Bad faith for beginners - the Employment Appeal Tribunal explains

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Forget the law for a moment and answer me this. If:

- despite having no reasonable grounds to hold that view, I genuinely believe that someone made a racist remark about me; and
- I sit on that belief without a murmur of complaint for four years; and
- when my work is entirely justifiably criticised, I then do complain about that remark with the express intention not of seeking any redress for it, but of deflecting that criticism, then

am I acting in bad faith? On the one hand, I do believe I am telling the truth even though objectively I am not. On the other, I am not raising my complaint to obtain a remedy but simply to avoid the consequences of genuine and reasonable criticisms of my own poor work.

This question is an important one in the context of victimisation claims under the Equality Act 2010. By section 27(3), a complaint of discrimination will be protected against retaliation even if it is false, so long as it is not made “in bad faith”. In Saad -v- Southampton University Hospitals NHS Trust this month (where the facts were essentially those in my question above) the EAT has taken a hard look at what “bad faith” in that context means, and the result makes faintly depressing reading for employers.

First, the EAT decided that “bad faith” implied an element of dishonesty. The key question was whether Mr Saad genuinely believed his race discrimination allegation to be true, not whether his belief was reasonable or indeed whether the allegation was actually true at all. Of course, the more obviously false an allegation, the harder it would be for an employee to claim that he genuinely believed in it, but the world is full of people who fervently believe in things for which there is no evidence at all, and woe betide anyone who challenges the genuineness of that belief. However, once you reach the point where the existence of objective evidence is merely optional in the holding of a belief about something, proving that someone does not have that belief will always be an uphill struggle.

Second, if the genuineness of the belief in the allegation is established, said the EAT, it will be hard to turn that disclosure into one made in bad faith through examination of the motive for making it. As a rule, if Mr Saad genuinely believed what he alleged, then it was not bad faith to allege it, even if it was long out of time for the employer to do anything constructive about it and was clearly for an ulterior purpose.

Lessons for employers

Despite this outcome, there were three glimmers of light and one pothole in the decision for employers, as the EAT did not totally rule out a role for motive in determining bad faith:

- Glimmer 1: if the malicious motive for the allegation were overt enough, that might cast doubt on the genuineness of the employee’s claimed belief in it in the first place;
- Glimmer 2: the EAT did not explain what sort of motive would trump a finding of genuine belief. Deflecting criticisms of one’s own performance clearly wasn’t enough. However, if the motive were itself dishonest, that might be different – for example, not to protect yourself but to harm someone else, or to obtain a...
financial or other advantage to which you knew you were not entitled;

- Glimmer 3: the EAT suggested that “ulterior purpose might be relevant to any question of remedy”. Therefore if you go down on section 27 victimisation because you retaliated against a discrimination allegation which the employee raised with trouble in mind, you may possibly still argue that essentially he got what he deserved and shouldn't be compensated fully for the consequences of his own malicious act;

- Pothole: alleging that a discrimination claimant is lying (which all of these Glimmers entail) is a risky business. Unless the ET agrees, all you will have done is victimise the employee and then grievously insult his integrity in a public forum. The consequences for injury to feelings and possible aggravated damages claims are obvious.

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