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Albion Chambers EMPLOYMENT NEWSLETTER

Costs and supersonic bacon!

'Can we get costs if we win?' A question that most of us are asked by clients, whatever the strength of the claim they are bringing or facing. The response has usually tended to be extremely negative. Flying pigs have occasionally featured within it, our advice often scorching their underbellies into hair-speckled scratchings. However, the issue of costs in the Employment Tribunals has gained increasing prominence of late, with a few cases decided in the last couple of years opening the door just a little more for costs applications to be founded and successful. As a result, this seems an opportune moment to review the current position, to pick the meat from the gristle in our hamburger of costs authorities.

This article does not deal with implementation or effects of the proposals by the current Government regarding fees in the Tribunals or the expanded notion of 'paying costs in' to open the door to justice although, for balance, the previous Labour government did try to introduce a similar structure under the 2001 Regulations.

History

As we know, upon implementation of the SI in 2001, the Government increased the maximum award for costs in the Employment Tribunals from £500 to £10,000, although, under rule 41, a tribunal can send the matter for detailed assessment in the County Court, thus lifting the £10,000 cap. Nevertheless, this article confines itself to applications under 2004 Procedure Regulations, specifically rule 40(3) and its two distinct tests; unreasonable, vexatious, abusive or disruptive conduct, or misconceived claims.

Rule 40 states that costs may be ordered:

"where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived."

Unreasonable conduct

In *Dunedin Canmore Housing Association v Donaldson (2009)* the EAT held that, where a claimant had based her claim upon a lie, it was perverse not to award costs against her. The Tribunal at first instance had declined to award costs on the basis that it was necessary for her to bring her claim in the ET because her former employer had alleged that she had breached a compromise agreement; that was her cause of action. The EAT strongly disagreed, stating that there was no basis for the view that she had no other option than to bring a case founded on a porky. The other option was not to bring the case at all!

An alternative stance was adopted in *Barnsley MBC v Yerrakalva (2012)*. At first instance the Tribunal followed the now well-trodden path of making a cost order against a party who was found to have been lying, the claimant told two lies in the course of a PHR. The matter was appealed to the EAT heard by the President. Thereafter, it was re-appealed to the Court of Appeal. The court finally determined the matter and in-part, overturned the decision at first instance to award 100% costs. The CoA held that the lies must be important to the matter in issue, rather than incidental or trivial, and such lies must be tasted in the context of the entire sausage mix.

A contrasting decision is that of *Daleside Nursing Home Ltd v Mathew* (2009), a race discrimination case. The claim was based upon a central, 'deliberate and cynical' lie. Despite a finding that the claimant had lied, the Tribunal did not make a costs order. To put this in context, they found as follows;

"If the claimant had been called "a black bitch" she would not have waited for nearly three weeks to raise the issue and done so only because it looked as though she herself might be taken through a disciplinary process. She raised the issue on 6 June 2007 when she was resigning. Such a phrase is so offensive it is incomprehensible that she would not have made her objection much sooner. Mrs Mathew had no explanation for the delay."

The EAT emphatically overturned that decision; a central lie told, on which a case was based, must have amounted to unreasonable conduct in its view. It was perverse to conclude otherwise.

Misconceived claims

As will be well known, where costs are being considered under the second limb of rule 40(3), the chances of such an application being successful are far less than in circumstances where there has been unreasonable conduct. However, Igboji v Tesco Stores Ltd and Others (2010) bucks the trend, though in very unusual, and somewhat Cumberland-esque twisting circumstances, which newsletter space does not allow to be masticated fully. It is a Judgment worth savouring in full. However, to paraphrase, the claimant's at-one-time solicitors were one of the many Respondents in his claim. The claim against them was based, in part, on the assertion that he was an employee of his solicitors due to his doing work on their behalf in his giving instructions to them. Unsurprisingly the ET found the claim misconceived and awarded costs. On appeal to the EAT, the Tribunal of first instance was entirely vindicated in its conclusions.

Often, the key to such applications will be whether the party who brings a misconceived claim has knowledge of the weaknesses of it, as in the EAT decision in *Imperial Day Nursery v Marshall (2010)* in which even the opposing party's representative did not realise (and therefore

did not highlight) the impossibility of success - a bit of a legal sty all round. The lesson we can learn is that, where we draft cost warnings letters (leaving to one side any issues about the tone of such letters being heavy handed) it is important to explain why the costs warning is being given.

