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Albion Chambers EMPLOYMENT AND PROFESSIONAL DISCIPLINARY TEAM NEWSLETTER

Sexual harassment in the workplace

A 2017 perspective

Background

Sadly, as each day passes at the moment, the pervasiveness of sexual harassment in modern society seems to be becoming ever more prevalent. The news has also showed us that being a victim of sexual harassment is not just something confined to women, but regularly occurs to men as well. Another interesting aspect of the recent news from the film and music industries is that these victims are from all walks of life, people such as actors, musicians, producers, directors, politicians and journalists; people used to speaking in public and being the centre of attention to observers worldwide, are just as easily the victims of sexual harassment as anyone else. The fact that even an outwardly-confident person can also feel just as oppressed and silenced by sexual harassment as anyone else demonstrates the all-encompassing nature of the menace.

Positively, however, what this daily-developing scandal shows us is that we live in a society where speaking out against such conduct is becoming, gradually, easier. The pace at which the allegations against Mr Weinstein gathered momentum and the way in which consequences flowed against him and others has been remarkable.

Purpose

This issue has ramifications across society, and in this article I shall be looking at recent cases on the issue in an employment law context and addressing what we can learn from them, particularly now that public attention is fixed on this issue and the Unison judgment means people may look afresh at taking an employment case to tribunal.

Where to start? – a detailed look at Talbot

An interesting case from earlier this year is *Talbot v Costain Oil & others* [2017] UKEAT/0283/16/LA. The EAT held in this case that the Employment Tribunal had not approached its fact-finding task properly, both in relation to finding "primary facts" and in relation to the proper inferences to be drawn on discrimination. The EAT also held the tribunal had failed to make proper assessments of the parties, the witnesses and the overall picture presented by the evidence. They failed to properly consider factors pointing towards discrimination and they placed too ready a reliance on the burden of proof. The case is a useful guide which provides a consolidated approach to fact-finding in the EAT.

The case centred around Ms Talbot, a very experienced female engineer new to an otherwise entirely male team. Her line manager assigned her a task which he clearly considered a 'waste of time'. Ms Talbot did not share this view and saw her role as being an important one. She took a thorough approach to her work which her manager did not appreciate, feeling she was taking too long and doing unnecessary work above what was needed. A sour atmosphere developed. The tribunal found she had a low opinion of her colleagues which she had made apparent, but did not find she was abusive or insulting to them.

After only 12 weeks at her job she was informed she was no longer required and escorted off site. She complained of sex discrimination and all of her claims were rejected, on the basis that she had either failed to prove the primary facts, or that the reason for the treatment was not 'because of' or 'related to' her sex. On the question of why her contract had been terminated, the tribunal found it was because her manager considered she was not doing the work in the way he wanted her to.

Mr Justice Shanks, sitting alone, reviewed various authorities on fact-finding in discrimination and harassment cases, he described this as a 'vexed' issue as "proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will, in any event, be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination." He then found the following general principles:

- It is very unusual to find direct evidence of discrimination;
- normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;
- it is essential that the Tribunal makes findings about any "primary facts" which are in issue so that it can take them into account as part of the relevant circumstances;
- the Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;
- assessing the evidence of the alleged discriminator when giving an

explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations;

- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors which point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;
- if it is necessary to resort to the burden of proof in this context, s 136 of the Equality Act 2010 provides in effect that where it would be proper to draw an inference of discrimination in the absence of "any other explanation" the burden lies on the alleged discriminator to prove there was no discrimination.

Admittedly, many of these seem pretty straightforward pronouncements of law, but as the case itself demonstrates, the ET missed many of these points in its assessment. Its own assessment of the task it faced was set out at paragraph 5 of its own judgment:

"5. The tribunal was faced, in relation to many of the complaints, by a situation where there was oral evidence only from each party, which differed in important respects, with no corroborating documentary evidence. The tribunal did not feel there was any basis on which the tribunal could prefer generally the evidence of the claimant to the respondent. We set out, in relation to each allegation, our reasons for making the relevant findings of fact. We are aware of the difficulties victims of discrimination face in proving discrimination. However, we must act in accordance with the law which places the initial burden of proof on the claimant. Where there is no basis on which we consider we can properly prefer the evidence of the claimant to the respondent in relation to a particular allegation, the operation of this burden of proof means that we cannot find that complaint to be well founded."

