TESTING THE OPEN GOVERNMENT CODE

Whistleblowers may benefit from advice given in Testing the Open Government Code of Practice (a briefing issued by The Campaign for Freedom of Information). It is designed to encourage people to test and use the government's new code on access to government information. The advice includes the following on applying for information:

"If you have been refused information in the past by a government department or agency, reapply for it now under the Code.

Make a point of mentioning the Code in any future requests for information (e.g. 'This is a request under the Code of Practice on Access to Government Information'). However, if you haven't done this, and have asked for information informally, you will still be able to invoke the Code at a later stage and complain via an MP to the Ombudsman about any unreasonable secrecy.

Apply in writing, and ask for the information to be supplied 'within 20 days as required by the Code'.

Make your request as specific as possible: this will reduce the chances of your being charged a fee, or having your request turned down altogether. (Requests which are 'too general' or would require 'unreasonable diversion of resources' can be refused.) Asking for information covering a short period (e.g the last 12 months) is less likely to provoke charges than a request covering several years. If you get the information you can make a further request to cover an earlier period.

If you want information about a body which is not covered by the Code, try applying to a government department with responsibility for that body. For example, nationalised industries are not covered but have sponsoring departments which are. You could try Department of the Environment for information about local government issues and the Department of Health for information about health authorities and trusts.[4] (Copies of the briefing are available from Campaign for Freedom of Information, 88 Old Street, London EC1V 9AR. Tel: 0171-253 2445)

JOIN
FREEDOM TO CARE

Your support is invaluable in helping conscientious employees in the public services who speak out in the public interest and in building up our campaign for the legal, administrative and managerial reforms necessary to encourage freedom of speech in the workplace. Membership will entitle you to 'The Whistle' three times a year, occasional information and attendance at our meetings in London and the regions.

I enclose a cheque for the sum of £_____ payable to 'Freedom to Care' to cover the following: [Tick Box]

£12 Membership _
£3 Membership (low income) _
Donation _
£6 Library subscription for 'The Whistle' (three issues) _

NAME_____
ADDRESS_____
_____
_____
_____
_____
_____
Postcode_____
WORK ROLE_____
DATE_____

Return this form to:
Membership Secretary
Freedom to Care
P O Box 125
West Molesey
Surrey KT8 1YE

May 1995 Volume III No. 7 £2.00 ISSN 0969-2118

The Whistle

Bulletin of FREEDOM TO CARE

EMPLOYMENT LAW WON'T PROTECT YOU
How it Should be Changed

Thirty years ago employers could hire and fire employees more or less as they pleased. Fortunately, employment-at-will is a thing of the past. Current employment law offers important protections to the workforce and termination of employment is now based, in theory at least, on just or good cause. This means that the employer must show reason for dismissing the employee, such as incompetence, misconduct or redundancy. Workers also have protections against sexual and racial discrimination. However, it is time to take this further in a more enlightened world in which civil and human rights and citizenship are pressing demands.

CURRENT PROTECTIONS

The Employment Protection (Consolidation) Act 1978 (EP(C)A) does not give adequate protection from victimisation for the conscientious employee who raises some concern in the public interest, particularly if that employee decides to go public.

There is now, for the first time, a hint of recognition of a public interest principle in employment law. It lies in the provisions for Health & Safety. But these are too narrow because only health and safety officers are protected against unfair dismissal for raising concern (or other employees where there is no such officer); the only concerns which count are those about the safety of workforce, not public; and only serious and imminent risks are covered.

PRINCIPLES

The fundamental reform needed is an extension of the recognition of the legal wrongness of victimising or dismissing someone on the basis of sex, race, union membership or discharge of the health and safety role to victimising or dismissing an employee for raising a concern in the public interest . The public interest must become a principal concept in employment law so that it has a central role in determining the 'fairness' of the employer's behaviour.

At present an employer's action, in unfair dismissal claims, may be deemed fair unless so unreasonable that no 'reasonable employer' would have acted so. But this is itself unfair. FtC submits that the fairness of dismissal be established in accordance with natural justice rather than what may be expected of the 'reasonable employer'.

FtC also maintains that it is unacceptable that at present industrial tribunals often accept that the employer's reason for dismissal consists in that employer's 'reasonable belief' rather than the facts of the case. We demand that industrial tribunals establish and pay strict attention to the facts of the case rather than the 'reasonable beliefs' of the employer.

At present, in addition to the potentially fair reasons which an employer may give for dismissal (lack of capability or qualifications, misconduct, redundancy or illegality) there is the catch-all 'some other substantial reason'. It seems to FtC that this catch-all is often abused to let in almost any excuse the employer cares to offer. We demand that employers always establish a claim to the fairness of the dismissal under a specific provision such as misconduct or redundancy rather than something as vague as 'some other substantial reason'.

SPECIFIC REFORMS

FtC seeks reform of the EP(C)A. Such reform should lead to increase in success rates for applicants - presently only about a third win their claims against dismissal.

THE WHISTLE

... is the bulletin of FREEDOM TO CARE and appears three times a year.

