

Looking for more

Chris Bryden and Michael Salter look at the different ways compensation can be obtained in harassment cases

IN BRIEF

- Victims of harassment can obtain injunctive relief against their harassers pursuant to the Family Law Act 1996, Protection from Harassment Act 1997 (PHA 1997) and basic common law principles.
- PHA 1997 goes further than the common law of personal injury by not requiring the victim to suffer psychiatric illness before allowing compensation.
- The Criminal Injuries Compensation Board requires that the anxiety or illness suffered is "disabling": there is no such threshold for compensation under PHA 1997.
- Damage to feelings employment tribunal claims may provide a basis for the quantification of damages under PHA 1997.

The House of Lords' decision in *Majrowski v Guy's and St Thomas's NHS Trust* [2006] IRLR 695, [2006] All ER (D) 146 (Jul) opened up the Protection from Harassment Act 1997 (PHA 1997) in the field of employment relationships. Although tempered by the Court of Appeal's decision in *Sunderland City Council v Conn* [2008] IRLR 325, [2007] All ER (D) 99 (Nov) PHA 1997 could impact people in most walks of life.

Victims of harassment can obtain injunctive relief against their harassers pursuant to the Family Law Act 1996, PHA 1997 and basic common law principles covering injunctions and torts. However, PHA 1997, s 3(2) also allows for the recovery of compensation from the harasser.

There is little case law on the quantum of damages for claims under PHA 1997, and what law there is, is generally only of first instance authority. Financial compensation is particularly relevant where the conduct complained of has ceased, as in when an injunction is no longer needed. Indeed, given a six-year limitation period, there is scope for claims for compensation to be brought some time after the harassment has ceased. Equally, where the harassment is ongoing, the risk of paying financial compensation may have the effect of "focusing the mind" of the harasser and causing him to cease his harassing actions.

ASSESSING COMPENSATION

Section 3(2) of PHA 1997 leaves open the question: on what basis should such compensation be assessed? In *Kuwait Airways Corporation v Iraq Airways Co* [2002] 2 WLR 1353, a case not involving harassment claims but of general application to the scope and measure of damages, Lord Nichols stated:

"In most cases, how far the responsibility of the defendant ought fairly to extend evokes an immediate intuitive response. This is informed common sense by another name. Usually, there is no difficulty in selecting, from the sequence of events leading to the plaintiff's loss, the happening which should be regarded as the cause of the loss for the purpose of allocating responsibility. In other cases, when the outcome of the second inquiry is not obvious, it is of crucial importance to identify the purpose of the relevant cause of action and the nature and scope of the defendant's obligation in the particular circumstances. What was the ambit of the defendant's duty? In respect of what risks or damage does the law seek to afford protection by means of the particular tort?"

This article considers other areas of law to draw similarities and obtain guidance which usefully can be applied to ascertaining the quantum of damages in harassment cases.

It seems reasonable to assume that damages for harassment are generally likely to consist mainly of compensation for psychiatric injury. There may also be special damages, eg for torn clothing or broken items after a struggle or caused by running away, which are fairly simple to quantify on the basis of actual loss.

In the traditional arena in which psychiatric injury is recognised, that of personal injury, compensation can be awarded for recognised psychiatric illnesses in accordance with the House of Lords' decision in *McLoughlin v O'Brien* [1983] 1 AC 410, [1982] 2 All ER 298 in which Lord Bridge stated:

"The common law gives no damages for the emotional distress which any normal

person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or reactive depression may be a recognisable psychiatric illness...So, the first hurdle that the plaintiff must surmount, when claiming damages, is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness."

Despite a number of subsequent cases on psychiatric injury, mere anxiety is not enough, without there also being some physical injury, for a successful personal injury claim. There needs to be a recognised psychiatric illness for compensation to be awarded. It would therefore appear that PHA 1997 goes further than the common law of personal injury by not actually requiring the victim to suffer such an illness before allowing compensation. If this is so, guidance as to compensation levels drawn from the common law relating to personal injury must be viewed with caution.

CRIMINAL INJURIES COMPENSATION BOARD

Further guidance in quantifying damages for harassment may be drawn from another scheme that awards damages for anxiety: the Criminal Injuries Compensation Board (CICB). Introduced in April 2001, it provides that:

"Mental illness and temporary mental anxiety

8. Mental illness includes conditions attributed to post-traumatic stress disorder, depression and similar generic terms within which there may be:

(a) such psychological symptoms as anxiety, tension, insomnia, irritability, loss of confidence, agoraphobia and preoccupation with thoughts of guilt or self-harm; and

(b) related physical symptoms such as alopecia, asthma, eczema, enuresis and psoriasis.

9. "Medically verified" means that the mental anxiety has been diagnosed by a registered medical practitioner."

The CICB apparently requires a recognised psychiatric condition or medical diagnosis before any award can be made for anxiety. The CICB scheme will not award damages for a "mental injury" without physical injury unless the circumstances of the cause of the



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injury fall within para 9 of the scheme which covers certain categories of offences.