The problem with this approach, as Shanks J found, was that the tribunal failed to look at the overall picture when deciding individual issues; instead looking at each issue individually, rather than taking an overall view of each witness' credibility and consistency and viewing the case through those prisms.

Shanks J provided several examples, one of which is that Ms Talbot's (apparently unchallenged) evidence is that she had been excluded by her manager from several team and technical meetings. Costain argued that there had only been one team meeting, not four as alleged, and that the technical meetings did not relate to her area of work. Costain produced no documentary evidence at all to support these assertions, had admitted at the outset they had failed in their disclosure obligations and yet the tribunal found there was nothing which led them to prefer T's evidence on the issue. Shanks J held that they had made no overall assessment of the respondent's witnesses and that they had overlooked the inherent probabilities and the inference to be drawn from the lack of supporting documentation.

The next issue was that the tribunal, despite finding the majority of Ms Talbot's allegations proved, did not find the cause of them to be because of, or related, to her sex. Preferring her manager's explanation, despite them finding that he had treated her badly from the outset, for example by assigning her a task he considered a waste of time, without even reading her CV to gauge her experience.

Of course, all of these issues relate to factual problems, rather than issues of law, however, Shanks J held that the tribunal's overly-fragmented approach to the issues, and the failure to make overall assessments of the witnesses amounted to a mistake in law and he allowed the appeal, ordering the matter to be re-heard.

Overall this case is a useful warning to tribunals and a useful guide to practitioners as to the proper approach to take in these cases.

Gender-neutrality

One case that hit the headlines in 2017 was Mr Elworthy's claim against Your Move. An interesting case in that the victim was male and revolved around the sensational claim that his yet-to-be line manager, Ms Thompson, had stated at a Christmas lunch words to the effect that if the Claimant banked £180,000 this year she would give him oral sex.

Mr Elworthy argued that this was an act of sexual harassment and sex discrimination. The tribunal accepted that the comment had been made, preferring the evidence of Mr Elworthy over Ms Thompson, but found that it did not amount to sexual harassment. The tribunal found that he had not complained to anyone at the time, that he had not said anything in response to Ms Thompson, and that he had stated himself on the issue no more than the comment had left him "not feeling great" and "a bit uncomfortable." The tribunal found that "the claimant did not find this comment humiliating, offensive, hostile or intimidating," and it did not therefore amount to harassment as Ms Thompson's purpose was not to harass the claimant nor did it have the requisite effect.

However, the tribunal did find that the comment did amount to an act of direct sex discrimination as Ms Thompson would not have made such a 'highly sexualised comment' to a woman.

While this case perhaps offers no real surprises when the issues are looked at objectively and away from the sensation which surrounded it, it is an interesting case which shows that not all victims of sexual harassment are women. Though at first blush potentially a fortunate result for the respondent in terms of the 'humiliating, offensive, hostile or intimidating' test, it is entirely a case which turns on its specific facts and does not represent a higher standard of proof for men to reach as has been suggested by some. Put simply, this was an inappropriate comment, but one which did not amount to harassment.

Special measures, not special enough?

Special measures are common place in courts up and down the country. The Criminal jurisdiction leads the way, and it is now routine for anyone complaining of a sexual offence to present their evidence via video interview and live-link cross-examination. It is unthinkable for a complainant in the criminal courts to have to appear face-to-face with the alleged perpetrator if they do not wish to do so.

There are so many options available to suit the particular case, as an example:

- screens;
- court-appointed cross-examination advocates; and
- and the use of video conferencing.

All aim to reduce the emotional stress that court appearances can cause. In fact, the lack of many equivalent measures in the Family Courts earlier this year caused much media attention and prompted a review of the issue by the Ministry of Justice.

In many ways, however, the Employment Tribunals are somewhat behind this curve. Just this month I conducted a five-day sexual harassment final hearing where the complainant was cross-examined with her alleged harasser sitting in the same small room watching everything she did for four days. Sitting next to him was an 'interpreter' who the claimant alleged had helped minimise her allegations at work, mocking her in her interviews with her managers.

