

BEST PRACTICES TO PROTECT THE WHISTLEBLOWER IN SPORT

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The Whistleblower

The EU Anti-Corruption Report (2014) encapsulated the key pre-conditions if the whistleblower is to be encouraged to come forward:

“...building an integrity culture within each organisation, raising awareness, and creating effective protection mechanisms that would give confidence to potential whistleblowers are key”

At the outset, who is a whistleblower? In essence, a person who raises a concern, either within his/her place of work or externally, about a danger, risk, malpractice or wrongdoing which affects, or has the potential to affect, others¹. In the context of sport, a whistleblower’s concern might arise not just in respect of match fixing, but as to other forms of corruption, doping, conflict of interest, discrimination or, of course, physical or sexual abuse.

Why is the whistleblower important in sport?

Central to sport, not just commercially, but in all its aspects, is participant, spectator and wider public confidence. As the Court of Arbitration for Sport has noted in relation to football²:

“...honesty and uprightness are fundamental moral qualities that are required in every field of life and of business, and football is no exception. More specifically, however, the Panel is of the opinion that the notion of integrity as applied to football requires something more than mere honesty and uprightness, both from a sporting and from a business point of view. The Panel considers that integrity, in football, is crucially related to the authenticity of results, and has a critical core, which is that, in the public’s perception, both single matches and entire championships must be a true test of the best possible athletic, technical, coaching and management skills of the opposing sides. Due to the high social significance of football in Europe, it is not enough that competing athletes, coaches or managers are, in fact, honest; the public must perceive that they try their best to win and, in particular, that clubs make management or coaching decisions based on the single objective of their club winning against any other club.”

¹ Public Concern at Work, www.pcaw.org.uk

² *AEK Athens & Slavia Prague v UEFA*, Arbitration CAS 98/200 (award 20 August 1999); cited in ‘Whistleblowing in Sport’, Sir Anthony Hooper & Andrew Smith, 15 December 2014, London.

Of course, football is not the only sport able to claim emotional attachment on the part of fans. In reality, any sport that does not have mechanisms in place to deter and punish misconduct is liable to bring itself into disrepute with its public, from the avid follower to the occasional viewer.

Encouraging & Protecting the Whistleblower

Corrupt behaviour is always difficult to detect. Corrupt transactions are, by their nature, secretive and guarded. But such wrongdoing in sport is particularly challenging to combat, given peer loyalty and a range of vested interests. The result is that proactive intelligence gathering or whistleblowing are the most likely means of identifying suspected wrongdoing.

It should be stressed, however, that although betting-related match-fixing far outweighs other forms of 'fix', there are other sources of corrupt inducement within sport. As the recent history of FIFA demonstrates, sport, particularly at the level of the international body or federation, needs better governance generally in order to prevent and detect corruption.

Despite the introduction of whistleblowing legislation in many states around the world, the work and advocacy of organisations such as Public Concern at Work, changes in workplace attitudes and behaviour and the greater recognition that corrupt behaviour is bad for business in any sector, it is still commonplace for whistleblowers to claim that they have had assurances reneged upon or have suffered retribution or victimisation. Indeed, within sport, the high profile whistleblower who alleged corruption surrounding Qatar's World Cup bid, Phaedra AlMajid, claimed that assurances of confidentiality given to her were later breached and her safety compromised³.

Moreover, some of those within sport who are considering whether to report may find themselves disadvantaged by being contractors rather than employees⁴; indeed, they may not even be in a contractual relationship. Whistleblower protection, even where it exists, might not extend beyond the employee.

Regard must also be had to the differences in outlook as between those engaged in team sports and those in individual sports. A powerful, practical example of this was the study undertaken in 2013 by psychologists at Leeds Metropolitan University in the UK⁵. The study

³ The Guardian, 16th December 2014.

⁴ Although on an unrelated employment law matter, see the case of *Conroy v Scottish Football Association Limited* UKEATS/0024/13/JW.

⁵ Research conducted by Lisa Whitaker, Susan Backhouse and Jonathan Long of Leeds Metropolitan University and presented at the British Psychological Society Division of Sport & Exercise (DSEP) Conference in Manchester, UK in December 2013.

comprised interviews with nine national level athletes from track and field and from rugby league and explored their attitudes towards drug taking in sport and the role of whistleblower. The athletes indicated they would blow the whistle and report doping behaviour that they became aware of, even though, when interviewed, they were unsure of the protocol that would be followed. The rugby league players, meanwhile, stressed the moral dilemma they would face in implicating a team mate and expressed a preference for keeping quiet, rather than to stay silent.

