EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/2 Test of 'good faith' in victimisation claims is employee's honesty not motivation (UK)

The Employment Appeal Tribunal (EAT) has clarified the grounds on which bad faith can be alleged in a victimisation claim under the Equality Act 2010 ('EqA'). The EAT held that although motive in alleging victimisation could be relevant, the primary question is whether the employee acted honestly in giving the evidence or information, or in making the allegation. The concept of 'bad faith' is thus different in victimisation claims than whistleblowing claims.

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Background

UK law prohibits discrimination in respect of nine specific protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. There are four kinds of discrimination – direct and indirect discrimination, harassment and victimisation.

Victimisation occurs where a person (A) subjects another person (B) to a detriment because B has done, or A believes that B has done, or may do, a 'protected act'. Protected acts include

making an allegation that A has contravened the EqA. However, section 27(3) of the EqA states that "giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made in bad faith."

For whistleblowing claims, there must have been a protected 'qualifying disclosure'. That is, the worker who makes it must have a reasonable belief that it falls within one or more types of information from a qualifying list. In relation to disclosures made prior to 25 June 2013, the qualifying disclosure had to be made in good faith to be protected and if an employee made the disclosure for an ulterior motive they could be found to have been acting without good faith. With effect from 25 June 2013, this requirement was removed and a good faith requirement was inserted in the whistleblowing remedy provisions.

Facts

Mr Saad was employed by Southampton University Hospitals NHS Trust and was training to become a cardiothoracic surgeon. Performance issues arose during his training. Around the time the performance issues came to a head, Mr Saad raised a grievance. This included alleged comments made by his training programme director saying that Mr Saad was "… a terrorist looking person" (he is from a Sudanese background). Mr Saad alleged that the programme director had likened him "… to the doctors who carried out the terrorist attack in Glasgow airport in 2007". Mr Saad complained that such comments were abusive and discriminatory on racial or religious grounds. His grievance was not upheld and he was subsequently removed from the training programme and dismissed.

Mr Saad issued proceedings against the Trust for unfair dismissal on whistleblowing grounds and for victimisation. He had relied on the terrorist comment allegedly made by the programme director as both a protected disclosure and a protected act.

The Employment Tribunal (ET) rejected Mr Saad's claim. In respect of whistleblowing, the Tribunal found that Mr Saad subjectively believed that the programme director had made the alleged terrorist comment, but found that his belief was not reasonable. Further, the Tribunal found that Mr Saad's grievance had been brought with the ulterior motive of postponing the upcoming performance assessment. On that basis, the Tribunal held that Mr Saad had not acted in good faith and dismissed his claim. In relation to victimisation, the Tribunal concluded that Mr Saad made a false allegation in bad faith and therefore there was no victimisation.

Mr Saad appealed to the Employment Appeal Tribunal (EAT) in relation to victimisation.

Judgment

The EAT allowed the appeal. The EAT held that the good faith test for victimisation is different from the good faith test that used to apply in whistleblowing cases (before changes made in 2013). The EAT concluded that the primary question for victimisation claims is whether the claimant has acted honestly in giving the evidence or information, or in making the allegation, that is relied on as a protected act. Although the existence of an ulterior motive could potentially be relevant, the primary focus in determining bad faith was the question of the individual's honesty.

The EAT set out the following key points as to its reasoning:

The good faith requirement for a protected disclosure claim (prior to 2013) related to a statement that the maker 'reasonably believed' to be true. Therefore, the tribunal would already have made a finding that the employee (reasonably) believed in the content of what they were saying. Therefore, the further requirement – that the disclosure was made in good faith – had to add something more.
What this 'something more' amounted to was clarified in Street v Derbyshire Unemployed Workers' Centre [2005] ICR 97, which held that there could be a lack of good faith if the individual had an ulterior motive as their predominant motivation in making the disclosure.
By contrast, section 27(3) of the EqA has no prior stage where the ET has first to determine whether the employee believes in what they are saying. The ET is simply required to find whether the information is true or false; if false, the tribunal must then determine whether it was given or made by the employee in bad faith.
This must mean that the ET has to determine whether the employee has given the evidence or information or made the allegation honestly (i.e. believing it to be true).
The EAT concluded that ulterior motives may be relevant in a particular case, but that it was not the primary focus under section 27(3) of the EqA.