The CICB also requires that the illness surpasses a threshold—that the anxiety or illness is “disabling”: there is no such threshold for compensation under PHA 1997. Indeed, the victim under PHA 1997 need not suffer any alarm or distress, as the partial definition of harassment contained in s 7(2) of the Act states that references to harassment “include alarm and distress”. By definition then “alarm and distress” are something separate, though contained within the definition of harassment.

Traditionally, damages for alarm and distress have been found in contract claims: (eg *Jarvis v Swan Tours Ltd* [1973] QB 233, [1973] 1 All ER 71 and *Jackson v Horizon Holidays* [1975] 1 WLR 1468, [1975] 3 All ER 92 where £125 and £500 awards were made respectively). While the words “any anxiety caused by the harassment” within PHA 1997, s 3(2) seems to amount to a causative test along the lines of contract law, it is difficult to compare the concept of harassment to damages for distress in relation to breach of contract. Nonetheless the quantum of these awards show that, on their own, alarm and distress do not sound in substantial damages.

STATUTORY TORT

Under PHA 1997, s 3 harassment amounts to a statutory tort. Rather than a simple causative test, tortious claims import a foreseeability test for recovering damages, with the traditional rules such as the “eggshell skull” and “eggshell personality” applying. This should be compared with the Court of Appeal’s decision in *Essa v Laing Ltd* [2004] ICR 746, [2004] All ER (D) 155 (Jan) (Lord Justice Rix dissenting) where it was held that for the purposes of the statutory tort of race discrimination the victim was to be compensated for the damage that arose as a consequence and

directly from the act, without the need for the traditional concepts of reasonable foreseeability. However, it seems likely that for harassment damages the traditional tortious rules will apply.

Some authorities on non-contractual anxiety compensation show an equally low level of compensation to the contractual cases being awarded. In *Westminster Council v Heyward* [1997] 3 WLR 641, [1997] 2 All ER 84 the Pensions Ombudsman awarded Heyward £1,000 for “distress and inconvenience in respect of the anxiety which he had suffered” as a result of maladministration. In *Ford v Large* [1992] CLY 1563 the claimant was awarded £3,000 compensation after a car accident for anxiety while driving.

EMPLOYMENT TRIBUNAL CLAIMS

These low levels of compensation should, however, be compared to the levels of injury to feeling awards recoverable in the employment tribunal for successful claims of discrimination. The starting point for assessing such compensation is the guidelines outlined in *Chief Constable of West Yorkshire v Vento* [2003] IRLR 102, [2002] All ER (D) 363 (Dec). This case set down three brackets for injury to feelings damages: £500 to £5,000; £5,000 to £15,000 and £15,000 to £25,000 (currently with RPI applied now worth £592 to £5,921; £5,921 to £17,764 and up to £29,607). Can these brackets provide a basis for the quantification of damages under PHA 1997?

The civil courts do not award damages to “injury to feelings” as a separate head of claim in tortious matters and so any sums for anxiety awarded under PHA 1997 are likely to be covered in any award made in a personal injury claim. *Green v DB Group Services (UK) Ltd* [2006] IRLR 764, [2006] All ER (D) 02 (Aug), caused employers to panic when the claimant was awarded over

£800,000. However, this was a traditional personal injury claim brought on the basis of stress at work, with a PHA 1997 claim bolted on in the alternative. The claimant did not receive any separately quantified compensation for the PHA 1997 claim. This has led many to feel that claims under PHA 1997 will not provide much in the way of compensation. This may be correct when compared to psychiatric personal injury claims where PHA 1997 merely comprises an alternative cause of action to such claims.

Given the incomplete list of recoverable heads of claim contained in s 3(2) we believe there is strong scope for arguing for the application of *Vento*-type brackets to claims under PHA 1997. The claimant may be able to recover damages for injured feelings under s 3(2). Factors such as the length of time that harassment has taken place, the form it took, and the effect it had, play a part in determining what the level of compensation should be. While the barrier of the traditional tortious measure of damages would have to be overcome, the fact the statutory tort created by PHA 1997 appears to be broader in terms of recoverability of damages makes it more similar to the *Vento*-type situation than traditional personal injury claims.

Damages under PHA 1997 are not limited to psychiatric injury. Under s 3(2) financial losses resulting from the harassment can also be recovered. Recoverable special damages include:

- lost salary;
■ bonuses and other payments/benefits;
■ pension loss; and
■ any sums the employee has to repay to the employer by way of a loan if the employee leaves employment.

At present the assumption when approaching damages for anxiety and distress for harassment is likely to be that nominal damages only will be awarded.

However, the broader basis of the statutory tort of harassment takes the quantification of damages out of the general rules applicable to personal injury and is more correctly identified with *Vento*-type bands of awards for injury to feelings in discrimination cases. While there is currently no authority on this point it is hoped a suitable case allowing for a challenge along these lines will arise.

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