Such findings highlight the challenges in reassuring sportsmen and women, especially in team sports, as to their fears of disloyalty to team-mates, damage to team cohesion and fear of how others in their sport might view and treat them thereafter in the event that they report wrongdoing. This difficult 'dynamic' must be kept firmly in mind when designing whistleblowing procedures in sport and when seeking to build a protective framework for those who are minded to come forward.

A best practice pre-requisite if whistleblowers are to be protected and to feel protected is, of course, national legalisation, with a comprehensive template for that being provided by the Council of Europe's 2014 Recommendation on Protection of Whistleblowers.⁶ But, building an integrity culture within international sporting bodies and federations, national governing bodies, national leagues and individual clubs does not need to wait for the law makers. Rather, each such sports entity should put in place a clear and detailed whistleblowing policy and set of procedures, with advice to sportspersons and clear channels of communication prominently contained therein. The greater the clarity and practicality of such documents, the more likely that effective implementation will be possible.

Implementation is, of course, the key. A policy and procedures that are in place and are actually being enacted in practice will encourage reporting and will be more likely to succeed in protecting the whistleblower. Counter-intuitively, perhaps, as well as express safeguards for the report made in good faith (even if later found to have no substance), there must be a requirement for such reporting to be made, so far as practicable, to a person or entity that has proper competence to receive it. A policy that fails to address this will risk causing confusion to the intending whistleblower and disquiet to his/her sport and the wider public. Of course, the option of going to the media must be there, but it is not usually the best way of addressing the issues, either for the sport or for the sportsman or sportswoman.

How can all this be done? International bodies and national federations or leagues must take the initiative. There has to be a will and a demonstration of that will. It is unlikely that states

⁶ <http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec%282014%297E.pdf>

will be willing, or, in some cases, able to make such sector-specific procedures a legal requirement. Just as wider success in protecting whistleblowers has been driven in significant ways by civil society, so, too, sport as a whole must play its part. Working through the 2015-16 Premier League Handbook, there are no explicit whistleblower provisions or guidance to be seen.

Meanwhile, the FAs Whistle Blowing Policy is set out in the Football Association Handbook 2015-16, as follows (at p.194):

'Whistle-blowing':

Whistle-blowing is an early warning system. It is about revealing and raising concerns over misconduct or malpractice within an organisation or within an independent structure associated with it.

Any adult or young person with concerns about a colleague can also use whistle-blowing by contacting The FA Case Management Team on 0844 980 8200 Ex.6400. Alternatively you can go direct to the Police or Children's Social Care and report your concerns there.

But, although it gives a definition of general application, the FA's Policy appears to confine its guidance to safeguarding concerns in respect of young players.

In contrast, the England & Wales Cricket Board (ECB) does set out a comprehensive policy⁷ that addresses common concerns that a person considering reporting is likely to have and details the process and expectations (including confidentiality, the limits of that confidentiality, reassurance for a person reporting in good faith where the report subsequently proves to be unfounded and a warning against malicious reporting). This is complemented by the Professional Cricketers' Association's (PCA) own anti-corruption programme, which reinforces the positive obligation to report imposed by the ECB on professional cricketers⁸. However, the PCA does not have explicit whistleblowing guidance over and above this.

Of course, not all matters of concern will be 'national'; some will, naturally, relate to violations of the Code of Ethics/Conduct of an international body or federation or to wrongdoing within the international entity itself. Consequently, clarity and detail is also needed at that level. FIFA's launch (in 2013) of its confidential hotline and online reporting mechanism (which contains some guidance and also explains that, whilst confidentiality will

⁷ http://www.ecb.co.uk/sites/default/files/b_putting_things_in_place_6_-_ecb_whistle_blowing_policy.pdf

⁸ <http://www.thepca.co.uk/anti-corruption.html>

be respected, there will be occasions when a person reporting will be asked to identify him/herself, rather than remaining anonymous) is an obvious example of this, as is UEFA's 'Protecting the Game'⁹, which includes a confidential reporting platform.