FREEDOM TO CARE is a non-party network of doctors, nurses, social workers, lawyers, accountants, academics, scientists and others. It campaigns for appropriate changes in the law, managerial & administrative procedures and workplace culture to allow professionals and all workers the freedom to raise concerns about standards without fear of reprisals. It also gives limited support to those who have been victimised for raising matters of public concern.

FREEDOM TO CARE's patrons are John Hendy QC and Allan Levy QC. It is a non-profit company limited by guarantee, registration No. 2973440 and it has received funding for 1994-96 from the Joseph Rowntree Reform Trust.

Editor

Geoffrey Hunt

Associate Editors

Edna Briscoe
Chris Chapman
Barry Clifton
Maureen Eby
Anne Leaver
Graham Pink
Helen Zeitlin

Subscriptions & Contributions

To subscribe fill in the form on the back page of this issue or write to the PO box for details.

Editorial contributions are welcome. The views expressed by contributors in this publication do not necessarily reflect those of the Board of Directors of Freedom to Care.

ISSN: 0969-2118
c FREEDOM TO CARE

P O Box 125
West Molesey
Surrey KT8 1YE
United Kingdom

Most important of all, whistleblowers should be able to claim 'automatically unfair dismissal' for public interest disclosure (PDI).

The modus operandi of industrial tribunals should changed so that the conscientious employee has a right to appeal to it for an independent investigation of any form of victimisation for PDI. FtC would like to see the implementation of the main proposals of the Justice Committee on Industrial Tribunals (1987). A central proposal of this Committee was an improvement of the investigative approach, especially by empowering a specially trained officer to carry out preliminary investigations.

At present employees need to have served two years before they can pursue an unfair dismissal case. This two year service qualification should be waived in the case of whistleblowers. Employees who are being victimised for being socially conscientious should be able to appeal to an IT and claim victimisation regardless of how long they have worked for an employer.

One should be able to seek compensation without a statutory ceiling in whistleblowing cases so that due consideration can be given to the damage done to an employee and the deterrence of victimising employers. Consideration should be given to the idea of punitive awards where clear victimisation can be shown to have occurred for PDI.

Job security is important for everyone, but especially for employees who are conscientious enough to speak up to protect the public. The whistleblowing employee should have status quo rights by which the contract of employment continues until the dispute is resolved. Those who have been dismissed for whistleblowing should have automatic and facilitated reinstatement (or at least re-engagement).

FtC supports the idea (already promoted by the regulatory body for nurses, midwives and health visitors) that professional employees should have their professional code of conduct embraced in their contracts of employment. Industrial tribunals should attach much greater weight to the demands of any code of conduct or best practice which the employee may be working under. Incorporation of such codes would strengthen a recognition of the social welfare objectives of professionals and avoid placing them in positions of double-bind and double jeopardy. A nurse, for example, should not be dismissed for abiding by the code, nor should she be disciplined by the regulatory body for following an employer's instructions. No one should be punished twice - by the employer and the regulatory body - for the same offence.

Much greater force should be given to the disciplinary framework for employers set out by the Advisory Conciliation & Arbitration Service. Many employers abuse disciplinary and grievance procedures to obstruct, intimidate and victimise conscientious employees. Disciplinary procedures were designed by ACAS in the light of due process and natural justice. Employers who abuse or fail to follow the ACAS disciplinary rules should be penalised.

Nearly all whistleblowers find it difficult to obtain new work. Part of the problem is that the victimising employer will not provide a fair, or any, reference. There should be a right enshrined in the EP(C)A for an employee to have sight of any reference or testimonial provided by an employer with whom they have been in dispute over whistleblowing.

Account should be taken of the growing proportion

PUBLICATIONS

THE DEFENCE INDUSTRY

The legal advice centre, Public Concern at Work, has published its First Annual Report (1994) and issued a booklet on Blowing the Whistle on Defence Procurement. The booklet points out that levels of fraud in this sector are rising, with the estimated value of fraud standing at £22 million in 1993-94, and yet not many employees report malpractice. This is not surprising in the current workplace environment of secrecy and intimidation. The report recommends that employers create the right environment to encourage conscientious employees to report malpractice, that there be a written code of conduct, assurances of confidentiality for the concerned employee, and alternatives to line management for raising concerns, as well as feedback to the employee on how the concern is being handled. (Price £20. Tel 0171-404 6609.)

In its Annual Report PCAW reports that 386 clients concerned about dangers and serious malpractice have received free legal advice and that 61% of clients followed that advice. It has given training sessions to senior managers and staff from over 25 organisations. In a review of the charity's year Sir Gordon Borrie QC, Chairman of the Trustees, explains that "we are concerned primarily with the process rather than the substance of the concern. Our aim is to ensure that the concern is raised so that it can be addressed by those in charge of the organisation or, where necessary, by the regulatory authorities."

