

# **TITLE PAGE**

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**SHORT TITLE: WHISTLEBLOWERS' EXPERIENCES OF RE-EMPLOYMENT**

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# **RETALIATION FOR WHISTLEBLOWING: SOME CASE STUDIES ON THE EXPERIENCE OF RE-EMPLOYMENT/RE-DEPLOYMENT.**

## **ABSTRACT**

Extensive research has been conducted over several decades on many aspects of whistleblowing. However, to the author's knowledge, no research has been carried out into the experiences of whistleblowers who have been reemployed/re-deployed following retaliation for raising concerns. In many countries, re-employment (i.e. reinstatement or reengagement) is seen as the primary remedy for unfair dismissal but in practice this remedy is rarely awarded. Indeed, both courts and tribunals seem to have little knowledge about what factors make re-employment practicable. One objective of the research undertaken for this article is to demonstrate that the re-employment/redeployment of whistleblowers may well be 'successful' in a wide range of circumstances. As a result, it is hoped that courts or tribunals and others in a position to award it, for example, arbitrators and mediators, will be more willing to accede to a whistleblower's wish to be re-employed.

## **1. BACKGROUND AND INTRODUCTION**

Although it does not accord with current legislative descriptions, the following definition of whistleblowing has been commonly used by researchers: " the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations who may be able to effect action" (Near, & Miceli, 1985) . However, according to recent guidelines published by the International

Standards Organisation, whistleblowing is defined very broadly as “the act of reporting suspected wrongdoing or risk of wrongdoing” (page vi) and “wrongdoing” is defined as “action(s) or omission(s) that can cause harm” (para 3.8) (ISO 37002,2001).

Extensive research has been conducted over several decades on many aspects of whistleblowing (Brown et al, 2014). Studies have explored intentions to whistleblow as well as actual disclosures of wrongdoing in different workplace and national cultural settings (Culiberg & Mihelic, 2017). Attempts have been made to examine the demographics of whistleblowers and to document the types of concerns that are raised, the way in which wrongdoing is reported as well as the consequences for both disclosers and the recipients of concerns (the ‘whistleblowing process’) (Mesmer –Magnus & Viswesvaran, 2005).

Increasingly employers have produced whistleblowing policies and procedures and in many countries protective legislation is in place (Vaughn, 2012).<sup>i</sup> However, to the author’s knowledge very little research has been carried out into the experiences of whistleblowers who have been reemployed/re-deployed following retaliation for raising concerns (Kenny,2019).

In many countries, re-employment (i.e. reinstatement or reengagement)<sup>ii</sup> is seen as the primary remedy for unfair dismissal. Indeed, there is impeccable logic in stating that individuals who have lost their jobs unlawfully should have restored to them what has been removed. In practice, this remedy is rarely awarded after the employment relationship has been severed<sup>iii</sup> so legal proceedings to prevent dismissals taking place are more attractive in jurisdictions where this is possible. In addition to a historical reluctance to order specific performance of a contract of employment and the fact that some successful claimants do not wish to be re-employed, the courts and tribunals seem to have little knowledge about

what factors make re-employment practicable.<sup>iv</sup> One objective of this research is to demonstrate that re-employment of whistleblowers may well be 'successful' in a wide range of circumstances. As a result, it is hoped that courts or tribunals and others in a position to award it, for example, arbitrators and mediators, will be more willing to accede to a whistleblower's wish to be re-employed.

## **2. HOW SHOULD WE MEASURE THE 'SUCCESS' OF REEMPLOYMENT?**

The 'success' of re-employment is a relative matter and may be measured in a number of ways. Using an objective criterion, some would argue that there is 'success' if the employment relationship endures for a minimum period of time even if the re-employee or employer (or both) are not particularly happy. On the other hand, re-employments enduring less than some minimum period cannot automatically be viewed as unsuccessful because some jobs habitually experience high levels of labour turnover. More broadly, re-employment of whatever length may be deemed a success if it provides the parties with some benefit or advantage that they would not otherwise have obtained. For employers, this may be as simple as avoiding a costly claim for compensation.<sup>v</sup> For employees, returning to work may be a means of avoiding an extended period of unemployment as well as providing the opportunity to assess alternative job prospects. Indeed, it is commonly remarked that getting a job is easier if you are already employed and, unlike other categories of job seeker,<sup>vi</sup> in the UK whistleblowers are not protected against discrimination at the point of hiring.<sup>vii</sup>

A more subjective approach would be to ask the persons involved whether or not they felt their re-employment was successful. In doing so we would have to bear in mind that, when

any group of workers or employers are interviewed, a number would express some dissatisfaction with the employment relationship. The case study participants in this research were specifically asked whether or not they would describe their re-employment as 'successful' and invited to give reasons for their verdict. Six thought re-employment had been successful (3 of the 5 women);<sup>viii</sup> three stated that it had been unsuccessful<sup>ix</sup> (although two of them would disclose again if similar circumstances arose again); and three indicated that they were unsure.<sup>x</sup> While it might be concluded that the interviewees had fairly positive views about their re-employment, we must bear in mind that the cohort was self-selecting. Indeed, we might also speculate that those who had more negative experiences of returning to work could be less likely to volunteer for interview.

