

A cautionary tale for claimants with a “distorted perception” of events

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Mr Brooks v Nottingham University Hospitals NHS Trust UKEAT/0246/18

Background

C worked/works as a plastic surgeon for R. C made a number of protected disclosures about health and safety. He alleged that, by virtue of that, he was subject to a number of detriments, of which 40 he pursued as individual claims. The ET heard the claim over 27 days.

The ET dismissed all of the claims. The ET found that C had made some protected disclosures; it also found that he had been subjected to detriment in some respects. However in respect of those matters the claims failed on causation grounds.

C appealed on liability. The EAT dismissed his appeal.

The application for costs

R applied for costs in the ET. The ET granted R's application.

It found that he had not acted deliberately dishonestly. However C had pursued claims with no reasonable prospects and had acted unreasonably in pursuing such a case over a very lengthy hearing. In respect of the issue of no reasonable prospects, the ET gave 17 examples of claims of that ilk (it did not address all 40).

The precise sum was left to be assessed, if not agreed between the parties. R had estimated its costs as being in the region of £170,000.

The EAT on costs

C appealed against the decision on a number of grounds. These focused on matters including:

- C had not acted deliberately dishonestly
- Public policy considerations applicable to NHS whistle-blowers and the potentially deterrent effect of costs orders
- The question of legal advice
- On some claims C had failed solely on causation grounds; such claims cannot have had “no reasonable prospects”
- It was implicit that in the judgment that the ET found that some of the claims did not have no reasonable prospects. An award for costs for all claims was therefore inappropriate.

The EAT dismissed the appeal. Matters of interest include:

Unsurprisingly the EAT made clear that a lack of dishonesty does not remove the risk of costs. An honest claimant can act unreasonably. In this case the ET concluded that C’s perception of events was distorted and that any objective person looking at the evidence would not have concluded that the case was arguable. As the EAT put it “the test of unreasonableness is an objective one which will encompass a wide range of matters,, which might include an unreasonably distorted perception of matters” (emphasis added).

The EAT set out that there are no grounds for softening or relaxing the costs regime in ETs for NHS whistle-blowers. As to the risk of deterrence, a costs order against an unreasonable claimant will not be a deterrent for a claimant pursuing a reasonable claim.

In respect of legal advice as to prospects, the starting point is for an ET to assume that a party has had the correct legal advice on his claims (as to merits) in advance. In order to depart from that assumption, an ET will want to see relatively detailed evidence as to the actual legal advice given (including context and instructions). A bare assertion as to legal advice (as was the case in this matter) is not enough.

Although C had succeeded on 2 of the 3 key limbs for some claims, it should have been apparent to C that the causation element could not be established. Proceeding in such circumstances was unreasonable conduct (on the ET’s view). It follows that a claimant is at

risk of costs whether or not he has been able to prove some, or even most, of the necessary elements of any particular claim.

Although the ET had only dealt expressly with 17 of the claims when covering the issue of no reasonable prospects, the ET was thereby simply setting out examples. It was implicit that the ET had the view that there were other claims with no reasonable prospects. It was not implicit that there were claims which did have prospects.



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