CORPORATE GOVERNANCE

Whistleblowers in the financial sector now have a set of elementary standards and precedents to refer to in the form of the Cadbury Report and its Code of Best Practice. A follow-up to the Cadbury Report on Corporate Governance has now been issued. The booklet on Compliance with the Code of Best Practice is the result of the monitoring of companies' behaviour since the Code was published in 1992. Adrian Cadbury, the chairman, says in the preface that "The overall response by companies to the degree of disclosure required by the Code has been positive and some exemplary governance statements have appeared in company reports." (May 1995, available from Gee Pubs., 01622 778080, price £7.50.)

SECRET SERVICES

How do you blow the whistle on quangos when very few know what they are up to? The Local Government Information Unit tells us how to go about investigating their operations. Their booklet Secret Services? A Handbook for Investigating Local Quangos aims to help local authorities, trade unions, community organisations like FtC and environmental campaigns in monitoring the unelected state. The book draws on detailed experience of investigating quangos, companies, other organisations and individual board members. It provides advice on the method and approach to obtain selected information. The authors say that "The book is not intended to attack or undermine the services that quangos provide or the people who provide them. It is concerned with issues of structure, accountability and regulation, which in many cases are outside the control of those who work for these organisations." (Local Government Information Unit, 1-5 Bath Street, London EC1V 9QQ, Tel. 0171-608 1051. Price £25.)

NURSING HOMES

The regulatory body for nurses, midwives and health visitors (UKCC) has issued a report on issues arising from professional conduct issues in the nursing home sector. The UKCC says that many of the issues identified "whilst revealing inappropriate conduct, also reveal major deficits in the organisation of care and supervision of clinical practice." Cases of assault on residents, physical and verbal abuse of patients, inadequate supervision of care assistants and poor management are given.

One of its recommendations is that owners and matrons "should ensure that a formal complaints system is in place and that it is understood by all staff. The complaints system must guide staff as to how to complain when the person to whom they report is the subject of their complaint." It also calls for "a charter of residents' rights and standards of care for each home".

(FtC is particularly concerned about the plight of thousands of care assistants who are not regulated by the UKCC or any other body, may witness abuses and are in a very vulnerable position when it comes to speaking up. Some have told FtC that since they are part-time or non-contractual they dare not pursue concerns.)
(Professional Conduct: Occasional Report on Standards of Nursing in Nursing Homes, United Kingdom Central Council, London July 1994. Tel. 0171 637 7181.)

interactions which are hard to investigate because the offending action is either ambiguous, subtle or deniable. Workplace ostracism is the paradigm example here." (12)

The box below shows the kinds of reprisals reported, in descending order from the commonest.

The report's remarks on medical referral are especially interesting: "Although psychiatric referrals are not considered by whistleblowers as amongst the worst form of official reprisals, we nevertheless know from our discussions with them that this form of reprisal, whereby their very sanity is brought into question, is intolerable to these people because behavioural assessment has a pernicious way of striking at the heart of their motivation."

"Compulsory referral for behavioural assessment is a particular savage form of organisational attack. For a start the compulsory nature of the referral exposes the whistleblower to a no-win situation. If the whistleblower refuses to be behaviourally assessed, he or she invites further negative attention by management for refusing to obey lawful orders..[and]..give rise to the view that the whistleblower has some hidden personality disorder that they fear the psychiatric assessment will uncover. If the whistleblower submits to assessment, the attitude they have to the assessing process and the assessor will have strong bearing on the diagnostic outcome. The whistleblower who feels a rapport with the assessor and opens up on personal feelings, has no control over how those feelings are documented by the assessor, no control over who gets to read the report, and certainly no control over being reported out of context."

"It is important to note that the assessor's client is the referring department, not the whistleblower. This allows assessor's to feel no primary ethical obligation of care, privacy and professional duty towards the whistleblower."

The report points out that the News South Wales branch of the Australian Medical Association adopted in April 1993 ethical guidance on forced referred of whistleblowers. The guidance says, among other things, that when an employee is forced to see a psychiatrist, "The psychiatrist must be freely chosen by the patient ... In general, it is unethical for a psychiatrist chosen by the employer to accept such a referral." However, there has been resistance to the acceptance of such guidance in the Australian medical professional generally.

The research found that 94% of the sample suffered unofficial reprisals as opposed to 71% who suffered official reprisals. The report distinguishes between 'vertical' unofficial reprisals, orchestrated by management, and 'horizontal' ones, such as ostracism, arising among colleagues who feel threatened or demeaned. Nearly a quarter of the sample reported ostracism. The authors say, "We tend to think that the difference between official and unofficial reprisals is the difference between a show trial which has all the trappings of legality, and a lynch mob which administers its own 'justice'." (23)

While ostracism was the most common, other forms of unofficial retaliation were: questioning of motives and personal attacks, increased scrutiny at work, abuse by colleagues, denial of work necessary for promotion, physical isolation, given very little work to do or over-worked.

Asked which were the worst of the reprisals whistleblowers' answers clustered around damage to career and to their personal honour and integrity.

[The next issue of The Whistle will look at this report's section on work values and how whistleblowing changes them.]

