Whistle-blowers Beware: Just because there is a PD doesn't necessarily mean that the employer can't respond (and damage your reputation) in order to 'set the record straight'

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Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73

(Judgment issued on 31st January 2020)

The Facts

Edwin Jesudason ('C'), was a paediatric surgeon who was an honorary consultant working in the Department of Paediatric Surgery ('DPS') in the respondent NHS trust from 2006 until he resigned in 2012. Between 2009 and 2014 he made a series of allegations to the Trust, regulatory bodies and the media where he alleged fundamental failings in the operation of the DPS including serious allegations of professional incompetence, use of improper medical practices, attempts to cover up wrongdoing and in some cases he named and criticised specific individuals.

Almost from when C took up his post in 2006 there were tensions between C and his consultant colleagues. Ultimately these tensions became so serious that there was a group mediation in 2008 ('the Braun process'). That process failed to restore relations and in March 2009 C made the first of a number of protected disclosures. When C's consultant DPS colleagues later became aware of the contents of that letter they took exception at the criticisms directed at them and the fact C had raised some allegations in breach of the confidentiality of the Braun process. The DPS consultants felt there was an irrevocable loss of trust with C and were unwilling to continue working with him.

RCS Report

In response to the initial PDs the Trust commissioned a review by the Royal College of Surgeons ('RCS') who produced a detailed report in August 2011. The Report concluded that the overall care provided by the DPS did not fall below an acceptable standard, specifically rejected C's claim that there had been a 'club culture' operating within the DPS and rejected C's assertion that there was discrimination against BME candidates in recruitment. The Report went on to criticise C in a number of ways including that he was unwilling to acknowledge the legitimacy of other perspectives and concerns. The RCS Report did however make some criticism of the Trust including the way in which the Trust had managed C's whistleblowing and made 24 recommendations to improve processes and governance which were accepted by the Trust.

Following further unsuccessful attempts by the Trust to reconcile the parties the Trust commenced steps to bring C's honorary contract to an end. C then obtained an interim injunction to prevent the Trust from convening a panel to consider termination of his contract and thereafter made further PDs to the GMC and CQC in October and November 2012.

Compromise Agreement and C's Resignation

During the High Court trial in December 2012 C admitted under cross examination to having provided to 'Private Eye' documents he had obtained as a result of disclosure in the legal proceedings having previously and categorically denied he was the source of the leak. As a result of such a serious breach of duty a Compromise Agreement was entered into whereby C would discontinue the HC action, discontinue the whistleblowing claims he had initiated in the ET, would resign from his post with the Trust and agreed to pay a substantial sum towards the costs the Trust had incurred.

Post 2012 Events

Following C's resignation at the end of 2012, C continued to make allegations and disclosures to various third parties including the press. In October 2014, C lodged further whistleblowing claims with the ET for detriments suffered between 2013 and 2014 (i.e. after he had resigned from the Trust) which C contended he had suffered both because of his disclosures pre and post Compromise Agreement.

It was not disputed that C could pursue claims for detriment which arose after the Compromise Agreement but for which C relied upon alleged PDs which pre-dated the Compromise Agreement. Nor was it disputed that C, despite not being an employee at the time of such 'detriments' and several of the PDs, could nonetheless present a whistleblowing detriment claim by virtue of the extended definition under S.43K ERA 1996 which includes *former* workers.

Whilst a number of the pre-termination/compromise agreement disclosures were accepted as constituting qualifying disclosures, save for one disclosure to the CQC in September 2013, the Trust disputed the other disclosures amounted to qualifying disclosures as they had not been made to the Trust or a prescribed body but rather had been made to the media (Channel 4, BBC) and other third parties such as MPs[1].

The letter of 5th September 2013 which was sent to Margaret Hodge MP and copied to the CQC was detailed, made various criticisms of the DPS and the Trust, alleged the Trust had used money and BMA support to leave in place an 'unaccountable, unsafe culture' with a small club of surgeons denying there was a problem, that there had been an improper use of a surgery technique, made serious allegations against individuals and that there had been a cover up by the Trust.

