

FAQ's: Whistleblowing & Junior Doctors

A number of questions have been raised as to the protections available to doctors in training when the raise concerns in the workplace, especially with regard their relationship with Health Education England ('HEE').

These questions arise largely due to a high profile case brought by a Doctor Christopher Day against HEE and this paper seeks to address the same.

1. Are Doctors in Training ('DiT') protected from detrimental treatment by HEE if they raise concerns in the workplace?

Yes, since 3rd August 2016 DiT and persons applying for a position as the same, have been protected in law from any detrimental treatment from HEE. This protection is in the form of a legally binding agreement (the 'HEE Agreement') entered into by HEE, the BMA, the BDA and employers that entitles any DiT in the wide categories specified in the Agreement (known as a 'Postgraduate Trainee' in the Agreement) to bring a legal claim against HEE in the event that they are exposed to any detriment as a result of having raised a concern.

2. Contractual protection? I thought whistle-blowers were protected by statute under the Public Interest Disclosure Act 1998 ('PIDA')?

A DiT, who believes they have been subject to a detriment from HEE as a result of raising a concern, could seek to bring a legal claim in one of two ways:

- (a) In the Employment Tribunal (citing the statutory provisions in PIDA and Employment Rights Act 1996 ('ERA')), or
- (b) In the Courts (citing the HEE Agreement).

A successful claim in either venue would have the same outcome as the contractual provisions mirror the statutory scheme. There are however certain advantages to pursuing HEE via the Courts rather than the Employment Tribunals.

3. What are the advantages of bringing the claim in the Courts?

The key advantages are as follows:

- (a) No need to prove that HEE is the employer of the DiT for the purposes of whistleblowing.**

Recent case law (Day v Health Education England & Ors [2017] EWCA Civ 329) (the Day case) tells us that a DiT seeking to bring a claim against HEE will first need to demonstrate to the Employment Tribunal that on the facts of the case HEE are their employer for the purposes of PIDA/ERA. The Employment Tribunals would need to deal with this as a preliminary issue before deciding upon eligibility to bring a legal claim. The Court of Appeal have remitted the Day case back to the Employment Tribunal to consider this on the specifics of his case; this preliminary matter is scheduled for a four-day hearing given its complexity.

Even if Dr Day is successful in showing the Employment Tribunal that HEE were his employer the judgment in that case will only be binding upon HEE in respect of him and HEE could claim that they are not the employer of different doctors, particularly those in other areas of the country where the training arrangements between the doctor and HEE may differ.

A DiT seeking to bring a claim in the Court will face no such barrier, HEE have already accepted that they are legally liable if they subject a Postgraduate Trainee under the Agreement to any detriment as a result of raising protected disclosures. The DiT can bring the claim without any scope for HEE to argue that the claim cannot be brought as they are not the DiT's employer.

(b) Longer period in which to bring a legal claim.

A legal action brought under PIDA via the Employment Tribunal needs to be issued within 3 months of the detriment complained of, which may be extended by a maximum of around 6 weeks for early conciliation.

A legal action under the HEE Agreement need to be issued within 6 months of the detriment complained of. Notification of the claim needs to be given to HEE within 4 months of the same, an extra month compared to the conciliation process used before issuing proceedings in the Employment Tribunal.

(c) Ability to recover your legal costs from HEE.

A successful party is normally entitled to recover their legal costs when the claim has been brought in the Courts; this is not the case in the Employment Tribunals where (save in exceptional cases) the recovery of legal costs is not allowed. This does of course cut both ways so claimants need to consider what their position would be if they were to lose the case.

The issue of legal costs is not so relevant of course to BMA members who are entitled to be considered for the BMA's discretionary legal support, although it is of material benefit to the BMA to be able to know that we can expect to recover legal costs from HEE. It also acts as a useful lever to ensure that HEE are mindful of the need to adhere to their legal obligations.

4. How confident are we that the HEE Agreement works?

We are very confident that the HEE Agreement is legally effective; we have received advice notes from Mark Sutton QC (a leading expert on whistleblowing in the NHS) and Sarah Keogh (Barrister with deep experience of junior doctor issues) and John Hendy QC (the preeminent trade union barrister and former 'silk of the year') to this effect. This legal advice is available for all to read on the BMA's website and is unequivocal.

Furthermore, Gateleys solicitors, who are responsible for determining eligibility for BMA legal support have confirmed that they regard the agreement as legally effective and will approve claims brought under it (subject to the claim having merit in the wider sense).

Finally, HEE have accepted that they are bound by the agreement and have published guidance explaining the agreement and its legal effect; this could be shown to the Court in the

(highly unlikely) event that HEE sought to argue that the agreement was in some way not binding upon them.

5. But I have read comments on social media as well as a QC opinion saying that the agreement doesn't work?

A doctor who is seeking to raise funds for his own litigation instructed the barrister who he is using for that litigation to write a paper upon the legal effectiveness of the HEE Agreement. The BMA attaches little credibility to the resulting paper and has responded to the concerns raised, that response can be read [here](#); the BMA is very confident of its position in this regard.