OFFICIAL REPRISALS

Reprimand	*39% of whistleblowers*
Punitive transfer	*31%*
Compulsory referral to psychiatrist etc.	*22%*
Threats	*18%*
(of punitive transfer, retrenchment, dismissal, legal action)	
Halt to career advancement	*18%*
Dismissal	*17%*
Official Investigation Obstructed	*10%*
Retrenchment/redundancy	*10%*
Charged or sued	*8%*
Demoted	*8%*
'Work performance' harassment	*6%*
Suspension	*4%*
Essential work resources withdrawn	
'Kept in the dark'	
Offered payment with silence condition	
Earned demerit	
Harassment by 'internal investigation'	
Support funds denied	
Contract tenders continually rejected	
Promoted as a bribe	
Department ignored complaint	
Denied appeal rights, Grievances lodged, Reported for trivia,	
Post-training employment option withdrawn	

of the workforce which does not fall under the EP(C)A: part-time, temporary workers and non-contractual workers. In late 80s 55% of part-time workers were unprotected. It is obvious that a part-time worker may also be aware of public harms in the workplace and that such a worker may be even more vulnerable than a full time one.

The level of tribunal awards for unfair dismissal is a sensitive political issue. Limits for compensatory awards were last raised in June 1993 from £10,000 to £11,000. The real value of awards has fallen dramatically. A compensatory award in 1975 was £5,200 which, uprated by price and earnings, would have been worth £30,000 by mid-1992.

Late in 1994 Michael Portillo, Secretary of State for Employment decided not to increase the limits. His Department justified the decision in terms of "the importance to national economic recovery of avoiding additional burdens on businesses and on the public purse."

About 60% of IT claims are for unfair dismissal. In 1993 the average award for unfair dismissal was £2,773. If we take into account awards for race and sex discrimination then average awards have risen - this is because the Government was forced by European legislation to do away with upper limits for race and sex cases. The unjust level of unfair dismissal awards may be, in part, due to the raising of the ceiling on discrimination cases.

FtC demands that the ceiling be abolished and that industrial tribunals be allowed to use discretion on a case by case basis. It is grossly unjust that an employee who has been victimised, with often severe repercussions for his or her physical and mental health, reputation and self-esteem, employment prospects, level of financial indebtedness, and family happiness should be awarded much less than the national annual average salary by way of maximum compensation when vindicated in a tribunal.

[Comments from readers are welcome in developing FtC's campaign on law reform]

AN AMENDED EMPLOYMENT PROTECTION ACT

WOULD ALLOW TO WHISTLEBLOWERS:

* ***A right to demand fairness in terms of natural justice***
* ***A right to have their case resolved on the basis of the facts of the case***
* ***A right to ask a tribunal to investigate at an early stage***
* ***Status quo rights until the dispute is resolved***
* ***A special category of automatic unfair dismissal***
* ***Waiving of the two year service rule***
* ***Protection even if part-time or temporary employees***
* ***No ceiling on compensation***
* ***Automatic reinstatement for those dismissed***
* ***Protection by incorporation in employment contract of any relevant code of conduct***
* ***Penalties for employers who breach ACAS disciplinary rules***
* ***A right to see any employer's reference which is provided subsequently***

NEWS

WHISTLEBLOWING FOR SALE?

What's the difference between a whistleblower and an informer? Could it be that the former is primarily motivated by the truth, personal integrity and public concern and the latter by malice or rewards such as money? Readers are invited to think about this one:

Employees who disclose information to a special hotline on illegal copying of software by employers may receive cash rewards of up to £2,500.

Crimeline has been set up by the Business Software Alliance, an organisation of software manufacturers and distributors which says it loses £8.5 billion globally every year through software piracy. In the UK it works under the umbrella of FAST (Federation Against Software Theft). Under a similar scheme in New York one temporary employee ran about reporting three companies in one week. Under that scheme the informer must provide an affidavit which the accused company has a right to read. (Crimeline's number is 0800 510510 - just in case you are a sacked whistleblower about to have your home repossessed.)

DOCTORS' PERFORMANCE

Is whistleblowing on incompetent doctors set to increase? The Medical (Professional Performance) Bill, published in March, gives the General Medical Council new powers to protect the public when it appears that the professional performance of a doctor is "seriously deficient". The GMC says it will take eighteen months to implement.

LAW OF LIBEL SHOULD NOT BE USED TO GAG?

The law lords have given a ruling which deters public bodies from using the libel law to quell criticism. The judgement says "not only is there no public interest favouring the right of organs of government whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it ... because to admit such actions would place an undesirable fetter on freedom o speech." However, FtC asks whether anyone know whether quangos and health trusts are organs of government? (See Derbyshire County Council v Times Newspapers Ltd and others [1993] 2 WLR 449.)

CIVIL SERVANTS' ETHICAL CODE

The civil service unions and the Government are at loggerheads over a new ethics code for civil servants. There are now three versions.

First, a Select Committee drafted a code which was appended to the July 1994 White Paper on the Civil Service. Second, a draft code of ethics was offered in the response of the IPMS and the FDA (Institution of Professionals, Managers & Specialists; First Division Association). Third, in a second White Paper (January 1995) the Government has accepted the principle of a new code but has drafted one of its own, claiming superiority over the Select Committee draft.

