West Midlands Councils
Employer Services

WEST MIDLANDS COUNCILS

# HR Bulletin *E-Update 6 - December 2010*

***In the case of Fecitt & Ors v NHS Manchester (EAT/0150) the EAT found that a group of employees were found to have suffered a detriment from less favourable treatment following an instance of whistleblowing. In referring the case back to the ET, the EAT ruled that the employer, had to prove that treatment, redeployment and (in effect) dismissal, was in no sense whatsoever on the ground of the whistleblowing action.***

**Facts of the case**

Fecitt, Woodcock and Hughes worked at Wythenshawe NHS `walk in centre`. Early in 2008 Woodcock expressed concerns about Swift, who was employed as a general nurse at the walk in centre, believing he did not have the level of clinical experience or the qualifications he claimed. On 3rd March Woodcock expressed her concerns to her manager, Fecitt. Fecitt looked into this and discovered that Swift was qualified as a children's nurse, but did not have the dual qualifications as claimed.

Subsequently Fecitt, supported by Woodcock and Hughes, raised her concerns with her manager, Coates. It was accepted at the ET that that this constituted a `protected disclosure` because of the potential health and safety implications of people with whom Swift came into contact with were being endangered.

Coates discussed this with Swift who admitted he had exaggerated his qualifications and experience to colleagues, but not to his employer, for which he apologised. Coates determined that no further action would be taken. This `action` though was not to the liking of Fecitt et al who, as some other colleagues considered, were now engaging in a form of 'witch hunt' towards Swift.

The ET heard that Swift was not happy in the way the matter was still being pursued, even though Coates had determined no action was necessary and that he had become increasingly distraught, with other colleagues expressing concern about his mental health, including a suicide threat.

In April, Swift lodged a bullying and harassment complaint against Fecitt, and though he sought to withdraw the complaint, for reasons not known, the complaint still went to a hearing. It was found that there was nothing to suggest that Fecitt had bullied or harassed Swift, but there were concerns about her style of management. It is not recorded that any action was taken towards her. The general situation and atmosphere at the centre continued to worsen to the point that Swift was suspended, for reasons unknown, and Fecitt then made a formal complaint under the whistle-blowing policy.

In June 2008, following a report by the Medical Director, Swift had his suspension lifted, but the report concluded that whilst Fecitt was justified in her concerns and agreed that no action should have been taken against Swift. In July, through a second investigation, Fecitt was again found to have acted properly in raising the issue of Swift's `conduct` in overstating his experience and qualifications.

The ET were also made aware that in March, Fecitt had received an anonymous telephone call from `an unknown male` threatening to burn her house down' if the complaint against Swift was not dropped and a picture of Fecitt had appeared on Facebook, causing her distress. The ET agreed that as a direct result of the whistle blowing-disclosures towards Swift, Fecitt et al had been the subject of **unpleasant behaviour** by other staff at the centre. In turn this `behaviour` led all three complainants to raise grievances which were investigated by an outside consultant, Mrs Nixon, though the complainants believed that the investigation did not fully investigate the issues.

Of the three complainants, only one reached a hearing, and Nixon partially agreed that Hughes had suffered unpleasant treatment `that left her feeling isolated` and that the employer could have done more to manage the situation. Around this time, Fecitt was removed from her managerial responsibilities and both she and Woodcock were redeployed away from the walk in centre, Hughes hours were reduced to `virtually nothing`.

**The Decision of the ET**

The ET found that Fecitt et al were subjected to `significant detriments` due to the above acts and that the employer could `have done more` to prevent the complainants from unpleasant and unwarranted behaviour from Swift and his `supporters`.

The principle issue was whether the employer could and should have done more to stop the situation escalating in the way that it did and hence was there a breach of the rights of Fecitt et al not be subjected **"to detriment"** for having made a protected disclosure.

The employer argued, that the protected disclosure had to be causative in the sense of being the real reason or core reason and motive for the treatment complained of (*Aspinall v MSI Mech Forge Limited* [2002] EAT). In contrast, the ET acknowledged that an employer might be vicariously liable for the acts of an employee done in the course of his or her employment, whether or not what the employee had done would be actionable against him or her.

There was, however no finding that the acts complained of were such as to make NHS Manchester vicariously liable, noting that although they could have done more they had not **deliberately failed to take appropriate steps to make them liable under section 47B both on the principles of vicarious liability and by reason of its failure to act.**

In relation to the test of causation the ET concluded;

**"It is, of course, correct that, had Fecitt et al not made the protected disclosures in question, they would not have been subjected to the detriment of which they complain. Having considered the submissions of Counsel and the relevant authorities, however, the unanimous judgment of the Tribunal is that the "but for" test is not the correct test to apply in order to establish liability under section 47B of the Employment Rights Act 1996. There must be a causal connection between the protected act and NHS Manchester's acts or omission to act.**

**In the Tribunal's judgment, any failure on the part of NHS Manchester to take sufficient steps to protect Fecitt et al from being subjected to a detriment was not "because" they had made protected disclosures and was not, therefore, "on the ground that" they had made the protected disclosures."**

The ET identified that the principle issue was what NHS Manchester could and should have done to stop the situation escalating in the way that it did, and including whether in those circumstances there was a breach of the rights to Fecitt et al not be subjected "to detriment" for having made a protected disclosure.

The ET went on to hold that the actions taken against the complainants was because of the dysfunctional state of the Walk In Centre and represented the only feasible way of resolving the problem and was also not "on the ground that" they had made protected disclosures.

**Before the EAT…..**

Fecitt argued that the ET erred on the question of causation and that it appeared to have applied the test **of requiring the protected act to be the direct and proximate cause of the detriment.**

It was argued it was for the employer to prove that its decision to move Fecitt and Woodcock and remove Hughes from work was **"in no sense whatever"** related to, the protected disclosures.

Secondly, in relation to the question of vicarious liability, the ET had accepted that there was no dispute that the employer could be liable for victimisation in two respects. Finally, ET's decision appeared incorrectly to have put the burden of proof on the employee, whereas S48 of the ERA provides:

"On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

The employer submitted that the detriments had not been suffered "on the ground that" Fecitt et al had done the protected acts. (although this is hard to reconcile with the facts!)

It was further argued that the whistle-blowing provisions of the ERA made no specific provisions for vicarious liability. If an employer was to be made vicariously liable for whistle blowing victimisation it would not have the statutory defence available in other discrimination cases that it took reasonable steps to prevent its employees doing the act in question in the course of their employment**.**

**Conclusions of the EAT**

On the matter of **Vicarious Liability** the myth in NHS Manchester's argument was considered to be that the ET found that the specific acts of the employer for which it might have been directly liable, namely the removal of the staff from the Walk-In Centre and the, withdrawal of work from Hughes were found by the ET not to have been caused by any protected acts. That claim therefore failed on its facts as it appeared quite obviously to have been the case.

The EAT concluded that what amounts to causation in cases of victimisation in discrimination claims is the same as that which should apply to victimisation for whistle-blowing. The parliamentary premise of the legislation was to protect the whistle blower and hence a broad view should be taken in provisions for such and that it is for the employer to prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of the protected act.

The case was referred back to the ET.

**The key point from this case is that local authorities need to ensure that those employees who raise a whistle-blowing/protected act claim or complaint are protected in a manner as not to cause them detriment or victimisation from either the employee(s) who they are whistleblowing about, or any other part of their organisation. The measures to ensure this takes place will vary, but the message is clear, protect your whistleblowers or they could blow the whistle on you.**

## Employer Services Team is here to help

***For advice and information on employment issues (including on any of the contents of this Bulletin) and consultancy support contact:***

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