate about how to create ethical culture and what needs to support this in terms of policies and practices.

Of course, a critical aspect of developing such a culture is leadership. We explore that elsewhere (see article by Tamkin P, p.56) but HR must also consider how it can contribute to the selection and development of organisational leaders, and how it can give the organisation a good chance that, when the pressure is on, the leaders will choose the right course of action. It is usually in the long-term interests of the organisation to behave ethically but the short-term demands of shareholders and the share price, of suppliers, and sometimes of customers, might make expediency more tempting.

This is not an easy role but HR might like to start with acknowledging it has a moral purpose in the organisation and make that the basis for its contribution to difficult business decision-making.

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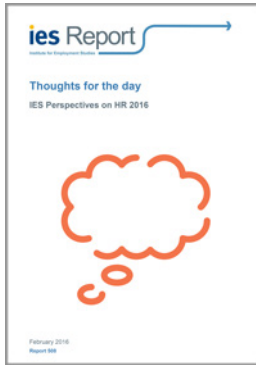
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Swimming against the tide HR Directors' Retreat 27–28 April 2016, Brighton

The theme of our annual HR Directors' Retreat this year will be 'Swimming against the tide'. The 2016 Retreat will explore the stories of those who have sought to do things differently or who have gone against the grain and in doing so, highlight what motivates people and what helps and hinders them on their journey. We will do so on Brighton's seafront, a city long-known for its nonconformity.



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