Employment

Whistleblowing Beyond your Employer: Coronavirus and the NHS

Posted on 16 April, 2020 by | Alice Mayhew | Samuel Nicholls | John Platts-Mills

The NHS has always proved fertile ground for employment litigation, and particularly complex whistleblowing claims. In this second of our two-part examination of whistleblowing issues in a COVID-19 world (you read the first part here) we will consider in more depth some of the specific issues that may arise in an NHS context, including: the different channels that whistleblowers may use to blow the whistle, other than to their employer, and whether protection is available to NHS workers who make public disclosures.

Widespread Press Coverage

The issues facing the NHS (and every other healthcare system in the world) have, unsurprisingly, captured the public's imagination and the media's attention. There are regular stories concerning the 'challenges', to quote the Health Secretary, surrounding the supply of PPE to NHS Trusts and the impact that this has on frontline workers.

Photographs of medics dressed in waste bags and wearing simple surgical masks have been posted on social media and then onto the front-pages. They present compelling images, capable of taking centre stage in the public discourse. Medical staff face the harsh reality of having to make life and death decisions as to which patients should receive priority over equipment. NHS staff may have very real concerns around implementing policies specifying which patients should be favoured.

Another feature of the press coverage has been a number of reports of NHS staff being 'gagged' from speaking out about shortages of equipment or the alleged conditions that they are working in. Examples cited in one article include:

- an intensive care doctor, who raised concerns about face masks, being told not to raise concerns outside of the hospital or otherwise face losing their job;
- a doctor being sent home from work for raising concerns; and
- a doctor being told that their social media was being monitored and they should be careful.

The spectre of costly and damaging whistleblowing litigation looms large across the NHS.

The Tension

The tension between competing interests is obvious – on the one hand the staff working in difficult and unprecedented conditions want to feel that they and their families are being properly protected. On the other hand, the NHS Trusts have an obvious and legitimate interest in maintaining public confidence in the services that they provide, against a background of the restrictions that have been imposed upon them both by the virus and supply chains. Part of maintaining such public confidence is no doubt seen as encouraging their staff to convey a positive public image.

The competing interests of NHS medical staff and Trusts would appear to be on a potential collision course.

Disciplinary Measures

A specific element of the statutory framework which may assume particular prominence in COVID-19 NHS whistleblowing claims concerns the manner of the alleged disclosure. A 'qualifying disclosure' is made in accordance with section 43C ERA 1996 if the worker makes the disclosure to their 'employer'. However, workers may be drawn to disclose information on social media, or even to the press, rather than using internal channels, feeling perhaps that this is the only way that they can be heard. The following scenario is foreseeable:

> *A member of a Trust's staff posts something to social media, perhaps depicting medics in sub-optimal PPE. The individual may or may not have realised the post would gain wide spread traction. Nonetheless, the post comes to the attention of their Trust and is seen as inappropriate and unprofessional, risking undermining public confidence in the Trust or the NHS more generally. The member of staff that posts such an image may of course see themselves as a whistleblower, particularly if it appears to them that management have not responded to previous concerns raised by that staff member or indeed others. It would seem likely that a worker who is the subject of disciplinary action as a result will assert that their actions amount to a 'qualifying disclosure' and merit protection under the relevant provisions of the Employment Rights Act 1996. This route may be open to the worker regardless of whether or not they thought about whether they were whistleblowing at the time of the post.*

When will protection attach to a disclosure – the general position

A disclosure of 'qualifying information' to an employer (section 43(1)(a)) is capable of being a 'protected disclosure', however, if the worker reasonably believes that the 'relevant failure' relates solely or mainly to the conduct of another person then a disclosure to that other person is also capable of being a protected (section 43C(1)(b)). If therefore the mischief that the worker is complaining about is caused by the conduct of a third party, for instance a member of central government, those concerns can be raised directly with that third person.

When will protection attach to a disclosure made to a third party?

A disclosure is also capable of being protected if it is made to a 'prescribed person' (essentially public authorities) and if the disclosure falls within the scope of the remit of that 'prescribed person' (section 43F(1)). A list of 'prescribed persons' and their field of responsibility is contained in the Schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014, for example in the context of the COVID-19 pandemic: the Secretary of State for Health is prescribed in relation to, for instance, 'protecting the public in England from disease and other dangers to health…'.

In addition to section 43F, section 43G offers some assistance to a whistleblower going to a third-party or via social media. Under section 43G, a disclosure may be protected if the whistleblower can show any of the following:

- 43(2)(a): they reasonably believed they would otherwise have been subjected to a detriment by their employer if they made the disclosure to them or a prescribed person (see section 43F);
- 43(2)(b): where there is no prescribed person, they reasonably believed that it is likely that evidence relating to the relevant failure will be destroyed or concealed if they make the disclosure to their employer; or
- 43(2)(c): the worker has previously made a disclosure of substantially the same information to their employer or to a prescribed person. The information disclosed need only been substantially the same as was previously disclosed and may even be expanded to include what the employer did or didn't do after the original disclosure.

In order for any of the exceptions to apply, any worker making such a disclosure must also believe that the information is true, and that belief must be reasonable; the disclosure must not be made for personal gain, and it must be reasonable for them to have made the disclosure in the circumstances of the case (section 43G(1)).

In determining for the whether it is reasonable for the worker to make the disclosure, what 'shall' be taken into account is set out in in section 43G(3), including: the identity of the person to whom the disclosure is made; the seriousness of the relevant failure; and whether the relevant failure is continuing or is likely to occur in the future; and whether the disclosure is made in breach of the duty of confidentiality owed by the employer to any other person.

Where the wrongdoing identified by the worker is isolated, or at a lower level, the requirements contained in section 43G can present an onerous obstacle and, as a result, the exception to the general rule that the disclosure should be made to the employer may have limited applicability in the majority of whistleblowing cases.

However, it seems to us, that in the context of the NHS in the midst of the COVID-19 pandemic section 43G may present an opportunity for claimants, particularly if the worker can demonstrate that his or her Trust was seeking to actively prevent such disclosures being made.

The Exceptionally Serious Case

Where the disclosure relates to a failure of an 'exceptionally serious nature' (section 43H) then the worker does not need to satisfy the conditions in section 43G(2). However, even where the failure is of an 'exceptionally serious nature', the worker must still show that they reasonably believe that the information is true and, that the disclosure must be made in good faith not be made for personal gain and, it must be reasonable for them to have made the disclosure in the circumstances of the case. When considering the reasonableness of the worker's disclosure the identity of the person to whom the disclosure is made is to be taken into account (section 43H(2)).

The ERA 1996 offers no guidance on what may be 'exceptionally serious', and it remains to be seen what factual circumstances may give rise to successful reliance on this exception. It seems arguable that disclosures about a lack of PPE, oxygen and ventilators (to name just a few) might fall within the scope of 'exceptionally serious'.

Summary

Trusts should therefore tread carefully when suggesting to staff that they should not be raising concerns outside the precinct of the Trust, as they may be providing ammunition for staff to claim that their disclosure should attract protection as they reasonably believed that they may be victimised if they had made their disclosure to the Trust first.

The importance of both sides to a potential dispute taking appropriate legal advice at the earliest opportunity cannot be over emphasised.

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