

Whistleblowing and Health Education England: Guidance

Introduction

The British Medical Association (BMA) and Health Education England (HEE), with the approval of the Department of Health and NHS Employers, have reached an agreement that provides junior doctors in England with legal protection if they are subjected to detrimental treatment by HEE as a result of whistleblowing (the HEE Agreement). The agreement also includes dentists in training. The British Dental Association (BDA) liaised with the BMA during the discussions leading to this agreement, but this note simply refers to doctors for convenience.

It is recognised that HEE can have significant influence over the career of a junior doctor, including ultimately the termination of their training. It is important that junior doctors (again in England because different arrangements apply in the rest of the UK) are able to raise concerns about issues in the workplace affecting the public, and in particular concerns about patient safety, without fear of adverse treatment by HEE.

Why is the HEE Agreement required?

Junior doctors in England have a unique arrangement by which they undergo training in a programme organised by HEE, which is responsible for appointing them to a series of training placements. In each placement they are contracted to work for an employer, usually an NHS trust but general practice trainees are also employed by GPs for part of their training. Junior doctors are already protected from detrimental treatment by the employer as a result of 'blowing the whistle'. The current legislation is the Public Interest Disclosure Act 1998 which is part of the Employment Rights Act 1996, and gives 'workers' (a term which includes employees under a contract of employment, but also has an extended meaning under the legislation) the right to bring proceedings in an Employment Tribunal if they are subjected to a detriment.

However, because of the specific functions of HEE it has not been found to qualify as an employer and so these proceedings cannot be taken against HEE by trainees. This was the finding in the recent case of *Day v Lewisham and Greenwich NHS Trust*¹. In this claim Dr Day alleged that HEE was also his employer, and he should therefore be protected from detrimental treatment by HEE; he alleges he was subjected to such detriments after making complaints about patient safety. HEE denies these allegations. The Employment Tribunal found that HEE was not his 'employer' for the purposes of the legislation, and this decision was upheld by the Employment Appeal Tribunal (this is under appeal).

This presents a gap in the law for junior doctors, unless the decision in *Day* is successfully challenged or proceedings against HEE are successfully brought by a different legal route. The HEE Agreement seeks to address this and to support the shared aim of encouraging junior doctors to raise matters of concern without fear of detriment by HEE.

What is whistleblowing?

Whistleblowing is the common term for reporting concerns about wrongdoing in the workplace. Under the Employment Rights Act 1996 a 'worker' can only bring a claim where the concerns they raise amount to a 'protected disclosure'. This is a disclosure of information which they reasonably believe shows that there has been wrongdoing of a certain type. In the context of the NHS, this will commonly relate to patient safety. However, the law also applies to disclosures about criminal behaviour, legal obligations, health and safety and environmental issues, provided that in each case it is in the public interest to report the wrongdoing.

Who is protected under the HEE Agreement?

Individuals covered by the HEE Agreement are referred to as 'Postgraduate Trainees'. In order to qualify as a Postgraduate Trainee while in foundation or specialty training, a doctor must be appointed by HEE to a relevant contract of employment and must

¹ [2016] I.R.L.R. 415

retain a training number (for example, a National Training Number, or in the case of Foundation Doctors, a Local Programme Number). The relevant contracts of employment are training contracts under national terms and conditions (whether under new or old terms), a contract with an NHS Foundation Trust that is not under national terms and conditions, or a contract for GP foundation or specialty training that is not under national terms and conditions. The HEE Agreement also covers trainee dentists, including Foundation Dentists, in a similar way.

The HEE Agreement does not cover any other types of contract, for example individuals under contracts for training ancillary to full time employment, which might be funded by HEE but which are not associated with a training number.

A trainee doctor or dentist will also qualify for protection as a Postgraduate Trainee if they are seeking to commence or recommence training, provided that on appointment the contract of employment they are seeking to be appointed to by HEE would meet the conditions set out above. This would include, for example, an individual who has applied for training through HEE under a relevant contract of employment but has not yet been appointed to a relevant contract of employment or given a training number, and an individual who wishes to continue to train under a relevant contract of employment but has had their training number removed by HEE. Trainees taking time out of programme who retain a training number with HEE will also qualify as Postgraduate Trainees.

How does the Agreement provide protection?

Under the HEE Agreement, HEE will contract with local employers to bring the terms of the HEE Agreement into effect. The HEE Agreement is drafted so that as soon as it is agreed anywhere protection will be extended to all Postgraduate Trainees, whoever their contract of employment may be with, or is intended to be with, when they commence or recommence training.

The HEE Agreement provides protection as against HEE which is equivalent to the protection the Postgraduate Trainee would have against his or her employer under the Employment Rights Act 1996. The HEE Agreement provides a contractual right to

bring proceedings in the County Court or High Court to enforce the relevant provisions but subject to the same limitations of the Employment Rights Act 1996 as if they were contractual terms. The provisions operate as if the Postgraduate Trainee were a 'worker' of HEE within the extended meaning of the term in the Employment Rights Act 1996. This means that where the Postgraduate Trainee makes a protected disclosure, and is subjected to a detriment by HEE as a result, they will enjoy an equivalent level of protection as against HEE as they would against an employer in an Employment Tribunal but must issue the proceedings against HEE in a County Court or High Court.