### **3. METHODOLOGY AND PROFILE OF THE PARTICIPANTS**

In order to conduct this research, national and international whistleblowing networks and support groups were asked to suggest possible names of people who might be willing to be interviewed about their experiences of re-employment following dismissal. It was always envisaged that it would be difficult to find participants for a variety of reasons. Apart from the low incidence of re-employment cases, perhaps the most obvious of these was that if the renewed employment relationship was working well individuals would have no incentive to discuss it. Conversely, if the re-employment had been problematic, the whistleblower might have no interest in exploring why this remedy had not proved satisfactory for them. Originally, the aim of the study was to investigate the experience of those who had been dismissed by way of retaliation for whistleblowing and subsequently achieved re-employment via the legal system or other mechanisms. However, when potential

interviewees were contacted via Zoom meetings it emerged that several of those willing to participate had not been dismissed but had been re-deployed following whistleblowing. For example, in several US cases legal proceedings had been brought to prevent dismissal but the individuals were transferred or re-assigned under their existing contracts. Given the shortage of potential participants and the close relationship between re-deployment and re-employment, it was decided to extend the case studies to incorporate those who had been redeployed after whistleblowing. Thus the eleven case studies consist of five persons who were dismissed and re-employed and six who did not have their employment terminated but were redeployed under their contracts. Three of those who were dismissed were reinstated and the other two returned to a different job but on the same terms and conditions. It is significant that 4 of the 6 interviewees who described their return to work as 'successful' (see above) had been redeployed rather than terminated.

As previously indicated, interviewees were identified via a direct call to organisations involved in advising or representing whistleblowers and known researchers in the field.<sup>xi</sup> Ideally, case study interviews should be discussed in person but Covid restrictions at the time (March –April 2021) prevented this from happening. Thus ethical approval was sought from Middlesex University for Zoom interviews and express consent to the administration of a structured questionnaire and the production of verbatim transcripts was obtained from all participants. Several of the interviewees were happy to be named in the case studies but others had reasons for not being identifiable. It was concluded that the sensible way forward was to try to maintain anonymity for all. Given the ease with which search tools can be used to identify people from very limited information, some of the facts have been truncated and edited in order to ensure confidentiality. However, all participants had the

opportunity to check what has been said about their case after a draft of this report was produced.

The eventual cohort consisted of six men and one woman living in the US and four women from the UK and Ireland. To protect their identity it has been necessary to conceal the precise job titles of the participants but it is worth noting that eight of the eleven worked in the public sector <sup>xii</sup>. At the time of the interviews, 4 participants had retired and one was unemployed. In terms of the nature of re-employment/redeployment, 3 were doing the same job after whistleblowing as before and 5 were doing a different job (including one who had been promoted and another who had been demoted). It is worth noting that all three who were doing the same job after whistleblowing and three of the five female interviewees <sup>xiii</sup> described the re-employment/redeployment as successful.

#### **4. INTERVIEW SUMMARIES**

INTERVIEWEE 1: was a counsellor in the US prior to whistleblowing who raised concerns about patient care with the Office of Special Counsel and subsequently with the news media. By way of reprisal, s/he was accused of threatening a co-worker and, although cleared of the charge, stayed on administrative leave for 18 months. As a result of his/her actions, the employer's policies were changed. Re-employment was achieved via an alternative dispute resolution programme and a non-disclosure agreement was signed. The interviewee was represented by GAP and had supportive family and friends but alleged that their work colleagues created a "corrosive culture". Eventually s/he was transferred on the same terms and conditions to another location with a different chain of command. Although no apology was received, s/he was thanked by letter for the initial disclosure of wrongdoing.

This interviewee was not financially worse off as they were paid throughout. At the time of the interview s/he was preparing to retire because of mental health issues.

INTERVIEWEE 2: held a senior public sector post dealing with learning and development prior to raising a concern about nepotism in confidence with the Chief Executive of the organisation. Despite an investigation taking place, the concern was not dealt with and s/he went on sick leave when s/he was not allowed to continue in her role. S/he claimed constructive dismissal and was represented by private lawyers throughout the employment tribunal process. Following a finding that detriment had been suffered which was reported in the press, s/he was offered reinstatement before a remedy hearing took place. The interviewee claimed to have the support of family, friends and colleagues and drew attention to the fact that by the time s/he returned to work- in a different job but with the same terms and conditions -the previous senior management team had been replaced. The interviewee received an apology and was asked to review the organisation's whistleblowing policy. Having been away from work for two years, s/he was re-employed for 2.5 years but then chose to retire as "I completely lost my sense of purpose". In terms of finances, this person was better off than before the constructive dismissal as s/he received compensation for the detriment suffered as well as the reimbursement of legal costs.

