

3: Learning from the tribunal case

Key findings and recommendations

The independent review commissioned by us to examine specifically the handling of the Mr Kumar case found that:

- There is the potential for multiple investigations in a whistleblowing scenario because other bodies have review/regulation functions, in addition to us. For example, in Mr Kumar's case there was a separate review by the Royal College of Surgeons into surgeries and clinical decisions where Mr Kumar raised concerns. This can lead to inconsistent conclusions.
- There wasn't a clear management structure for the flexible workforce, nor was there a clear process for determining the allegations against Mr Kumar. The letter of disengagement sent to Mr Kumar did not detail the behaviour in question and was used by the Tribunal as a fact from which they could infer that the protected disclosures had a material influence on the detrimental treatment of Mr Kumar. The Tribunal did not make any finding of any behaviour of concern on the part of Mr Kumar.

- Mr Kumar assisted with inspections within the region of his employer NHS trust but he did not inspect any hospital that he worked in, or was part of the trust that employed him, nor one which was in the same clinical pathway. It is foreseeable allegations and counter-allegations may be made where individuals are part of inspections in the local area in which they work.
- It was not clear who in CQC was in charge of the early conciliation process, nor where the instructions to the Government Legal Department came from. The CQC response to Mr Kumar's employment claim at the outset appeared to be led by CQC's witness in the case but although witnesses will potentially be the point of contact for the facts of the case, they should not be the point of contact for instructions on litigation strategy.
- Opportunities were missed to assess the case merits at an early stage and there was a limited interpretation of Mr Kumar's pleaded case. There was a heavy reliance on the Government Legal Department.
- CQC's focus appears to have been on the financial side of the settlement but Mr Kumar was clear he was seeking recognition by CQC of their actions and where they had fallen short of expected standards.

Aim 10: Relevant CQC colleagues feel confident, skilled and empowered to deal with employment litigation, including working with internal and external lawyers.

The independent review commissioned by us recommended that CQC:

- Considers whether we need to enter into Memorandums of Understanding with other bodies that have review or regulation functions (for example, Royal Colleges) to ensure they are notified of any parallel investigations being undertaken by us.

- Clearly identifies who in CQC has responsibility for managing our flexible workforce and ensure they understand our legal duties (with training provided), including the need for a fair process for managing allegations, the need to give clear and detailed reasons for decisions and the need to be clear and transparent when we have not acted as we should. Provide specialised training to our HR team on whistleblowing legislation.
- Does not use specialist professional advisors in inspections within the local area where they work in their substantive post.
- Clearly identifies who in CQC has responsibility for providing instructions to the Government Legal Department in employment litigation, including early conciliation – this should be someone sufficiently senior with the necessary skills and knowledge. It should not be a witness, nor should it be the HR professional who supported the matter before litigation.
- Undertakes a full assessment of the pleaded case straightaway and take legal advice on the merits at an early stage in order to build a litigation strategy. Discovery of documents should take place as soon as a claim is made and factual evidence assessed accordingly. The case timeline should factor in time to obtain Treasury approval for any settlement and consideration should be given to the possibility of making admissions where appropriate.
- Puts in place a programmed dialogue with the Government Legal Department to deepen its understanding of us and our priorities. When workplace disputes arise, recognise when mistakes have been made and take steps to rectify them as soon as possible.

We have looked at these internal review findings and recommendations and, in order to take them forward, we also recommend that we:

- Widen CQC's 'conflicts policy' for specialist professional advisors so that it covers all services within their own integrated care system or in relation to clinical pathways which might cross multiple integrated care systems including their own.
- Where an employment tribunal claim is lodged against CQC, set up a team in CQC to respond to the claim, including case preparation, litigation strategy and instructing external employment solicitors and counsel, as appropriate. The team should not include CQC witnesses. The Director of Governance and Legal Services and the Director of People should have oversight of the team and ultimate responsibility for CQC's handling of the claim.
- Ensure that CQC's Executive Team is notified of any high-profile or complex employment tribunal claim that has been lodged against CQC.
- Ensure that employment tribunal claims lodged against CQC are represented in CQC's Risk Register.