As a result, though not the central subject matter of this article, where a party is of the firm opinion that the case against them is weak or misconceived, a deposit order application, under rule 18/20 may be the most appropriate course of action. Indeed, many applications for costs under this limb are often met with an Employment Judge immediately asking if an application for a strike out and/or deposit order was made? If not, why is the claim now considered to have been misconceived if that view was not taken earlier in the proceedings?

This apparent reticence to award costs where claims may be misconceived, and I emphasise the word 'may', is also shown in the recent case of *HCA International Ltd v JL May-Bheemul (2011)*. In this case, the claimant had a genuine belief in the truth of her claim, had not acted unreasonably, despite her case eventually being led to the slaughterhouse. However, this authority requires a cautionary post-script; some commentators appear to have put a gloss upon this case, an undeserving emphasis, seeking to argue that it establishes a new or amended stance by the EAT. This is incorrect; HCA does no more than to re-state the existing position, but the case is highlighted because it appears as an Old Spot, in a litter of Chester Whites, not unusual in itself, but unexpected in relation to its brothers and sisters.

However, in contrast to HCA International, the 'genuine belief' defence, if that is what it can be called, can be negated by a well drafted costs warning letter. In the February 2012 authority of *Growcott v Glaze Auto Parts Ltd (2012)*, a classic *Burchell*/misconduct case, the original Tribunal found against the Claimant in her claim for unfair dismissal. The Respondent applied for costs under both the 'misconceived' limb, and in the alternative, under 'unreasonable conduct'. The Tribunal found that the claim could not be adjudged to have been misconceived, but, after a very well drafted, straightforward and informative costs warning letter was sent to the Claimant, by the Respondent, the Tribunal was prepared to find that the Claimant's conduct thereafter in pursuing the case was 'unreasonable'. Costs were therefore awarded.

The Claimant appealed to the EAT. Without rehearsing the entire judgment, the EAT described the costs letter as *"crucial to the Employment Tribunal's decision [in finding unreasonable conduct and awarding costs]"*, and declined to interfere with the discretion exercised by it. Therefore one can see the importance of a costs warning letter in a shaky case, it can transform an otherwise properly (though not necessarily strongly) conceived case, into an unreasonable conduct case, because the Claimant had then been informed as to the weaknesses and difficulties with it. *Growcott* loops back very neatly, to the 'genuine belief' matters set out above.

Temper, temper

On the flip side, in the 2006 EAT authority of *Simms v McKee* the big bad Respondent wolf threatened to blow the Claimant's house down. The employer had acted in a high-handed manner, threatening a costs application against the claimant in correspondence during litigation. The EAT disapproved of such tactics, holding that an employer can be at risk of a costs order against it for such boorish behaviour. A salutary authority for the exercising of restraint in such matters!

It is therefore worth revisiting the aforementioned case of *Barnsley MBC v Yerrakalva (2012)* but in a slightly different context, when seeking to claim that proceedings are misconceived and/or a party has acted unreasonably. The Court of Appeal looked closely at the conduct of the Respondent, and despite a finding that the claimant had acted unreasonably and so making a costs order, the Court also decided to reduce those costs to reflect the conduct of the Respondent.

Means

Where an ET is considering the making of a costs order, either on its own motion, or at the invitation of a party, it 'may' have regard to the means of the 'loser' to pay the order under rule 41(2). Case law, such as *Shields Automotive Ltd v Ronald Greig (2011)*, suggests that the ET should take a broad view of the 'ability to pay', to include such matters as the equity in a property. However, the EAT in *Shields* recognised that physical assets should be viewed as being harder to realise that cash assets, and this may be reflected in any determination made by a tribunal.

The qualification of the word 'may' in rule 41(2) is also emphasised in two authorities, the first being the EAT authority of *Jilly v Birmingham and Solihull Mental Health NHS Trust (2007)* where the 'soft requirement' of assessing ability to pay was considered in circumstances where the claimant had given poor evidence as to their means. The second authority of note is *Mirikwe v Wilson and Co Solicitors (2011)*, where the claimant had chosen not to return to the Tribunal to face a costs application after losing the substantive hearing. In both authorities, the EAT wrapped up the claimants' appeal submissions, taking a robust line in defending the lower Tribunals' discretion in this regard.