INTERVIEWEE 3: was a senior law enforcement officer who initially reported staff shortages to his/her supervisor. Having been interviewed by a newspaper reporter, s/he was ordered to have no contact with the media and put on administrative leave. S/he maintains that, despite continuously raising the concern externally, it was not dealt with and that s/he heard about the termination of their employment via the radio. According to this interviewee, judicial mediation failed (inter alia) because the employer was represented by



someone without authority to take decisions. Ultimately s/he was re-employed following decisions of the US Merit Systems Protection Board and Court of Appeals. In addition to receiving some pro bono assistance, the interviewee self-funded the hiring of an attorney but was reimbursed on return to duty. S/he claims to have received invaluable support from family, friends and colleagues and noted that his/her case was reported both nationally and internationally. The explanation given for this was that the media felt that they had been wronged because the person they had interviewed suffered retaliation. This interviewee was reinstated with full back pay and voluntarily retired three years later. S/he drew attention to the fact that on their return to work everyone above in the chain of command was different.

INTERVIEWEE 4: was a private sector manager when she raised a concern with a line manager about bullying, harassment and sex discrimination against several fellow workers. As a result, s/he was told there was no longer a role for her/him, and put on a performance improvement plan. Following negative performance reviews, s/he was signed off work with stress. At no stage was the concern raised externally as s/he felt that its nature made it inappropriate to do so but a claim for detriment was lodged with an employment tribunal. Following a favourable judgment, the interviewee undertook a phased return from sick leave. S/he had legal advice and representation throughout which was partly paid for via house insurance but s/he was £50-60,000 out of pocket as a result of the tribunal proceedings. The interviewee received support from his/her family and friends but not colleagues who were unaware of the situation. Although the concern was never dealt with, the problem disappeared when the manager was moved to another role and others left. S/he said that their employer had treated her/him negatively on their return to work and had raised a grievance about that with them. Nevertheless, this interviewee concluded that

the reemployment was successful as it enabled him/her to get salary again and to re-skill after being off sick.

INTERVIEWEE 5: was a law enforcement officer who reported racial profiling and quotas to management. S/he asserted that intimidation followed as well as attempts to isolate and find fault with his/her work. The interviewee engaged a local lawyer who used social media and contacted GAP. After contact was made with a senator's office the racial profiling etc ceased and the interviewee was transferred back to a former post s/he had held in another US state. S/he maintained that his/her spouse was the only person to offer support and that both suffered post - traumatic stress disorder (PTSD) as a result of the attempts at bullying made on his/her return to work. In terms of finances, the interviewee stated that s/he was earning the same amount as prior to raising the concern but had incurred legal expenses of \$30,000-40,000. Despite taking extensive sick leave owing to anxiety and depression, s/he regarded the redeployment as successful as it "built character and resilience". At the time of the interview, s/he was two years from retirement.

INTERVIEWEE 6: was a nurse who raised concerns about understaffing and patient care with a colleague. Following this s/he was moved because the line manager had "no confidence in her practice". Although a formal investigation found no evidence of bullying, the interviewee stated that the bully left after 12 months. After mediation failed the nurse went off sick and was redeployed a total of 9 times over 6.5 years. With support from family, friends and a nursing union representative a suitable job was eventually identified and expenses incurred were also repaid. S/he also recorded that the social media interventions of his/her MP were enormously helpful. In terms of current relations with her employer, s/he feels more secure now that a 'speak up system' has been put in place. At the time of

the interview the nurse had a formal diagnosis of adjustment anxiety disorder and had four years left until retirement. Although the nurse asserted that the redeployment had been successful and that "raising patient safety concerns is what we should do as nurses", s/he stated that she would hope never to be put in the same situation again because of the impact on his/her family and health: "it gave me severe anxiety and depression which I know at one point was life threatening, it was very frightening, thankfully now my life has been restored to near normal, but the terrible experience never really goes away entirely".

INTERVIEWEE 7: was an academic researcher who raised concerns about serious unethical behaviour by his/her Director. Unfortunately, s/he was required to report wrongdoing to their supervisor who, in this case, was the alleged wrongdoer. At a subsequent team meeting it was stated that "you are either in or out" and, having walked away, s/he then became an outsider. Having taken the concern to the Office of Inspector General, s/he was re-assigned and "relegated to making data entries into computers". According to the interviewee, an investigation took place which lasted six years and the concern was dealt with "to some degree". Alternative dispute resolution proved to be unhelpful but eventually a private agreement was reached "to help make me whole in both my job and financial reimbursement". Prior to the re-employment, this person had strong family support but work colleagues were hostile until the Director was removed. The interviewee was legally represented pro bono by GAP and the US Congress got involved in the case following press and social media coverage of the corruption allegations. In terms of relations at work after the re-employment, it was recorded that s/he was promoted contrary to the terms of the settlement agreement and that this was resented by co-workers. The

interviewee stated that s/he was now medically retired and the high stress s/he experienced triggered multiple sclerosis. S/he regarded the reemployment as unsuccessful.