Why we looked at this area of our work

It was clear from the [employment tribunal judgment](#) in Mr Kumar's case that mistakes had been made and we needed to take learning from it for future employment tribunal cases. We want to know what improvements we can make to our management of these cases to reduce any negative impact they have on those involved, as far as we can and to ensure we get to the right outcome in the best way.

We therefore engaged an independent specialist employment barrister (separate from the independent review carried out by Zoë Leventhal KC) to undertake a review of our handling of Mr Kumar's employment tribunal case and provide us with a report of their case review.

What we looked at

The focus of the independent barrister's review was the way we handled Mr Kumar's case internally and how we worked on Mr Kumar's case with the Government Legal Department (GLD), who conduct employment litigation on our behalf, as well as government departments and other non-departmental public bodies. The review also looked at our management of our flexible workforce (including specialist advisers such as Mr Kumar).

Independent barrister case review report

Note: The rest of this section contains the independent barrister's case review report in her own words unedited and unredacted.

Review into the decision of the employment tribunal in Mr S Kumar v The Care Quality Commission (case number 2410174/2019)

Introduction

This is a review of the case of Kumar v CQC (case number 2410174/2019). The review considered both the decision and preparation leading up to the decision of the Employment Tribunal. The purpose of the review is to identify lessons that can be learned in terms of how the CQC manages its obligations to those who make protected disclosures and cases in the employment tribunal that concern the same.

The review is divided into two-time phases, prior to the employment tribunal claim being lodged and post the claim being lodged. Within each time period specific issues are considered. Where I have identified there is scope for learning, this is set out and discussed within the body of this report.

Factual background

The claim was heard in Manchester Employment Tribunal in November 2021 and then again in June 2022. Both parties were represented by Counsel. The tribunal found the claim that the Claimant suffered a detriment on the grounds of having made a protected disclosure well founded. It ordered a sum of £23,000 to be paid as compensation for injury to feelings.

Pre claim in the employment tribunal

Concurrent reviews

As the CQC is not the only statutory body with a remit to review and regulate the work of the NHS, there will always be the potential for concurrent reviews of cases. A protected disclosure may have also been made to other bodies who are also tasked with investigation and ensuring the quality-of-service provision within the health sector. For example, as was the case in this matter, the Royal Colleges. However, this could also apply to other regulatory bodies such as the Charity Commission etc. As with any situation where there are multiple fact finding or investigative bodies this can lead to inconsistent conclusions, which undermines both legal certainty and ultimately the conclusions that are reached. When a whistleblowing scenario has been identified, the potential for multiple investigations should always be a consideration. The CQC may wish to consider entering into Memorandum of Understandings with relevant bodies in order to ensure they are notified of any concurrent investigations.

If the CQC becomes aware of a concurrent investigation consideration should then be given as to how to manage the parallel proceedings. And whether this necessitates a change of approach, for example staying the publication of any conclusions pending the results of the parallel investigation.

HR role/responsibility and management of flexible workers

There needs to be a clear division of responsibility regarding the management of the flexible workforce and contract workers. The request to remove Mr Kumar from the list of contractors appears to be received an insufficient level of scrutiny. And there appears overall to have been a lack of clarity about the management of his role.

The lack of clear line of management of the flexible workforce and those undertaking the role that Mr Kumar fulfilled meant there was no clear route by which allegations against him were to be determined. In the event to some degree the HR department stepped into fulfil this role. However, the HR department was not ideally placed to do this. The HR department are not party to the alleged conduct or any of the relationships involved in the work the specialist professional advisors undertake, nor do they have the clinical or operational knowledge necessary to undertake the broader management role.

Ownership of decision making and understanding of where responsibility lies must be clarified in respect of the management of the flexible workforce and contract workers. Whoever holds management responsibility for this group must have a sufficient understanding of the legal duties the CQC is under, including the need for fair process.