In addition, C gave a fundamentally false account of the circumstances of his resignation, asserting that his concerns had not been investigated, he had been forced to resign because the BMA had withdrawn their funding in order to protect Trust employees and to collapse the trial and that attempts to gag him had been made by offering him a six figure sum. Funnily enough C made no reference of his accepted unlawful disclosure of confidential materials which brought about his resignation, the fact he had agreed to pay costs, nor the fact he had misled his own BMA lawyers by denying to them that he had made such an unlawful disclosure. C was also raising complaints in this letter which the RCS review had expressly rejected such as the 'club culture' and that certain specified individuals had adopted improper and experimental practices.

C alleged that he had been suffered 11 detriments, largely comprising of various letters and correspondence from the Trust sent to MP's, CQC and an internal email by the CEO of the Trust to all the consultants at the Trust.

[1] Note at the time the communications were sent MPs were not 'prescribed persons' covered by s.43F. Thus, all these disclosures needed to fall within the scope of s.43G ERA 1996 in order to be 'protected'.

The ET Decision

In short, the ET found C was an unreliable witness and dismissed all his claims.

The ET held that none of C's disclosures post 2012 complied with the conditions of s.43G save for the one admitted by the Trust, namely the letter to the CQC. The ET found that the appellant had largely repeated the same criticisms as the pre-2012 disclosures, reiterated complaints that the RCS Review had expressly rejected and found that C had knowingly lied about the circumstances in which he had resigned from the Trust and made an untruthful claim that he had been offered a six-figure sum to keep silent.

Whilst the ET analysed the disclosures by reference to the requirements of s43G, ultimately the ET made it's finding on s.43G on the basis that the fourth requirement was not satisfied, namely that it was not reasonable for these disclosures to be made within the meaning of s.43G(1)(e). The ET had regard to the fact that the Trust had taken action in response to many of the complaints by setting up the RCS investigation and implementing its recommendations and this also meant in the ET's view that the allegations now made were unlikely to recur.

The ET considered in some detail the detriments (namely the alleged detrimental correspondence from the Trust) and the ET summarised that that correspondence had sought to show C's concerns had been dealt with by the independent RCS investigation, had highlighted that C's further complaints to the GMC and CQC had not been sustained and set out the circumstances of how C's employment had come to an end thereby countering the false account given by C himself. Indeed in virtually all of the communications relied upon by C it was noted that the following statement or something very similar was made:

> *"Each of Mr Jesudason's allegations have been thoroughly and independently investigated by different professional bodies on a number of occasions and found to be completely without foundation"* (Para 54).

And in most of the letters went on to say that C's persistent campaign was *'weakening genuine whistleblowing'* and that *'we have reported his conduct to the GMC'*. (Para 54)

These comments were at the heart of C's complaints which the ET recognised. The ET further recognised earlier in its decision that the Trust had clearly overstated the case with regards to the RCS Report as contrary to the Trust's account, C's complaints had not been

'completely without foundation' as the RCS report had identified areas of concern and made various suggestions for improvement which the Trust had adopted. C contended that these false observations were more than a mere 'overstatement' as by inference they represented C as someone who had made vexatious, irresponsible and wholly unsubstantiated allegations. This was unfair and inaccurate and the comments were damaging to his standing and reputation and thus amounted to a detriment.

The ET held that nothing in the correspondence or communications amounted to a detriment, giving its reasons as follows (Paras 57, 58 & 59):

> *"The Trust was anxious to do a number of things by issuing the media statements and the letters to the various MPs etc, which was to protect its own staff, to confirm to its patients within the catchment area that the Trust is a safe place for them to bring their children and to try and quell the media interest that was in danger of overwhelming the Trust"*
>
> *"Nothing in the correspondence caused a detriment to Mr Jesudason. The letters sought to give the opposing view to Mr Jesudason's allegations"*
>
> *"we find that no reasonable worker / employee would consider the comments referred to in…the list of issues as detriments. Those comments were made either without the knowledge of the author of the whistleblowing, or in an attempt to protect the Trust against potential criticism from the press or other bodies, or wanting to put the record straight"*

The ET found that none of the alleged detriments were made in response to a PD, rather they were all connected to *'the non-prescribed information C had sent to the likes of the BBC, Channel 4 and David Davis MP'*.