Paragraphs 10, 11 and 12 of the Government's version may interest readers:

"Civil servants should not without authority disclose official information which has been communicated in confidence within Government, or received in confidence from others. They must not seek to frustrate the policies, decisions or actions of Government by the unauthorised, improper or premature disclosure outside the Government of any information to which they have had access as civil servants."

"Where a civil servant believes he or she is being required to act in a way which is illegal, improper, unethical, or in breach of constitutional convention, which may involve possible maladministration, or which is otherwise inconsistent with this Code or raises a fundamental issue of conscience, he or she should first report the matter in accordance with procedures laid down in departmental guidance or rules of conduct."

"Where a civil servant has reported a matter covered in para 11 in accordance with procedures laid down in departmental guidance or rules of conduct and believes the response does not represent a reasonable response to the grounds of his or her concern, he or she may report the matter in writing to the Civil Service Commissioners."

At about the time the Select Committee was drafting ethics for civil servants the then Minister for Open Government, William Waldegrave, announced that it was alright for government members to "say something that is untrue to the House of Commons." To make himself clearer on this point he later told MPs: "Much of government activity is more like playing poker than playing chess ... You don't pull all your cards up at one time."

The unions are now making criticisms of it - so a fourth may be in the offing.

The unions' draft Code clarifies the position of civil servants in relation to market testing and contracting out, responsibilities to the public, and civil servants as citizens.

[The next issue of The Whistle will follow up progress, and examine the unions' draft code. See back page of this issue on gaining access to government information.]

INTERNATIONAL

UNITED STATES OF AMERICA

David Nochumson, a scientist working for the Los Alamos National Laboratory (LANL) in New Mexico, was removed from his position as manager of the Radiation Air Emissions Programme at LANL in 1991 after he urged management to comply with Clean Air Act regulations regarding radio-active releases. With the help of the Government Accountability Project (GAP - a whistleblowers' organisation) he filed a complaint with the Department of Labour. In September 1994, a DoL judge ruled in Nochumson's favour. The judge's 53-page decision chronicled and condemned the abuses Nochumson had suffered: "During a single five-month period Nochumson's supervisors threatened to abolish his job, limited his ability to communicate with other Laboratory employees, reprimanded him in a 'performance improvement' memo, criticized him for filing his whistleblower complaint, and told him that his job would be moved to another section into which he could not transfer. In such circumstances, most reasonable people would perceive that they were working in a hostile environment."

The judge ordered LANL to reinstate Nochumson to his former management position, pay back wages, reinstate all leave, pay all costs and attorney's fees, and all harassment and discriminatory activities against him and pay him $10,000 in damages for emotional distress.

Following the decision, Nochumson's attorney, GAP's Tom Carpenter, wrote to the Department of Energy (DOE) asking for an accounting of how much taxpayer's money had been spent on DOE's case against Nochumson, and asking the DOE to cut off future attorney fees for NANL to fight the case. Robert Nordhaus, General Counsel for DOE, informed Carpenter in a letter that LANL had spent $500,000 in DOE money to fight Nochumson, and that LANL had been instructed that no more money would be available for litigation in the case. DOE invited settlement negotiations to resolve the case.

In early January 1995, David Nochumson and LANL reached a mutually agreeable settlement where Nochumson will be promoted (retroactive to October 1991) to the position of Group Leader in the Water Quality Department. All of his costs and fees amounting to $257,000 will be paid by LANL, in addition to his receiving $20,000 in emotional distress damages. Finally, LANL will restore the majority of his leave and lost retirement benefits. [From 'Bridging the Gap' Winter 1995]

AUSTRALIA

Two in-depth studies of whistleblowers in Australia have been published by the University of Queensland. The first, Unshielding the Shadow Culture, (April 1994) analyzed 299 separate acts of alleged wrongdoing reported, and evaluated government responses to disclosures made in the public interest. The researchers say of this first study that the data shows up certain 'paradoxes'. "The first paradox concerns a co-existence between a minority of workers driven by conscience and a majority of workers driven by self-interest, fear and expediency. Another paradox concerns the co-existence of a small population of highly stressed whistleblowers within work contexts that thrive on a false aura of harmony and teamwork. The third paradox gets to the heart of bureaucratic ineffectiveness; diligent whistleblowers taking their concerns to obstructive and/or incompetent investigating authorities. Through resource starvation, jurisdictional narrowness, red tape, sheer incompetence and/or more sinister motives such as protecting the 'good' name of the department and maintaining the status quo for the ruling administrative elite, these authorities outpace the diligent whistleblower. The final paradox buried within this data is perhaps the most poignant of them all; private citizens acting in the public interest.

The second study (Wounded Workers, by W De Maria & C Jan, October 1994) focuses on the reprisals that whistleblowers faced; the financial, physical and emotional effects on the whistleblower; and "how whistleblowing impacts on the personal work values of those who make public interest disclosures."