An acute case

This close proximity of witnesses and spectators would seem inconceivable in the criminal courts. Yet, despite Special Measures being available in the Employment Tribunal, there needs to be, in my view, a similar shift of attitude in the tribunal as there has been in the courts. It is notable for example, that the draft 'Agenda for Case Management at Preliminary Hearing' contains little mention of this important issue.

This is surprising; after all, the ET is designed to function without lawyers, to allow one lay person to cross examine the other. The acute risk in Employment Tribunals is where there is an absence of special measures, this facilitates a forum in which the alleged perpetrator has the opportunity of cross examining the complainant directly. This would not happen in the Criminal or Family jurisdictions.

However, the issue has been canvassed by the Court of Appeal in the 2013 case of *Duffy and George* [2013] IRLR 883. In that case the complainant in a sexual harassment case did not attend the final hearing in her allegations, yet favourable findings were still made. On appeal by the respondent the Court of Appeal held that the tribunal had erred in not first holding a pre-trial review to consider the options available for the conduct of a hearing with a reluctant Claimant. Lord Justice Pitchford, giving judgment in the Court of Appeal, reviewed the statutory framework in the Criminal Courts and stated:

"It seems to me that the principles upon which the criminal courts act to do justice may be of equal importance to the duty of achieving justice in the civil jurisdiction, including the jurisdiction of the employment tribunal, where the investigation of allegations of sexual misconduct is taking place."

(No doubt Lord Justice Pitchford would also extend this rationale to other protected characteristics also.)

He went on to state that the pre-trial review should have considered issues such as:

- deciding on evidence whether the Claimant had grounds for fearing the respondent and not attending;
- if so, whether the tribunal should have dispensed with an inter partes final hearing;
- whether the tribunal should have held separate hearings for both parties, and
- whether the parties should have been invited to submit to the tribunal in advance, questions to be put to the other party.

Pitchford LJ particularly emphasised the powers of the ET to conduct its proceedings how it wishes and how that includes special measures, for example having the tribunal ask questions on behalf of the respondent and the provision of screens to block the line of sight between the two parties.

Conclusions

In my view, being more alert to the advantages of Special Measures, particularly in sexual harassment cases but also in other cases where the quality of the Claimant's evidence is likely to be affected by the presence of others (usually the respondent's witnesses) in the hearing room, is vital to getting the best out of the Claimant's evidence.

In a world where the emphasis on employers ensuring that the dignity of their employees in investigations is becoming ever stronger, to not follow up those ideas in the tribunal itself seems very out of step.

All that being said, maybe some of the responsibility should rest on the shoulders of the lawyers, us; we should be pushing for special measures, rather than waiting to be guided by the ET.

Erinna Foley Fisher

Fiduciary what?

Cited cases: Nottingham University v Fishel [2000] ICR 1462
Ransom v Customer Systems Plc [2012] EWCA Civ 841
Milanese v Leyton Orient Football Club [2016] EWHC 1263

Introduction

Directors and certain categories of employees owe fiduciary duties. Fiduciary duties are additional to any contractual obligations under a contract of employment and, accordingly, duties owed to an employer by someone who is a fiduciary are more onerous than those owed by an employee who is not a fiduciary.

Fiduciary duties can provide an organisation with a useful additional layer of protection against misconduct. In some situations an employer may not have the level of contractual protection they need so that fiduciary duties provide the only avenue for recourse. For example, where an individual does not have restrictive covenants in their employment contract, an employer's only means of protection against misuse of confidential information may be a claim in equity for breach of fiduciary duty. Additional remedies will potentially be available against an ex-employee who is a fiduciary; in addition to claiming damages for breach of contract, an employer can ask for an account of any profit made from the activities carried out in breach of their fiduciary duties.

What is a fiduciary duty?

A common law fiduciary relationship arises where it is agreed that one person (A) will act on behalf of or for the benefit of another (B) in circumstances which give rise to a relationship of trust and confidence. Typically, A will have a degree of discretion or power over B's best interests and, in turn, B relies on A to act in B's best interests. A fiduciary is expected to act in the interests of the other – to act selflessly and with undivided loyalty. It is this obligation to act selflessly which distinguishes a fiduciary from an individual who merely owes contractual obligations; i.e. the difference between a company director/senior employee and a mere employee.

Who can enforce these duties?