The EAT Decision

In short, the EAT dismissed C's appeal on all grounds.

The EAT had permitted C's appeal to be heard in respect of whether the ET had erred in their 'reasonableness' assessment under s.43G by not taking into account certain evidential / factual matters before them, such as the fact that the RCS Report had not addressed all of his concerns and that there were a number of outstanding matters which the Trust had not

put right and these justified him in ventilating his complaints more broadly. However, the EAT permitted this only in respect of two distinct factual matters and ultimately on the full hearing, the EAT did not accept that these criticisms of the ET were warranted. The EAT held that the ET had not erred, fundamentally on the basis that those two matters had not been raised (or raised sufficiently) before the ET in respect of the contention that the disclosures were reasonable under s.43G.

The EAT did however go on to then consider these factual allegations made by C and concluded that C's allegations on these matters were in any event unfounded. Accordingly, the EAT held that *'even if the ET had considered [such issues] in the context of asking whether the 43G disclosures were reasonable, there was no basis to conclude that the ET would have altered its finding on reasonableness.'*

It was argued in the alternative that since the ET had accepted in one letter that there was a PD, the content of that letter must be also be protected with respect to the other recipients of that information in any event also. The EAT summarily rejected such an argument stating that it *'rests on the fallacy that the letter is, by virtue of being copied to the CQC, to be treated as if it were a protected disclosure to all other recipients'*.

The EAT held that the ET's decision on detriment was a conclusion open to it, the ET had applied the correct legal principles and directed itself in accordance with established authority and was *"an unimpeachable finding of fact"*.

The EAT similarly held that the ET had not erred in its findings on causation as the EAT held that '*the ET had in terms concluded that the purpose of the letters was not to disparage or discredit [C]'*.

The CA Decision

The Protected Disclosures

The CA held that it was inappropriate for the EAT to consider, in the context of reasonableness under s.43G, whether a particular complaint was made out or not. A disclosure of alleged wrongdoing may be reasonable even though it is ultimately found to be unsubstantiated provided, in the case of a s.43G disclosure, that the worker reasonably believes that it is substantially true. Neither the ET nor EAT made any finding about that, whether expressly or by inference. The CA confirmed that:

> *"The question of reasonableness must be assessed at the time the complaint or concern is raised, not with hindsight after the complaint has been examined. If the appellant did reasonably believe that the facts on which he relied were substantially true, this might in principle have justified the disclosure, particularly given that the RCS Report had chosen not to deal with [certain issues]."* (Para 48).

However, the CA went on to find that a worker cannot expect to have protection for a host of complaints unjustifiably brought to the attention of the media or other influential third parties on the basis that amongst them there is one issue which it might have been reasonable to disclose, stating:

> *"A whistle-blower must take some responsibility for the way in which complaints or concerns are framed, and the requirement of reasonableness in section 43G enables an ET to refuse to give protection to irresponsible disclosures. Had the disclosure related only to the [issue not dealt with by the RCS Report] then perhaps it would in the circumstances have satisfied the reasonableness test. But that was not how the appellant chose to put this issue into the public domain."* (Para 49)

The CA agreed with the EAT's finding that the argument that because a protected disclosure is found in respect of one recipient, that other communications should be regarded as protected where the same information was included or copied, was a misguided argument. The CA stated that such an argument *'would wholly undermine the carefully structured safeguards in the legislative scheme if copies of a letter are to be treated as PDs with respect to all recipients merely because there is a protected disclosure with respect to one of them"*

Accordingly, in short, the CA rejected C's appeal against the findings of the ET in respect of what PDs they found to be established.

