Can independent HR consultants be liable for whistleblowing detriment claims as “agents” of the employer?

In the recent case of Handa v Station Hotel (Newcastle) Ltd and others, the EAT held that independent HR consultants may be viewed as agents of an employer for the work they are instructed to do. However, here, the HR consultants were not asked to, and did not, decide whether to dismiss and so were not liable as agents in a whistleblowing detriment claim concerning the dismissal.

What happened in this case?

The Claimant was a director of a company operating in the hotel sector (the **Respondent**). After the Claimant blew the whistle on alleged financial impropriety, several members of staff raised grievances alleging that he had bullied and harassed them.

The Respondent instructed an independent HR consultant, Mr Duncan, to investigate the grievances. He upheld two complaints and recommended that disciplinary action be taken against the Claimant. A second independent HR consultant, Ms McDougall, was instructed to conduct the disciplinary hearing. She produced a report which indicated that the Respondent was entitled to dismiss the Claimant for gross

misconduct, but she did not go as far as recommending that it do so. The Respondent went on to suspend the Claimant and remove him as a statutory director of the company. A few days later he was summarily dismissed. His appeal was rejected.

The Claimant brought a whistleblowing dismissal claim against the Respondent. He also brought whistleblowing detriment claims against two of the Respondent's directors, and also against Mr Duncan and Ms McDougall, arguing that they were "agents" of the Respondent and, as such, liable for the detrimental treatment i.e. the dismissal. However, the Employment Tribunal struck out the claims against Mr Duncan and Ms McDougall on the basis that they were not agents of the Respondent, and the claims had no reasonable prospect of success. The Claimant appealed that decision.

What was decided?

The EAT held that an HR consultant tasked with investigating, reporting and concluding a grievance or disciplinary could, in principle, be an agent of the employer. Traditionally, it is understood that an agent usually has the power to affect the principal's legal relationships with third parties. However, this is not necessarily the case in the employment context. Here, the key question to ask is whether the services the person is contracted to provide relate to a significant aspect of the employment relationship, rather than the employer's business activities. Where a third party is instructed to run a process closely related to the employment relationship (such as a grievance or disciplinary process) there is no reason why they cannot be an agent of the employer, although the assessment is fact-sensitive in each case.

However, in this case, neither Mr Duncan nor Ms McDougall had been contracted to make the decision about whether to dismiss the Claimant, and nor did they do so. The mere fact that the Respondent had relied upon their work to support its position that the dismissal was fair did not mean they were liable for the detriment of dismissal. Nor did the fact that their work was part of the chain of events which led to the dismissal decision mean they were liable for the dismissal.

The appeal was dismissed.

What does this mean for employers?

There are many reasons why an employer may wish to appoint an independent HR consultant to conduct a grievance or disciplinary process. For example, where a very senior member of staff is implicated in the complaint, an external person brings a neutral perspective and so reduces the risk of perceived or actual bias. It might also be desirable to appoint an HR consultant where there is no dedicated HR team or the team is overstretched and/or where specialist knowledge and experience is required.

This decision will be helpful to employers wishing to reassure HR consultants that they will not be on the hook for dismissals – provided that they do not, in fact, make or implement the dismissal decision. To protect the HR consultant, employers should take the following steps:

- **Be clear about the remit of the HR consultant's role**: spell out what they are being engaged to do, for example, advise on a process, conduct an investigation or chair a hearing.

- **Ensure the HR consultant's impartiality is protected**: ensure that the independence of the HR consultant is not compromised by being too closely aligned with management (e.g. by acting as an adviser to the business on the process *and* as an investigator). Consultants should be wary of cases where they feel they are being used to "rubber-stamp" a predetermined decision.

- **Retain decision-making responsibility**: ensure that the company, not the HR consultant, makes the final disciplinary or grievance decisions. HR consultants should be careful to stick to their remit and resist any pressure to tell the employer what to do.

- **Transparency and disclosure**: remember that any written communication with the HR consultant will need to be disclosed in litigation unless it is legitimately protected by legal privilege. Both parties should avoid making comments that suggest bias or predetermined outcomes.

Even with all these safeguards in place, HR consultants should remember that they could be liable as agents of the employer in respect of the work that they have been instructed to do. For example, in this case, if the Claimant had argued that the handling of the grievance process or disciplinary hearing was detrimental to him (as opposed to complaining about the dismissal itself), the HR consultants could have been liable given that they were instructed to run those processes. Therefore, HR consultants must take care to act fairly and transparently. It would be wise to keep clear records of the entire process, separate to any fact-finding or recommendations, as this will help defeat any claims attacking the process.

Handa v Station Hotel (Newcastle) Ltd

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