Directors and (relevant) employees owe their fiduciary duties to the company and, generally, only the company can enforce them. Normally, those fiduciary duties are owed to the company for the duration of the directorship/employment. However, some of the duties have a continuing effect after the directorship/employment has come to an end; for example, the duty not to exploit confidential information and maturing business opportunities.

Do directors and senior/mere employees owe fiduciary duties?

Directors owe fiduciary duties. Broadly speaking there are two types of company director. An executive director is usually an employee of the company and is involved in the day-to-day management of it, whereas a non-executive director will

often retain a degree of independence and become involved in the affairs of the company on a limited basis, often just attending and preparing for Board meetings. However, there is no distinction in principle between the duties owed by executive and non-executive directors.

In contrast, not all employees owe fiduciary duties. Certain employees, however, might. Each case will turn on its own facts. It does not figure that a senior employee will always owe fiduciary duties and a junior employee will not. The position will depend upon the employee's role and responsibilities and particular relationship with the employer. To owe fiduciary duties, the employee must be in a position of utmost trust in relation to the employer's business or assets such that it is fair for additional fiduciary duties to be imposed. This has often been seen as meaning that they only apply to senior employees. In practice that that may prove to be the general rule but, in the leading case of *Nottingham University v Fishel* [2000] ICR 1462, it was held that fiduciary duties may arise given the particular contractual obligations the employee has accepted.

What fiduciary duties are owed?

The four-key equitable fiduciary duties comprising confidentiality, undivided loyalty, no conflict and no-profit have been codified for the purposes of duties owed by directors to their companies in the Companies Act 2006 and are as follows:

- To act within powers.
- To promote the success of the company.
- To exercise independent judgment.
- To avoid conflicts of interest.
- Not to accept benefits from third parties.
- To declare an interest in a proposed transaction or arrangement.

The position of employees was considered in *Ransom v Customer Systems Plc* [2012] EWCA Civ 841 where an employee resigned and set up a business. However, during his notice period he met with clients of his employer and discussed his future plans. Customer Systems' main complaint was that Mr Ransom had failed to tell them of his actions, and that this breached his fiduciary duties.

The ruling serves as a useful reminder that there are differences between duties of fidelity owed by an employee to his employer and a director's fiduciary duties. Whilst every employment relationship contains an implied term that an employee will serve their employer with good faith and fidelity, as well as the more commonly known term of mutual trust and confidence, it was held that a senior sales manager did not, as an employee non-director, owe a fiduciary duty to his employer to report his own activities in preparing to set up in competition after his employment had ended. Such a duty could have been made an express term of his employment contract, but this did not occur despite several internal promotions to senior positions in the company. Without such a contractual term, only a duty of fidelity arose and not a fiduciary one.

Notwithstanding that the Court of Appeal made a clear distinction between employees and directors, it did acknowledge that there will be some circumstances where mere employees (particularly senior employees) owe fiduciary duties, over and above their contractual duties, to their employer. But this will only be the case where such duties are created by the contract of employment. Accordingly, an employer wishing to create fiduciary duties needs to be careful that the contract clearly specifies the obligations an employee is under, for example, by creating an obligation to promote the company's interests whilst employed by it and to not undertake work at any time, paid or otherwise, whilst employed by the company.

A beautiful game

This point was re-affirmed in *Milanese v Leyton Orient Football Club* [2016] EWHC 1263 where an employer dismissed the employee for breach of a fiduciary duty and sought repayment of the salary he had earned prior to his dismissal (as is becoming increasingly common).

Mr Milanese's appointment was for one year, but could be terminated earlier without notice if Mr Milanese committed gross misconduct. It could also be terminated with notice but, under the terms of his contract, the club would be required to pay him one year's salary as compensation. The reason for such a large sum was that in the world of football, it would be difficult for Mr Milanese to get a job if he was dismissed part way through the football season. Six months into the contract Mr Milanese was dismissed by the club, without notice, on the grounds of gross misconduct because the club believed he had overspent on players, although he refused to admit this when questioned. Mr Milanese brought a breach of contract claim against the club in the High Court on the basis there were no grounds to dismiss him without notice. Mr Milanese claimed damages of one year's salary, which is what he would have been paid if his employment was terminated with notice. Following Mr Milanese's claim, the club discovered a number of other acts it considered were further breaches of Mr Milanese's contract of employment; one of which included alleged failings in relation to the handling of a talented young academy player. The club counterclaimed that Mr Milanese owed fiduciary duties to the club given his senior position as Director of Football, and that by his conduct he had breached these duties. The club claimed that Mr Milanese should repay the salary he had been paid since his appointment on the basis that his salary should be treated as profits deriving from a breach of his fiduciary duties.

