EMPLOYMENT LAW AND PI

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This paper aims to provide guidance as to the issues facing litigants and their advisers when pursuing claims for PI under the ET's inherent jurisdiction to determine claims for compensation arising from the statutory tort of discrimination.

Jurisdiction

In *Sheriff v Klyne Tugs* (Lowestoft) Ltd [1999] IRLR 481, the Court of Appeal considered for the first time whether the ET had the inherent jurisdiction to consider claim for physical and mental damage as a consequence of an employer's discrimination.

Mr Sheriff, a Muslim of Somali origin, was employed as an engineer on the Respondent's vessel, the "Anglian Salvor". He claimed that during his employment he suffered racial harassment, abuse, intimidation and bullying by the ship's master. He claimed that he had been made to work longer hours than white employees, that he was made to eat pork against his religious beliefs and that he was refused permission to go ashore to obtain medical treatment. He alleged that as a result of this abuse, he had a nervous breakdown. He was diagnosed as suffering from anxiety and stress and was certified as unfit for work. When he submitted a medical certificate to the employers, he was told that there was no work for him.

Mr Sheriff brought a complaint of race discrimination in the Employment Tribunal. The case was adjourned part heard and then settled in January 1996 on payment of £4,000 without admission of liability. A settlement agreement was entered into, which provided: "The applicant accepts the terms of this agreement in full and final settlement of all claims which he has or may have against the respondent arising out of his employment or the termination thereof being claims in respect of which an industrial tribunal has jurisdiction." The Employment Tribunal then issued a formal decision dismissing the application on withdrawal by the Applicant.

In January 1998, Mr Sheriff brought a claim in the County Court for damages for personal injury caused by the abusive and detrimental treatment he received from the master. The particulars of the claim were almost identical to the allegations giving rise to the claim for racial discrimination.

This action was struck out as an abuse of process. The Recorder took the view that it was within the power of the ET at the time the discrimination case was heard "to award damages for injury to feelings, which are a euphemism for mental suffering, mental injury, personal injuries of a psychiatric nature." Since he had compromised that claim, "then he has compromised his rights in regard to the damages that flow from his psychiatric condition ... Since, therefore, that matter has been litigated before the industrial tribunal and compromised, it is, in my view, an abuse of process of the county court that the matter should be brought here."

The Court of Appeal dismissed the appeal and held that he county court judge had correctly struck out as an abuse of process the Appellant's claim for damages for personal injury caused by alleged racial harassment and abuse he received during the course of his employment from the master of the ship on which he was employed, in circumstances in which the Appellant had brought, and compromised, a claim of race discrimination in almost identical terms in an Employment Tribunal.

An Employment Tribunal has jurisdiction to award compensation by way of damages for personal injury, including both physical and psychiatric injury, caused by the statutory tort of unlawful discrimination. The statutory language is clear that a claimant is entitled to be compensated for the loss and damage actually sustained as a result of the statutory tort. The question was one of causation.

The County Court claim fell within the terms of the compromise agreement because it was a claim for compensation for injury sustained by the Appellant arising out of his employment with the Respondent, and in respect of which the Employment Tribunal had jurisdiction.

The action also fell to be struck out on the basis of the public policy principle enunciated in *Henderson v Henderson* that claims that have been or could have been litigated in one tribunal should not be allowed to be litigated in another. The same issue of the conduct of the ship's master lay at the heart of both the proceedings in the Employment Tribunal and the county court action, and the Appellant could have brought forward his whole claim for compensation in the Employment Tribunal.

Types of discrimination?