6. How long does the HEE Agreement last for? Is there is danger they can get out of it in the future?

The HEE Agreement is binding in perpetuity; it would only cease to exist in a limited number of circumstances:

- (a) If the Courts were to make a final and binding determination HEE were an employer of all the specified Postgraduate Trainees for the purposes of whistleblowing, then the agreement would no longer be needed so it would come to an end. It is worth noting the at the Day case has been remitted to the Employment Tribunal, for a first instance decision that will not be binding on other cases and therefore will not trigger termination of the Agreement.
- (b) If the legislation is amended so as to provide for a legislative route to bring such claims. In this case there would be no need for the HEE Agreement so it would terminate.
- (c) If the legislation were to change such that whistleblowing protection is no longer provided by statute. The purposes of this Agreement is to mirror the statutory protections that exist, so if the statutory scheme were to be removed then the Agreement would terminate.

7. Shouldn't the BMA lobby Parliament to achieve a statutory protection for members?

The HEE Agreement provides all the protection of the statutory scheme and has certain advantages that a statutory scheme does not (including the ability to recover legal costs and a slightly longer period in which claims can be brought) and it may well be that the BMA's political capital is better focussed on areas where there is a material benefit to members and/or the NHS.

Lobbying to solve a problem that doesn't exist could undermine the BMA's credibility and may make it difficult for the BMA to achieve success in other fields. Furthermore, the perception that could be created by such activity may be that the BMA somehow doesn't have confidence in the HEE Agreement, this could cause doctors to lack confidence in their ability to raise concerns in the workplace and have a deleterious effect upon patient safety.

8. What should a member DiT do if they believe they have been subject to a detriment by HEE as a result of raising a concern?

They should contact First Point of Contact in the normal manner and advise them of the circumstances of their case. Gateleys will assess whether there is evidence of a causal link between their raising of a concern and the detriment to which they have been subject in order to progress their claim through the merits assessment. Claims with merits will be eligible for the BMA's full discretionary support.

9. Why didn't the BMA support Dr Chris Day in the case he was seeking to bring against HEE?

The BMA, via its external law firm Gateleys, have explained to Dr Day the reasons why we are not supporting his case. Gateleys used the same process to assess merit as with all other cases presented by the BMA. Dr Day's solicitors have written to us to ask us not to discuss those reasons and the BMA are under an obligation to act according to that request.

10. Doesn't Dr Day's victory in the Court of Appeal show that the BMA, and Gateleys, got it wrong?

When Gateleys decides whether or not to support a case it looks at the case as a whole, and specifically the merits of the case in terms of its overall chances of success. The BMA is not at liberty to comment on the conclusions reached by Gateleys in Dr Day's case. The Court of Appeal was asked to decide a very narrow question upon Dr Day's eligibility to bring a claim which is only one aspect of his case. Furthermore, the Court of Appeal did not rule that Dr Day is eligible to bring a claim, they have remitted this question to the Employment Tribunal for further consideration. The Court of Appeal decision did not look at nor comment on the underlying merit of Dr Day's whistleblowing claim, which remains to be determined by a Tribunal if he is able to show that he is eligible to bring a claim.

11. What is the BMA doing now about the Chris Day case?

Dr Day's case has been remitted to the employment tribunal for consideration of the preliminary issue as to whether or not he is eligible to bring a claim. The employment tribunal is a first instance tribunal that does not set binding legal precedent. The decisions the employment tribunal makes will not be binding upon another tribunal in another case. As such the Dr Day case look unlikely to set any legal precedent that would entitle junior doctors to bring claims against HEE.

The BMA has secured robust legal protection for all junior doctors in respect of their relationship with the HEE and whatever the outcome of the Dr Day case we believe that our members are better placed to bring whistleblowing claims against HEE under the HEE Agreement and not via the statutory route.

12. Did the BMA say that there was an injunction preventing it from discussing the Dr Day case?

The BMA has never said that there was an injunction preventing it from discussing any aspect of the Dr Day case.

The BMA has received letters from Dr Day's lawyers accusing the BMA of breaching his right to confidentiality following a confidential discussion that took place in BMA Council. The BMA

believes that it is entirely free to discuss his case in internal meetings and that as such his lawyer's letters were fundamentally misconceived.

Notwithstanding this, in an attempt to avoid an unnecessary dispute and bad feeling the BMA's lawyers told its office holders not to engage in further discussion as to the merits of Dr Day's case.

We believe that one doctor who was informed of this message may have said that there was an injunction in place; we believe that this was an innocent misunderstanding by the doctor concerned. The doctor in question accepts that he got the word wrong in a private email.

Dr Day's solicitors have written to the BMA and inviting us to discuss the implications of his case. We have commissioned a legal opinion upon the same for members from John Hendy QC and we intend to publish this once it is received.

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