

Guide for postgraduate trainees

This note is to explain what the recently announced extended whistleblowing protection means for HEE's postgraduate medical and dental trainees. This is a new legal route with some technical aspects, but this short summary aims to give you the main points.

Background

Whistleblowing legislation is in place to protect those who make 'protected disclosures' from any negative consequences. This was granted by the Public Interest Disclosure Act (1998), but the protections are within the Employment Rights Act (1996) and enforced in the Employment Tribunal.

This current legislation does not allow for claims to be brought by postgraduate trainees against HEE in relation to any harm suffered, because HEE does not employ them. However, HEE recognises that it has significant influence over the careers of postgraduate trainees and wishes to remove any perceptions that might prevent patient safety issues, or significant education and training issues, being raised. The right of doctors in training to make protected disclosures without fear of detriment has been one of the British Medical Association's (BMA) key concerns during their non-contractual discussion with us.

The New Right

HEE cannot change the law to give postgraduate trainees a statutory right to bring claims against it in the Employment Tribunal. What HEE has agreed to do is to amend the contractual relationships that we have with the various employers of trainees in order to provide what is known as "a third party right" to allowing contractual claims against HEE. This was the suggestion made by the BMA.

This third party right:

- does not add anything to the obligations currently placed on postgraduate trainees;
- allows postgraduate trainees to seek legal redress if HEE is responsible for harm to them because they raised concerns (whistleblowing detriment);
- does not affect the existing contractual and statutory rights of postgraduate trainees against those who employ them (nor does it affect any other claims that can be made against HEE);

In summary, postgraduate trainees will have the opportunity to pursue claims against HEE for breach of contract in the same way as if the current legislation allowed HEE to be a respondent in the Employment Tribunal. However, this must be pursued through the courts, because the Employment Tribunal is not able to determine such contractual claims.

Specific Provisions

The right includes all postgraduate trainees in the NHS for whom HEE is responsible, as a group, and includes new junior doctors and dentists who acquire this right as they come into training.

The intention is to replicate what the Employment Tribunal provides for whistleblowing claims and it allows unlimited damages claims for the actions of HEE if they amount to whistle-blowing detriment.

The right allows trainees to pursue claims for up to six months after they become aware of any perceived negative consequences; this is to reflect the limitation period within the Employment Tribunal.

Before issuing any claim, the matter should be raised with HEE, although if that is not possible it will not prevent a claim being made.

In Practice

Anyone working in the NHS should not act to disadvantage those who properly raise matters of concern. To do so has its own possible consequences in terms of disciplinary action and professional regulation. However, it is understood that this could happen or can be perceived to have happened.

In the circumstances where there are concerns about actual or potential negative consequences (whether within HEE's processes or otherwise) they should be raised formally so that the matter can be addressed by the employer and/or by HEE as appropriate.

In the event that this is not done, or not possible, or when a postgraduate trainee still feels aggrieved, this change allows a claim to be made against HEE.