

Government urged to close junior doctors whistleblowing loophole

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The government should act to close a loophole in whistleblowing protection after a court ruled Health Education England's relationship with junior doctors was outside the scope of employment law, *HSJ* has been told.

Legal experts said junior doctors continue to have whistleblowing protection from the actions of their employing trusts and this could include any subsequent action taken by HEE if it was based on information supplied by trust employees such as clinical supervisors.



Lewisham and Greenwich Trust said it did not accept Dr Day's allegations

The case of junior doctor Chris Day, who claims he was unfairly dismissed by Lewisham and Greenwich Trust for alleged whistleblowing in 2014, has caused widespread concern among trainees after an employment tribunal barred him from including HEE in his claim.

An appeal ruling last month said Parliament had deliberately excluded junior doctors' relationship with HEE from protection under employment law, adding that Dr Day was not an employee or worker of HEE.

Employment lawyers have told *HSJ* this does leave junior doctors at risk from detrimental treatment by HEE.

Peter Daly, a solicitor at Bindmans law firm, said: "An employer is restricted from imposing a detriment on a whistleblower, but as HEE is not an employer there is no such restriction on HEE.

"This is a substantial gap in the protection for junior doctor whistleblowers. It is at odds with the government's stated aim of protecting NHS whistleblowers, for example in the review by Sir Robert Francis QC. An amendment to the current legislation to address this situation would not be complex and might be achieved relatively quickly."

He added that junior doctors could in theory judicially review a decision by HEE but this was likely to be "extremely expensive and realistically out of the financial reach of an individual doctor".

Helen Baxter, a specialist in employment law at Hempsons, said: "The judgment confirms that where a junior doctor has a contract of employment with an NHS trust then they are entitled to bring a whistleblowing claim against their employer trust but do not have additional protection as a whistleblower against detriments from a third party, such as HEE.

"The [tribunal] found that HEE had not determined the terms of Dr Day's engagement 'let alone done so substantially', which is a prerequisite for satisfying the statutory definition of 'worker' in the whistleblowing legislation. This means that the risk exists."

She added: "If the junior doctor can establish connection between their whistleblowing, the actions of the trust and the withdrawal of the training by HEE, they could potentially recover damages from the ex-employer trust for future loss of employment. Damages in a whistleblowing claim are uncapped."

Dr Day was working at the Queen Elizabeth Hospital when he claims to have raised concerns regarding poor staffing levels in the intensive care unit.

Following his whistleblowing he has accused the trust of making false allegations about him and that after he repeated his concerns to HEE it said it would only place him at a new trust in London if he accepted conditions, which Dr Day said were unacceptable.

These included psychological counselling and a commitment to return to work regardless of whether an investigation into his concerns took place.

When he refused to accept the conditions HEE deleted his national training number, preventing him from continuing his training.

Dr Day said the judge had misunderstood the significance of HEE's role in a doctor's training. "The consequences of this appeal judgment is that a doctor's career loss, the actions of a postgraduate dean, an [Annual Review of Competence Progression] panel and an entire HEE formal investigation will not be scrutinised by an employment tribunal. If that is not a lacuna, I do not know what is," he said.

Dr Day said he believed it would be almost impossible for a junior doctor to successfully claim for their career loss without being able to include HEE. "It is difficult for me to see any set of circumstances where a judge would accept that an individual NHS trust had legal responsibility for an entirely separate organisation deleting a doctor's national training number and the events and investigation leading to that action.

"This leaves a junior doctor not protected from unfair dismissal for their hard won career from the only NHS body with power over it."

The employment appeal tribunal ruling is binding on lower tribunal courts but *HSJ* understands Dr Day's legal team are planning to appeal the decision.

A spokesman for Lewisham and Greenwich Trust said it did not accept Dr Day's allegations and that it was "defending all claims in ongoing legal proceedings".

An HEE spokesman said: "In this case the judgement was very clear, we are not an employer, we offer training programmes and are not covered by this particular legislation."