Protected characteristics

For all relevant purposes this is now governed by the Equality Act 2010 which provides for the following types of "protected characteristics":

- AGE
- DISABILITY
- GENDER REASSIGNMENT
- MARRIAGE ABD CIVIL PARTNERSHIP
- PREGNANCY AND MATERNITY
- RACE
- RELIGION/ BELIEF
- SEX
- SEXUAL ORIENTATION

Relevant Prohibited conduct:

- DIRECT DISCRIMINATION
- INDIRECT DISCRIMINATION
- FAILURE TO MAKE REASONABLE ADJUSTMENT (DISABILITY)
- HARASSMENT
- VICTIMISATION

Other relevant prohibited conduct not covered by the Equality Act:

- WHISTLEBLOWING (Employment Rights Act 1996 s 43 to 47)

The role of the ET

In deciding that there has been an act of unlawful discrimination and or whistle blowing the ET will commonly be asked to consider schedules of loss that includes element of both special and general damages. Where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort *Hurley v Mustoe* (No 2) [1983] ICR 422, EAT.

Where compensation is awarded, it is on the basis that 'as best as money can do it, the applicant must be put into the position she would have been in but for the unlawful conduct of [her employer]' *Ministry of Defence v Cannock* [1994] IRLR 509, EAT.

This may include an element of compensation in relation to the stigma associated with having to bring and contest proceedings for discrimination.

In determining the issue of damages/compensation for personal injury the ET has to consider two fundamental issues. First, whether the type and extent of the damage alleged to have been caused by the tortious conduct of the employer was reasonably foreseeable and whether the tribunal is at risk of providing double recovery where the successful litigant claims compensation for "injury to feelings" and general damages for personal injury.

Forseeability- an issue in the ET?

The leading case remains that of *Essa v Laing Ltd* [2004] EWCA Civ 02, [2004] IRLR 313. Yassin Essa was Welsh and of black Somali ancestry. In June 1999, he obtained employment as a construction worker at the Millennium Stadium site in Cardiff, working for Roy Rogers, a

subcontractor. Almost immediately after starting work, he experienced petty acts of humiliation and insult. On 28 July, a foreman for Laing Ltd, Mr Pritchard, in front of a gang of 15 men, said in reference to Mr Essa: “Make sure that black cunt doesn't wander off.”

This remark caused Mr Essa immense distress. He complained to Laing, but considered that his complaint was not taken seriously. Thereafter, he was taunted by other employees. On 5 August, he left the site. He brought a claim of race discrimination against Laing.

An Employment Tribunal upheld the claim of race discrimination against Laing, on grounds that it was responsible for the abuse by Mr Pritchard. The ET awarded compensation of £5,000 for injury to feelings and £519.76 in respect of financial loss. In so finding, the ET acknowledged that Mr Essa had undergone a dramatic personality change subsequent to the incident on 28 July and that he had been treated for depression.

As a consequence, he had stopped looking for work. However, in calculating compensation for financial loss, the ET said that the employers "are... only liable for such reasonably foreseeable loss as was directly caused by the discriminating act.” It found that Laing may have reasonably foreseen that some distress might have resulted from the abuse from Mr Pritchard and that Mr Essa might have left work, “but they could not have reasonably foreseen the extent of Mr Essa's reaction to it and his subsequent failure to look for other work.” The ET therefore confined compensation for loss of earnings to three weeks.

On appeal by Mr Essa against the award of compensation, it was contended that the Employment Tribunal applied the wrong test in holding that a victim of discrimination can recover compensation for losses only if they are reasonably foreseeable. It was argued that it is sufficient that the complainant proves a causal link between the act of discrimination and the loss. The EAT allowed the appeal and remitted the case to the Employment Tribunal. The EAT held that an applicant who has been the victim of unlawful discrimination is entitled to compensation where they can show a direct causal link between the act of discrimination and their loss. Compensation is not limited to cases of reasonably foreseeable harm. The EAT remitted the case to the ET to reconsider the question of compensation having regard to the extent to which the applicant's psychological injury was a direct cause of the racial abuse he suffered.

On appeal by the employers to the Court of Appeal, it was submitted that for a respondent to be liable for psychological injury in a discrimination case, it must be established that injury of that kind was reasonably foreseeable.

The Court of Appeal by a majority decision (Rix LJ dissenting) held that the Employment Tribunal erred in holding that the Applicant was not entitled to compensation under the Race Relations Act in respect of loss which resulted from the depression he suffered as a result of an incident of racial abuse, because the loss was not reasonably foreseeable.

