

Title: Whistleblowing protection and concurrent ‘worker’ status for a junior doctor: *Day v Lewisham and Greenwich NHS Trust also known as Day v Health Education England*

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Subject: Employment

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1. INTRODUCTION

In *Day v Lewisham and Greenwich NHS Trust also known as Day v Health Education England*¹ (*Day*) the Court of Appeal (the CA) had the opportunity to consider whether the relationship between a junior doctor and Health Education England, the organisation responsible for organising training and posts for post-graduate trainee doctors, came within the protection from detriment for whistleblowers under the Public Interest Disclosure Act 1998 (PIDA). From a socio-political perspective this case is of particular significance, set against a backdrop of the Francis Report into the catastrophic failings of the Mid-Staffordshire NHS Trust² and the recognition in that report of the necessity of a cultural shift at organisational level to ensure that NHS workers feel able to raise concerns without fear of detriment. The potential compromising of whistleblowing protection in working relationships falling outside the primary working relationship if the Employment Tribunal and Employment Appeal Tribunal ruling had been upheld, led to Public Concern at Work joining the proceedings as an interested party.³ From a legal perspective, it is Lord Justice Elias’ reasoning on the statutory interpretation of the relevant legislative provisions which is noteworthy and likely to prove useful in the future development of the law. By allowing the appeal and holding that Dr Day’s relationship with HEE could come within the scope of the extended definition of worker in s43K(1)(a) of the Employment Rights Act (ERA), it is suggested that this judgment provides the right framework for future analysis of the ‘worker’ ‘employer’ relationship.

2. FACTUAL BACKGROUND⁴

Following his application to train in emergency medicine Dr Day entered into a training contract with the London Deanery which later became the South London Health Education Board (the Board), part of Health Education England (HEE), which is responsible for organising training programmes and posts for post-graduate trainee doctors. Dr Day was placed with Lewisham and Greenwich NHS Trust (the Trust) where he worked under a contract of employment as a specialist registrar in Acute Care Common Stem Emergency Medicine. During his time at the Queen Elizabeth Hospital Dr Day raised concerns that serious under-staffing levels were compromising patient safety. As well as raising these concerns with the Trust, he also claimed to have raised them at training progress meetings with the Board, alleging that these were protected disclosures within the scope of whistleblowing legislation and that as a result he was subjected to a number of significant detriments by HEE. Dr Day brought proceedings before the Employment Tribunal (ET) against the Trust and HEE.⁵ HEE denied Dr Day’s claims that he had suffered detriment as the result of making protected disclosures and asserted that even if his claims were valid, his relationship with HEE did not fall within the statutory worker/employer relationship as set

out in the Employment Rights Act 1996 (ERA) extended definition of worker in s43K. The issue was considered at a preliminary hearing which, Elias LJ noted, was unfortunately to deal with HEE's strike-out application on an agreed set of limited facts, which argued that the claim against it had no reasonable prospect of success, instead of being determined after a full fact-finding exercise. HEE was successful in the ET having Day's claims struck out and Day's appeal to the EAT was unsuccessful.

3. THE LEGISLATION

It is worth reminding ourselves at this point that the whistleblowing provisions provide a framework for disclosure in the workplace and entitlement to claim compensation on suffering detriment as a result of having made a 'protected disclosure' as per s43B(1) of the ERA.⁶ S47B states:

1. A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

Therefore, as Mr Justice Langstaff set out in the EAT judgment, a Claimant must show that he is a 'worker' within the meaning of Part IVA of the ERA and that the alleged act has been carried out by his 'employer'.⁷ Section 230(3) defines 'worker' as:

an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment or (b) any other contract whether express or implied and (if it is expressed) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual

But the key issue in this appeal centred around the extended definition of worker set out in s43K(1)(a), reproduced below, in particular the meaning of the introductory words of that provision and of the phrase 'substantially determined' that appears further down:

For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who-

- (a) works or worked for a person in circumstances in which-
 - (i) he is or was introduced or supplied to do that work by a third person, and
 - (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them...

And any reference to a worker's contract, to employment or to a worker being employed shall be construed accordingly.