Whilst the High Court held that the initial reason for Mr Milanese's dismissal, the alleged overspending on players, was not sufficient to amount to an act of gross misconduct, it did find that his handling of a talented young academy player was, therefore, entitling the club to dismiss him without notice. Mr Milanese's breach of contract claim therefore failed.

Turning to the club's counterclaim, the High Court held that Mr Milanese did not owe fiduciary duties to the club. The High Court found that there were no contractual obligations in his contract which were capable of making Mr Milanese a fiduciary. As such, the counterclaim failed.

Once again this demonstrates the importance of ensuring a senior employee's duties are fully captured in the contract of employment. This will assist in any future argument that they owe fiduciary duties. In its decision, the High Court considered that Mr Milanese's actions in respect of the youth academy play were not connected to or contrary to any particular duty covered by his employment contract. This suggests that had it been, the High Court may have held that he owed a fiduciary duty to the club in respect of his actions with the youth academy player.

Conclusion

Proving the existence of fiduciary duties is certainly easier with a director. That, it appears, is half the battle in these sorts of cases. Employers, however, should not underestimate the importance of their senior employees, and their ability to harm the company even though they may not be directors. Comprehensive employment contracts should, therefore, be drawn up for senior employees, contractually giving them specific duties so that, at least, the employer has a contractual remedy in the case of a breach by the employee, causing harm to the company. However,

in a worst-case scenario where no such contract exists, employers should not despair. It may well be that by virtue of implied duties the employer has a remedy against the harm caused by the employee, particularly where it can show the employee to be in a position of significant autonomy and power. It's just that the first half of the battle becomes significantly harder.

Jason Taylor

Back to Basics

Calculating compensation in unfair dismissal claims

As the Employment Tribunal caseload increases many practitioners are returning to practise in the employment law field. In addition, in response to the increases many firms are now actively developing trainees and junior solicitors into employment practitioners Albion Chambers' 'Back to Basics' series aims to help in this regard by providing the foundations stones for building a successful, practical career in this sometimes less-than-straightforward field.

Statutory foundations

Our starting point is Section 118(1) of the Employment Rights Act 1996 – compensation for unfair dismissal must consist of a basic award and a compensatory award.

There is also the possibility of an additional award, where the employer has been ordered to reinstate or re-engage the employee and they fail to do so [ERA 1996, s117].

The basic award

The basic award is usually calculated in the same way as the statutory redundancy payment.

The ET will award:

- one and a half week's pay for the number of years the employee was employed over the age of 41;
- one week's pay for the number of years the employee was employed between the ages of 22 and 41, and
- half a week's pay for any period the employee was employed below the age of 22 [ERA 1996, s119(2)].

The maximum amount for a week's pay for a dismissal on or after 6 April 2017 is £489 and gross pay is used for the calculation [ERA 1996, s119(3)].

For dismissals taking place on or after 6 April 2016 the amount is £479. The number of years used for the calculation is determined by using the effective date of termination, and working back to get the number of full years the employee was in continuous employment.

20 years is the maximum that can be taken into account [ERA 1996, s119(3)].

Reductions

The amount of the basic award can be reduced where:

- The employee's conduct before dismissal or before notice makes it just and equitable.

The Tribunal must first identify the conduct, consider if it is blameworthy and then make a reduction if it is just and equitable to do so [ERA 1996 s122(2)]. The Tribunal must consider what the employee has actually done as opposed to how 'wrongful' the employer views the conduct.

However, the employee's conduct is not taken into account where the principle reason for the dismissal is redundancy.

- The employee refused an offer of employment (and that refusal was unreasonable) that had the effect of reinstating the employee as if the dismissal had not occurred [ERA 1996, s122(1)];
- A sum has been awarded under a designated dismissal procedures agreement [ERA 1996, s122(3A)];
- The employee has been paid a redundancy payment for the same dismissal [ERA 1996, s122(4)].