A Claimant who is the victim of direct discrimination in the form of racial abuse is entitled to be compensated for the loss which arises naturally and directly from the wrong. The good sense of employment tribunals can be relied upon to ensure that compensation is awarded only where there really is a causal link between the act of discrimination and the injury alleged.

In order to be entitled to compensation for unlawful racial discrimination, it is not necessary for the claimant to show that the particular type of loss was reasonably foreseeable. Justice and equity are best served by holding that it is sufficient if the Claimant shows that the particular type of injury alleged was caused by the act of discrimination. There is no real risk that, without a further requirement of reasonable foreseeability, the floodgates of unmeritorious claims will be opened.

It is possible that different considerations will apply where the discrimination takes other forms than that in the present case. The key element of the judgment is at para 40:

> “The present facts are akin to the torts of assault and battery in that there was deliberate conduct towards and in the presence of the victim, though the abuse was verbal and not physical. The statutory tort in my view affords protection against that conduct and, applying Lord Nicholls's test, to the extent that the victim is to be compensated for the loss which

> arises naturally and directly from the wrong. It is possible that, where the discrimination takes other forms, different considerations will apply."

Treat Essa with caution?

That Essa must be approached with some caution was emphasised by the EAT in *Abbey National and Hopkins v Chagger* [2009] IRLR 86, EAT (a point not disapproved by the Court of Appeal in *Chagger v Abbey National and Hopkins* [2009] EWCA Civ 1202). As Underhill J noted: 'there is nothing in the statue to suggest that discrimination is to be treated as a specially heinous wrong to which special rules of compensation should apply'. Although this is subject to one qualification; as stated in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, a different approach is justified in cases where the damage is done maliciously and/or knowingly. *Essa v Laing*, concerning racial harassment, was expressly said to be an example of this exception to the general rule.

Given this, it is arguable that Essa should be regarded as applying only to cases where there have been deliberate acts of discrimination such as direct discrimination, harassment and victimisation and the other similar 'retaliation tort' of detriment for whistle blowing.

Where the failures are much more akin to negligence or nuisance then it is likely that the employer will have strong argument for contending that loss has to have been foreseeable. This will include claims for indirect discrimination and failure to make reasonable adjustments in DDA claims.

Once liability as been established the individual will need to focus on the issue of causation and procure the necessary medical evidence.

Overlap with awards for injury to feelings

It is important to note that injury to feelings is a wholly separate head of claim to damages for personal injury. Compensation in respect of an unlawful act of discrimination may include compensation for injured feelings whether or not this includes compensation on any other basis: see the Equality Act 2010 section 119(4).

The Claimant must show that anger distress and affront have been caused by the unlawful act of discrimination. It will often be the case that this is easy to prove (see *MOD v Cannock* [1994] ICR 918). In *Murray v Powertech* (Scotland) Ltd [1992]IRLR 257 the EAT held that it is 'almost inevitable' that an award will be made, all that is required is the victim merely states that they have suffered injury to feelings. In *Assoukou v Select Services Partners Ltd* [2006] ALL ER (D) 122, the Court of Appeal ruled that an Employment Tribunal had erred in law by not making an award for injured feelings where the claimant was merely angry and frustrated by the discrimination.

In *Vento v Chief Constable of West Yorkshire* (No 2) [2003] IRLR 102, the Court of Appeal set the standard guideline measure of damages for injury to feelings awards for:

> "Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression etc and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise".

Not uncommonly, a victim of unlawful discrimination may suffer stress and anxiety to the extent that psychiatric and/or physical injury can be attributed to the unlawful act. In that situation, the Employment Tribunal has jurisdiction to award damages. It is very easy to see how it is possible for an ET to become confused as between the claims for injury to feelings and personal injury in the form of psychiatric injury. There is no doubt not least from the quote from the case of Vento above that there is considerable scope for overlap. Indeed in Vento the Court of Appeal referred to the JSB Guidelines when assessing the totality of the award for non pecuniary loss of which only £9,000 was attributable to proven psychiatric injury:

> "£74,000 is in excess of the JSB guidelines for general damages for moderate brain damage involving epilepsy, for severe post-traumatic stress disorder having permanent effects, for

> loss of sight in one eye with reduced vision in other remaining eye, and for total deafness and loss of speech. No reasonable person would think that that excess was a sensible result."