The lack of clarity in who was decision making is demonstrated by the fact concerns were raised internally regarding the draft letter which communicated the decision to place Mr Kumar's secondment on hold. This suggests a recognition of the risk involved in the decision to place Mr Kumar's secondment on hold, however steps were not taken to mitigate this risk by changing course. It may be that HR department did not feel sufficiently resourced or empowered to refuse or challenge the request to put Mr Kumar's secondment on hold. The lack of clear management structure is very likely to have impacted on this.

Investigation and process around allegations made against contract workers

It follows on from the above point, that there should be fair, clear and robust processes in place for managing allegations made against flexible contract workers.

Understanding of legal duties to contract workers

The legal responsibilities owed to those who are contract workers, as opposed to employees should be fully understood. It may be helpful to have a periodic review of all contractors the CQC works with to consider their employment status and the relevant duties that are owed.

All those who are working with or managing individuals who have contractor or worker status should have a good understanding of the relevant legislation. Training should be provided to ensure that the duties owed to workers are understood. In turn this should ensure that all legal obligations are complied with.

Detailed reasons for decisions

The tribunal found that the letter of disengagement did not detail the behaviour that was of concern [para 145 b of their reasons] and the tribunal did not make any finding of any behaviour of concern on the part of Mr Kumar. The tribunal used this as a fact from which they could infer that the protected disclosures had a material influence on the detrimental treatment. It is always good practice to set out clear and detailed reasons for decisions that are taken contemporaneously.

Localised inspections

In this instance Mr Kumar was employed on a secondment as part of a flexible workforce. His work responsibilities included assisting with inspections within the region of the NHS trust he was employed in. Although he did not inspect any hospital that he worked in, or was part of the trust that employed him, nor one which was in the same clinical pathway. It is my view foreseeable that allegations and counter allegations may be made where individuals are part of inspections in the local area in which they work.

I would advise that specialist professional advisors are not used in inspections within the local area in which they work in their substantive post. By this I mean, that specialist professional advisors should not be used in inspections within their own integrated care system or in relation to clinical pathways which might cross multiple integrated care systems including their own. Not only will this ensure a greater level of independence for inspections, but it will also create a degree of separation between those being inspected and the inspectors. This will provide a level of protection to those who are part of inspection teams, as it will minimise the likelihood of localised politics or allegations being raised. It also is likely to have other benefits, such as the ability to share knowledge more widely across the nation and to learn from the practices of others from a much wider network.

Post ET claim 16 July 2019 onwards

Early consideration of the merits of the claim

Opportunities were missed in this case to assess the merits of the claim at an early stage. The CQC, as with any public body, should always take all reasonable steps to ensure it is acting lawfully. This includes compliance with its duties under employment law. Where workplace disputes arise it is necessary for the CQC to consider whether or not it has acted in line with expected practice and to be clear and transparent where it has not. In certain circumstances the first opportunity to do this may be when formal legal proceedings are initiated by a worker or employee. Within the Employment Tribunal almost every claim must go through the early conciliation process which is managed by ACAS. This may be the first opportunity for the CQC to assess the claims that are being made against it, and to reflect on whether or not there is merit in any criticism. In this case it is not clear to me who was in charge of the early conciliation process and it may be that an opportunity to reflect, review and manage the litigation was missed at this point.

Named individual with conduct of the claim

In this case it is not clear to me where instructions came from. The response appears to some degree at the outset to be witness led as the subject of the allegations are the people who appear to be providing instructions to the GLD.

There needs to be a clear line of responsibility for providing instructions within the CQC. The named contact person needs to be sufficiently senior and have the necessary authority to take decisions regarding the litigation and its outcome. Increasing the level of knowledge and skills of the point of contact for instructions and having a clear line on how and when to escalate up the chain of seniority is essential. The individual will need to be comfortable with the responsibility and accountability that this entails. Further, the person who has responsibility for providing instructions, must be sufficiently knowledgeable of the case and the strategy to be able to do this.

Instructions must be considered and provided following an analysis of the specific evidence and policy considerations in each individual case.