Court of Appeal

As we all know, in the Court of Appeal, the usual form is that costs follow the event. Therefore, whoever appeals from the EAT must have a very good reason to do so, or at least, a confident view as to their prospects of success. *St Albans' Girls School v Neary (2009)* is a case in which the claimant was unsuccessful at first instance, successful in the EAT but finally lost in the Court of Appeal. Smith LJ noted that the first two stages of the litigation were 'cost free' and that the claimant's employer had (entirely legitimately) 'bumped' the litigation into a forum that may attract costs. For this reason, and on the basis that the case had at least some merit (since the EAT had found in the claimant's favour after all), costs were not appropriate in the circumstances. Nevertheless, on close reading of the judgment, it is clear that the ruling is far from definitive; it simply states that in some circumstances the usual rule, by which costs follow the event, may not be appropriate.

Conclusions

What can be discerned from our trot through the costs case law. Broadly speaking (i) unreasonable conduct claims are more likely to be successful than misconceived claims; (ii) liars beware; (iii) wealthy liars should especially beware and (iv) *St Albans'* will not save you if you have lost at both first instance and the EAT.

Despite claiming in my introductory paragraphs that this article was not going to deal with the new costs proposals, I do wonder whether the nudge towards the increased making of costs orders will only accelerate towards the date of implementation? If, or when, the new proposals are implemented, Tribunals will have far more day to day contact with costs liability and are likely, I suspect, to accept arguments for costs in other areas more readily. Will the net effect be of a form of 'costs creep', the new rules, impacting upon determinations of 'traditional costs' applications? We'll wait and see.

Richard Shepherd

Bias in professional disciplinary proceedings

Those who practice in the field of Employment law are fortunate to appear in front of professionally trained judges who are both impartial and independent. The nature of their jurisdiction means that they rarely, if ever have any prior involvement with the parties in a case before them. If a link is demonstrated it will be identified by the parties and in order to avoid any question of bias arising, the judge will inevitably recuse himself. The same principle will apply to any other member of the tribunal who identifies a prior knowledge of the parties before them.

The issue of bias can however prove more contentious in other areas and, in particular, the area of professional disciplinary tribunals. These tribunals are established by a professional body to regulate its own membership. It is the regulating body of that profession that establishes the procedure and rules that are to be applied. Those rules ordinarily govern the constitution of the relevant tribunal.

The problems that can be caused by professional self-regulation were illustrated by the case of *P v The General Council of the Bar* (24 January 2005), a decision of the visitors to the Inns of Court, on appeal from the disciplinary tribunal of the Council of the Inns of Court, reported as *Re P (A Barrister)* [2005] 1 WLR 3019. The issue was whether Ms Nathan could participate as a member of the tribunal when she was a member, albeit only as a lay representative, of the Professional Conduct and Complaints Committee (PCCC) of the Bar Council, which was the body responsible under the Bar Council Code of Conduct for deciding whether to prosecute a member of the Bar against whom a complaint had been made. The submission against her participation is set out in para 4 of the judgment, being that –

"…Ms Nathan would be a judge in her own cause. This would also be a situation of apparent bias for, although it was accepted that she had taken no part in the particular decision of the PCCC to prosecute the Appellant and that there was no actual bias on her part, there was nevertheless a real apprehension or danger or possibility or suspicion of bias by reason of her membership of the PCCC."

This judgment represents a clear application of the long standing doctrine that no one must be a judge in his own cause (nemo debet esse judex in propria causa) as well as the principles that govern the issue of bias established in *Porter v Magill* [2001] UHKL 67;

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

The importance of these principles was highlighted in the well publicised authority of *R v Bow Street Metropolitan Stipendiary Magistrate (ex parte Pinochet)* [2001](Pinochet No 2). This was an appeal in relation to the extradition proceedings relating to General Pinochet, the Chilean dictator. It was held that Lord Hoffmann had been automatically disqualified to sit on the House of Lords Judicial Committee hearing Pinochet No 1 because he was an unpaid director of a subsidiary of Amnesty International when the latter had intervened as a party in the proceedings. Although Lord Hoffmann had no personal interest in the case, both Amnesty International and its subsidiary were parts of a movement working towards the same goals with an interest in the proceedings' outcome.

