



Whistle blowing in Corporate Nigeria:

Myth or Reality

**Adekunle Obebe A.cis, ACI arb LLB BL
Partner,
Bloomfield**



Introduction

Nigeria has over the years witnessed a steady growth in corporate activity as a result of the various strategic economic restructuring programmes of the former Federal Government administration. The competition especially in the financial institutions has become so pulsating with various companies growing in leaps and bounds with skyrocketing profits in their financial statements. This Article seeks to examine the need for whistleblowing avenues in corporate Nigeria.

The discuss proceeds by (1) canvassing definition of whistleblowing; (2) discussing the common law view of whistleblowing with a specific concern with the unique employment situation of employees; (3) discussing specific cases of whistleblowing in Nigeria and other countries; and, (4) finally offering some suggestions.

What is Whistleblowing

There have been various definitions for the phrase whistleblowing, however we can generally define whistleblowing as:

“the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.” ¹

Simply put, someone blows the whistle when they tell their employer, a regulator, customers, the police or the media about a dangerous or illegal activity that they are aware of through their work.

We can draw out two key points from the foregoing definitions. The first concerns the topics ripe for whistleblowing. We can define it as wrongdoing (an illegal, immoral, or illegitimate act) which is liable to cause harm to persons outside of the organization from which the wrong emanates. Thus, purely internal matters would not tend to be ripe for whistleblowing, i.e. under this definition, one could not properly be said to be blowing the whistle on a manager who is engaging in workplace human rights violations. While this seems simple enough in practice, it does raise questions. For instance, surely at some point a department's human relations climate becomes part of the public interest? There have been various cases of fraudulent practices as such; could an employee legitimately blow the whistle in such an instance?

Secondly the notion that whistleblowing must be directed outside an organization has a strong pedigree. Ralph Nader, for example, argues that the heart of the issue in whistleblowing is determining “at what point should an employee resolve that allegiance to society ... must supersede allegiance to the organization's policies ... and then act on that resolve by informing outsiders or legal authorities?”³ In Nader's understanding, whistleblowing is an activity which necessarily gives rise to a major ethical conflict – the decision about when one ought to turn against their employing organization in order to preserve the ‘public interest.’



The Employment Relationship

Duty of Loyalty

The common law holds that there is an implied terms of contract between employee and employer which set out “judges” prevailing conception of what an ideal employment relationship should be. One of the implied terms of the employment relationship, the duty of fidelity (or loyalty) is “the cornerstone.” It enjoys this central role as it allows employers to maintain control over their employees the duty holding “that within the terms of the contract the employee must serve the employer faithfully with a view to promoting those commercial interests for which he is employed.” In short, it is the employees’ job to do the job as asked, not to criticize.⁴

As it dates from prior to the Industrial Revolution, it is not surprising that the duty of fidelity has been moderated over time, no longer extending indefinitely. The bearing this process of limiting has had on whistleblowing stems from the notion, first enunciated in the mid-nineteenth century,

that confidential communications involving fraud are not privileged from disclosure.... The true doctrine is, that there is no confidence as to the disclosure of iniquity. You can not make me the confidant of a crime or a fraud, and be entitled to close up my lips upon a secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence can not exist.⁵

Thus, there is a whistleblowing exemption to the common law duties which emerge from an employment relationship. The question facing us is what sort of wrong gives rise to the exemption? Clearly the *Gartside* measure cited above is one of fraud. Perhaps the high-water mark for this expansion has been set by Lord Denning, who wrote that an employee may disclose “any misconduct of such a nature that it ought in the public interest to be disclosed to others.” Though the exact nature of what constitutes “the public interest” has proved to be of concern to numerous courts, some judgements have stated in *dicta* that the public interest exception “should be restricted to instances of wrongdoing of grave public importance.” The Law Reform Commission in England notes that the success of a common law whistleblowing defence to a breach of confidence is dependent on both the evidence backing the disclosure, as well as to whom the disclosure was made. With respect to what sort of evidence warrants disclosure, the Law Reform Commission argues that there is minimal guidance from the Courts. However, authorities point to two considerations: **(1) a disclosure is justified only if the whistleblower has a reasonable ground for believing that a crime or civil wrong has occurred or will take place, and (2) that good faith on the part of the whistleblower must be proven.**

