

Victimisation: When is a protected act done in bad faith?

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The facts

Mr Saad was a Specialist Registrar who was training to become a Cardiothoracic Consultant. The training programme for Specialist Registrars involves continuous and rigorous assessment through a series of training placements on fixed term contracts ("FTC") in training hospitals in the NHS. The training is overseen by Health Education England ("HEE").

Mr Saad's employment with University Hospitals Southampton NHS Foundation Trust ("the Trust") commenced in July 2009 for an initial fixed term of eight months. Subsequently his contract was extended for further fixed term periods of various lengths.

In December 2006, Mr Saad's trainer at the Trust, a Mr Tsang, referred him to HEE's Professional Support Unit ("PSU") as he considered that Mr Saad was struggling with this training. Ms Luszkat of HEE was appointed as Mr Saad's PSU case manager and provided him with confidential support. Although Mr Saad spoke to Ms Luszkat about perceived unfair treatment towards him by his trainers, he made it clear that he did not want to take any action at that stage.

In April 2011, Mr Saad complained to HEE's Ms Luszkat that he felt bullied by another trainer, Mr Ohri; but he confirmed that he did not want to pursue it. She advised him to wait for his next Record of In Training Assessment ("RITA") review and depending on the outcome, decide on his next course of action.

On 19 July 2011, Mr Saad was told he had failed his training. On 21 July 2011, he raised a grievance. He went on sick leave after this and never returned to work with the Trust.

In November 2011, the Trust's Cardiac Surgery consultants unanimously decided against Mr Saad returning to work in the Cardiac Unit, and although alternative employment within Thoracic surgery was offered, Mr Saad also confirmed he did not feel able to return to work there.

A grievance investigation report was produced in July 2012 and after a series of hearings the grievance was dismissed on 2 September 2012. Mr Saad's FTC expired on 30 September 2012.

In December 2013, Mr Saad was removed from the National Specialist Registrar Training Programme by HEE. He appealed this decision and this appeal was dismissed in August 2014.

Mr Saad presented ET claims on 13 October 2011 and 9 November 2012. His complaints included detrimental treatment because he had made protected disclosures and victimisation.

The specific act of detrimental treatment/victimisation that he complained of and which was relevant to the EAT appeal was the unanimous decision by the Cardiac Surgery consultants against his return to work in the unit.

On the whistleblowing front, all the alleged protected disclosures were made before 25 June 2013 and consequently there was no "public interest" provision to meet, but Mr Saad had to show that the alleged disclosures were made "in good faith" to be a protected disclosure.

The 9th alleged disclosure was Mr Saad's grievance letter of 21 July 2011. This included a specific complaint that in July 2007, Mr Saad had been described as looking like a terrorist who had carried out an attack on Glasgow Airport in 2007.

The ET found that a Mr Ahmed (another cardiothoracic trainee) had made a statement confirming that he had heard this comment being made by Mr Tsang and they also accepted that Mr Ahmed told Mr Saad of it and Mr Saad subjectively believed it to be true.

The Trust did not dispute that this was a disclosure of information but argued that Mr Saad didn't have a "reasonable belief" in the truth of the allegation and it had not been made in "good faith" (as per s.43C Employment Rights Act ("ERA"))

The ET found that the test of whether an employee has a "reasonable belief" in the truth of the allegation/evidence/information involves an objective test and consideration of whether that belief was reasonable. They found that Mr Saad did not have "a reasonable belief in the allegation" and went on to state that "although [Mr Saad]

subjectively believed that Mr Tsang had made this comment, he has not shown that he had a reasonable belief applying the objective standard".

Regarding "good faith", the ET reviewed Mr Saad's motivation in submitting a grievance on 21 July 2011. It found that "the predominant purpose of the [Mr Saad's] grievance was his own personal interest in delaying the RITA assessment on 22 July 2011, seeking a transfer out of the Wessex Deanery and seeking to rescue his career prospects as a Consultant Cardiothoracic Surgeon" and it was therefore not made in "good faith".

On the victimisation front, the Trust accepted that the protected disclosure was also potentially a "protected act" within section 27 Equality Act 2010 but subject to the allegation not being made in "bad faith".

The ET analysed the "bad faith" issue. It concluded it could use its finding under the protected disclosure test that this particular allegation had not been made in "good faith" to support a further finding that the allegations were "false" and made in "bad faith" for the purposes of the victimisation allegation; this then meant that the requirements to establish a "protected act" under s. 27 EqA were not met and this claim failed.

Mr Saad appealed the finding that he had not been victimised. He argued that the Tribunal had made a mistake when it had read across two sets of legislation because it did not give the employee the fair opportunity to have their victimisation case assessed in the way the legislation intended.

The EAT upheld the appeal and found that Mr Saad had been victimised.

It said that the Tribunal had been wrong to read across two sets of legislation because the tests under each were different.

1. The test for whether a protected act has been made in "bad faith" is a two stage test:
2. Is the allegation/evidence/information said to form the protected act false? This is an objective test where the employee's honest belief is not considered.

If yes, was the allegation made/evidence or information given in bad faith? This is where the issue of the employee's honest belief, motivation and all the surrounding circumstances will be considered; so the subjective elements. But the focus for bad faith is whether the employee was acting honestly.

The EAT said that the whistleblowing legislation (as it applied pre changes on 25 June 2013) also required a two stage test, but in a different way as it allowed for the issue of the employee's honest belief to be considered at all stages of the test, which was effectively more generous to the Employer.

Therefore to simply read across the two sets of legislation was wrong as it went against the purpose of the different sets of legislation and did not allow the victimisation case to be assessed in the intended manner.

The case has been remitted to the ET for determination of remedy.

What does this mean for employers?

The "bad faith" defence is not run that frequently in victimisation claims and therefore the impact of this case may well be limited. Nevertheless, it does demonstrate that such a defence should be approached with caution. If all an employee has to do to establish a protected act is demonstrate a genuine belief in the truth of what they are saying (or the evidence/information they are providing), even if it is objectively untrue, then in all but the most blatant of cases of false evidence, this isn't going to be that challenging. Furthermore, the suggestion of a malign ulterior motivation is going to be very difficult to use to undermine this genuine belief.

[Saad v Southampton University Hospitals NHS Trust](#)

Authors



Ceri Fuller

London - Walbrook
cfuller@dacbeachcroft.com



Zoë Wigan

London - Walbrook
zwigan@dacbeachcroft.com