Employment Newsletter
May 2013

This newsletter is for circulation among the Equality Liaison Officers. Please note that this does not form any legal advice or conclusive views on employment law matters. Merits of a claim will turn on its own facts and circumstances. Please seek legal advice for individual member cases. The intention of this newsletter is to keep ELOs abreast with the changes in the dynamic field of employment law.

Introduction

Welcome to the newsletter of May 2013. In this issue you will find recent decisions including *Onu* where EAT took a different approach from *Jessemey*, on post-employment victimisation, which was discussed in the April issue. Also, you will find details of the Enterprise and Regulatory Reform Act 2013, Queen's Speech and ET fees. Enjoy reading!

Post-employment victimisation covered under Equality Act (EqA)

Onu v Akwiwu and anor (link)

Claimant (C), a Nigerian, worked for the Nigerian Respondents (R) as a domestic worker. C was not paid properly and was treated abominably by R. C's passport was also held by R. In June 2010, C managed to get her passport and escaped from the house. Subsequently, C brought a number of claims to ET including failure to provide national minimum wage and race discrimination.

At a later date, R telephoned C's sister in Nigeria and threatened her to force C to drop the claims against R. Consequently, C amended the ET claim to include a victimisation claim under the Equality Act 2010. With respect to the victimisation claim the ET observed that although the threatening call was made because of the ET proceedings, there was no specific reference to race discrimination claim submitted to the ET as such and in reality C had also brought proceedings relating to national minimum wage and deduction of wages to the ET. Hence, ET did not conclude that the threats were because of C's race discrimination claim (i.e., a protected act) under the Race Relations Act 1976 (now the EqA 2010).

There were appeals and cross appeals to the EAT. One of the preliminary issues was whether C's claim for post-termination victimisation was precluded by EqA 2010. The EAT noted that the EqA does not expressly provide protection for a claim of post-employment victimisation. However, European obligations require domestic law to provide remedy for post-employment victimisation. Pursuant to Section 39 (4)(d) of EqA an employer must not victimise an employee by subjecting him to any detriment and the EAT held that this could include detriments which occurred after the termination of employment.

Comment: EAT's decision in this case was contrary to the decision in *Rowstock Ltd v Jessemey* (discussed in April 2013 newsletter) where it was decided that section 108(7) excludes post termination victimisation. Section 108 deals with prohibited conduct, in particular discrimination and harassment, with regard to relationships that have ended. The wording of s. 108(7) is that the "*conduct is not a contravention of this section in so far as it also amounts to victimisation*". EAT observed in *Onu* that there is a sensible purpose for this subsection only if the draftsman had assumed that victimisation occurring post

termination could be subject of a claim. The word *also* is significant and the purpose of subsection is to prevent double recovery where the same act amounts to harassment and victimisation. The Equality and Human Rights Commission statutory code also provides that post-termination victimisation is compensable. It is interesting that now there are conflicting decisions of the EAT on the same question of post-employment victimisation. The Court of Appeal is due to hear an appeal in the *Jessemey* in the second half of the year. Until then it is a matter for the ETs to decide which EAT decision to prefer. It can be hoped that the ETs will follow the decision in this case considering the importance of post-employment victimisation.

Strike out in the absence of evidence of employer's knowledge of disability.

Patel v Lloyds Pharmacy Ltd EAT (link)

Claimant (C) was a pharmacist who suffered from bipolar disorder. In 2008, C was interviewed by an area manager of Respondent (R), Mr Butt and was informed about C's bipolar disorder. C was then employed as a short term self-employed locum pharmacist for R. In 2011, C applied for a full time position at Lloyds. Although C had filled details of disability in an employment questionnaire, as a matter of practice, this was not made available to the interviewers.

Mr Butt then sent an email of poor comments about C's performance and aggressive nature to one of the recruiters. There was no mention of C's disability in that email. C was interviewed despite this email and scored very low in their standard scoring system. As a result C was not offered the job. The interviewer provided feedback to C but C complained that the interview was not conducted properly. C complained direct disability discrimination before the ET but the claim was struck out as it had no reasonable prospect of success. ET found that there was no evidence that the interviewers and decision makers who decided on C's application had knowledge of his disability. C appealed.

EAT dismissed the appeal agreeing with the ET that there was no reasonable prospect of success. There was nothing that prohibited the Tribunal from taking proper steps of striking out a claim that had no reasonable prospect of success. EAT further observed that it was wrong in principle to allow an apparently hopeless case to proceed to trial in the hope that "something may turn up" during cross examination.

Comment: Strike out is considered as a draconian step and is applied with caution to fact-sensitive discrimination claims. The EAT has taken a strong approach in this regard on a very sensible reasoning that even after keeping the case at its reasonable highest it is wrong in principle to allow a hopeless case to proceed purely in the hope that something may turn up in cross examination. For direct disability discrimination employer's knowledge of worker's disability is a crucial factor to build a prima facie case and in this case there was no evidence to suggest that knowledge.