REPRISALS: The study reveals that in the 596 alleged cases of reprisals suffered by the whistleblowers the reprisals were hardly ever anticipated. The employee thought that the manager would do something about the reported wrongdoing. Reprisals were either 'official' or 'unofficial'. "Official retaliation is a vindictive process of organisational payback whereby the whistleblower is punished for speaking out. This punishment is veiled behind policy and procedure in order to avoid the charge of illegality (particularly the charge of victimisation). Actions such as selective redundancy and poor performance reviews, along with many other strategies ... Unofficial reprisals rely less on adverse reaction which can be legally or procedurally justified, and more on workplace

problems caused when an establishment is mentioned in a consultant's report. In these cases it was suggested that the Health Authority write back to the consultant requesting him/her to amend the report by deleting any reference to a particular establishment. Mr Banham was grateful that this decision had been taken, because once a report has been received it must be sent to the parents." [Minutes of a meeting held between officers of the Education Dept and the Health Authority on 2nd October 1984, p 3.]

In 1984 Mr Large issued 'Guidelines' with the last page headed 'What cannot be said in a Report'. Here it prohibited any reference to any 'specific alternative provision or placement proposed' and also banned 'any reference to "absence of resources or provision" etc.' [Guidelines, sec. 3.9] Placement psychologists were invited to submit such information in a 'covering memo attached to the front of the Special Services copy' of their report. Parents and others would not have access to such a memo. The 'Guidelines' also forbade psychologists from making any references from which an alternative placement might be inferred by parents and others: "you should not include the name of any proposed future special school or unit on your Distribution list" [sec. 3.1]. This angered me since the promotional literature for the 1981 Act stressed the need for partnership between parents and LEAs.

I opposed the 'Guidelines' when it appeared in 1984. The paragraph which I introduced into my report writing 'offended' Banham and Large. Clearly, whilst they intended to censor the reports they wanted to conceal this intention. I was now treated as a newspaper editor might who had to accept censorship but exposed its existence by leaving blank columns in his newspaper. Subsequent complaints by me to the Department for Education and Science showed that the Department was quite content to accept that a council should not publish to its citizens its working guidelines.

Mr Large wrote to me in May 1989 to say, "I am currently preparing a full report on your performance as a psychologist in this Service" but then failed to submit it. He increased the pressure on me by reducing the hours I could work and instructing me, without preliminary discussion, to re-write the seven reports which carried my 'offending' paragraph. I had worked for the council for about 20 years and had never been asked to rewrite a report. I now refused to do so, since I felt that this would be an acknowledgement that they were defective in some way without any indication of where this defectiveness lay. I was then brought before a disciplinary hearing and dismissed.

I had to appeal against my dismissal before I could complain to the Industrial Tribunal. The council's case collapsed within an hour or so of its opening presentation. Unfortunately I followed the advice of a barrister the services of whom I obtained through his own free representation scheme and agreed to settle. This was a mistake I have spent the last five years trying to rectify - but that's another story.

WORDS OF WISDOM
3: PUBLIC ACCOUNTABILITY

..not just a matter of rubbing along with a pre-democratic, top-down kind of government which happens to have been monopolized by a single party ... The additional seriousness derives from the redefinition of government itself that such a system is enabling to put in place. This involves a privatization of citizenship and a dissolution of accountability. Political consumers are left to pursue their 'rights' and make their complaints in relation to services over which they have ever less control and ever less expectation of control, in an invisible fog of non-accountability, deprived of the means of effective collective action and of independent agencies of support and scrutiny. Truly a world in which nobody is responsible for anything any more - a central virtue claimed for markets, but a terminal vice when transferred to politics.

(Tony Wright, Citizens & Subjects: An Essay on British Politics, Routledge, 1994, pp. 133-34.)

WHISTLEBLOWING IN THE HEALTH SERVICE
Edited by Geoffrey Hunt
Edward Arnold 1995
ISBN 0-340-59234 6 (£12.99)
From bookshops or Edward Arnold, Marketting dept. on 0171-873 6000.

CASES

SUE MACHIN
SOCIAL WORKER

Sue Machin, the Ashworth security hospital social worker who blew the whistle on abuse of clients, has just won her claim of unfair dismissal against the Special Hospitals Service Authority. Machin, who is now a Freedom to Care activist, was dismissed in February 1994 for allegedly giving a client a catalogue of listening devices. The majority decision of the Leeds industrial tribunal, published on 31st May, was that the employer "had failed to carry out such an investigation into the facts of the case as a reasonable employer would have carried out." In fact "the investigation ... was so flawed that no reasonable employer would have relied upon it."

Machin believes that the dismissal was a reprisal following her vindication at a public inquiry headed by Sir Louis Blom-Cooper in Spring 1992. After the tribunal she said, "I urge conscientious social workers who feel victimised or gagged to join Freedom to Care and help to bring fairness, openness and freedom of speech to the workplace."

HELENA DALY
HAEMATOLOGIST

Dr Helena Daly, former consultant at Treliske Hospital in Truro, was suspended by her hospital management for 'personal and professional reasons'. In June 1995, after nearly three years of dispute, the hospital has admitted that its charges and criticisms (rudeness, upsetting colleagues) were unfounded. There has not yet been any sign of reinstatement, or even of an apology.