INTERVIEWEE 8: was a patient advocate when s/he reported human rights abuses caused by staff shortages to the line manager. The manager then told the interviewee that “it is put up or shut time, this is the job so just take it”. No investigation took place and the concern was not dealt with. Having been told that the matter could not be taken further internally and, believing that there was considerable urgency, the interviewee contacted a national radio station. Following coverage of the story in the media and the issue being raised in Parliament, his/her indefinite employment was terminated. Subsequently the employer offered reinstatement but s/he was given was a six month fixed -term contract which involved training rather than advocacy. No real training was offered and the interviewee believes that the re-engagement was a public relations exercise designed to limit the financial liabilities of the organisation. Although colleagues had their fixed -term contracts renewed, the interviewee, who experienced management hostility on her return to work, did not. At no stage was the interviewee legally represented but s/he had the support of his/her son, MP’s and the press. S/he asserted that work colleagues were quite supportive but they got sucked into the dispute and had also been sacked. The interviewee reported that financially s/he was not worse off when s/he returned to work but s/he was unemployed for three years after the new contract expired which caused huge stress. The interviewee was pleased to have “held on to my principles” but thought the re-engagement was unsuccessful because s/he had simply been bought out for six months.

INTERVIEWEE 9: was a senior academic working in the public sector when s/he raised serious concerns about discrimination with his/her immediate boss. Having done so, s/he

was invited to investigate his or her own allegations but was not allowed to talk to the relevant people. S/he was told “if you try to push this forward you will lose your job” but nevertheless tried repeatedly to raise the concerns again internally. After the matter was taken to the Office of the Inspector General, the interviewee reported that s/he became the target of ridicule and was banned from performing his/her job on the grounds that s/he was a security risk. The interviewee was offered alternative employment with the same employer but was unable to take it up after a near fatal car accident. His/her employment was eventually terminated after notice was given following a short fixed-term contract extension. The interviewee recorded that his/family were scared as he/she was the breadwinner and had serious health problems, that colleagues stopped talking to him/her and that friends were lost. As a result of his/her actions, it was stated that one of the wrongdoers was fired and some of the allegations of violation of human rights were acknowledged. At the time of the interview, s/he was suffering from chronic PTSD, had undertaken a range of badly paid jobs and had suffered periods of unemployment resulting in financial losses of \$600,000. The interviewee regarded the re-employment as successful because it provided a short period of extra remuneration.

INTERVIEWEE 10: was a law enforcement agent who reported bribery and fraud to his/her second line supervisor as the immediate boss was allegedly involved in the wrongdoing. The interviewee maintained that, as a result, s/he was “sidelined” and told to “leave the matter alone”. Having raised the concern again internally because this was a legal obligation, s/he asserted that they were accused of lying and their job was threatened. Following judicial mediation, it was agreed that the interviewee would be offered another overseas assignment. S/he was represented by GAP and the Office of Special Counsel, the former engaging both politicians and the press. Support was also received from a spouse and a few

friends but colleagues turned their backs. According to the interviewee, the re-engagement meant that s/he ceased being an investigator in the field and was assigned menial administrative tasks. The interviewee maintained that s/he was harassed in this work and was denied promotion despite submitting hundreds of applications. Eventually s/he accepted early retirement on health grounds and the financial losses led to tensions within the family.

INTERVIEWEE 11: also worked in law enforcement when he reported serious of misconduct by a colleague to his/her supervisor. In response there was an attempt to cover up the alleged incident and the interviewee was threatened with “destruction”. Having been dismissed for a “laundry list of allegations”, including inappropriate comments, s/he approached the Office of the Inspector General. Ultimately, a high level court ruled that his/her disclosures did not violate the law and ordered reinstatement. Although the interviewee wanted to go to another enforcement agency, s/he was unilaterally reinstated. The interviewee was legally represented by GAP and, although s/he had great family support, claimed to have lost 99% of their friends. The case received much attention in the national media and the interviewee believes that this had a significant affect on the outcome. In relation to experiences post - reinstatement, the interviewee stated that s/he was asked to undertake psychiatric assessment at his/her own expense to assess their fitness to carry out the full job duties. Most to his/her work colleagues were hostile but this was not surprising since the interviewee had publicly testified that they were ineffective in performing their security role. At the time of the interview, this person was on living on state benefits owing to unemployment and had been diagnosed with anxiety, depression and PTSD. S/he also reported that their experiences had adversely affected relationships within the family in that his/her children resented the poverty they had endured.

## 5. ANALYSIS OF THE INTERVIEW DATA

### 5.1 THE NATURE OF THE CONCERN AND THE RELEVANCE OF MOTIVE

Dworkin and Baucus apply Collins' categories of harms (Collins,1989) to the whistleblowing process to produce the following hierarchy:

“Wrongdoing involving physical harm – endangering public or workers’ safety or health- has potentially serious consequences, and may represent a morally compelling situation for employees who observe wrongdoing. Economic harm represents moderately serious wrongdoing (price fixing activities, loss of or damage to property, and so on), while psychological harm – such as discrimination or verbal forms of sexual harassment that create emotional stress or damage – is the least serious type.” (Dworkin & Baucus, 1988,1285).

In terms of this typology, four of the case studies can be classified as involving physical harm, three involved economic harm and four psychological harm. Three of the interviewees who described their re-employment/redeployment as successful raised concerns about physical harm to patients (2) or the public (1); two reported discrimination and bullying and one disclosed nepotism. One of the three alleging economic harm described their re-employment/redeployment as unsuccessful and the other two were unsure.

