Employment

Unreasonable conduct

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Michael Salter & **Chris Bryden** review alternative means of address for workplace harassment

IN BRIEF

- *Veakins v Kier Islington Limited*: the primary focus for a court when faced with a case concerning the application of conduct to a civil claim for damages under PfHA 1997 is whether the conduct is oppressive and unacceptable.

As those avid readers of these authors will have noted, the potential application of the provisions of the Protection from Harassment Act 1997 (PfHA 1997) to, in particular, the workplace, has been a recurring theme. It has previously been argued that, following *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] All ER (D) 53 (Feb) and *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2006] All ER (D) 146 (Jul) bullying and stress caused or allowed in the workplace (among other environments) could potentially sound in damages or an injunction under PfHA 1997.

Notwithstanding the later decision of the Court of Appeal in *Conn v Sunderland City Council* [2007] EWCA Civ 1492, [2007] All ER (D) 99 (Nov) which appeared to limit the scope of the application of PfHA 1997 in such circumstances, it was contended that in appropriate cases such a remedy was still open to potential claimants. It appeared that this view was confirmed by the decision of *"Ferguson" v British Gas Trading Ltd* [2009] EWCA Civ 46, [2009] All ER (D) 80 (Feb) which allowed such a claim in much lesser circumstances than as appeared to be envisaged in *Conn*.

However, on 2 December 2009 the Court of Appeal handed down its decision in *Veakins v Kier Islington Limited* [2009] EWCA Civ 1288, [2009] All ER (D) 34 (Dec). This case also concerned the somewhat vexed issue of claims of harassment at work under PfHA 1997. The court (Maurice Kay LJ giving the reasoned judgment of the court with Rimer and Waller LLJ agreeing) noted that PfHA 1997 was being used in more and more cases and in wide circumstances to establish workplace stress claims since *Hatton v Sutherland* had made it more difficult for an employee to succeed in a negligence action based on stress at work.

Harassment claims

Veakins concerned the not unusual situation of an employee who raised a complaint over the conduct of her line manager. The defendant accepted it was vicariously liable for the actions of the line manager (should there be an actionable liability committed by him) and in all essentials the matters alleged in the claimant's witness statement were not challenged. The conduct complained of included an initial dispute over wages, which led to a "telling off" and the claimant feeling that she was singled out by her line manager and picked on often in front of other employees. The claimant also complained of being told to "fuck off" by her line manager and that he ripped up a letter of complaint provided to him by her without even reading the same.

It appears that the reason that the claim was brought in this manner, rather than by relying upon a remedy in the employment tribunal under one of the various statutes directed towards eradicating discrimination in the workplace, was that the behaviour of the line manager towards the claimant was borne out of a personal dislike or animosity, and not because, for example, of her gender, age or race. Ms Veakins made clear in her witness statement to the court that this dislike existed.

Tribunal decision

Mr Recorder Grainger at Brighton County Court heard the claim at first instance and focused on the well known paragraph of the Court of Appeal in *Conn* in which Buxton LJ noted that "crucial to [the type of conduct that crosses the line into harassment] is Lord Nicholls' [in the House of Lords in *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34] determination…that the conduct concerned must be of the order that would sustain criminal liability and not merely civil liability on some other register".

The recorder went on to note that: "I cannot see that any sensible prosecuting authority would pursue these allegations criminally; or, even if a prosecution were somehow brought…I cannot see that any prosecution would suffer any fate other than to be brought to an early end as an abuse of process."

Unsurprisingly, based upon this finding and his reliance upon the *dicta* in *Conn*, the recorder dismissed the claim for damages.

The claimant appealed this decision and contended that there was no evaluation in the judgment of the recorder of the behaviour of the line manager beyond the conclusion that it would not justify a criminal prosecution. The claimant argued that while it was correct to keep in mind that the conduct must be "of an order which would sustain criminal liability" a court must consider what this actually requires when coming to a determination of a case of this sort. Subsequent case law, it was submitted, had established a test for such conduct.

The court was referred in this context to the passage in para 30 of Lord Nicholls' speech in Majrowski where it was stated that: "Where...the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day to day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under s 2."