There was a risk at that time that awards for injury to feelings were rapidly heading down the "American route".

Vento is now quoted daily in the ET as the correct basis for measuring awards for injury to feelings, the obiter guidance is as follows (as updated for inflation by the case of *Da' Bell v National Society for the Prevention of Cruelty to Children* [2010] IRLR 19). Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, can be identified:

1. The top band should normally be between £18,000 and £30,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £30,000.

2. The middle band of between £6,000 and £18,000 should be used for serious cases, which do not merit an award in the highest band.

3. Awards of between £500 and £6,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings (in *Doshoki v Draegar Ltd* [2002] IRLR 340, it was held that awards of less than £750 are unlikely to be made).

The leading case on the issue of how an ET is to deal with this potential overlap is *HM Prison Service v Salmon* [2001] IRLR 425.

Dawn Salmon was one of only three women out of 120 prison officers at Canterbury prison. She was employed there from September 1991. She was increasingly unhappy about the sexualised nature of her working environment. This culminated in an incident in October 1996, when a male colleague, Officer David, wrote offensive and sexually degrading comments about her in the dock book at Canterbury Crown Court. This led to her being off work with what was later diagnosed as a moderate to severe depressive illness. Eventually she took medical retirement in December 1997.

Mrs Salmon successfully claimed that she had been discriminated against on grounds of sex by the Prison Service and by Officer David. The Employment Tribunal found that the Prison Service had created a humiliating working environment for women officers. Male colleagues openly read pornographic magazines and engaged in unacceptable sexual banter. The ET found that Officer David's comment in the dock book amounted to sexual harassment.

The ET awarded compensation of £76,344.88 against the Prison Service. This included £45,094.88 in respect of loss of earnings, £20,000 for injury to feelings and £11,250 compensation for personal injury in respect of the psychiatric damage caused to Mrs Salmon. This latter figure was arrived at by assessing "full" compensation for her injury at £15,000, on the basis that her illness fell within the category of "moderately severe" psychiatric damage as defined in the 1998 edition of the Judicial Studies Board Guidelines for personal injury damages, for which a bracket of £9,500 to £27,500 is given. The ET then reduced the £15,000 by 25% on the basis that her depressive illness was only caused to the extent of 75% by the acts of discrimination which had been proved. The award of £20,000 for injury to feelings included £5,000 aggravated damages. A further £1,000 under this head was awarded to be paid by Officer David.

The overlap between the injury to feelings for which the applicant would be compensated and the injury covered by the award of general damages for psychiatric injury was not such as to give rise to a substantial degree of double recovery.

> "As stated above, in principle, injury to feelings and psychiatric injury are distinct. In practice, however, the two types of injury are not always easily separable, giving rise to a risk of double recovery. In a given case, it may be impossible to say with any certainty or precision when the distress and humiliation that may be inflicted on the victim of discrimination becomes a

> recognised psychiatric illness such as depression. Injury to feelings can cover a very wide range. At the lower end are comparatively minor instances of upset or distress, typically caused by one-off acts or episodes of discrimination. At the upper end, the victim is likely to be suffering from serious and prolonged feelings of humiliation, low self-esteem and depression; and in these cases it may be fairly arbitrary whether the symptoms are put before the tribunal as a psychiatric illness, supported by a formal diagnosis and/or expert evidence".

There is nothing wrong in principle in the ET treating 'stress and depression' as part of the injury to be compensated for under the heading 'injury to feelings', provided it clearly identifies the main elements in the victim's condition which the award is intended to reflect (including any psychiatric injury) and the findings in relation to them. But where separate awards are made, the Court of Appeal held that tribunals must be alert to the risk that what is essentially the same suffering may be being compensated twice under different heads. It is significant thus that if the overall and combined award is going to exceed the 'top band' Vento category that the heads of damage are clearly separated out. It is not suggested that the Vento case presents a cap on all non pecuniary loss awards.

