

NHS whistleblowers still face consequences

Catherine Baksi on how little has changed since the Francis review

Catherine Baksi

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Rhiannon Davies hugs fellow campaigner Kayleigh Griffiths after the release of the Ockenden report last week

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Criticism of NHS managers over the treatment of whistleblowers has been reignited by Donna Ockenden's damning review of maternity services at Shrewsbury and Telford Hospital Trust.

Her findings come seven years after the "Freedom to speak up?" report from Sir Robert Francis QC, which found that NHS staff feared repercussions if they blew the whistle on poor practice. He recommended reforms to change the culture and support whistleblowers.

The Public Interest Disclosure Act 1998 makes it unlawful to subject workers to negative treatment or dismiss them because they have raised a whistleblowing concern, known as a "protected disclosure". But critics say little has changed since the Francis review.

According to Protect, a whistleblowing charity, 64 per cent of those contacting it for advice said that they had been victimised, dismissed or forced to resign. Shazia Khan, founding partner at Cole Khan Solicitors, says that instead of being afforded protection, whistleblowers are "targeted as a form of retaliation by trust senior management and disciplined on trumped up charges to shut them down".

Those seeking to vindicate their rights before an employment tribunal, Khan adds, will often be "priced out of justice" by well-resourced NHS trust lawyers who at public expense "deploy a menu of tactics" to defend cases. This includes triggering satellite litigation to strike out claims as a means to drain resources and threatening

six-figure costs applications. “Trusts rely on law firms to use litigation as a form of attrition to erode the confidence, finances and mental health of the whistleblower,” adds Georgina Halford-Hall, the director of WhistleblowersUK.

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When Peter Duffy, a consultant urologist at University Hospitals of Morecambe Bay Foundation NHS Trust, reported on allegedly unsafe practices by colleagues in 2016, he was demoted, falsely accused of financial irregularities, and threatened with a six-figure adverse costs order by Capsticks, the hospital’s law firm.

“All my witnesses dropped out after the medical hierarchy told them that the department might be dissolved if the case went badly,” Duffy says, which meant there was no one to rebut the trust’s evidence.

In 2014 Chris Day, a junior doctor, raised concerns about understaffing and safety at the intensive care unit of Queen Elizabeth Hospital in southeast London. When he went to an employment tribunal claiming a whistleblowing detriment, the trust and Health Education England (HEE, the body responsible for training junior doctors) fought him for years, racking up taxpayer-funded legal costs of almost £1 million. HEE, represented by the law firm Hill Dickinson, argued that junior doctors did not have whistleblowing protection because it did not technically employ them. But it later emerged that the same law firm had drafted the commissioning contracts imposing HEE’s terms on NHS trusts on how doctors are trained and employed.

After the documents came to light and the Court of Appeal sent his case back to the tribunal, Day was forced into a settlement owing to the threat that he would have to pay the legal costs for the trust and HEE if he lost. He says that Capsticks later denied having threatened him with adverse costs.

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In parliament Norman Lamb, the Liberal Democrat MP, criticised the “grotesque spectacle” of the NHS “deploying expensive QCs to defeat a junior doctor who raised serious and legitimate patient safety issues”. Day and Lamb complained to the Solicitors Regulation Authority (SRA) about the behaviour of the two law firms, but neither practice has been fully investigated.

“The antics of Capsticks and Hill Dickinson scare NHS staff into thinking the legal system won’t treat them fairly if they tell the truth and speak up,” says Day, who is concerned that a potential conflict of interest prevents the SRA from investigating Capsticks.

Capsticks is retained by the SRA to prosecute lawyers in professional disciplinary proceedings. Both firms declined to comment. The SRA was also approached for comment.

Critics argue that employment tribunal judges fail to curb the oppressive acts of hospital trusts. The journalist David Hencke has branded the ruling dismissing allegations of victimisation, harassment and discrimination made in the case of Usha Prasad, a cardiologist, “a stain on British justice”. The judge, Hencke says, “airbrushed” key parts of her claim from his ruling, exonerated the senior management and wrongly took issue with a ruling from the General Medical Council that exonerated her.

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Campaigners, including Protect, want an inquiry including an examination of the experience of whistleblowers at employment tribunals. In a letter to the president of the tribunals, more than 300 doctors, whistleblowers and journalists called for proceedings to be recorded and official transcripts provided to improve fairness. Campaigners also call for independent scrutiny panels at NHS trusts, which must give permission before formal investigatory processes begin.

Caroline Klage, a partner at Bolt Burdon Kemp, says: “To improve patient care and prevent catastrophic and fatal mistakes from being repeated, NHS staff must be encouraged and empowered to speak out without fear of recrimination. If this does not happen soon, how long until the next scandal emerges?”