A pragmatic approach

In Chelsea Football Club and Athletic Co Ltd v Heath [1981] ICR 323, the Employment Appeal Tribunal decided that if an employer pays an employee an amount that covers their statutory entitlement, as well as the amount of any basic and compensatory award, then the Tribunal is under no obligation to make an award in such circumstances. The Tribunal must consider whether the payment made is sufficient.

Compensatory award

The compensatory award is the amount the Tribunal considers *'just and equitable'* in the circumstances. To determine what the amount should be, the Tribunal should look at the loss suffered by the employee that flows from the employer's actions in unfairly dismissing the employee [ERA 1996, s123(1)].

The loss includes any expenses reasonably incurred by the employee and loss of any benefits the employee had during their employment [ERA 1996, s123(2), (3)]. The Tribunal has to be careful not to over-compensate and the concept of double recovery should be borne in mind.

In *Digital Equipment Co Ltd v Clements (No 2)* [1998] IRLR 134, the Court of Appeal discussed the steps that should be taken by the Tribunal in calculating the amount of the compensatory award.

The steps are:

- The Tribunal should decide the amount of the award by determining the value of the loss actually suffered by the employee;
- The award should then be reduced according to any mitigation on the part of the employee in terms of amounts received from other employment (except in the notice period), or for a failure to mitigate where the Tribunal concludes the failure was unreasonable;
- A reduction is made by the amount of any payments made by the employer to the employee as compensation for the dismissal;
- The Tribunal then considers if a percentage reduction needs to be applied to reflect the fact the dismissal would have probably occurred fairly in any event, see *Polkey v AE Dayton Services Ltd* [1988] ICR 142 (discussed below);
- Adjustments are then made for the employee or employer failing to follow statutory procedures, and a 25% increase or decrease can be applied if a party fails to follow the ACAS Code (discussed below);
- The Tribunal makes further deductions to reflect any contributions toward the dismissal decision by the employee;
- Finally, the statutory maximum is applied to reduce any award if it is higher than the maximum.

For the purposes of the calculation, the value of any wages and benefits is net, unlike the basic award, which is

gross. For dismissals on or after 6 April 2016 the statutory maximum is £78,962 or 52 times a week's gross pay. The statutory maximum for an employee who is dismissed after 6 April 2017 is £80,541 or 52 times a week's gross pay.

Whichever of the two values is the lowest is the value used as the statutory maximum.

Remember, the cap does not apply in discrimination-type cases.

Further Analysis

In *Norton Tool Co Ltd v Tewson* [1972] ICR 501, the Tribunal decided that they have a duty to show how the compensation is calculated and should include full pay for the notice period, without an obligation to mitigate loss during that period or give account of earnings from other employment.

The statutory notice period is one week for an employee who has been continuously employed for one month or more, but less than two years. It is two week's when the employee has been employed continuously for two years, and an additional week is added for every year after the initial two, that the employee is still in employment. Twelve week's notice must be given when an employee has been in continuous employment for twelve years or more.

Common heads of loss

Common heads of loss that are used in the assessment of the compensatory award are:

- Immediate loss of wages;

- Future loss of earnings. This calculation is based on the employee's net loss of earnings for a reasonable period of time.

It takes into account any increase in salary or other benefits the employee would have received. If the employee does find a higher paying job it may be that when the Tribunal is deciding whether to make an award it concludes that the employee hasn't suffered a loss;

- Loss of use of a company car if used for private use as well as business use;

- Loss of benefits in kind, such as medical insurance and accommodation;

- Loss of reputation;

An example is *Malik v BCCI* [1997] ICR 606, where an employee was entitled to 'stigma damages' as the employer's poor reputation affected the employee's ability to find another job. Another situation is an employee being tainted on the job market due to bringing a claim in the Employment Tribunal Future losses can be recovered for this [*Chagger v Abbey National plc* [2009] EWCA Civ 1202];

- Pension rights (instruct an expert!);

- Loss of statutory rights.

The Tribunal can award compensation for the loss of protection from unfair dismissal for the first two years of new employment. Tribunals usually award between £250 and £350. An employee can also be compensated for the loss of the right to the statutory minimum notice period outlined above. One sum will be awarded to reflect the loss of both of these rights, usually in the region of £300-£350.

Other factors

The tribunal will take into account a number of other factors:

- Whether the unfairness made any difference.