Although the witnesses will potentially be the points of contact for instructions as to the facts of the case they should not be the point of contact for instructions on litigation strategy. As understandably, most witnesses of fact will not be best placed to assess their own conduct in the light of a claim that scrutinises their actions. This will ensure a greater degree of independence of mind feeds into the assessment of the merits of the claim and any strategic decisions that have to be made.

Thought should be given as to who the point of contact for instructions should be, particularly when a member of human resources has managed the process that is now the subject of the employment tribunal claim. In my view, where human resources have been involved in a process or provided advice, it would be sensible if a different individual took over conduct of the issue once litigation has commenced. Not least because, as occurred in this case, the human resources professional dealing with the matter pre-litigation may end up becoming a witness of fact.

Ownership and responsibility for decision making within litigation

In this case the early consideration of the case appears to have been led by the GLD, who ask for a variety of documents and speak to witnesses. There is a heavy reliance upon the GLD and there does not appear to be any internal assessment of the documents for disclosure or the merits of the claim.

Responsibility for decisions regarding conduct of the case must remain with the CQC. An adequately trained person of sufficient seniority must be tasked with this role and they must be suitably skilled so they are able to determine when it is necessary to escalate decisions and to do so in a timely manner.

The GLD can and should advise and assist in decision making. However, as the client it is for the CQC to ultimately make decisions as to how the litigation is run. From the GLD's side this means they should be referring all decision making back to the CQC for instructions. From the CQC's side if advice from the GLD is not understood, or not fully explained in a comprehensible manner then it should be queried.

Full interrogation of the pleaded case

There was a limited interpretation of Mr Kumar's pleaded case. Mr Kumar advanced the arguments in his case in two different ways. First that he had suffered the detriments due to the protected disclosures combined. And second that he was subject to detriment as a result of his knowledge of the Respondent's inaction in response to him having raised concerns, essentially an extended causation argument. The tribunal dealt with this at paragraph 18 of their written reasons onwards.

Although objection was raised to the extended causation argument, the tribunal accepted Mr Kumar's submissions that this was part of his pleaded case. And in any event, the tribunal concluded that *'causation is always a matter of fact for the tribunal'* and *'It would be hugely detrimental to any claim of this nature if limited pleadings on causation were to act against a claimant, given that the knowledge behind taking action and/or the motive rests with the respondent (which explains s.48(2) of the Employment Rights Act 1996)'*.

There was therefore a misunderstanding of the shape and scope of the case the CQC had to meet. The case was not simply the straightforward detrimental consequences of making the disclosure but there was also said to be a detriment because of disclosure and knowledge of the subsequent failure to act on the disclosure.

Early full interrogation of the pleaded case in order to ensure that the evidence marshalled meets every aspect of the claim is essential. This will form the basis upon which a review of merits and the litigation strategy is built.

Disclosure

On 29 October 2019 a request was made to undertake a disclosure exercise. Discovery of all documents should take place as soon as a claim is made within the employment tribunal. Having sight of all relevant documents will ensure that a strategic assessment of the evidence can be made at the earliest possibility. This will in turn ensure that disputes are resolved in the most resource efficient manner.

Policy documents

Disclosure should always include the relevant policy documents. The CQC should include these as part of the evidence that it wants to rely upon in any employment tribunal claim. These will also help provide guidance as to the assessment of risk in any claim. If a policy has not been followed that should raise a question in terms of liability. As any actions taken outside of the guidance provided by a policy will need to be justified and this will have to be addressed by evidence.

Taking draft proofs of evidence

Again, it is always helpful to have a clear idea of the factual evidence in a case at an early stage. In this case I understand the factual witnesses assisted with the response to the claim. Their instructions as to the facts of the claim should always feed into the decision-making process about the best course of action within the litigation.

Early advice

It is advisable to take legal advice on the merits of a claim at an early stage. Having an early conference maybe with both counsel and the solicitor with conduct of the litigation will provide an opportunity to obtain legal advice. This will also afford an opportunity to decide upon an overall litigation strategy. Including, whether or not the CQC wishes to settle a claim. It will also provide an opportunity for the individual with conduct within the CQC to give instructions to their legal team.