There are some parts of the legislation which have been deliberately excluded. This is because they are not relevant to a claim that HEE has subjected a Postgraduate Trainee to a detriment as a result of having made a protected disclosure (section 43KA deals with the rights of police officers, and section 47B(2) contains an exclusion to bringing a claim where the detriment complained of is dismissal by termination of a contract of employment).

What can be claimed?

The orders that could be made in a successful claim by the County Court or High Court are equivalent to the remedies which would be available in an Employment Tribunal. For example, the Postgraduate Trainee would be able to claim damages for any loss of earnings suffered as a result of the detriment, would be able to make a claim for damages equivalent to compensation for injury to feelings (which would not ordinarily be recoverable in the County Court or High Court in a breach of contract claim) and can seek declarations. There is no cap to the amount recoverable.

The Postgraduate Trainee will not be able to make a claim for anything that could not be claimed in equivalent Employment Tribunal proceedings and in particular cannot claim injunctive or equitable relief. The reason for this provision is that it is not intended that a Postgraduate Trainee should be in a worse position or a more favourable position as a result of bringing proceedings against HEE in a County Court or High Court. An Employment Tribunal can only grant injunctive relief (an order requiring a respondent to act or not to act in a particular way) in limited circumstances, which are

not currently applicable to claims relating to detriment as a result of making a protected disclosure. An Employment Tribunal cannot grant equitable relief at all (this is a form of discretionary common law relief which is available in limited situations in the County Court or High Court, whereas an Employment Tribunal can only grant relief as specified in statute).

Any damages awarded would be subject to the same reductions as might be made in an Employment Tribunal. For example, where a Postgraduate Trainee is shown not to have made a protected disclosure in good faith, the court will be able to reduce any damages awarded by up to 25%.

If the Postgraduate Trainee has already been paid or awarded compensation or any other remedy in respect of the detriment complained of, a matter related to the detriment, or a matter otherwise related to the act(s) or failure(s) to act complained of, the court will be able to take that into account as it sees fit when assessing the compensation or any other remedy to be awarded against HEE. For example, if a Postgraduate Trainee complains that they have been subjected to a detriment by both their employer and HEE, and enters into a settlement agreement with the employer in relation to that detriment, then any sums paid under the settlement agreement could be taken into account by the court and offset against any compensation payable by HEE. This prevents a Postgraduate Trainee from recovering the same sums twice.

What time limits apply?

Under the HEE Agreement, the time limits which apply to proceedings brought in the County Court or High Court are slightly more generous than those which apply in an Employment Tribunal, to take account of the different procedural requirements of these venues. Proceedings against HEE must be commenced by issuing proceedings in the County Court or High Court within six months beginning with the act or failure to act which the proceedings relate to or, where the act is part of a series of similar acts or failures, the last of those acts or failures. This time limit can be extended where the court is satisfied that it was not reasonably practicable to issue proceedings within the time limits specified. This compares favourably with the Employment Tribunal where

claims may need to be brought as soon as three months, or up to five months where time has been extended as a result of ACAS early conciliation.

There will not be any requirement to go through a conciliation process with ACAS before bringing proceedings as there is when commencing claims in the Employment Tribunal. However, the Postgraduate Trainee will have to comply with the usual requirements for bringing a County Court or High Court claim, including sending a letter before action complying with the Practice Direction on Pre-Action Conduct setting out full details of the claim, the basis of the claim, and what relief is sought. Unless it is not reasonably practicable to do so, the letter before action should be sent to the relevant Postgraduate Dean in HEE at least two months before the end of the six month time limit.

When does the HEE Agreement take effect?

As soon as the first contract with a local employer is entered into, the HEE Agreement will take effect retrospectively from 3 August 2016.

When will the HEE Agreement end?

The HEE Agreement is open ended and has no specific end date. However, it will come to an end automatically where:

- the underlying protection in the Employment Rights Act 1996 against being subjected to a detriment by an employer is repealed or revoked;
- the Employment Rights Act 1996 is amended to allow Postgraduate Trainees to bring a claim against HEE for being subjected to a detriment as a result of making a protected disclosure;
- the courts of England and Wales make a final and binding determination or ruling that Postgraduate Trainees are entitled to bring proceedings against HEE for being subjected to a detriment as a result of making a protected disclosure under the Employment Tribunal Act 1996 in the Employment Tribunal. Where there is a right of appeal open to HEE, they can terminate the HEE Agreement

by giving notice to the BMA and the BDA that it intends to be bound by the determination or ruling and will not appeal.

There is an exception to this where proceedings have been issued against HEE or a cause of action has accrued by the time the HEE Agreement ends, in which case a Postgraduate Trainee will be able to continue to pursue a claim against HEE in the County Court or High Court.

The HEE Agreement can also be altered at any point with the agreement and consent of the BMA and the BDA.

What if there is a potential claim against both an employer and HEE?

A situation may arise where the Postgraduate Trainee believes that both the employer and HEE have subjected them to a detriment or detriments. In such a case, it is open to the employee to bring proceedings in the Employment Tribunal against the Employer, and in the County Court or High Court against HEE. As discussed above, in the claim against HEE the court will be able to take into account any damages awarded or settlement achieved in respect of the same matters elsewhere.

The HEE Agreement contains indemnity clauses as between HEE and any employer who has signed up to the HEE Agreement. This means that where both HEE and an employer are alleged to have contributed to the matters complained of, liability to pay compensation may be split between them and if there is a dispute a court could determine the extent of each party's responsibility for the detriment suffered. This should not affect the overall level of compensation payable to the Postgraduate Trainee.

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