An expert witness in Daly's hearing stated, "Helena put pressure on the hospital to respond faster and more sympathetically to patients...The Trust's management was not used to this, they didn't like it..."

Daly said, "Officially, suspension is not meant to be a disciplinary sanction, but in fact it's the most unjust form of discipline I know because you're taken away from your professional life, the worst thing that can happen to a doctor, often without even knowing what you're meant to have done." She claims the action against her has cost the trust at least £200,000, plus her full salary of £50,000 per annum.

There is evidence that women doctors suffer this kind of disciplinary abuse more often than their male counterparts. [See 'The Independent', Section Two, 02-06-95]

PREM SIKKA
ACCOUNTANCY LECTURER

A lecturer in accountancy at the University of East London, and supporter of FtC, has just published an account of what happened to him when he blew the whistle on the accountancy profession. In a paper delivered to the 1995 British Accounting Association Conference at Bristol Business School he and his two co-authors write: "When one of the authors [Sikka] publicly aired his criticisms of the undemocratic practices of the UK's second largest accountancy body, the Chartered Association of Certified Accountants (ACCA), the Association sought to silence him by exerting pressure upon his employers (without the knowledge of the author) with a threat that if the university supported the author, it would withdraw accreditation of the ACCA sponsored courses. In this case, the Vice-Chancellor resisted the ACCA's pressures. Subsequently, the Association tried to play down the episode as a 'private' matter, as if underhand threats to the rights to speak out critically could conceivably be interpreted in this way. Believing that such efforts to silence concerned voices should not go unrecorded, the support of journalists and senior politicians was sought, resulting in embarrassing news coverage and critical letters to the ACCA, followed by motions in British Parliament. At the very least this demonstrated to other professional associations that there is a limit to their powers, and that they could not expect to intimidate academics without the prospect of damaging ramifications." The following Early Day Motion No. 126 of 1st December 1993, was signed by 41 Mps: "That this House deplores the attempt by the Chartered Association of Certified Accountants to silence Dr. Prem Sikka's criticisms of the internal democracy in the Association by writing to his Vice-Chancellor at the University of East London as an attempt to infringe academic freedom and is concerned that this example is only the latest in a growing list of attempts to pressurise academics working in the field of accountancy by threats of lawsuits, withdrawals of grants and more covert pressures on the academic institutions which employ them and it calls upon the accountancy professional bodies, the accountancy firms and the profession generally to recognise that the enormous power they hold has to be tempered by a respect for independent criticism, impartial inquiry and academic analysis, all of which have a major contribution to make to the development of accountancy and audit and the refinement of their institutions and procedures."
[Sikka P, Willmott H, Puxty T., 'The Mountains are Still There: Accounting Academics & the Bearings of Intellectuals,' BAA Conference, 5-7 April 1995.]

KEN CALLANAN PARAMEDIC

Investigations by a 'Health Service Journal' reporter have revealed that Surrey Ambulance Trust has admitted serious flaws in its disciplining of an ambulance paramedic [See Whistle 6]. Ken Callanan was given a warning after informing the media that he had written to Virginia Bottomley about poor standards of care. An appeal panel has now found that the disciplinary investigators committed a catalogue of breaches of due process. It failed to interview key witnesses, made recommendations on outcome before the hearing, and one person was judge and jury. Apparently the appeal panel has reduced Callanan's warning from second level to first level. [One may wonder whether those who flagrantly flouted due process have been warned.]

DAVID GRIFFITHS EDUCATION DIRECTOR

Rhodri Morgan, the Labour Party's Welsh health spokesman, said there was no doubt that David Griffiths had been sacked for revealing abuses of the budget. Griffiths, then Gwent's director of education, found that he was the only member of the authority not to have his contract renewed earlier this year. His disclosures led to the resignation of the chief executive of Health Promotion Wales who also had to repay £3,000 expenses for a trip to Brazil with his lover. Mr Griffiths said, "Whoever takes over from me needs to ask questions and not join the gentleman's club." ['The Guardian' 29-03-95]

PAUL WATT MACDONALD STUDENT NURSE

Following an ITV 'World in Action' report on 'The NHS Secret Service, in which FtC's national coordinator appeared (23-01-95), FtC received a letter from a viewer in Scotland, ex-student nurse, Paul Watt MacDonald. He writes, "I too have come across difficulty in having issues investigated which I raised concerning patient safety, student safety, and brutality against psychiatric patients." He says no one would follow up his concerns. Exasperated, MacDonald abandoned nursing and is now a university student studying languages.

NURSE VAL MACINTOSH

District nurse Val MacIntosh, whose case was reported in Whistle No. 6, was dismissed in March 1995. Management said "the work relationship ... has irretrievably broken down." Her dismissal follows on many complaints she made about what she considered to be unacceptably low standards of care. In a March letter to FtC her husband Wayne writes: "The feeling of isolation and despair for Val is overwhelming, a feeling which I am told, a number of your members within your organisation have felt previously. We are both experiencing growing frustration following the Trust's dismissal of the majority of complaints. We are determined to fight on until justice is achieved. Countless nurses, who are still employed by the Trust in addition to those who have now left or been dismissed, have contacted us to add their stories of unacceptable working practices within the south west [of England] healthcare trusts. Patients have written to Val expressing sympathy and concern for her."