Research demonstrates that it is not only the type of whistleblowing but also its ‘seriousness’ that affects the whistleblowing process (Miceli et al 1991). Seriousness could be measured in a number of ways, including the degree of risk to safety or health, the financial consequences, the frequency of the wrongdoing and its level of organisation. According to Smith, “more serious wrongdoing appears to be more likely to end in reprisals

for whistleblowers than less serious wrongdoing” (Smith, 2014; Bjorkelo et al, 2011). It can be asserted that all of the interviewees believed they were reporting serious wrongdoing and, as mentioned above, were either dismissed or redeployed for doing so. This lends some weight to the theory that the more threatening the disclosure, the more severe the retaliation will be.

It is often emphasised that for whistleblowing arrangements to be effective, recipients of concerns should focus on the credibility of the information rather than the motives of the discloser (Roberts, 2014). Thus if whistleblowers have reasonable grounds to believe that wrongdoing has occurred their allegations should be investigated. Put simply, it is the message that is relevant not the possible motives of the messenger. <sup>xiv</sup> Nevertheless, in these studies we had the opportunity to form an opinion about the reasons for reporting and the researcher had no hesitation in concluding that all the interviewees were driven by personal morality/altruism rather than self-interest. <sup>xv</sup> Indeed, the public interest element of reporting wrongdoing is highlighted by the fact that those involved in patient care (3) and law enforcement (4) had legal obligations to report alleged wrongdoing.

## 5.2 HOW THE CONCERN WAS RAISED AND HOW IT WAS DEALT WITH.

Researchers have suggested that where and how whistleblowers report wrongdoing might affect how organisations respond (Smith, 2014). In particular, it has been asserted that if the first step is to disclose information externally this is likely to be considered as disloyal. <sup>xvi</sup> In terms of with whom the wrongdoing was first raised, ten of the eleven interviewees reported internally. Six interviewees approached their supervisor (even though in one case this person was the subject of the concern); two went to their second



line manager (in one instance because the first line manager was involved); one contacted a colleague and another the Chief Executive. The one external disclosure was made to the US Office of Special Counsel (OSC) <sup>xvii</sup> by an interviewee who regarded the re-employment/redeployment as successful. Five interviewees stated that their initial step led to an investigation being carried out, although three of them questioned its validity; <sup>xviii</sup> the other six asserted that no investigation took place at this stage. Five interviewees raised their concern again internally and the remainder either chose not to do so or had received a response to their initial reporting.

It is not unreasonable to suggest that external disclosures are an indication that internal reporting mechanisms have failed and that “further action from any source is unlikely to improve the situation” (Smith, 2014). In the case studies, 4 interviewees asserted that no external disclosure was made (3 of them described their re-employment/ redeployment as successful and the other was unsure). Of the rest , 4 went to the Office of the Inspector General (OIG) <sup>xix</sup> and three went to the media. <sup>xx</sup> When the relevant 7 interviewees were asked if the external step resulted in the concern being dealt with, 3 said it had not. <sup>xxi</sup> One interviewee stated that the employer’s policies were changed and another revealed that the offending behaviour stopped. Another asserted that the wrongdoing was dealt with “to some degree” and one pointed out that, although the formal investigation found no evidence of bullying, the alleged offender left the organisation. 3 of the 4 indicating that the concern had been dealt with regarded their re-employment/redeployment as successful.

### 5.3 THE EXPERIENCE OF REPRISALS

International research has long established that the two main reasons why people do not report perceived wrongdoing are fear of reprisals and a belief that, even if proven,

wrongdoing is unlikely to be rectified (Brown et al, 2014). Not only is it unfair in principle to retaliate against those who have reasonable grounds to believe that they are raising concerns in the public interest but the imposition of reprisals acts as a deterrent to others contemplating the disclosure of wrongdoing. In this section we document not only the formal or the work-related damage suffered by the interviewees but also the social or informal harms. Financial losses and the impact on health and wellbeing will be discussed later on.

Three interviewees recorded that they had experienced 3 different types of retaliation, <sup>xxii</sup> 4 mentioned two types of reprisal and 4 indicated one form only. The following reprisals were suffered: a warning being issued (5); put on leave/told not to come into work; (4) reassigned to another job (4); subject to capability/performance review (2); isolated/separated from colleagues (2); ridiculed at work (1); falsely accused of threatening a co-worker(1); ordered not to contact the media (1); angry phone call (1).

#### 5.4 MECHANISMS FOR ACHIEVING RE-EMPLOYMENT/REDEPLOYMENT

Five interviewees stated that they had participated in judicial mediation <sup>xxiii</sup> and three of them were reemployed/redeployed through this mechanism. Four secured re-employment/redeployment via a private agreement and there were judicial rulings in the other four cases. Of those who described their re-employment/redeployment as successful, three obtained a judicial ruling, two achieved a mediated settlement and the other negotiated a private settlement. All three who returned following mediation signed non-disclosure agreements as did two who reached private settlements. <sup>xxiv</sup> Interestingly, two of those with court rulings had offered to leave prior to the judicial decision if the right

settlement terms could be agreed. Both of them described their re-employment/ redeployment as successful.

