NEWS – DR DAY LOSES WHISTLE BLOWING CASE AGAINST HEALTH EDUCATION ENGLAND IN EMPLOYMENT APPEAL TRIBUNAL

Dr Day, a Specialist Registrar in Medical Training, worked under a contract of employment with Lewisham NHS Trust. Health Education England ("HEE") arranged his training placements, were responsible for paying a substantial part of his salary to Lewisham, and regularly reviewed his progress in training.

Dr Day made disclosures about patient safety, both to his employer and to HEE, complaining that serious under-staffing placed patients at risk. Dr Day alleged that HEE subjected him to detriment as a result of his disclosures.

To be entitled to compensation for having suffered a detriment for making a disclosure, a Claimant would most commonly show that he is a "worker" for an "employer", as defined in s.230 ERA. Dr Day was not a worker for HEE within the scope of s.230 ERA. He therefore sought to bring a claim under s.43K, which provides an extended meaning of "worker" for the purposes of Part IVA.

At a preliminary hearing, it was found that Dr Day was able to meet some of the requirements of s.43K(1)(a), but was not able to demonstrate that HEE was his "employer" because it was Lewisham who had substantially determined the his terms of work. Dr Day, therefore, could not bring himself within the scope of s.43K. His claim was struck out for having no reasonable prospects of success.

Dr Day appealed this decision.

Langstaff J in the Employment Appeal Tribunal accepted that a purposive approach should be used when construing a Statute, but this does not entitle a court to ignore the words of the legislation. Parliament had not created a free-standing regime, protecting any disclosure made in the public interest by anyone. The prohibition against detriment is set out with particularity in the Statute. There is no general principle to be extrapolated to junior doctors, such as Dr Day, who are subject to detriment by HEE.

Though HEE made some decisions regarding Dr Day's employment, the work was performed under contract with Lewisham, who were held to have substantially determined the terms and were, therefore, the "employer". According to Langstaff J, HEE was little different from any third party who might have acted detrimentally towards Dr Day for being a whistle blower. The ERA does not provide protection for such acts of a third party (see, for example, **Fecitt & Others v NHS Manchester** [2012] ICR 372).

Langstaff J concluded that, while it is forensically attractive to describe an absence of protection as a "lacuna", the answer to this case was similar to that in **Fecitt** – Parliament had carefully delineated the extent to which protection should be afforded against detriment for whistle blowing. This case does not fall into a lacuna, but rather falls well outside the boundaries set by Parliament.

The appeal was dismissed.