Failure to provide reasonable adjustment

Redcar & Cleveland Primary Care Trust v Lonsdale EAT

Claimant (C) was employed in a band 6 post with the Respondent (R). In 2008 as a result of her visual impairment she was redeployed to a band 4 role as Workforce Co-ordinator. In 2011 R started a restructuring procedure to delete 30 posts one of which was C's band 4 post. R introduced a framework whereby

employees who were at risk of redundancy were allowed to apply for jobs in the same band or one band higher than their current post. C was therefore limited to applying for one band 5 post although there was a band 6 post which C wanted to apply. C requested that she should be allowed to apply for that post as she joined R in grade 6 prior to her disability. This was refused although the impact assessment of the Framework recognised R's duty to take account of employees with disabilities and to take favourable steps for them. C was subsequently dismissed on grounds of redundancy. C among other claims brought a disability discrimination claim of failure to provide reasonable adjustment to the ET and was successful as the ET found that R had in fact failed to make a reasonable adjustment by allowing C to apply for band 6 roles. R appealed to EAT.

EAT dismissed the appeal and held that had C not become disabled she would have remained in her original band 6 post and, had that post been at risk, she would have been eligible to compete with the successful candidate in the band 6 role C wanted to apply. R, therefore, failed to make the reasonable adjustment of allowing C to compete for the band 6 role. Moreover, R's own Framework had acknowledged the need to treat disabled employees more favourably in certain situations and it was not unreasonable to allow favourable treatment in C's situation.

Comment: Albeit this decision is an expected conclusion from the courts, what is interesting is the fact that often we would find policies that comply with EqA but in practice it may not be complied with. This case reiterates that such anomalies will be taken into account by ETs. Further, this case also reminds us the fact that in certain situations the duty to provide reasonable adjustment is continuous and therefore the employer should be mindful to offer opportunities which the employee would have been entitled to, if not disabled.

<u>Vague complaints of Discrimination could mean unfair treatments and not unlawful</u>

Durrani v London Borough of Ealing EAT

Claimant (C), a British of Pakistani origin, worked for London Borough of Ealing (R) and in 2004 was transferred to Ealing Homes. In 2011, some staff were re-transferred from Ealing Homes to R. C was not included in this re-transfer and in fact was dismissed, by way of redundancy, the day before the effective day of this re-transfer. Three months prior to this C was told that his employment was liable to be terminated as the funding of his post was coming to an end. On 18 March 2011, less than two weeks before his dismissal, C submitted a grievance alleging bullying and harassment which remained unresolved at the termination of his employment. Among other claims, C claimed discrimination, harassment and victimisation at the ET.

ET dismissed discrimination and harassment claims as there was insufficient evidence to show that dismissal was connected with C's race and substantively the evidence suggested that the dismissal was due to lack of funding. Claimant appealed.

In the EAT, C argued that he had often referred during his employment that he had been discriminated against and the dismissal was because of those complaints. The EAT dismissed the appeal holding that although C had used the word "discriminated", it was not used in any sense other than that C had been treated unfairly i.e., not linked to race or other protected characteristics.

Comment: The EAT decision suggests that the word discrimination may not always mean discriminatory treatment contrary to EqA and it could send the message of unfair treatment which is not unlawful in itself. So it is always advisable to expressly specify what discriminatory treatment the Claimant is complaining about in the grievance. This case does not mean that all complaints which only refer to general discrimination are not protected under the EqA but each will turn on its own facts and circumstances.

Publication

Enterprise and Regulatory Reform Act 2013

Please find below some of the important Employment Law provisions of ERRA:

i) Sections 7 & 8 - **ACAS Mandatory Early Conciliation**, Claimants to contact ACAS before submitting tribunal claim. Coming into Force in April 2014.
ii) Section 17 – **Whistleblowing and public interest test**, Claimants to make disclosure in public interest for the disclosure to be qualified as "qualifying disclosure". Coming into effect on 25 June 2013 and does not apply to disclosures made before that date.
iii) Section 18 – **Whistleblowing and good faith**. Removal of "good faith" requirement for a protected disclosure and reduced compensation if disclosures are not made in good faith. Coming into force on 25 June 2013 and does not apply to disclosures made before.
iv) Section 19 – **Whistleblowing and vicarious liability**. Employers to be vicariously liable in whistleblowing claims, to nullify the outcome of Court of Appeal decision in *NHS v Fecitt*, that an employer cannot be vicariously liable under whistleblowing provisions. Coming into effect from summer 2013 – date to be confirmed (TBC).
v) Section 65 – **Repeal of Third Party Harassment** from Equality Act 2010. Coming into force either in October 2013 or April 2014 (TBC).
vi) Section 66 – **Repeal of statutory discrimination questionnaires provisions** in the Equality Act 2010. Coming into force in October 2013 or April 2014 (TBC).

Queen Speech and impact on Equality Act 2010 (link)

One of the measures announced in the Queen's Speech that will impact on Equality Act 2010 is the *Deregulation Bill* which will be introduced to reduce the burden of excessive regulation on businesses. The Government's intention is to remove the power for employment tribunals to make wider recommendations in successful discrimination cases under the Equality Act 2010 through this Bill.

ET fees

As per the latest available information the two tier fee structure is going to be implemented from the end of July 2013. Any claim to ET or appeal to EAT submitted before fees are implemented will not attract any fee payments.

The draft Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 in relation to the Fee structure has been laid before the Parliament on 24 April 2013. For more details please click link for letter from Deputy Director of Tribunals and please click link for *ET and EAT Fees Stakeholder Q&A* for useful information.

PFEW will be issuing circulars on how ET fees will be funded in due course

Jibin Philip
In-house Assistant Solicitor