## 5.5 REPRESENTATION, SUPPORT AND APOLOGY

Given that six interviews were arranged as a result of a call put out by the US Government Accountability Project, it is unsurprising that all six were represented by this organisation during the process of securing re-employment/redeployment. As regards the other 5 interviewees, three engaged private lawyers for their case <sup>xxv</sup> - one had insurance that partly covered their costs but the other two were entirely self-funded. One person was represented by their trade union and the other had no formal representation. Of those describing their re-employment/ redeployment as successful, three were represented by private lawyers, two by GAP and one by a trade union.

All bar one interviewee stated that they had received the support of their family. <sup>xxvi</sup> Six interviewees also had the support of friends and two of these indicated that they also had additional support from colleagues. Of the six describing their re-employment/ redeployment as successful, two mentioned that they had the support of family, <sup>xxvii</sup> two had the additional support of friends and the same number had the backing of family, friends and colleagues. It is also worth recording that all three interviewees who were union members prior to re-employment/redeployment regarded their return as successful, although only one of them was formally represented by their union in the process. Of the two who suggested that their re-employment/redeployment was unsuccessful one only had the backing of family while the other obtained support from the media, members of parliament as well as a whistleblower support group.

In terms of coverage in the press and social media etc, 9 participants mentioned such involvement and 7 of them felt that it had helped their cause. Indeed, the interviewee who had no representation described the role of the press as vital in securing their re-employment /redeployment. Only two of those describing their re-employment /redeployment as successful failed to have press etc contact. One claimed that, as a law enforcement officer, it would not have helped them and the other stated that they were prevented for talking to the press about the employer's business without prior approval. The other interviewee who shunned press involvement indicated that this was entirely appropriate as they worked in the field of national security.

#### 5.6 EFFECT OF RE-EMPLOYMENT /REDEPLOYMENT ON WORK RELATIONSHIPS

Two interviewees stated that they had received an apology – one was verbal and the other recorded in official minutes. Of the nine without an apology, one stated that he had been thanked for what he had done and two indicated that they had been asked to apologise for the trouble they had caused. Both interviewees who received an apology asserted that there had been changes in their employer's policies/processes as a result of their case, although three of those without an apology also pointed to such changes.

A specific question was asked about whether or not re-employment/redeployment had affected relations with their employer. Two interviewees stated that they didn't think this was the case, although one mentioned that they had lost their sense of purpose and the other referred to being more cautious in everything they did at work. Three interviewees reported that they had been demoted, two had been promoted and another two recorded that they returned to work with different bosses. One indicated that they felt more secure and another that the employment relationship had completely broken down and was the

subject of litigation. Unsurprisingly, of those describing their re-employment /redeployment as successful, two had different bosses, one was promoted, one felt more secure and two thought that their relationship with the employer had not really been affected.

Five interviewees asserted that they experienced victimisation/retaliation after returning to work, although two of them described their re-employment /redeployment as successful.

As regards their general relationship with colleagues after re-employment /redeployment, two interviewees recorded that support was received, the same number reported hostility and one thought that their relationship with colleagues was not really affected. The remaining six interviewees had all been moved away from their previous location as a result of promotion, demotion or transfer. Indeed, two of these interviewees emphasised the importance of new colleagues being unaware that they had been returning to work following whistleblowing and both of them regarded their re-employment/redeployment as successful. Of the other four maintaining that their re-employment/redeployment was successful, three had moved to work with different colleagues as a result of promotion or transfer and the other thought that the relationship with their colleagues was not really affected.

## 5.7 THE FINANCIAL AND HEALTH CONSEQUENCES FOR INTERVIEWEES

Although research clearly demonstrates that not all whistleblowers suffer, it is commonly thought that many lose out as a result of reporting wrongdoing (Smith, 2014).<sup>xxviii</sup> While it is difficult to measure subjective feelings of harm, financial losses are easier to quantify. In our discussion of reprisals above, we have outlined some of the negative actions taken against the interviewees (ostracism, demotion, transfers etc) after they raised concerns.

Here we describe the financial and health consequences experienced by participants as a result of going through the re-employment/redeployment process.

After returning to work, one interviewee reported that they were financially better off, <sup>xxix</sup> five believed they were not worse off <sup>xxx</sup> and the other five stated that they were worse off.

Those who felt they were worse off included one person who had three years unemployment after returning to work for a short period and two who retired early on less than full pension. All bar one of those who described their re-employment/redeployment as successful indicated that they were not financially worse off. Indeed, one would expect that the monetary consequences of returning would be a key criterion in evaluating success.

In terms of anxiety, depression and other health issues after re-employment/redeployment, only one interviewee stated that they suffered none of these. Six interviewees mentioned anxiety/anxiety adjustment disorder, three reported stress, two experienced depression and another two had been diagnosed with post- traumatic stress disorder; and one had high blood pressure. Of those who described their re-employment/redeployment as successful, one had no health issues, two mentioned anxiety, one experienced stress and anxiety and another depression and anxiety. Given that most people would suffer in some shape or form from the experience of retaliation, it is unsurprising that health issues did not seem to be regarded as the touchstone for assessing the success or otherwise of re-employment/redeployment. <sup>xxxi</sup>

At the end of the interviews, all participants were asked how, in the light of their experience, the existing modes of redress for retaliation could be improved. Four called for more financial assistance. Three of the US interviewees thought that OIG's and OSC's should have more power to stop involuntary transfers and terminations. Two UK interviewees

stated that there should be access to a specialist body for support and help and one of them suggested that regulators should have the ability to scrutinise employers' procedures. Other suggestions made by individuals were: a call for speedy interventions to investigate concerns; someone to check that re-employment actually occurred; a strengthening of the legal protection for whistleblowers and personal accountability of managers.

