Employment

The early bird...

Chris Bryden & **Michael Salter** discuss the correct approach to apportioning discrimination awards

IN BRIEF

- *Brennan* is a case that may have an impact both at an early & an end stage of litigation.
- Advisers would do well to be aware of the consequences.

In a previous article, the authors discussed the impact of the Employment Appeal Tribunal's decision in *Brennan and others v Sunderland City Council* UKEAT/0286/11/SM ("An unsatisfactory state of affairs", NLJ, 22 June 2012, p 821). In this case, the Employment Appeal Tribunal (EAT) found that there was no jurisdiction for an employment tribunal to entertain claims for contributions between discriminating respondent parties. At the end of that article we posited that there was a risk that individual employee respondents could face when a substantial award has been made by the tribunal.

Real consequences

This potential risk has very real consequences for those advising claimants at the earliest stages of litigation. One of the authors has recently been involved in a case where the impact of *Brennan* was felt a few weeks after the ET1 was presented. In this matter, an employee had presented their ET1 without the assistance of a lawyer. The ET1 was, at best, sparse and made reference to some alleged comments that could have been in law discriminatory. However, there was no clear mention of discrimination at all in the rest of the ET1, save that the box was ticked for such claim. The tribunal rejected the claimant's ET1 as far as it alleged a breach of the Equality Act 2010 (EqA 2010). There was no review of the rejection for a number of months. The matter then was listed for a case management discussion (CMD) to determine the review application and/or an extension of time to present a claim out of time under EqA 2010.

The employment judge reminded herself that the discretion to extend time for presentation of EqA 2010 claims and for seeking a review out of time was exercisable if it was just and equitable in the circumstances to do so. After consideration of the reasons for the delay in either presenting the claim or seeking a review the employment judge noted that the recent impact of *Brennan* was such that in claims for discrimination against both an employer and a named respondent employee, the latter potentially faces ruinous compensation awards and that a claimant wishing to proceed with such claims should make it clear from an early stage and in clear terms that they are seeking awards/findings against the named employee. Justice and equity, meant justice and equity for all parties, and not just for the claimant in isolation. On the facts the claimant's application was rejected.

The correct approach

Undoubtedly, this approach is right. While the discretion to extend time is less restrictive in EqA 2010 claims than the test set out in the Employment Rights Act 1996 for unfair dismissal, the Court of Appeal in *Robertson v Bexley Community Centre* [2003] IRLR 434, [2003] All ER (D) 151 (Mar) has made it abundantly clear that: "It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

These are words that claimant advisors should strongly keep in mind. Indeed, when a claimant has presented his ET1 without assistance of a lawyer and only at that stage seeks legal representation, a thorough review of the ET1 must be conducted to avoid any undue delay in presenting a claim of discrimination. It will be, and was, an easy argument for a respondent's representative to make that it is neither just nor equitable for their client to be brought into a claim where they face the potential for large compensation bills when they were never named in the original ET1 and the presented ET1 does not appear to set out the alleged discrimination.

Whether the risk to named respondent employees is more apparent than real is another matter. The "employer's defence", contained in s 109 of EqA 2010, is not often advanced by a respondent-employer, meaning that they accept by implication they will be liable for the wrong-doing employee's deeds. The said employer's defence operates to absolve the employer of liability for the acts of the wrongdoing employee if the employer took reasonable steps to prevent the employee from doing the act complained of or anything of that description. By not raising a defence under s 109, it is implicit that the employer concedes liability (if the same is proven) for the acts of the employee. Will their situation change then if, post-*Brennan*, an award is made by the tribunal which the claimant enforces against the respondent-employee rather than the employer; will the employer simply indemnify the

respondent-employee? It would be a brave and risk-taking employer who was to insert such an indemnity into an employment contract for its managers. However, if they did not offer an indemnity, in circumstances where the employer's defence was not advanced, would this amount to a breach of trust and confidence entitling the respondent-employee to resign and claim constructive dismissal? If an employer thought the respondent-employee was to blame they could and should have pleaded and advanced the s 109 defence. In the absence of such a defence (and thus an acceptance of fault), might a failure to indemnify in *Brennan* circumstances then amount to a breach of the implied duty of trust and confidence? It seems arguable that it might be; if the employer does not take the opportunity to contend that it is not responsible and then finds itself in a position where only the employee has to pay. However, such an argument would, save in exceptional circumstances, be likely to fail. Given that an employer would be potentially able to recover by way of damages for breach of contract such sums against a wrongdoing employee it seems unlikely that a tribunal would entertain a claim for failure to indemnify amounting to a breach of trust and confidence without more evidence of certain assurances given to that employee as to any liability.

Employer ceases to exist

Of course, this issue is not in any event going to arise when the employer has ceased to exist, which is where the likely risk to a named employee is likely to arise. In such circumstances, the wrongdoing employee is faced with shouldering the entire liability themselves with little, if any, recourse to the employer. This too poses claimants issues: do they proceed against the respondent-employee who may never be able to pay the compensation awarded; or seek to argue the liability is the respondent-employers', which may have transferred under a relevant transfer to a new employer that has taken over the business entity. Again, due diligence by employers is strongly advised as is always the case when considering liability on transfers. Rule 11 of TUPE imposes requirements for disclosure of information about employees who are assigned to the organised grouping of resources, or employees that are the subject of the relevant transfer, and this information includes information of any litigation that has been brought or which the transferor employer has reasonable grounds to believe may be brought. If, however, the claimant is an ex-employee and the respondent-employer is closing, it would appear the r 11 obligation does not apply. The transferee employer therefore may need to ensure they have full disclosure exceeding that contained within r 11 of TUPE and indemnities signed by the transferor's directors.

Brennan accordingly has effects beyond the mere question of who pays the claimant. It presents issues for both claimants and respondents right at the very beginning of litigation, throughout the entire process as well as at the end of the day when the dust has settled after tribunal litigation. While the circumstances in which *Brennan* will apply are likely to be quite limited, in cases where its particular issues are raised, advisors for all sides may need to beware. NLJ

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