Employment

A Case of Bad Faith?

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If something is not done in good faith, then one might think it must have been done in bad faith. The two terms appear mutually exclusive, and the man on the street would be forgiven for thinking that no-one but a lawyer could argue with that proposition.

However, due to the wording of statute, the Employment Appeal Tribunal recently found the opposite in a judgment handed down by HHJ Eady QC on 22 August 2018. In the law relating to victimisation, an act not done in good faith within the context of other legislation is not necessarily done in bad faith. The case was *Saad v Southampton University Hospitals NHS Trust* UKEAT/0276/17/JOJ, a matter which concerned events in 2011 and which therefore engaged provisions of "whistleblowing" legislation which have since been amended.

Legal Framework

The appeal before HHJ Eady QC concerned the protection against victimisation provided by **section 27** of the Equality Act 2010 ("the 2010 Act"). That provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. Crucially, **section 27(3)** provides 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".* It was that reference to 'bad faith' which was the subject of the appeal.

The former wording of the whistleblowing provisions contained within sections 43A to 43H of the Employment Rights Act 1996 ("the 1996 Act") was also relevant, and in particular those portions of sections 43C and 43F which read (at the material time) as follows: *"a qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith".*

Factual Background

Mr Saad, the claimant, was a trainee surgeon at the Southampton University Hospitals NHS Trust. His time as a trainee had not gone to plan, and he was due for a performance assessment which, he believed, was going to go badly for him. Prior to that performance assessment, he raised a grievance relating to an alleged racist remark, said to have been made to him some four years beforehand. He alleged that a teaching surgeon had said he was *"a terrorist looking person"* and had likened him to *"the doctors who carried out the terrorist attack in Glasgow airport in 2007".* This remark was said to have been made in front of other staff during an operation. The grievance was not upheld, and he was subsequently removed from the training programme and dismissed.

He subsequently brought claims relating both to whistleblowing and victimisation. He relied upon his grievance as both a qualifying disclosure of information in respect of whistleblowing and a protected act for the purpose of his victimisation complaint. However, the Employment Tribunal rejected his claims. It held that his grievance was not a protected act, because the grievance was made in bad faith so as to postpone his assessment. Whilst he might have believed that the comments were made, he had an ulterior motive in raising them.

EAT Decision

The claimant appealed, and the EAT allowed that appeal. It held that the tribunal had applied the wrong test: a finding that an individual has not acted in good faith in one context does not automatically mean that he has acted in bad faith in another.

When considering a victimisation claim, it is not appropriate for a tribunal to read across from its findings in relation to a protected disclosure claim (or, indeed, any other claim). It should, instead, consider the statutory test for each cause of action in isolation, and apply its finding of facts to that test: *"the good faith requirement for the purposes of the Claimant's protected disclosure claim had to be construed in one context and the bad faith exception to the victimisation protection in another".*

This is what the Employment Tribunal had failed to do. The Court of Appeal had provided guidance as to the meaning of protected disclosure "good faith" in *Street v Derbyshire Unemployed Workers' Centre* [2005] ICR 97, but the tribunal had, unfortunately, applied this to the 'bad faith' test within the victimisation legislation. In *Street*, the Court of Appeal was concerned with a case in which the employee had reasonably believed in the substantial truth of the disclosures she made but, as the Employment Tribunal found, had been motivated to make those disclosures by her personal antagonism towards the manager to whom they related. In these circumstances, the appellate courts had upheld the dismissal of the claimant's whistleblowing claim, finding that the disclosures were not made "*in good faith*".

In a victimisation claim, however, the EAT held that the primary question is whether the worker has acted honestly in providing the evidence or information which makes up a protected act. While motivation could of course be part of the context in which that information is provided, the primary focus when determining "bad faith'" is the worker's honesty. Mr Saad genuinely believed that the alleged comments had been made, and therefore had clearly done a protected act honestly. For that reason, he had not acted in bad faith even if he had an ulterior motive in lodging the grievance.

What is the upshot of all of this? The decision could lead to an increase in grievances being raised by employees subject to disciplinary or capability procedures. If such a grievance emerges, careful consideration should be given as to whether it has been honestly raised. If it has, it is likely to be a protected act, and employers will need to think carefully so as to avoid any justified suggestion of victimisation.

Matthew Sellwood is frequently instructed in the Employment Tribunal, and has recently also appeared in the Employment Appeal Tribunal. He has conducted successful defences in a range of multi-day hearings involving elements of unfair dismissal, discrimination and whistleblowing, and also advises across the whole range of employment law. As both a former employer at a public authority and a former trade union representative at a national charity, he brings a pragmatic view to employment litigation and is able to view 'both sides' of any issue.