In *Polkey*, the House of Lords made it a requirement that the Tribunal looks at this, and reduce the award by a percentage if it concludes that the employee would have been dismissed even if a fair procedure had been followed. The Tribunal must also consider when the employee would have been dismissed had a fair procedure been followed, and compensate for the additional period of time the employee would have remained in employment.

A *Polkey* point must be properly raised and supported by evidence. It is for the employer to raise the point, but often in practice the Tribunal considers it necessary to consider this in any event and will decide the issue on the balance of probabilities;

- Whether an employee has mitigated their loss;

- The employee must take reasonable steps to find new employment.

It is for the employer to prove the employee has acted unreasonably in their attempts to mitigate, not for the employee to prove they have acted reasonably. The standard of what is expected cannot be set too high, but the employee may have to accept a lower paying job. If no reasonable efforts have been made, the employee's compensation will be reduced to reflect what the Tribunal believes would have been the situation had the employee mitigated.

The Tribunal takes into account when the employee would have found alternative employment if reasonable steps had been taken, and what the pay would have been for the new job.

- Compensation should include full pay for the notice period without the employee having to mitigate any losses during that period, and there is no requirement for the employee to give account of earnings during the notice period either [Norton Tool].

This, of course, does not apply to cases of constructive (unfair) dismissal.

- An employee who is unfairly dismissed must consider an offer of reinstatement and may be awarded a basic award only, if they unreasonably refuse an offer.

In *Wildling v British Telecommunications plc* [2002] EWCA Civ 349, the Court of Appeal held that an employee considering an offer of reinstatement must act as a reasonable person, unaffected by the possibility of compensation. The burden of proof is on the employer to prove the employee's refusal was unreasonable, and the test of reasonableness is objective. A Tribunal must take into account the circumstances of the offer and refusal, the employer's attitude, the treatment the employee received and the surrounding circumstances;

- Payments made by an employer;

- Payment of state benefits;

- The Tribunal may make an allowance for delayed payment;

- Contributory fault.

If the Tribunal concludes that the dismissal was caused or contributed to by the employee's conduct, it will reduce the award by a percentage that is just and equitable [ERA 1996, S123(6)].

The conduct must be culpable or blameworthy amounting to foolish, perverse or unreasonable behavior [*Nelson v BBC (No 2)* [1980] ICR 110]. The same percentage of reduction is usually applied to the basic and compensatory award. A reduction can be made in constructive dismissal cases but it is unusual;

- The employee is found guilty of misconduct only discovered after dismissal.

When this situation occurs, the Tribunal has the discretion to reduce the award on a just and equitable basis to reflect the misconduct discovered [S123(1), ERA 1996] This is because, logically, it cannot be used

as a factor to determine a reduction for contributory fault, with the misconduct being discovered after dismissal. It may be that the Tribunal decides to make no award depending on what the misconduct is;

- Failure to provide written particulars.

Under s38 of the Employment Act 2002, the Tribunal must make an award of between two and four weeks' pay if it finds in favour of the employee but doesn't make an award, and when the proceedings started the employer was in breach of its duty to provide written employment particulars or particulars of change if applicable to the employee.

The maximum amount that can be awarded is £1,956, reflecting an award of four weeks' pay. If the Tribunal has made an award to the employee and these circumstances apply, then the Tribunal must increase the award by two to four weeks' pay [EmA 2002, s38(3)].

The duty on the Tribunal in this situation doesn't apply where exceptional circumstances make it unjust or inequitable [EmA 2002, s38(5)];

- Failure to follow 2009 ACAS Code of Practice 1 on Disciplinary and Grievance Procedures.

S1 of the Employment Act 2008 gives the Tribunal the power to increase an award by 25% if it concludes an employer has acted unreasonably in failing to comply with the ACAS Code of Practice. The Tribunal can reduce an award by 25% if it concludes the employee has failed to comply. It must be just and equitable in the circumstances to do so.

Additional Award

An employee is sometimes entitled to an additional award. The Tribunal can award this where there has been an order for an employer to reinstate or re-engage an employee and the employer does not comply with the order [ERA 1996, s117].

The amount of the award is between twenty-six and fifty-two week's pay. The maximum amount used for a week's pay is £489. The Tribunal must consider the employers conduct and the extent to which the award covers the loss, as opposed to offering the maximum in every case.