In conjunction with the s43K(1)(a) extended worker definition, an employer is defined as 'the person who substantially determines or determined the terms on which he is or was engaged'..⁸

Judge Hyde in the ET held that the Dr Day's relationship with HEE ran alongside his contractual relationship with the relevant NHS trusts and that although HEE did organise his training, it did not substantially determine the terms of his work. Langstaff J in the EAT found that the ET was entitled to find as it had, agreeing that whilst HEE decided where Dr Day worked, reviewed his training and supplied a significant proportion of his salary, it did

not follow that this meant HEE had determined his terms. Furthermore, even if it had, this was certainly not ‘substantially’, which must be interpreted as ‘in large part’ rather than as Dr Day contended ‘more than trivially’.⁹

GROUNDINGS OF APPEAL

The questions for this appeal to address centred around statutory interpretation, namely whether Dr Day was a worker and HEE his employer within the legislation. More specifically, the issue was whether Dr Day’s commonly agreed status as a s230(3) worker with the Trust precluded him from having a s43K(1) extended definition worker status with HEE. The conclusion of the EAT was that because Dr Day had s230(3) status with the Trust, he could not have s43K(1) status with HEE. Important here is that although Dr Day was not without whistleblowing protection, this was, in PCAW’s words ‘cold comfort’ given that the bulk of the detrimental treatment alleged was from HEE rather than the Trust.¹⁰ Had this finding of the EAT been upheld by the CA it is likely that an unwelcome consequence could have been that junior doctors would be deterred from making disclosures in respect of key organisations outside of the primary employment relationship such as HEE.

Counsel for Dr Day submitted that the ET had wrongly analysed the question it had to determine. In focussing on whether the Trust or HEE had played the primary role in determining Dr Day’s terms of engagement, it had failed to recognise that both may have done so.¹¹

THE COURT OF APPEAL’S FINDINGS

A. Is it possible to have concurrent s230(3) and s43K(1) worker status?

Langstaff J’s ruling in the EAT was that it was not. Agreeing with HEE’s argument that where a person came within the s230(3) definition, which the Claimant did in respect of his employment with Lewisham, the s43K extensions could not apply, he stated:

If the section had been intended to add a category of employer against whom a person might act in addition to others who were his employer, there would be no need for the words “who is not a worker as defined by s230(3)”. They were intended to have a meaning.¹²

Of particular interest in the EAT judgment is that Langstaff J addressed the issue of purposive statutory interpretation head on, stating that his acceptance of HEE’s submissions ‘does no violence to the principle of purposive construction’¹³ because the purpose of the s43K extension is to extend the category of ‘worker’ to a ‘limited category of other relationships’.¹⁴ This he explained, in line with HEE’s submissions, was demonstrated by the health service relationships set out in the statute:

[T]he omission of specific reference to the relationship of a doctor with HEE (or to the deaneries which preceded HEE) therefore is strongly suggestive that Parliament deliberately did not intend to include it.¹⁵

Consequently, as the detriment alleged was in respect of his relationship with HEE rather than his role with the Trust, ‘the position of HEE was little different from any third party who might have acted detrimentally towards him as a whistleblower.’¹⁶

Drawing on Elias LJ's comments in *Fecitt & Others v NHS Manchester (Fecitt)*¹⁷ as to the "legitimate role of the Court in construing legislation" Langstaff J made the following comment on the limitations of the purposive approach:

I accept that a purposive approach should be taken to interpreting the public interest disclosure provisions in the Employment Rights Act. But I also accept that this does not mean that a Court is entitled to ignore the words of the legislation by thinking that the purpose would better be served if they did not appear.¹⁸

The *Fecitt* decision was reversed by Parliament by s19 of the ERA, which introduced additional protection from detriment by a co-worker as well as employer, giving whistleblowing provisions consistency with discrimination protection more generally, with the same 'reasonable steps' defence available. However, whilst one view of *Fecitt* is that it highlighted a loophole in protection which Parliament ultimately closed, Langstaff J did not share that view:

Forensically attractive though it may be to describe an absence of protection in particular circumstances as a "lacuna" it is better viewed in this case, as it was in *Fecitt*, as Parliament carefully delineating the extent to which protection against detriment for whistle blowing should be afforded.¹⁹