This was built upon in *Ferguson v British Gas Trading Ltd* [2009] (see " Justice denied?" Salter & Bryden, 159 NLJ 7375, p 943) where Jacob LJ at para 18 stated: "I ask myself whether a jury or bench of magistrates could reasonably conclude that the persistent and continued conduct here pleaded was on the wrong side of that line, as amounting to 'oppressive and unacceptable conduct'."

Thus, the Court of Appeal in *Veakins* considered that the primary focus for a court when faced with a case concerning the application of conduct to a civil claim for damages under the PfHA 1997 is on whether the conduct is oppressive and unacceptable, as opposed to "merely unattractive, unreasonable or regrettable" albeit that a court must keep in mind that it must be of an order which "would sustain criminal liability". This finally sets out in clear terms that the "criminal liability" referred to in the case law amounts in effect to a gloss upon the core test of whether the conduct is oppressive and unreasonable, and as such is not by and of itself the court's primary focus, or determinative of the case.

Criminal liability test

In this respect, therefore, the Court of Appeal found that the recorder erred, as his primary focus was upon whether a prosecuting authority would have pursued a criminal case, and if so what were the prospects of success. If, instead, the recorder had borne in mind the primary requirement, that the conduct be oppressive and unreasonable, the court found the claimant would have succeeded. The court noted that the claimant's evidence was accepted by the recorder, that no contrary evidence was called and that although malice is not an ingredient of the statutory tort of harassment (which can be committed where the perpetrator does not know, but ought reasonably to know that the conduct amounts to harassment) the presence of malice makes satisfaction of the "oppressive and unreasonable" test easier to achieve.

However, the court did make reference to the test of criminal liability at para 15 when considering the effect of the conduct: "It self-evidently crosses the line into conduct which is 'oppressive and unreasonable'. It may be that, if asked, a prosecutor would be reluctant to prosecute but that is not the consideration, which is whether the conduct is 'of an order which would sustain criminal liability'. I consider that, in the event of a prosecution, the proven conduct would be sufficient to establish criminal liability. I do not accept that, in a criminal court, the proceedings would properly be stayed as an abuse of process."

This case finally refocuses attention on the purposive intention of the 1997 Act away from the requirement of criminal prosecution to that of the quality of the conduct, albeit with the gloss of criminal standards and reverses an alarming trend towards closing down the applicability of PfHA 1997 in civil, and in particular, in workplace cases.

No defence

What this means in practical terms is that defendants will no longer be able to rely on the quality or nature of the conduct, and in particular, the erroneous test of whether a prosecutor would be reluctant to prosecute, as an escape route, but will have to meet the complaints made head on and argue that the conduct alleged is not oppressive and unreasonable. This will involve an assessment and explanation of the standards of behaviour prevalent at the workplace as well as any evidence the defendant has that the claimant consented to such conduct (the classic defence in discriminatory harassment claims: it was office banter and the claimant took part in it).

For claimants, and their lawyers, faced with potentially robust defences to employment tribunal discrimination cases, it may well be that the avenue of damages under PfHA 1997 will provide alternative redress. However, the Court of Appeal was swift to warn that, while there is nothing to exclude PfHA 1997 from workplace claims "it is doubtful whether the legislature had the workplace in mind when passing an Act that was principally directed at "stalking" and similar cases. Nevertheless, there is nothing in the language of the Act which excludes workplace harassment. It should not be thought from this unusually one-sided case that stress at work will often give rise to liability for harassment. I have found the conduct in this case to be "oppressive and unacceptable" but I have done so in circumstances where I have also described it as "extraordinary". I do not expect that many workplace cases will give rise to this liability. It is far more likely that, in the great majority of cases, the remedy for high-handed or discriminatory misconduct by or on behalf of an employer will be more fittingly in the Employment Tribunal."

> **"Whether the 1997 Act will truly evolve into an alternative route for litigation in cases of workplace stress is yet to be fully determined"**

This amounts to a clear warning that not every case will meet with a similar outcome, and the question of whether PfHA 1997 will truly evolve into an alternative route for litigation in cases of workplace stress, bullying or harassment is yet fully to be determined. NLJ

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