SPECIFIC CASES OF WHISTLEBLOWING

Corporate Nigeria has witnessed in the last five years a series of cases involving whistleblowing in blue chip companies, the most outstanding occurred in October 2006 when the board of Cadbury Nigeria PLC notified the world, which include its stockholders and regulatory bodies of the discovery of “Overstatements” in her accounts, which



according to it, has spanned many years. The company in its release stated that the overstatements could be between **₦13billion** and **₦ 15billion**

In relation to the scandal, Mr Bunmi Oni, The Managing Director, and Mr Ayo Akadiri, the Finance Director, were relieved of their employment. Following suit, the Council of the Nigeria Stock Exchange barred the duo from running any publicly quoted company for life, whilst the apex regulatory body, The Securities and Exchange Commission, we understand is still undertaking a detailed investigation of the matter.

It came as quite a shock that a discovery of this magnitude occurred in a Company that prides itself with high corporate governance practice and standards. It is useful to point out that, these "Overstatements" were only discovered upon due-diligence undertaken at the prompting of Cadbury Schweppes PLC, the London confectionery giant, when it increased its stake in the company from 46% to 50%. 7

Another case that shocked the world was Enron. In just 15 years, Enron grew from nowhere to be America's seventh largest company, employing 21,000 staff in more than 40 countries, but the firm's success turned out to have involved an elaborate scam. Enron lied about its profits and stands accused of a range of shady dealings, including concealing debts so that did not show up in the company's accounts. As the depth of the deception unfolded, investors and creditors retreated, forcing the firm into bankruptcy.

CONCLUSION

With the growth that has been experienced in Corporate Nigeria through the various restructuring programmes carried out by the last administration, many blue chip companies and financial institutions have published various incredible financial results which make one wonder; do we have another WorldCom or Enron in the making in Nigeria? It is therefore suggested that regulatory bodies like the Securities and Exchange Commission, Nigeria Stock Exchange, Central bank of Nigeria and other bodies direct that all public quoted companies and financial institutions should have whistleblowing policy which would ensure that:

- a. staff are aware of and trust the whistleblowing avenue;
- b. make provision for realistic advice about what the whistleblowing process means for openness ,confidentiality and anonymity;
- c. continually review how the process works in practice ;and
- d. regularly communicate to the staff the avenues open to them.

It is also suggested that the federal laws be passed which would provide the whistleblower protection from victimisation, countries like United Kingdom and the United States, laws have passed laws which provide legal protection for whistleblowers. It is therefore submitted that without a legal framework protecting whistleblowers, the fear of intimidation or victimisation would certainly override the moral duty to the society.



List of referrals

1. Janet P. Near & Marcia P. Miceli, "Organizational Dissidence: The Case of Whistle-Blowing"(1985) 4 *Journal of Business Ethics* 1 at 4.
2. Harry Arthurs, Richard Brown & Brian Langille, *Labour and Employment Law*, 6th ed.(Kingston: Industrial Relations Centre, 1998) at 106.
3. Ralph Nader, "An Anatomy of Whistle Blowing" in Ralph Nader, Peter J. Petkas & Kate Blackwell, eds. *Whistle Blowing: The Report of the Conference on Professional Responsibility* (New York: Grossman, 1972) 3 at 5.
4. Harry Arthurs, Richard Brown & Brian Langille, *Labour and Employment Law*, 6th ed. (Kingston: Industrial Relations Centre, 1998) at 106.
5. *Gartside v. Outram* (1856), 26 L.J. Ch. 113 [Gartside.]
6. *Corporate Governance Issues in Financial Reporting-The Cadbury challenge* By Oladele O Solanke paper delivered at the Nigeria Bar Association Business law Section workshop