Legal advisors' understanding of the CQC and its priorities

A regulatory body is always likely to have a low tolerance for the risk of losing a case regarding this type of protected disclosure. It may be helpful for the GLD and CQC to open a programmed dialogue in which the CQC's policy objectives, statutory duties and remit are discussed. This will help develop the CQC's understanding of their role as decision-maker, as set out above, and the options open to them in light of any legal advice provided. It will also help the GLD deepen their understanding of current issues that are going to be significant to the CQC, which in turn means they are better able to identify them and tailor their advice accordingly.

Consideration of wider consequences of defending meritorious claims

There are numerous consequences to defending meritorious claims. The first is the cost of the litigation. The CQC like all public bodies is under a duty to spend the public purse prudently. Secondly, the need to act transparently as a public body and ensure good governance. This includes recognising where there are areas of concern, where different action should have been taken and accepting that. There is also the impact on reputation that must be considered and the need to maintain public confidence in the regulatory process. This again includes recognising when mistakes or errors have been made and taking steps to rectify them as soon as possible.

General litigation strategy, over individualised consideration of a claim

It may be that a general view of litigation strategy influenced decision making in this matter. Or it may have persuaded those who were making the decisions. I would advise that an individualised approach on a case-by-case basis is always adopted.

Enhanced understanding as to parameters of whistleblowing legislation

It would be helpful to have an individual or small group of individuals within the Human Resources team who have specialised training on the legal framework surrounding protected disclosures given its importance to the work of the CQC and the NHS.

Speed in gaining Treasury approval for settlement negotiations

Once the decision had been made to attempt to settle the claim there was a delay in getting approval for this from the Treasury. As it can take time to gain approval from the Treasury it is necessary to factor this into the timeline of managing any claim. This underscores the need for early review and for an early decision about litigation strategy to be made. Obviously there is always the possibility for unexpected or unforeseen events in litigation, for example witnesses saying something unexpected in their evidence, or new documents being provided in disclosure. And these may necessitate in seeking late approval of a settlement. However, a clear litigation strategy from the outset should minimise the circumstances in which this issue occurs.

Understanding the motivation of Mr Kumar

When negotiating with the other party in any litigation, it is essential to listen carefully to what they want to ensure that if there is any room for negotiation or settlement it can be achieved in the easiest and most effective way possible.

In July 2020 Mr Kumar through his representatives set out what he wanted in order to bring the claim to a conclusion.

To some degree the focus appears to have been on the financial side of settlement and gaining the necessary departmental approval. However, Mr Kumar was clear through his representatives that what he was seeking was a recognition by the CQC of their actions and where they had fallen short of the expected standards. Consideration should always be given to the possibility of making admissions where appropriate as this is part of good governance.

Evaluation

There should be a thorough evaluation of how well CQC learns from the tribunal case following the implementation of recommendations from this review. This should seek to understand whether CQC has taken learning from the tribunal case for future employment tribunal cases against the following aims in this review:

- CQC works well with partners and providers when concerns about care are raised. [Aim 4]
- CQC's appointment, contracting, engagement, deployment and disengagement processes relating to advisory and complementary staff are non-discriminatory, consistent with the values of CQC and ensure employment rights are maintained. [Aim 9]
- Relevant CQC colleagues feel confident, skilled and empowered to deal with employment litigation, including working with internal and external lawyers. [Aim 10]

Six months after this review is published, CQC should look at progress against the implementation of the recommendations. After 12 months there should be an evaluation report on the outcomes of CQC's response and this should mark the formal close of the review. The evaluation should then continue to understand the full impact of the recommendations in achieving the aims set out.

To evaluate how this review has impacted CQC's ability to learn from the tribunal, possible methods include:

- recommendation tracking
- a survey of people who have provided feedback or raised a concern about care
- focus groups with CQC staff to understand whether they feel safe to raise their concerns

- interviews with partners about how well we have worked with them when concerns about care have been raised
- CQC employment tribunals case reviews.

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