In a letter of 27th May to FtC Wayne writes "to thank Maureen Eby and Graham Pink [of FtC] for their telephone calls to Val; their time and thoughtfulness achieved great reassurance for Val at a time when she was feeling very isolated."

At the time of writing the Macintoshes were waiting for a decision on whether Val meets the two year service condition for a claim to the industrial tribunal. She has also filed for defamation against the Trust's director of operations.

Letters of support for Val may be sent to her at FtC (address inside cover).

Mr J ACCOUNTANT

[Identity concealed to protect this whistleblower from reprisals]

Mr J was an accountant working for a small London company. In his routine work he detected irregularities in invoices and claims. The sums involved may amount to £10,000. He drew this to the attention of the directors, but some were themselves involved in the fraud. Mr J then resigned, regarding himself as having been constructively dismissed. (This arises where the employee terminates the contract, but does so because he believes the employer's conduct leaves him no alternative.) He then received a letter from the company's auditors threatening him with legal proceedings unless he withdrew his complaints and apologised.

Earlier this year FtC obtained legal advice for Mr J. Then a solicitor's letter was sent to the company warning of possible action. The auditors have not to date followed up its threat of legal proceedings. Mr J did not work for the company for two years so could not make an unfair dismissal claim. He considered a High/County Court application for wrongful dismissal. However, Mr J was concerned about the personal financial cost of such an action and of being branded a 'troublemaker' and not obtaining further work. He is now seeking work elsewhere. He says he does not need a reference from this company. He does not know whether the fraud is continuing.

CASE STUDY

Educational Psychologist John Linsie Tells his Story

"I WAS SACKED FOR DEFENDING PARENTS' RIGHT TO KNOW"

I was summarily dismissed in 1989 by Solihull Local Education Authority from my employment as an educational psychologist on a trumped up charge of 'gross misconduct' in failing to carry out two instructions. The charge was trumped up, I assert, for two main reasons. First, the charge of 'gross misconduct' was, in fact, a rolled-up charge comprising two quite different accusations which, in the interest of justice, should have been addressed in two quite different ways. Second, a senior officer of the council admitted, before a witness, that the reason for the charge was that, under the Authority's disciplinary procedure, that was the only charge which allowed for an employee to be dismissed. This clearly establishes, it seems to me, that the council was not concerned with the quality of my work, as it tried later to claim, but simply wanted to use the threat of dismissal to get me mindlessly to toe the established administrative line with regard to the working of the 1981 Education Act concerning special education and children with learning difficulties.

The dual character of the charge against me, and the duplicity of the council in pressing that charge, is clearly established by the council's own minutes for the disciplinary hearing itself:

"During the course of his evidence, Mr Linsie has admitted refusing to carry out two specific instructions from Mr Large [the council's Principal Educational Psychologist]. These were:

1) To delete a paragraph in each of seven reports concerning a pupil's placement;
2) To re-write seven reports so that they were understandable to a variety of readers, to-the-point, educationally relevant and of clear practical use in devising strategies and/or making decisions."

[Minutes from Disciplinary Hearing, 8th December 1989, p. 16]

My refusal to implement Mr Large's two instructions was clearly established before the hearing commenced - I had never made any bones about it. The reference to a paragraph concerning a pupil's placement is wholly misleading in that it makes it seem that in seven of my reports I included placement recommendations which, on Mr Large's direction, I had refused to remove. However, none of them contained a placement recommendation but carried instead a paragraph advising the reader why such a recommendation was <u>not</u> included. That paragraph was dubbed, nevertheless, by the then Special Needs Officer, Philip Banham, as that "offending paragraph". Yet it only stated that:

"[It should be noted that I have prepared this report under the guidelines issued by the Solihull Education Department as required under the 1981 Education Act. These guidelines require that psychological reports should not contain any advice, or recommendation, concerning a pupil's eventual placement.]"

The council's own guidelines were the immediate cause of my difficulties. For what the council wished to do was restrict the recommendations about provision and placement made by psychologists and others in their reports whilst, at the same time, conceal such restriction from the public. The council sought to intervene with such a restriction, following the passage of the 1981 Education Act, because the Act had assigned parents the right to see all the reports produced during a child's assessment while councils were seeking to control the money they spent on special education.

Thus Solihull sought to limit the opposition which a parent might raise to the council's own decisions about special education.

Mr Banham, in a meeting with Solihull Health Authority in October 1984, is quoted as follows:

"It was felt to be very important for the nursing reports and the medical reports to be objective and not prejudging. Therefore, Mr Banham asked that if the author of the report had any private views, i.e. which establishment might best suit the child, to write a covering letter which will not be attached to the statement and therefore not sent to the parents. Mr Banham felt that in effect this would make the formal report much more objective." [Minutes of a meeting held between officers of the Education Department and the Health Authority on 2nd October 1984, pp. 2-3.]

In another meeting Mr Banham is quoted as follows:

"Mr Banham reiterated the