



Raising the red flag

Corporate whistleblowing is on the rise, but many concerns that are raised are ignored, and over a third of whistleblowers are likely to lose their jobs. So is it worth speaking up?

The highest payout ever made to a whistleblower by the US financial regulator, the Securities and Exchange Commission, is US\$14m. The SEC pays whistleblowers, including non-US citizens, between 10% and 30% of the amount collected as a result of the information received.

In 2014, whistleblowers from the UK provided the SEC with 70 tip-offs, topping the foreign tip-off table as a result. But there are no such rewards

for whistleblowers in the UK itself – no rewards at all, in fact – and the Financial Conduct Authority (FCA) has recently advised the government against introducing them in future.

Yet corporate whistleblowing in the UK is on the rise. According to a report by Public Concern at Work, there were 17% more cases across all sectors in 2013 than in 2012.

More and more complaints are raised within the financial services industry too. Research by Kroll shows

that 5,150 people called the FCA's whistleblower hotline in the year to October 2013, compared with 3,813 in the preceding year. As a result, the regulator opened 254 new cases, compared with 148 a year earlier. The cases that made big news in 2014 were Tesco, and the foreign exchange trading scandal where, after six years of investigation, the FCA brought enforcement actions against five major banks for attempted manipulation of forex benchmark rates.

Controls have been tightened, most probably as a result of the rise in reports, mainly from the financial services sector. And the threat of hefty fines has helped sharpen the focus of businesses on compliance and reporting obligations.

'The tough regulatory penalties that emerged from the Libor scandal, and the recommendations from the Commission for Banking Standards, have encouraged more people from the sector to report potential wrongdoing,' says Cathy James, chief executive of Public Concern at Work.

Unprotected

However, many more potential issues go unreported. In a Roffey Park survey of over 1,800 managers, more than half say they have observed misconduct in their company but a third chose to stay silent because they did not think corrective action would

services sector appear to be silenced far faster than in any other. And those who decide against raising concerns do so because they anticipate gagging or non-disparagement clauses, says James.

Many fear blowing the whistle could affect their health as well as their careers. When Paul Moore, group head of regulatory risk at HBOS, alerted the board to the bank's excessive risk-taking, he lost his job. He told the *Financial Times* that the process 'nearly killed him'. Parry says: 'He's not alone in finding there can be a high price to pay for doing the right thing.'

Some people report anonymously, but, says Andrew Durant, head of forensic investigations at FTI Consulting, 'in my experience, companies invest a lot of time in trying to identify exactly who the person is'.

is that a person has breached or is likely to breach a binding legal obligation, including a breach of accounting rules – but not just a breach of good accounting practice. He also confirms that an accountant does not have a statutory obligation to report such a breach, although their contract of employment and professional code of ethics may impose that obligation.

'Especially where the individual is employed at board level or in a risk or audit function, they are likely to have a contractual obligation to raise compliance issues with their employer,' he says. 'To see something material in those circumstances and not raise it could be construed as misconduct and if it's very serious – if the breach is extremely grave and very obvious – it could even count as gross misconduct, justifying summary dismissal.'

THE MOST COMMON WHISTLEBLOWING DISCLOSURE IS BREACH OF A LEGAL OBLIGATION, INCLUDING ACCOUNTING RULES

be taken or feared reprisals. Steve Hearsurn, senior consultant at Roffey Park, says it can be hard to reconcile the dilemma of whether people should stay true to their personal and professional standards by speaking up, but risk their position, salary and ability to support their family in the process. 'It can be a catch-22 or damned if you do/damned if you don't situation,' he adds.

Figures from Public Concern at Work show that in 2013, across all sectors, 63% of the issues raised were denied or ignored, and over a third of whistleblowers lost their jobs.

Ignorance was bliss in the case of Tesco too. 'The Tesco whistleblower appears to have been largely ignored for many months until the appointment of the new CEO Dave Lewis,' says Oliver Parry, corporate governance adviser at the Institute of Directors.

Public Concern at Work's report *Silence in the City* reveals whistleblowers in the financial

Accountants' duty

Whistleblowers may receive compensation for any adverse consequences for them, but whether or not that balances the personal as well as financial costs is another matter. Hearsurn says: 'I can tell you that speaking out is the right thing to do, but I don't have to live with the fallout.'