<u>The Detriment</u>

The CA held that on the issue of detriment, both the ET and EAT had erred in law and were manifestly wrong as they had brought issues of causation into the factual question of whether C had been subjected to a detriment or not. The CA stated that:

> *'a detrimental observation about a whistle-blower, claiming for example that he is a liar or a troublemaker, may be made in a letter whose purpose is to put the*

employer's side of the story. It does not cease to be a detriment because of the employer's purpose or motive. That purpose – why the letter was written in that way – will be relevant at the later causation stage…but it is irrelevant to the question whether a detriment was suffered at all.' (Para 61)

The CA went on to find that there was clearly a detriment to C in the way in which those letters from the Trust were framed and that it was not open to the ET to conclude otherwise as the only sensible inference from the offending passages was that C had made specious, unjustified and unsubstantiated complaints with perhaps some suggestion of bad faith.

The CA did accept that if the letters had simply and accurately stated how C's complaints had been assessed in the RCS report, there might be a convincing argument advanced that the letter did not amount to a detriment as an 'unjustified' sense of grievance was not enough to make something amount to a detriment and C could have no legitimate grievance at the Trust responding, even in a robust way, to his damaging and, in part, false communications, but that was not the case here.

The Issue of Causation

The CA observed that this was an unusual case in that the alleged detriments arose out of communications which were, as a matter of fact, a response to C's disclosures to third parties. The CA however clearly stated that even if the disclosures are protected disclosures, an employer is obviously entitled to respond to them in order to rebut what has been alleged and to put his side of the case, even robustly. Indeed, even if the rebuttal also contains misleading statements which constitute a detriment to the worker, it does not necessarily follow that the *reason* for making those statements is the fact that the worker made the protected disclosure. Having said that the CA accepted that in such a case the employer is likely to have a much harder task in showing that the making of the PDs played no, or at most a trivial, part in the decision to include a false statement, where the letter in which it is contained is itself a direct response to a PD.

The CA observed that there was no reason in principle why the Trust may not in its responses have chosen to take the opportunity to retaliate against the appellant (at least in part) because of earlier PDs he had made. It was argued on behalf of C that the ET did not engage with this possibility and simply assumed that *'the reason for sending the letters also explained why the offending passages were included'*.

The CA accepted that the ET's reasoning could have been sharper in this regard, but reading the ET decision as a whole the CA found that the ET had made appropriate findings as to why the false statements were included in the Trust's various responses and that the Trust's objective of sending the letters, namely to nullify the adverse, potentially damaging and, in part at least, misleading information C had chosen to put in the public domain also explained the form in which those letters were cast (i.e. the inclusion of false statements by the Trust which caused C detriment).

Accordingly, the CA found that the ET was entitled to reach the conclusion that C's claims of whistleblowing detriment had also failed due to lack of a causative link with any protected disclosures.

Comment

This case is a clear example of how whistle-blowing claims can trundle on even after a compromise agreement and working relationships have long since ended. It is also a useful reminder of the heightened requirements imposed by the legislation for a protected disclosure to be made out where the purported PD is made to persons other than the employer and that the concept of detriment is to be viewed at the time from the individual's perspective as opposed to with the benefit of hindsight and of course should be assessed free of any causation considerations.

Importantly however in terms of 'detriment' and 'causation' this Judgment may somewhat reassure Respondents in at least two respects:

(i) Whilst albeit obiter, the CA did comment (in terms) that had the letters from the Trust, simply and accurately stated (even robustly) how C's complaints had been addressed already in the RCS Report and how specifically C had made what were evidently false assertions, then such would not amount to a detriment per se.

(ii) The CA affirming the ET's decision that at a causative link was not made out in the circumstances of this case. Namely, despite the offending communication amounting to a detriment and being sent ostensibly in direct response to a PD by C, the PD was not a 'material influence' in such detrimental communication but rather the Trust sending that communication and making false assertions detrimental to C's reputation was simply to nullify the adverse and potential

damaging and misleading information that C had put (separately) into the public domain. This arguably evidences that ETs (and indeed the higher courts) are becoming more willing to separate out the PD itself from the interconnected state of affairs that is said to exist and which is the prime or predominant reason for detrimental action that is taken.

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