If a Judge of the Supreme Court is governed by the principles of bias then disciplinary tribunals clearly are as well. In order to reduce the possibility of bias in the constitution of tribunals, many professional bodies have imposed rules that restrict eligibility to sit on disciplinary tribunals.

In the case of barristers, the PCCC has no legal personality and prosecutions are conducted in the name of the Bar Council itself.

Solicitor prosecutions are brought by the Law Society acting through its Office for the Supervision of Solicitors: solicitor members of the disciplinary tribunal cannot be members of the council of the Law Society. As for accountants, no officers or serving member of the governing body of any of the accountancy professional bodies can be a member of the panel of tribunal members from which tribunal members are selected to hear prosecutions brought by the Accountancy Investigation and Discipline Board. In the financial services industry, membership of the disciplinary tribunal, the Financial Services and Markets Tribunal is, in practice, closed to FSA personnel. In most of those cases, a governing member of the profession's ultimate board or council could not sit on any tribunal hearing.

The difficulties that can be caused when issues of bias are not dealt with sufficiently in a disciplinary process have recently been highlighted in the case of *R (on the application of Kaur) v (1) The Institute of Legal Executives Appeal Tribunal (2) the Institute of Legal Executives [2011] EWCA Civ 1168.*

This case involved disciplinary proceedings against Darsho Kaur who was a student member of the Institute of Legal Executives (ILEX). She and a number of other students were caught cheating in exams. Following investigations and a decision by the ILEX investigating committee, Mrs Kaur and five other student members of ILEX were charged with various disciplinary offences, such as conduct unbefitting to ILEX or likely to bring ILEX into disrepute in that, "either alone or with others – 1. She cheated in two ILEX examinations; 2. She produced two examination scripts that were not wholly her own work; or 3. Were not wholly from her own knowledge or memory". It was inferred and alleged that she must have had access to the course manual during two examinations.

She was convicted of most of the allegations (although the case was not proved in relation to one exam) and then appealed to ILEX's Appeal Tribunal ("IAT") which heard her appeal (and that of one other) on 24 June 2009. The appeals were rejected. While continuing to protest her innocence, and raising numerous other issues, Mrs Kaur also raised, as a preliminary matter, an objection to the presence on the IAT of ILEX's vice-president. It was this issue that ultimately made its way to the Administrative Court.

The memorandum of association of ILEX was examined and one of its aims was found to be as follows:

"To promote and secure professional standards of conduct amongst Fellows and those who are registered with ILEX, and regulate Fellows and Registered Persons in the public interest and to ensure compliance with those standards."

The disciplinary hearings were governed by ILEX's Investigation, Disciplinary and Appeals Rules ("IDAR"). These specified that lay members were appointed to a panel

by the Master of the Rolls, and that the appeal tribunal should consist of either the president or the vice-president of the council and two lay members who had not sat on the original disciplinary tribunal. The IAT decision was to be made by a majority. It had power to affirm or vary the findings and order of the tribunal of first instance and to make such ancillary orders, including orders for costs, as seemed just and appropriate to it.

The Court considered the significance of the condition that an appeal should be chaired by either the president or vice president of the council. It was noted that the fact that the charge against Mrs Kaur was of *"conduct unbefitting to ILEX or likely to bring ILEX into disrepute"* underlined the interest of ILEX and its governance in upholding its professional standards. This created a perception that the president or vice-president of ILEX had a vested interest in maintaining the integrity of the professional body and accordingly a risk that an objective observer would conclude that cheats would not be tolerated in ILEX.

The Administrative Court found that this argument was compelling and overturned the findings of the appeal tribunal. It is perhaps an indication of the scepticism of the Court towards the approach of the appellate proceedings that they commented on the level of costs imposed in this way:

"As for the implications of costs and fines up to £3,000, it may be that this is a negligible matter in an organisation of 22,000 members: nevertheless it again demonstrates the importance of proper separation of the disciplinary panels from those concerned with the overall governance of the organisation. It may be noted that the costs award of £8,500 (£1,700 x5) was exactly the figure requested by the prosecution."

