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Mrs Susan Kramer MP
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12 September 2009

Re Legislative protection of 'whistleblowers'; refs: JH/300709/Graeber, M and
MW/143860

Dear Mrs Kramer,

Thank you very much for sending the letter of Mr Pat McFadden, Duty Minister, dated 13 August, and the email of Mr Ahmet Gungoren, dated 1 September, 2009.

In addition to sending this to you, I would like to submit this letter as an official response to the ongoing consultation, "Employment tribunal claims and the Public Interest Disclosure Act" (<http://www.berr.gov.uk/files/file51554.pdf>) which is to end on October 2. Please let me know via email if I should also fill in the online form. The BMA, the NCUP and other organisations should be notified of the consultation in my view. I find the deadline rather tight and I believe that it could be extended.

I have read the consultation document and I would like to express strongest disagreement with the proposed process. I am also concerned that the consultation, like the substance of the letter of 6 July by Lord Young of Norwood Green, completely sidesteps the key issue where PIDA currently fails.

This key issue is that PIDA currently *accepts and even prescribes that the 'whistleblower' has to pay for her/his public interest disclosure (professionally, financially and personally).*

The reason for this is that PIDA currently cannot offer any effective protection because all action is taken when it is already too late, i.e. after the attack and the resulting job loss. Effective *protection* (the original meaning of protection is "cover in front") would need to be proactive in order to be effective. It is not logically possible to protect in retrospect.

There is only a delayed and merely material remedy at the moment, which moreover appears to be insufficient. Most importantly, many 'whistleblowers' are unlikely to even see a tribunal because they cannot afford it!

Thus, the sobering reality is that a corrupt executive will still be able to take full advantage of the existing loophole, and I would like to refer to Mr Gosling again to illustrate this (see attached page 1380A from the legal bundle). Why should a 'whistleblower' have to fear for his reputation? As long as there is no appropriate punishment such as a prison sentence for a person who victimises a 'whistleblower', no improvement over current practices can be expected in my opinion.

Secondly, if the regulator, e.g. the Serious Fraud Office and the Charity Commission as relevant "prescribed persons" in the case of Imperial College London, is asked to take action but this action "will not create any delays in the Employment Tribunal process" (minister McFadden), the process initiated by the regulator, which unavoidably takes time, is apparently *a priori* considered *irrelevant* for the Employment Tribunal's decision because its results are unlikely to be available in time. Thus, the actual matter for which the 'whistleblower' was originally victimised is specifically excluded from the considerations of the Tribunal.

I find this highly problematic because generally there can be disclosures that are of greater or lesser significance to the general public and they can also come with a greater or lesser risk for the 'whistleblower', and this needs to be assessed professionally and taken into account before appropriate compensation can be awarded. Therefore, the proposed procedure is likely to worsen the current situation if no additional changes are made.

In addition, I am concerned that the proposed procedure will result in a formal split of the cause of the victimisation from the 'whistleblower's' case, a significant step which can be abused with strategic intent. As a warning example, a split occurred (was achieved) in the case of Imperial College London: the original (financial) fraud has not been investigated to this day, the subsequent and far more serious institutional fraud with corruption of audit has not been prosecuted either, and the people responsible are still in post, some even continue to hold public office and the affected charities are kept at bay.

Therefore, the proposed procedure's main effect "without involving the release of ... allegations into the public domain" (from the consultation document) will be to "defuse" a 'whistleblower's' case. In addition, the proposed procedure provides an official means to turn a public interest disclosure case into an employment case against the 'whistleblower' (see example of the case of Imperial College London).

As suggested earlier, a much better option would be to "create a new body that is directly answerable to Parliament and to which a whistleblower can turn before putting his job at risk. This body should be equipped with powers to investigate independently of government and to initiate a prosecution of the perpetrators sufficiently early while protecting the whistleblower. The protection of whistleblowers has to be decisive, proactive and effective or too few will continue to come forward." (see my submission dated 5 May 2009).

Furthermore, the current post hoc-approach is highly uneconomical - consider the legal costs of the Imperial College London case alone.

In the BMJ article on 'whistleblowers' (Cassidy J (2009) Name and Shame. British Medical Journal 1 Aug 2009 Vol. 339 264-267) which has been submitted to the government, a consultant who has reported more than 20 doctors to the GMC in this country is quoted as saying "It was clear to me that loyalty, no matter how misplaced, was valued more highly in

medicine than integrity". This is not acceptable because "loyalty over integrity" is a principle upon which street gangs function but the patient-doctor relationship requires absolute protection.

In the above article, Mrs Joan Bye is also quoted stating that "whistleblowers... should receive Nobel prizes on the steps of 10 Downing Street". I would like to take this opportunity to propose formally that future 'whistleblowers' once legally recognized are considered for a knighthood.

Finally, improved legislation for the protection of 'whistleblowers' should abandon the term 'whistleblower'. Although an ethical word by most definitions, i.e. to inform, 'whistleblower' has developed unsavoury connotations in recent years. Semantics are powerful, and the term 'whistleblower' is now rather undesirable, implying a disruptive and indecorous act, rather than a courageous and worthy course of action often undertaken at great personal risk.

I would like to propose "Public Interest Champion" (PIC) or "Public Interest Advocate" (PIA) instead.

Respectfully submitted,

Yours sincerely,

Professor Manuel Graeber MD PhD FRCPATH

Encl. Page 1380A from the legal bundle

Gosling, Chris

To: Kelly, Ann I
Cc: Lindsay, Louise E
Subject: Manuel Graeber

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Dear Ann

Please see the attached.

Could I have 2 or 3 lines pithily refuting (as of course we can) the points made in this letter.

Incorporating these points I then intend to add text in my reply reply along the lines that:

- a) this is one of the worst cases of management bullying and harrassment I have ever experienced;
- b) suspension was the only possible response from an employer who takes seriously the duty of care on behalf of staff already professionally and personally damaged by MG's unacceptable behaviour;
- c) whilst surprised that MG should risk damaging his professional reputation we frankly welcome an opportunity to vindicate our actions in the public forum of an ET.

Thanks

Chris

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29/03/2007

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