Conclusions

This Back-to-Basics briefing note covers the primary areas of claim for the purposes of quantum when dealing with unfair dismissal cases.

As the reader will appreciate there is a mass of case law for each sub-heading or bullet point which is invaluable in being able to reliably advise our claimant and respondent clients.

It is not possible to include all of the relevant case law within the space permitted in this bulletin, therefore, the cases that have been selected are generally seen as key or leading cases for the primary areas addressed and should be seen as the 'starting point', not the 'finishing line'.

Richard Shepherd
Lucy Taylor (Pupil)

Employment Tribunal Fees

An update

This review of the current status of employment tribunal fees is accurate as of 30 October 2017. Things are moving quickly and therefore by the time of going to press some matters may have changed.

Old fees

As we all know by now, the Supreme Court decision of Unison struck down the government's fees regime as unlawful. Therefore, all those who paid fees in connection with their claim will receive their fees back. This is a little simpler for claimants but how respondents, who were ultimately unsuccessful and were ordered to pay the claimant's fees, will claim them back is currently unclear. In relation to claimants, the government announced in October, that the first 1,000 guinea-pig claimants were being contacted to trial run the process; we'll see how they get on.

New fees?

Despite the pointed opinion of the Supreme Court, it would appear that the government is still contemplating a form of fees in the ET. In a recent parliamentary question regarding fees, Dominic Raab dealt with it this way:

Justin Madders:

"I understand that the Government are considering how to approach the system, but will the Minister rule out any type of up-front fee to access justice in employment tribunals in the future?"

Dominic Raab:

"...If the Hon. Gentleman would like to read the judgment, he will see... in principle, a place for fees in the justice system. We need to strike the right balance between taxpayers subsidising the justice system and those who benefit from it making a contribution..."

It would appear Dominic Raab didn't read para 66 of the judgment, but there we go.

Nevertheless, this answer may indicate that the government hasn't consigned the idea of ET fees to the bin entirely. Whether the government has enough time to design and implement a new system, or whether any new system would be worth implementing in pounds and pennies is an entirely different question.

Whether it is decided to implement a new system or not, it is of note that there are rumblings that the MOJ and the ETs are lobbying the Judicial Appointments Commission for a slot in 2018's competition calendar for new, full-time ET judges. Therefore, whatever may happen with a new fee system, those in the know are clearly planning for an increased volume of work.

What's the effect?

There are 11,000 cases (or thereabouts) that were struck out (post issue) for failure to pay the appropriate fee. It would appear that such claims will be reinstated if the claimant wishes their claim to be reinstated.

The picture is more 'impressionist' in the circumstances of a claim having not been issued in the first place because the claimant could not afford, or was not prepared to risk, the fee. One would expect the usual arguments of 'reasonable practicability' and 'just and equitable' to be re-cast. No doubt we'll receive some

EAT guidance soon but there are one or two claims at first instance that have been permitted to be pursued 'out of time' based on the fees argument.

All that being said, looking to the future, reports from employment tribunals around the country are positive Bristol. ET has seen a 300% increase in claims issued, whilst Newcastle ET has seen nearer a 400% increase. Therefore, from the South West to the North East there is a pleasing consistency in those increases. There is no reason to think that this pattern is not replicated elsewhere. There is more work, both claimants and respondents will need legal advice and representation.

Back to basics

As a result of the increasing numbers of employment claims being issued many practitioners who had, in recent years, decided to focus on alternative practice areas are happily now returning to the employment-law fold. Similarly, firms that had chosen not to offer employment seats to trainees, or not to develop junior employment solicitors are now looking to expand into the field once again

For those who may be a little 'ring rusty', or those new to the field, the Employment and Professional Disciplinary Team at Albion Chambers is here to help. If you have a query, or simply want to bounce an idea or an approach off one of our experienced team, just pick up the phone and our dedicated Clerk, Steve Arnold (stephen.arnold@albionchambers.co.uk) will put you in touch with the right person. In addition, we have decided to launch a "back to basics" segment in our e-bulletin series. Each publication will devote one column to the foundations of practical employment law, setting the foundation stones for a successful future practice; in this issue "Calculating Compensation in Unfair Dismissal Claims". We hope it helps.

Richard Shepherd

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