Conclusions

The moral of this article is that it is always best to scrutinise the constitution of any disciplinary tribunal before a hearing begins. Efforts are made to ensure that proceedings are conducted fairly and impartially but as Kaur demonstrates, they are not always successful.

Stephen Mooney

The Protection from Harassment Act 1997

Are you protected?

Doing work in more than one jurisdiction can have the benefit of allowing one to see at first hand how other courts deal with matters that are of direct relevance to issues in an employment context. For this writer, this has been the case particularly with regards the Protection from Harassment Act 1997 (PHA). In the last 12 months I have acted on both sides in PHA prosecutions, represented the trustees of a leisure complex in a County Court application for an injunction against a former commercial tenant who was subsequently convicted of arson and been involved in Employment Tribunal proceedings which involved a preliminary issue as to whether the proceedings for sexual harassment should be stayed to allow a PHA action to proceed in the County Court first.

Employment lawyers have been alive to the fact that an employer could be vicariously liable under the PHA for the actions of its employees since at least 2006 when the House of Lords handed down its judgment in the case of *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2006] IRLR 695, [2006] ICR 1199. The advantages that this presents to a claimant are not simply the opportunity to bring a claim for harassment where the perpetrator's conduct cannot be said to relate to a protected characteristic under the Equality Act 2010. Other notable benefits include: (1) the opportunity to recover damages for personal injury, including compensation for anxiety or stress, without the need to prove that the employer could have foreseen the damage that occurred; (2) the absence of any potential defence that the employer took all reasonable steps to prevent the conduct complained of, as is afforded in claims of discrimination; and (3) a six-year limitation period, which is not only significantly longer than the time limits for presenting claims in the Employment Tribunal, but is also three years longer than a claimant would ordinarily have for bringing a claim for damages for personal injury.

Sunderland City Council v Conn

The scope of an employer's potential liability under the Act appeared to have been significantly limited by the Court of Appeal in *Sunderland City Council v Conn* [2007] EWCA Civ 1492, [2008] IRLR 324. The Court held that, as the Act attracts both civil and criminal liability, the conduct complained of in respect of at least two individual incidents must justify the gravity of a criminal offence. In *Majrowski*, Lord Nicholls had already said that *"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"*. It had appeared, however, that there was wide scope to catch various types of behaviour.

Mr Majrowski's claim had been struck out at first instance but that decision was reversed by the Court of Appeal and the House of Lords. Their Lordships were prepared to accept that, although it was generally understood that the Act was intended to deal with stalkers, it was not so limited and could also cover harassment in a range of situations for which an employer could be liable. Mr Majrowski had alleged that he had been bullied, intimidated and harassed by his departmental manager because he was gay. He complained that she had isolated him, been excessively critical, been strict about his time-keeping, rude and abusive in front of other members of staff, had imposed unrealistic performance targets and had threatened him if he failed to meet those targets. Following *Majrowski*, if an employee could demonstrate that they had been bullied by a colleague their employer might be vicariously liable under the Act.

In *Conn*, the claimant was employed as a paver and alleged that the Council was vicariously liable for harassment inflicted on him by his foreman. Of five incidents of harassment that were alleged by Mr Conn, at first instance the Recorder found that only two had been proved. In the first proven incident, the foreman had asked Mr Conn and two others to give him the names of two workers who had left the site early. When they had refused, the foreman had lost his temper and had threatened to smash the windows of the cabin with his fists and to report them to the personnel department.

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The two other men stated that they had not been bothered by the foreman's behaviour. In the second incident, the foreman had asked Mr Conn why he was giving him 'the silent treatment', to which Mr Conn had replied that he would only talk to him about work. The foreman lost his temper again and threatened to give him a good hiding even if it would lead to him being dismissed. The Recorder found that these two incidents constituted a course of conduct amounting to harassment, for which the Council was vicariously liable.

The Court of Appeal held that the Recorder had erred in finding a course of conduct. It held that there must be at least two incidents of harassment and that, to cross the boundary from the regrettable to the unacceptable, the gravity of the misconduct in respect of those two occasions must be of an order which would sustain criminal liability under section 2 of the Act. With regards the first incident, whilst it was no doubt unpleasant, no threat of violence had been made, only a threat to damage property. The other two colleagues had not been troubled by the remarks. The conduct was unpleasant but it did not justify criminal sanction. Following Conn therefore, it appeared that it was not enough to prove that there was conduct which simply alarmed or distressed an employee.