There must, though, be a synergy between national and international efforts, so that the person reporting to an international body may be easily re-directed to the appropriate national entity if the wrongdoing in question falls more appropriately into national competence and, of course, vice versa, where a complaint is made nationally, but is properly a matter for the international body.

Some have suggested that whistleblowing guidance and reporting mechanisms might be created on a national basis to encompass every sport in that given country. Co-ordination between the sports would be key and would require a true spirit of co-operation. The advantages would be likely to include: the opportunity to build clear lines of communication with national law enforcement (when necessary) and with international sports bodies; the creation of a centre of excellence and specialisation for handling the whistleblower in sport; and, the capability to scope threats and typologies that straddle different sports, particularly in respect of bookmaking and drug risks.

There is a wealth of anecdotal evidence that some potential whistleblowers in sport are deterred by the risk of penalty where they themselves have committed a violation. With that in mind, there has been lively discussion as to the appropriateness or otherwise of having an amnesty or discounted penalty available. Indeed, in 2013, the suggestion was made by the International Cycling Union that WADA should consider a pan-sports amnesty. However, as critics (even within cycling) pointed out, a blanket amnesty is unlikely to clean a sport and to prevent future recurrence.

Having said that, there are compelling arguments for both encouraging and protecting a whistleblower (who him/herself has violated) by imposing a shorter ban than would otherwise be the case and, in an exceptional circumstance, not imposing a ban at all (and providing for confidentiality). Indeed, this reflects the 2015 World Anti-Doping Code¹⁰. Part of the protection particularly important to a sports person is the ability to continue competing; the Code's concessions clearly help to address that concern. In addition, they also provide a real incentive and also provide a sufficiently wide discretion, so that an individual is able to have his/her circumstances, and the 'substantial assistance' that will have been provided, assessed on the merits.

⁹ <http://www.uefa.org/protecting-the-game/integrity/index.html>

¹⁰ At Article 10, World Anti-Doping Code, 2015.

Some would, however, go further and suggest that financial reward should be considered as both an incentive and as a protective measure (to reflect potential blight on future career). Certainly, US law enforcement and regulatory authorities have adopted such a course, with reported success. Others, however, have found that financial incentive does nothing to bring about greater numbers, or better quality, of disclosure.

Looking at the issue of protection from a different angle, it might be argued that imposition of a duty to report, with penalty for any sports person who fails in that duty, would have the effect of affording protection, since coming forward would then be seen as an act not borne out of individual choice. Whatever the attractions, however, it raises the risk and spectre of inconsistency in application. It would also be likely to deter a 'late reporter', given that such individual might face penalty for his/her tardiness, and might, moreover, bring about an atmosphere of undue suspicion and uncertainty in many sports. In any event, the experience of evaluations and peer reviews, such as those conducted by GRECO, shows that obligations on officials to report corruption, although common, are generally ineffective.

Protection Following Disclosure

The most important protective step, post-reporting, is for the appropriate authorities to ensure that a proper and proportionate investigation of the allegations takes place. Nothing is likely to damage a reporting person more than a failure to inquire into the alleged wrongdoing reported. In sport this may be an even greater challenge than in other sectors, given that there may be a lack of genuine will in one quarter or another, a lack of investigative capability (particularly where matters concern historical, cross-border or complex matters) and an absence of the necessary investigative tools.

Moving forward, protection may require a whistleblower who is to be called to give evidence to be provided with protective measures within the court or tribunal, including being shielded by screens or having anonymity granted at a hearing (although this is to be distinguished from anonymity in the true sense, such as in the case of an entirely anonymous report)¹¹ and outside and away from the hearing, especially where threats or attempts at intimidation are likely. Protection must also extend, in appropriate circumstances, of steps being taken to provide advice and support in the wake of adverse reaction from teammates, opponents and the public.

¹¹ See, for instance, the arguments for anonymity and the provision of giving evidence by telephone link, *FK Pobeda et Al. V. UEFA* (CAS 2009/A/1920)

Going Forward

Clarity of policy and procedure, coupled with a genuine desire and will to implement, lie at the heart of affording genuine protection. At the same time, for public confidence to be maintained or, in the case of some sports, for confidence to be regained, there has to be a willingness to 'lift the stone' and to look underneath, no matter what might be found.

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