Whilst agreeing with Langstaff J as to the need for a purposive approach to whistleblowing legislation, Elias LJ disagreed with his conclusion on the mutual exclusivity of s230(3) and s43K(1) worker status, giving a succinct example:

Take an agency worker who has a second job serving in a restaurant in the evenings. The fact that she is a section 230 worker in an unrelated position could not sensibly preclude her from seeking to rely upon the extended definition of worker with respect to the agency work.²⁰

Elias LJ drew on Simler J's approach in *McTigue v University Hospital Bristol NHS Trust*²¹ rejecting the EAT's conclusion in the Day appeal, which she argued would lead to unsatisfactory outcomes if correct. Simler J submitted that the correct interpretation of the introductory words to s43K(1) 'mean that the provision is only engaged where an individual is not a worker within s230(3) in relation to the **respondent in question**' [my emphasis].²² This interpretation meant that although Ms McTigue, an agency nurse, had s230(3) worker status in respect of her relationship with her agency, this did not preclude her from having extended meaning s43K(1) worker status with the University Hospital Bristol NHS Trust, against whom she had brought a claim of detriment having made protected disclosures. Accepting the submissions of Counsel for Dr Day and Counsel for PCAW, Elias LJ held that the words 'as against a given respondent' should be inserted into s43K so that it reads:

For the purposes of this Part "worker" includes an individual who *as against a given respondent* is not a worker as defined by section s230(3)²³

resulting in the possibility of concurrent s230(3) and s43K(1) worker status with different employers. Addressing the issue of purposive construction, Elias LJ agreed with Langstaff J that there are limits to this but found those constraints not to be overreached through his interpretation in this case:

A court cannot simply ignore the language of a statute to achieve what it conceives to be a desirable policy objective. But where, as here, some words need to be read into the provision because a literal construction cannot be what Parliament intended, then in my view the court should read in such words as maximise the protection whilst remaining true to the language of the statute²⁴.

Arguably, the key flaw in the EAT judgment was the result that a worker could have whistleblowing protection in an employment relationship where no detriment has taken place but no protection in a relationship where it does. It is still however necessary to satisfy the ‘substantially determines’ requirement of s43K(2)(a) and this is discussed below.

B. Can more than one body ‘substantially determine’ the terms of a worker’s engagement?

As noted above, Langstaff J in the EAT, found that Hyde J in the ET hearing was entitled to find that although HEE organised Dr Day’s training, it did not substantially determine the terms of his work. Elias LJ agreed with Counsel for Dr Day’s submission that the ET had applied an incorrect test; namely by considering which of HEE and the Trust had played a greater role in setting Dr Day’s terms of engagement, it did not reflect on whether there was a possibility that both HEE and the Trust could substantially determine those terms.²⁵ Noting that it was not in dispute that the Trust ‘played a more significant role than HEE’, this did not mean that HEE could not also ‘substantially determine’ Dr Day’s terms. Elias LJ did not however accept the submission that this approach would have necessarily led to the ET finding in Dr Day’s favour, instead remitting the case to a fresh tribunal to decide as a finding of fact whether HEE satisfied the substantially determined requirement.

C. Can a tribunal consider factors affecting terms of engagement which are not contractual in nature?

A final issue which Elias LJ addressed, whilst noting that it was perhaps a side issue to the case in question, was whether a tribunal could only consider contractual terms or whether it was permitted to take factors outside contractual terms into account. Following *Sharpe v Bishop of Worcester*²⁶, where the CA held that for the s43K extended definition of worker to apply, there had to be a contractual relationship, the argument can be made that the ‘terms’ to be substantially determined per s43K(2)(a) must therefore be contractual. Recognising that this is unlikely to have any ‘material impact’ on the analysis of the fresh ET hearing of Dr Day’s claim, Elias LJ provided guidance which may well prove useful for future cases. Acknowledging that the terms of engagement are likely to be ‘overwhelmingly contractual’, he proceeded again with a purposive approach, stating:

I do not think that Parliament will have envisaged fine arguments on whether a term is contractual or not before it can be taken into account.²⁷

It is however likely that the following statement will feature in future cases where the issue of who substantially determines a worker’s terms of engagement needs to be determined:

...a tribunal should make the assessment on a relatively broad brush basis having regard to all the factors bearing upon the terms on which the worker was engaged to do the work.²⁸

It is suggested that whilst a ‘relatively broad brush basis’ may well be helpful in terms of overall approach, more specific guidance may prove necessary on this point.