A wider scope for liability?

The Court of Appeal has, however, subsequently taken a more lenient approach. In *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46, [2009] 8 LS Gaz R 18, it refused to strike out a claim where the claimant alleged that she had been pursued aggressively by a utility company for the payment of unjustified bills. Two years on from *Conn* and the Court of Appeal appears to have loosened the need for every and/or any individual instance of misbehaviour to itself amount to harassment. Rather, the question is whether, viewed as a whole, there has been a course of conduct that amounts to harassment (see, most recently, *Iqbal v Dean Manson Solicitors* [2011] IRLR 428, CA). If it is not necessary for a claimant to prove that each and every act complained of (i.e. at least two incidents) amounts to harassment, this would significantly widen the scope of an employer's potential liability.

Iqbal is of note for two further reasons. First, it confirms that civil PHA proceedings can be brought against a partnership. Secondly, it reaffirms that there is wide scope to the type of conduct that maybe caught by the Act. The facts of the case were particularly interesting and, one would hope, rather peculiar. Mr Iqbal, a solicitor advocate, had previously been employed by the Defendant as a part-time assistant solicitor, before leaving and setting up his own practice, initially with a partner, but then as a sole practitioner. Whilst employed by the Defendant, he had worked on a file relating to two clients of the Defendant, Mr and Mrs Tahir. The Defendant alleged that they had a guarantee for fees owed to them by the Tahirs by a Mr Butt. They brought proceedings against Mr Butt under the alleged guarantee, and also against the Tahirs. Mr Iqbal was instructed by Mr Butt to represent him. The Defendant then wrote three letters to Mr Iqbal, headed by reference to the Butt litigation.

In the first letter, the Defendant alleged that Mr Iqbal lacked integrity as a solicitor and questioned whether he was able to act independently and impartially in his client's best interests. They asked whether he had any issues in relation to his employment with them that were still outstanding. That letter was said to be an open letter, which could be presented to the court if necessary. In the second letter, the Defendant referred to Mr Iqbal having been dismissed for gross subordination and reckless conduct and accused him of acting for Mr Butt as part of a personal vendetta against the Defendant. A copy of that letter was sent to the County Court. The third letter alleged that Mr Iqbal's former partner had also worked with the Defendant and had personal knowledge of the Defendant and its partners and, whilst he had worked with Mr Iqbal, he had had no permission to remain and work in the UK. Mr Iqbal brought PHA proceedings in the County Court alleging that the three letters constituted a course of conduct amounting to harassment.

In its defence, the Defendant alleged that Mr Iqbal had married a British citizen in order to change his immigration status but *"upon his immigration status clearing he left his wife and without a proper divorce has announced and entered into another marriage overseas and has brought in his second wife pretending to be a student from Pakistan thereby circumventing the law of the land".*

The Court of Appeal held that the Circuit Judge had erred in striking out the claim, holding that each of the letters, particularly when viewed in the light of the other two, arguably amounted to a deliberate attack on the professional and personal integrity of the claimant in an attempt to pressurise him either into declining to act for Mr Butt or into advising him to agree to the Defendant's demands. Arguably, the conduct was of a gravity which could be characterised as criminal. Although not strictly necessary for it to do so, the Court of Appeal also held that the Circuit Judge had erred by not asking himself whether the three letters as a whole could amount to a qualifying course of conduct, particularly in the light of his finding that the third letter was arguably capable of being described as harassing. It also held that a claimant can rely upon the contents of a defendant's defence, not only to evidence a pre-existing course of conduct, but also as a constituent part of that course, thus completing his cause of action.

Conclusion

So the Court of Appeal's approach in *Conn* has loosened. It accepted in *Iqbal* that the contents of the correspondence *"may seem to lie far from the kernel of the mischief which no doubt led to the Act's enactment, which was the stalking of women"*, that case shows that a statement that, at first sight, might appear inoffensive, may in retrospect be deemed to have formed part of a course of conduct amounting to harassment.

