Employment

An alternative route

Chris Bryden & **Michael Salter** advise how employees can make a successful claim for injury to feelings

IN BRIEF

- Successful unfair dismissal claimants cannot claim damages for stress or injury to feelings under the Employment Rights Act 1996. Could the Protection from Harassment Act 1997 provide a relatively straightforward route to recovery?

It is trite law that a claimant who is successful in convincing an employment tribunal that their dismissal was unfair, within the meaning of the Employment Rights Act 1996 (ERA 1996), is not entitled to receive, as part of their compensatory award, any damages for stress or injury to feelings that arise as a result of the manner of their dismissal. The House of Lords, as was, made this point clear in *Dunnachie v Kingston-Upon-Hull City Council* [2004] UKHL 36, [2004] 3 All ER 1011. The reasoning is that s 123 of ERA 1996, which governs the compensatory award, does not permit recovery of non-financial losses. However, there is a mechanism by which such a claimant could obtain from the court an award of compensation for injury to feelings caused by their dismissal in appropriate circumstances.

The Protection from Harassment Act 1997 (PHA 1997) permits the recovery of compensation by a claimant where the wrongdoer has carried out a course of conduct that causes harassment. There is no express definition in PHA 1997 of harassment, although we are told by s 7 that it includes "alarm and distress". The term is, therefore, potentially very widely drawn.

The question of how serious must the conduct be to constitute harassment for the purpose of a claim under PHA 1997 has been considered by the higher courts. The starting point can be taken from the speech of Lord Nicholls in *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2006] 4 All ER 395 where he stated: "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."* [Authors' emphasis]

Behaviour tantamount to criminal

This was seized on by the Court of Appeal in *Conn v Sunderland City Council* [2007] EWCA Civ 1492, [2007] All ER (D) 99 (Nov) as establishing a requirement of a threshold akin to that applied by the Crown Prosecution Service when considering whether to prosecute under PHA 1997; and that therefore to mount a successful claim the behaviour amounting to harassment had to be tantamount to criminal. 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). Here, Maurice Kay LJ noted that PHA 1997 was being used more and more to establish stress at work claims. At first instance the court applied the "sensible prosecuting authority" test that had developed since *Conn*, and dismissed the claim. The Court of Appeal disagreed

with that approach and stated that the primary focus when assessing any claim under PHA 1997 is to look at which side of the oppressive-unacceptable/unattractive-unreasonable-regrettable line the conduct fell. The criminal liability test was merely a gloss on that primary focus. This clearly amounted to a significant movement away from the overly high hurdle established by *Conn* when approaching the question of compensation for harassment.

Indeed, nowhere does PHA 1997 require that the victim must be frightened, or intimidated or threatened; Lady Hale, in *Majrowski*, says that "conduct might be harassment even if no alarm or distress were in fact caused" provided that it satisfies the s 7 definition of harassment and amounts to "conduct which the person knows or ought to know amounts to harassment". Pursuant to s 1(2) of PHA 1997: "(a) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other."

Bullying conduct

It is easy to imagine that a claimant who successfully shows that the bullying conduct of their employer was of such severity as to amount to a repudiatory breach of contract entitling the employee to resign and present a claim of constructive dismissal would be highly likely to satisfy the requirement contained within s 1(2) of PHA 1997. Indeed, it has long been recognised that employers owe to their employees a common law duty to ensure that they can go about their duties without fear of harassment or disruption by fellow employees. This was cited as a proposition of law by the House of Lords in the case of *Waters v Commissioner of the Metropolis* [2000] 4 All ER 934, [2000] ICR 1064. The same case recognised the general duty to ensure that an employee was not bullied or victimised.

Thus, in cases of constructive dismissal it is likely that a court considering a claim for compensation for harassment will be able relatively easily to conclude that it follows from the facts of the dismissal that a claim under PHA 1997. Cases of "ordinary" unfair dismissal may not so easily fall within the broad definition of harassment; however there are numerous cases of unfair dismissal where the behaviour of the employer amounts to a "bullying out of the job", for example by subjection to repeated disciplinary meetings, that could found a claim.

> **"There is little authority on how a court should assess compensation under PDA 1997"**

Appropriate yardstick

There is little authority on how a court should go about assessing compensation under PHA 1997. However, in cases arising out of an employment tribunal claim, the structure of awards applied for injury to feelings in discrimination claims is, it is submitted, an appropriate yardstick. While all matters are fact-sensitive, harassment claims based on a protected characteristic often fall in the middle band of compensation as identified in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871, [2002] All ER (D) 363 (Dec), as revised by the EAT in *Da'Bell v NSPCC* [2010] IRLR 19, [2009] All ER (D) 219 (Nov) that is between £6,000 and £18,000.

What though is the risk to the claimant in commencing litigation under PHA 1997 after successfully litigating their claim in the employment tribunal? It is important to note that the costs regime applicable to the employment tribunals will not apply; the usual cost rules that the loser will pay the winner's costs will be the default approach of the court. Thus advisers need to be clear that the case is sufficiently strong to lead to an award of damages. Limitation is not likely to be an issue. Even with current lead times in getting tribunal claims to final hearing, the matter will be disposed of well within the six-year limitation period for issuing a PHA 1997 claim using Pt 8 of the CPR. This also results in the claimant knowing what findings of fact have been made by the tribunal in their dismissal claim.

It is likely that the unsuccessful respondent will be unable to re-litigate the allegations that founded an award for (for example) unfair dismissal in PHA 1997 proceedings, as an issue estoppel arises: "Where a particular issue forming a necessary ingredient in the cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue" (*Arnold v National Westminster Bank plc* [1991] 2 AC 93, [1991] 3 All ER 41, per Lord Keith of Kinkel).

Binding findings

Thus, the findings of the tribunal will be binding on the respondent as defendant to the harassment claim. Further, it is clear that PHA 1997 proceedings will not be liable to be struck out as an abuse of process offending the principle that generally a claimant must present all their case in one go and will be prevented from presenting claims later on that could have been presented in the earlier proceedings (*Henderson v Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378). It is well established that this applies to tribunals as it does to the civil courts (*Sheriff v Klyne Tugs (Lowestoft) Ltd* [1998] IRLR 481, [1999] EWCA Civ 1663). This principle would not be offended as, again for the reasons set out above, the tribunal has no power to award compensation for injury to feelings under s 123 and the claimant could not have brought this claim before the tribunal. For a general discussion of these principles of law, see the judgment of Silber J in *Foster v Bon Groundwork Limited* (2011) UKEAT/0382/10/SM, [2011] IRLR 645.

If the above reasoning is correct then what does this mean for those advising in dismissal claims? For those advising the claimant it means that the decision of the tribunal, and the expiry of the limitation period for the appeal, may not be the end of the matter and careful consideration and analysis of the tribunal's reasons may be necessary, to determine whether a further claim, in the county court, should be considered. For those advising employers, it is important to bear in mind this other factor when considering settlement terms and advising on the extent of any financial exposure from litigation. NLJ

Chris Bryden, 4 King's Bench Walk. Websites: *www.4kbw.co.uk*; *www.chrisbryden.co.uk* **Michael Salter,** Ely Place Chambers. Websites: *www.elyplace.com*; *www.michaelsalter.net*