CONCLUSION AND WIDER IMPLICATIONS

Following this decision PCAW made the following statement:

The judgment makes crystal clear that action against a whistleblower can sometimes take place by those outside the primary employment relationship and that outside bodies can have a huge influence over the terms of any worker's employment. This goes beyond the specific terms of the employment contract.²⁹

Whilst in the initial appeal Counsel for Dr Day had submitted that his arguments for a purposive interpretation of the s43K provisions were underpinned by the Article 10 European Convention of Human Rights right to Freedom of Expression, interestingly this discussion was superfluous to this appeal.³⁰ Langstaff J in the EAT and Elias LJ in the CA were in agreement as to the need for a purposive approach, the issue to be resolved was what that actually meant in the context of the s230(3) and s43K(1) definition of 'worker'. It appears that this decision, in removing the unsatisfactory situation where Dr Day would have had whistleblowing protection but not from the organisation against which he claimed detrimental treatment, has put whistleblowing protection back on the right track. Although more guidance for the lower tribunals may, as suggested above, prove necessary on the 'substantially determines' point, by focussing on the wider context rather than 'fine arguments', this decision is welcome. Beyond the scope of this note, much work needs to be done at organisational level to ensure that raising concerns is seen as a positive contribution to governance. It is suggested that this decision, unlike the EAT ruling, at the very least does not impede that process.

¹ [2017] EWCA Civ 329.

² Independent Inquiry into care provided by Mid-Staffordshire NHS Foundation Trust January 2005-March 2009 by Robert Francis QC, published 6 February 2013.

³ Independent whistleblowing charity which advises individuals and organisations and provides input on public policy on whistleblowing.

⁴ N1 at [3-6].

⁵ Heard by Hyde J at the London South Employment Tribunal.

⁶ The disclosure must be information rather than opinion or allegation and the disclosure must ‘in the reasonable belief of the worker’ tend to show that a criminal offence, a failure to comply with a legal obligation, a miscarriage of justice, a danger to health and safety, environmental damage or deliberate concealment of the above ‘has occurred, is occurring, or is likely to occur’

⁷ *Day v (1)Lewisham and Greenwich NHS Trust and (2)Health Education England* UKEAT/0250/15/RN at [6].

⁸ S43K(2)(a).

⁹ N7 at [40].

¹⁰ http://www.pcaw.org.uk/latest/blog/protection-of-workers-the-case-of-dr-chris-day?utm_medium=email&utm_campaign=Whistleblowing%20Newsletter%20March%202016&utm_content=Whistleblowing%20Newsletter%20March%202016+CID_19b73fed932dc4a71c4d0962d33b2d0c&utm_source=email%20newsletter&utm_term=BlogThe%20case%20of%20Dr%20Chris%20Day (last accessed 16 May 2017).

¹¹ N1 at [14].

¹² N7 at [37].

¹³ N7 at [38].

¹⁴ *Ibid.*

¹⁵ N7 at [39].

¹⁶ N7 at [42].

¹⁷ [2011] EWCA Civ 1190 at [58] cited in *Day* at [32].

¹⁸ N7 at [35].

¹⁹ N7 at [44].

²⁰ N1 at [16].

²¹ UKEAT/0354/15/JOJ, [2016] ICR 1156 at [26].

²² N21 at [26].

²³ N1 at [17].

²⁴ N1 at [18].

²⁵ N1 at [25].

²⁶ [2015] ICR 1421.

²⁷ N1 at [29].

²⁸ *ibid*

²⁹ <http://www.pcaw.org.uk/latest/news/chris-day-appeal-statement> (last accessed 16 May 2017)

³⁰ For a brief discussion of the implications of Article 10 more generally see e.g. J.Ashton, ‘15 years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?’ (2015) 44 (1) *Industrial Law Journal* 32-52 at 33.