Employers would certainly be wise to ensure that their policies and the advice that they give to their employees about inappropriate conduct covers this danger. Email correspondence is an area that would seem to be most prone to such pitfalls. Care needs to be taken when sending any communication to a former employee, whether it be traditional correspondence or in the form of court or tribunal pleadings.

It is not, however, only employers who need to be alive to the danger of a PHA claim being brought against them. An employee who bullies a colleague could be sued jointly with his employer. Even those involved in peaceful picketing could potentially be the subject of a legitimate claim or prosecution if someone is alarmed or distressed by their actions or demeanour on at least two occasions. Although an employer cannot be a harassed person, it could seek injunctive relief on behalf of its employees or other persons. Further, the wording of section 7 (3A) means that all those involved in a picket line could face a civil claim, or even prosecution, on the basis, not of their own actions, but those of their ringleaders.

Given the scope of the Act, the potential for vicarious liability and the loosening of the approach in Conn, employers and employees alike need to be aware that they can be more readily exposed to claims of harassment, irrespective of the victim's lack of protected characteristics under the Equality Act.

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Freedom of choice for the insured?

Last year saw two High Court rulings which confirmed that a legal expenses insurer could no longer require their insured client to use its preferred solicitor (or barrister), nor could it impose a cap on the amount of fees which a separately instructed solicitor could bill.

The decisions concerned "Before the Event" ("BTE") legal insurance. BTE cover is typically included in most policies to cover the legal expenses that a policy holder may incur; personal injury, consumer, property and employment disputes for example. In simple terms, when an insured makes a claim under such a policy, the matter will be referred to the legal expenses insurer who will determine if there is an arguable case. If the matter cannot be settled easily, the insurer would turn to one of its 'panel' Firm or Barrister's chambers who would be chosen to conduct the work. Such work is often done on a tender basis, with the most keenly priced being selected. The trade off for the Firm is a reliable stream of work. This has meant that solicitors or Chambers not on the 'panel' have been unable to put themselves forward for the work, but most importantly, the insured has never been able to use a solicitor or barrister of their choice. In March and the end of October, this was changed dramatically.

Pine v DAS Legal Expenses Insurance Company Ltd [2011] EWHC 658 (QB) and *Brown-Quinn v Equity Syndicate Management Ltd [2011] EWHC 2611 (QB)* approached the issue from slightly different angles.

Pine concerned the instruction of a barrister on a direct-access basis by the insured, without a solicitor. When the limit of indemnity was reached, she claimed under the DAS legal expenses policy, intending to use the same barrister throughout. DAS refused, stating that she was required to instruct a barrister through their panel solicitors. DAS stated that the policy included a clause entitling them to refuse her choice *"in exceptional circumstances"*. The court found that the mere choice of the insurer to instruct from the panel did not amount to "exceptional circumstances"; she was entitled to continue to instruct the counsel of her choice.

If *Pine v DAS* was significant, *Brown-Quinn* was more so. The decision in that case is more likely to be of practical importance as it concerned an insured wanting to instruct a solicitors firm of her choice, rather than one from the insurer's panel. The firm that chosen was not able to carry out the work at the same low rates as the panel firm. The High Court clarified that not only is an insured entitled to choose their own solicitor, but the fact the firm was more expensive did not amount to *"exceptional circumstances"* entitling the insurer to refuse.

Brown-Quinn does not, however, give carte blanche to a firm to charge whatever they wish. The fees have to be *"reasonable"* and it is inevitable that 'reasonableness' will be assessed by a comparison with panel firms. However, it was made plain that the clients' entitlement to recover their legal costs was not to be capped at panel rates.

Legal expenses insurers have been dismayed by the decisions and are challenging them as you read this. Until the issue is resolved, they will continue to work hard to push their choice of solicitors and it is not hard to see why in this financial climate. There may be justifiable arguments why a client should continue to use a panel firm; the insurers will argue that firms have been chosen not for cost, but for expertise. They say that their Terms of Business and auditing processes allow them to ensure that the firms are working in an efficient way, according to high standards.

However, what must be clear is that it is now an open market where it was not before, and should a client wish to instruct a firm, or counsel, of their choice, they can now do so, safe in the knowledge that the High Court will back their decision.

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