A case concerned with the liability for losses flowing from protected disclosure detriment

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McNicholas v (1) Care and Learning Alliance (2) CALA Staffbank [2023] EAT 127

The (Scottish) EAT gave judgment on an interesting issue involving the liability for losses flowing from protected disclosure detriment, where those losses involve decisions made by a regulatory body following a report made in retaliation for a protected disclosure having been made.

Reminding itself that an act of a third party which flows "naturally and reasonably" from the original wrongdoing does not break the chain of causation, the EAT upheld the Claimant's appeal against a decision that a regulator's decision that there was a prima facie case to answer did just that.

Background

The Claimant, Ms McNicholas, was a teacher employed by the two respondents. The two respondents were connected entities which ran a nursery and supplied staff to the local authority and other organisations, respectively. Ms McNicholas had made a protected disclosure, and suffered detriments from both respondents as a result. This appeal dealt with the treatment of loss flowing from those detriments.

Both Respondents had made reports to the regulator, the General Teaching Council for Scotland, in retaliation for the Claimant's disclosures. The Tribunal also found that the complaints were made in bad faith to discredit the Claimant, and were based on allegations that probably had no substance. The GTCS had taken a decision, following an interim investigation, to proceed with their investigation against the Claimant.

The Employment Tribunal had, at first instance, considered that the decision of the GTCS constituted a *novus actus interveniens* and that the Respondents were not liable for losses after that point, including financial loss, injury to feeling, psychiatric injury and the cost of defending the GTCS proceedings.

On appeal, the EAT overturned that decision. In a short judgment, Lord Fairley summarised the relevant law: in particular that the *novus actus* must "eclipse" the prior wrongdoing such that it is not an effective or contributory cause (even if the prior wrongdoing is a "but for" cause), and that actions of third party which are a "natural and reasonable consequence" of the wrongdoing do not interrupt causation.

On the basis of the factual findings made by the Tribunal, including that the allegations probably had no substance, Lord Fairley concluded that it was not open to the Tribunal to find that the GCTS's decision was a *novus actus*. That was, rather, a "natural and reasonable" consequence of the complaints made by the respondents. The question of re-assessment of quantum was remitted to the Tribunal.

Discussion

The brevity of this EAT judgment suggests that Lord Fairley did not have to think too hard about whether the Tribunal was entitled to come to the conclusion it did.

It is difficult to see how a regulator's investigation is not a "natural and reasonable" consequence of a report being made to it, and note that the test does not require that a third party's actions flow inevitably from the wrongdoing for the prior wrongdoer to be liable. The fact that the GCTS made its own decision, and might have decided otherwise than it did, did not let the respondents off the hook.

This does raise a question of when investigation and decisions made by a regulator following a retaliatory report *would* be regarded as a *novus actus*. While the answer will always be fact-sensitive, the fact that the GCTS's decision in this case was an assessment of whether there was prima facie a case to answer (presumably based in substantial part upon exactly those bad-faith, retaliatory reports) was surely relevant in this case. Where a full investigation takes place and (unlike in this case) a Claimant found to have committed a regulatory breach, the full independent process of the regulatory tribunal is much more likely to be considered an intervening break in the chain of causation.

Conclusion

While most practitioners will be unsurprised to learn that an employer can be liable for losses relating to regulatory action taken following bad-faith, retaliatory reports, this may still be a useful case for claimants to draw to the attention of a tribunal in situations (not limited to protected disclosure detriments) where a third party engaged their own processes and came to some kind of reasoned decision which has played a part in losses.

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