## **6 CONCLUSION**

Arguably, the case for re-examining both statutory and judicial approaches to re-employment is reinforced by the EU Directive "on the protection of persons who report breaches of Union law" .<sup>xxxii</sup> Article 23 of the Directive requires Member States to provide "effective, proportionate and dissuasive penalties" for: "(a) hindering or attempt to hinder reporting;(b) retaliating against persons referred to in Article 4..." . According to paragraph 95 of the Recital, compensation or reparation must be dissuasive and should not discourage potential whistleblowers. Of particular note here is the observation that "providing for compensation as an alternative to reinstatement in the event of dismissal might give rise to systematic practice in particular by larger organisations..".

This Directive will have an impact outside the EU since countries aspiring to join as well as external organisations which do business in the EU will be expected to adhere to the principles set out in the document. The recently published international standard for whistleblowing management systems may have more global effects (ISO 2021). In addressing detrimental conduct (which expressly includes retaliation by virtue of the note to section 3.13), section 8.4.3 states that : "Remediation can be needed. To the greatest extent possible, the whistleblower should be restored to a situation that would have been theirs had they not suffered detriment. For

example:

- a) reinstating the whistleblower in the same or equivalent position, with equal salary, responsibilities, working position and reputation....”

In discussing how to measure ‘success’, we rejected the notion that this should be assessed solely by the length of the period of reemployment/redeployment. It seems far more apposite to argue that success could be based on the fact that one or both parties benefited in some way from it. From an employer’s perspective, reemployment/redeployment may be advantageous if it avoided a substantial award of compensation. Even more so if the particular individual could be productively reengaged in the organisation. For employees, it is obviously beneficial to avoid an extensive if not unlimited period without remunerated work. Turning to the subjective assessments of our interviewees, we have seen that only two of them regarded their reemployment/redeployment as unsuccessful. In one case this conclusion was based primarily on the suffering inflicted on their family and in the other reference was made to the very serious damage to health that had occurred.

It will be recalled that the objective of conducting this research was not to demonstrate that reemployment/redeployment can work in all cases where whistleblowers have returned to work. The aim was merely to identify factors that might be conducive to a ‘successful’ restoration of an employment relationship in order to allow employers, employees, their representatives and adjudicators to make informed choices in the variety of situations that can arise.



Indeed, where there are doubts about whether it is appropriate for adjudicators to order re-employment, it has been argued that there is value in considering a trial period (Williams & Lewis,1981). This would allow the parties to assess the situation on its merits and, if necessary, to provide reasons for arguing that indefinite re-employment is not practicable.

These case studies suggest that ‘success’ was associated with a range of factors:

- (i) *the individual returned to the same job with a different boss or at a different location.* <sup>xxxiii</sup> However, where the contract of employment had been broadly framed, technically this could amount to reinstatement.
- (ii) *the concern raised was dealt with.* Since this is not relevant to the issue about whether or not detriment was suffered, adjudicators may not have information about the rectification of the wrongdoing at the time remedies are considered. In the light of these case studies and as a matter of principle, we would argue that enquiries should be made about whether the wrongdoing has been effectively addressed.
- (iii) *there had been judicial involvement by way of mediation and/or adjudication.* Such involvement suggests a degree of formality in the re-employment process might be desirable.
- (iv) *that lawyers were used as representatives.* Suggesting that coherent arguments are likely to have been presented in a logical order etc.
- (v) *that most returnees were not financially worse off.* Indicating that resentment etc arising from hardship was avoided. <sup>xxxiv</sup>

- (vi) *that the individual had the support of family, friends and colleagues and were willing to get the press or other media involved.* Such involvement is a strategy advocated by GAP and others in order to redress the power imbalance between the parties to an employment relationship.

Significantly, the number of reprisals experienced did not seem to adversely impact on judgments about the success of re-employment/redeployment. This lends weight to Near and Miceli's observation that "whistle-blowers appear to be strongly motivated by the opportunity to bring about change, any retaliation is of lesser concern to them" (Near & Miceli, 1986,143). Indeed, the interviews also support the argument that one consequence of incurring negative experiences is that whistleblowers become campaigners for social-political change (Rothschild & Miethe, 1994,271).

## **7 RESEARCH LIMITATIONS AND SUGGESTIONS.**

Since the above findings are based on a small number of purely illustrative case studies, it goes without saying that more extensive research is needed to check their validity. Not only might this take place in different countries but efforts should be made at triangulation i.e. to include employers and representatives in order to receive their assessment of the situations that arose. More mundanely, the interview schedule should be reconsidered and improved in the light of some of the limitations highlighted in this research. For example, no specific questions were asked about the number of employees in the organisation and the size of the workgroups.