But Sue Almond, external affairs director at ACCA, believes blowing the whistle is a professional and ethical responsibility. 'Whistleblowing is about acting in the public interest, and our rulebook for members details what it means – exposing misconduct and alleged dishonest or illegal activity occurring within an organisation,' she says. 'I believe it's a fundamental duty of the accountant and the auditor to call it out when it's wrong, dangerous or illegal, and to speak out, however difficult they may feel this is.'

David Whincup, employment partner at law firm Squire Patton Boggs (UK), says the most common subject of a whistleblowing disclosure

Making the call

Those employers that do have whistleblowing policies in place normally set out the procedures on the intranet or in the employee handbook. 'So, in theory, it should be fairly easy to establish what the steps are – report to manager, general counsel, audit committee or third party nominated for receiving such reports,' says Durant.

Unfortunately, Public Concern at Work's statistics suggest most organisations just pay lip service to whistleblowing: although 93% have formal whistleblowing arrangements in place, more than half do not train key members of staff designated to receive concerns and one in 10 admit their arrangements are not clearly endorsed by senior management.

This is why Public Concern at Work has developed a code of practice for employers, workers and their representatives, with recommendations for raising and handling complaints, training staff and reviewing procedures. 'We are running a First 100 campaign, encouraging organisations to sign up to the 15 principles of the code,' says James. 'We want to see leadership from the top, demonstrating to staff that concerns will be taken seriously.' »

If boards start to ask themselves whether their arrangements are working in practice and sanction those who treat whistleblowers badly, then we might see a shift in attitudes.'

In the meantime, what can you do if a concern you raise is not dealt with, or not dealt with adequately? Durant says: 'You may need to escalate it in accordance with internal procedures or, if you don't get any traction, you have the option of reporting to relevant external authorities.'

You may be able to report externally straightaway if you feel unable to tell your employer in the first place. 'The Department of Business, Innovation and Skills has an online publication that lists prescribed bodies, such as HMRC for tax fraud,' says Almond.

The findings of *Silence in the*

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City show that financial services whistleblowers are more likely to approach a regulator directly. 'This suggests a lack of trust in employers and in the internal structures to protect whistleblowers,' says James. She recommends that potential whistleblowers seek advice at an early stage. 'Public Concern at Work runs a free, confidential advice line, we operate on a lawyer-client basis and all communication is legally privileged.'

Whistleblower protection
Whistleblowers in the UK are protected under the Public Interest Disclosure Act 1998 (PIDA), amended by the Enterprise and Regulatory Reform Act 2013, against retaliatory action by employers, such as dismissal or attempted gagging. However, their disclosure must meet certain criteria. 'The disclosure must be made in the public interest, they must reasonably believe that the information is substantially true and

that they are making the disclosure to the correctly prescribed person,' explains Nick Matthews, global head of forensic services at Kinetic Partners.

Whincup clarifies this: 'There is no protection if the disclosure is made for personal gain or made outside

the employer without good reason – the whistleblower must reasonably believe they would be subject to detriment if they made a disclosure internally, or that if they did so, relevant evidence of the wrongdoing would be destroyed.' Similarly, they will not be protected if the disclosure concerns something other than the breach of a legal obligation.

'In addition to ordinary employees, the whistleblowing protection extends to "workers", a wider population that includes partners, agency workers and some self-employed consultants,' says Whincup. But it does not extend to corporates. 'So if a firm of accountants makes a disclosure about the financial practices of a client and, in consequence, the client withdraws its business, there is little the firm can do.'

Whistleblowers making a 'protected disclosure' (see box) are also protected against victimisation by colleagues. 'Workers and agents

will be personally liable if they victimise a whistleblowing colleague,' says Matthews. 'Furthermore, the employer will also be liable if they fail to prevent any acts of victimisation, unless they can show they took all reasonable steps to prevent it happening.'

Parry believes PIDA gives the UK one of the strongest regimes in Europe for whistleblower protection. 'It makes the dismissal of an employee who makes a protected disclosure automatically unfair, and compensation is unlimited,' he says.

But more needs to be done. In 2014, the government announced proposals to encourage more employees to come forward. These include improved guidance for individuals on how to blow the whistle, a model whistleblowing policy for employers, and the introduction of a duty on prescribed persons such as regulators to report annually on the concerns received. MPs have also been added to the prescribed persons list.

James says: 'While the new requirement on regulators is a step in the right direction, there are gaping holes in the law including the prevention of blacklisting of those who have blown the whistle and the issue of gagging clauses.' ■

Iwona Tokc-Wilde, journalist

FOR MORE INFORMATION:

The *Silence in the City* report is available at tinyurl.com/SilenceCity