The EAT found that Mr Saad subjectively believed that the alleged terrorist comment had been made and therefore he had made the allegation honestly and had not made it in bad faith.

Commentary

This decision clarifies the grounds on which bad faith can be argued in victimisation cases. Although ulterior motives might be relevant to establishing bad faith, this decision makes it clear that they should not be the focus in victimisation cases. The real question is whether the

employee acted honestly in making the allegation that is the protected act.

An employer needs to be mindful of what they must establish when defending a victimisation claim on the basis of bad faith. In order for an employer to defeat a claim on the ground of bad faith, it must show both that the evidence, allegation or information was false and that the employee acted dishonestly. Showing that an employee had an ulterior motive for doing a protected act will not be enough.

Employers' advisors may need to review their tactics. If an allegation made is proved to be false, an employee may find it hard to argue that they reasonably believed it to be true. It might therefore be better to argue that the employee could not have reasonably believed in what they were saying, if the facts in a particular case permit.

Comments from other jurisdiction

The Netherlands (Peter Vas Nunes): Following his dismissal, Mr Saad claims: (1) my boss discriminated against me by making a 'terrorist comment'; (2) I complained about this; and (3) the complaint triggered the dismissal. The employer rebuts: (1) we deny the terrorist comment; (2) yes, Mr Saad did complain about such a comment; but (3) he was not dismissed because of the complaint. Under Dutch law, the issue would likely have centered around the question: who bears the burden of proof in respect of (1)? Must Mr Saad prove that his complaint caused the dismissal? Or must the employer prove that there was no causal relationship? Point 1 would not have been relevant. Even where an employee has not been discriminated against, if he complains about discrimination and is dismissed for complaining, that is sufficient to support a victimisation claim. I would expect this to be no different under UK law.

What makes this case different is that UK statute contains an exception to the rule prohibiting victimisation: where the employee knows that his detrimental treatment is not related to a complaint about discrimination, but he nevertheless – i.e. in bad faith – claims that it was, he cannot claim on the basis of victimisation. In this case, the employer relied on this statutory exception by arguing: the real reason Mr Saad filed a discrimination claim is not that he felt discriminated against, but to postpone an upcoming performance assessment. In other words, he had an ulterior motive for complaining. The EAT rejected the employer's argument. Even if Mr Saad may have had an ulterior motive, he subjectively believed the alleged terrorist comment had been made, so therefore his complaint was not made in bad faith. Conclusion: the said statutory exception does not apply.

I would expect that this is not the end of the story. The EAT does not seem to pronounce on the question of whether Mr Saad was or was not dismissed because of his complaint. Perhaps the case will now go back to the Employment Tribunal to answer this question. If so, the next step will be to determine who bears the burden of proof. The relevant EU directives 2000/43 (race) and 2000/78 (religion) are silent on this issue. Their provisions on burden of proof apply to claims of discrimination (respectively, Articles 8 and 9), but it is not clear whether they also apply to victimisation claims, which are dealt with in, respectively, Articles 10 and 11. The Dutch Human Rights Commission has issued conflicting rulings on this point.

The UK case reported above deals with the relationship between claims (1), (2) and (3). To my knowledge, there has been no Dutch case dealing with this relationship. Let me give an example: an employee accuses his boss of a discriminatory comment. He knows the accusation to be false. He is dismissed for making a false accusation. Strictly speaking, this is a clear case of victimisation. Will the court order reinstatement (or compensation)? I doubt it. If my doubt is justified, Dutch law has, de facto, a similar exception as UK statute.

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