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## **ENDNOTES**

<sup>i</sup> The EU Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the

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protection of persons who report breaches of Union law is due to be transposed in Member States by December 2021.

<sup>ii</sup> Reinstatement is where the person is treated as if they had not been dismissed. Re-engagement takes place where the individual returns to work on different terms and conditions with the same or an associated employer. See, for example, the definitions in the UK Employment Rights Act 1996.

<sup>iii</sup> Indeed, this is a feature of the operation of the unfair dismissal provisions in the UK.

<sup>iv</sup> The word ‘practicable’ features prominently in the UK statutory provisions on remedies. See: *PGA European Tour v Kelly* [2021] IRLR 575. On previous research see: Williams & Lewis, 1981.

<sup>v</sup> Although no employers were interviewed as part of this research, it became clear that the threat of a large payout if the individual was not re-employed was a factor in several of the case studies. As one interviewee put it: “They don’t want to pay you a lot of cash to go away because if they bring you back then they can fire you again and save a lot of money.” [INTERVIEWEE 10]

<sup>vi</sup> For example, those with protected characteristics as defined in the UK Equality Act 2010.

<sup>vii</sup> Special regulations apply to recruitment in the NHS.

<sup>viii</sup> One alleged that they saved lives [INTERVIEWEE 1]; another stated that “my objectives were to get salary again and re-skill after being off sick [INTERVIEWEE 4] and a third insisted that s/he would not do it again because of the impact on their family and personal health [INTERVIEWEE 6]

<sup>ix</sup> It is important to note that one interviewee asserted that the restoration of the relationship had been both successful and unsuccessful and is therefore included in both categories. It was successful in that they wanted to go back to work but unsuccessful because “I let them buy me for six months because I was under financial pressure” [INTERVIEWEE 8]

<sup>x</sup> One indicated that reemployment/redeployment bought them extra time with remuneration [INTERVIEWEE 9]. Another reflected as follows: “Part of you says you did the right thing but then again I think with the losses and effect on my family, it wasn’t really worth it” [INTERVIEWEE 10]

<sup>xi</sup> Of outstanding value was the assistance provided by the Government Accountability Project (GAP) in Washington DC who contacted clients that they believed had been reemployed.

<sup>xii</sup> 4 interviewees worked for law enforcement agencies. The two main reasons for expecting the public and private sector treatment of whistleblowers to vary are the different prevailing organisational values and regulatory regimes.

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<sup>xiii</sup> One other stated that the re-employment/redeployment had been both successful and unsuccessful in some respects.

<sup>xiv</sup> Indeed, in jurisdictions where good faith is required for whistleblowers to be afforded protection, it is often unclear at what stage this test must be applied i.e. should attention focus on the initial and/or any subsequent disclosures?

<sup>xv</sup> Although interviewees were not questioned about the subject, 3 interviewees mentioned the importance of religion in their lives.

<sup>xvi</sup> On loyalty see Lewis, 2011.

<sup>xvii</sup> The Office of Special Counsel is a permanent independent investigative and prosecutorial agency with the remit of protecting federal employees from “prohibited personnel practices,” including whistleblower retaliation.

<sup>xviii</sup> One claimed they were asked to investigate their own allegation but were forbidden from talking to the relevant people. Another stated that they were not contacted as part of the investigation.

<sup>xix</sup> The Office of Inspector General is a generic term for the oversight division of a US federal or state agency aimed at preventing inefficient or unlawful operations within the agency.

<sup>xx</sup> One interviewee hired a lawyer and went to the media.

<sup>xxi</sup> One asserted that, although the facts could not be changed, a principle was established.

<sup>xxii</sup> All of them concluded that their re-employment/redeployment had been successful.

<sup>xxiii</sup> Four of these described their re-employment/redeployment as successful.

<sup>xxiv</sup> Non-disclosure agreements are irrelevant when there are detailed judicial decisions in the public domain.

<sup>xxv</sup> Another hired a private attorney prior to the involvement of GAP in their case.

<sup>xxvi</sup> This person was unsure whether or not their re-employment/redeployment was successful.

<sup>xxvii</sup> Three interviewees emphasised the vital role played by their spouses and stated that they could not have coped without them.

<sup>xxviii</sup> For a powerful insights on the personal impact of whistleblowing see Alford, 2001,

<sup>xxix</sup> A judge had awarded compensation for the detriment suffered.

<sup>xxx</sup> Although two of them mentioned that they had incurred legal costs that had not been reimbursed.

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<sup>xxxii</sup> One of the two interviewees who had medically retired regarded their re-employment/redeployment as successful.

<sup>xxxiii</sup> See note i above

<sup>xxxiii</sup> In recognition of the difficulties that individuals may face in returning to work for a boss they have successfully sued, some countries allow litigants to opt for a transfer. For example, see the US Whistleblower Protection Act 1989

<sup>xxxiv</sup> It should be noted that one interviewee stated that s/he “massively resented” that, despite winning their legal case s/he only recovered about half of the £100-£110k costs incurred.

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