Medical evidence

In any PI claim conducted in the Employment Tribunal there is likely to be a clear need for the production of medical evidence. It may not be necessary to adduce expert medical evidence as the EAT has affirmed on a number of occasions that in general the medical notes and GP's report will suffice. Much depends on the nature and extent of the injury and in more complex cases where there are substantial sums at stake it will always pay to involve expert psychiatric witnesses.

Expert evidence may also be needed to deal with alleged physical injuries caused by reason of the type of unlawful conduct contemplated in Essa. This could include assessing injuries alleged to have been caused by way of sexual assault in the context of a sexual harassment claim or injuries sustained by the victim of brutal act of racial harassment. Given the absence of the need for forseeability in these sort of cases the ET need only concern itself with causation. There is no reason why an employee fleeing harassment from colleagues may not receive damages from an ET for the physical and mental injuries he sustains.

JSB Guidelines/ authorities

In practice the JSB Guidelines are the first port of call for an ET assessing general damages. This includes the contention that the claimant may have suffered PTSD in the right case. The expert PI lawyer should be a major ally for employment lawyers seeking to contest large awards. For all material purposes the exercise in assessing quantum has no material distinction form that of a Court, save for the relative lack of experience of the judge who probably will not have had a background in PI before appointment.

Financial losses

There are no major differences in approach in calculating financial loss, for example, the ET should normally calculate damages for future loss of earnings by using the usual multiplicand and multiplier method adopted by the courts (*Ministry of Defence v Cannock* [1994] IRLR 509. However, the EAT has discouraged the use of multipliers based on the Ogden tables for assessing future loss of earnings in discrimination cases but not when calculating pension loss. In this instance the Ogden tables should only be used when the claimant has established a prima facie case that loss will last for the rest of his or her career: see *Kingston upon Hull City Council v Dunnachie* [2003] IRLR 843.

Statutory Defence / Vicarious Liability

In considering the correct forum for a particular case, there will need to a consideration as to whether the merits of the case will be materially affected by the risk that the employer will establish "the statutory defence". This is not an issue that will trouble the courts.

Section 109 of the Equality Act 2010 - Liability of employers and principals:

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A:

(a) from doing that thing, or
(b) from doing anything of that description.

Superficially there is considerable overlap between PI and employment law on the issue of “anything done in the course of employment.” However, in *Jones v Tower Boot Co Ltd* [1997] IRLR 168 the Court of Appeal held that the question of whether an employer was liable under [the then] section 32(1) of the Race Relations Act 1976 for acts of discrimination perpetrated by an employee "in the course of his employment" was to be answered by reference to the ordinary meaning of those words rather than to the more stringent requirements of the common law concept of vicarious liability.

In April 1992 Mr Jones, then aged 16, began work at the employer’s shoe factory as a last operative. He was of mixed ethnic parentage and was joining a workforce which had not previously employed anyone from an ethnic minority.

From the outset he was subjected by fellow employees to harassment of the gravest kind. He was called by such racially offensive names as "chimp" and "monkey". A notice had been stuck on his back reading "Chipmunks are go". Two employees whipped him on the legs with a piece of welt and threw metal bolts at his head. One of them burnt his arm with a hot screwdriver, and later the same two seized his arm again and tried to put it in a lasting machine, where the burn was caught and started to bleed again.

Unable to endure this treatment, Mr Jones left the job after four weeks. He made a complaint against the employer of racial discrimination, contending that his fellow employees had subjected him to a discriminatory detriment on racial grounds under section 4(2)(c) of the 1976 Act, and that the employers were liable by virtue of section 32(1) because the acts had been done by the employees in the course of their employment.

The employer resisted the claim on the ground, upheld by the appeal tribunal, that the relevant acts were outside the scope of the fellow employees' employment.

The issue was whether, in considering for the purpose of section 32(1) whether any conduct complained of amounted to a "thing done by a person in the course of his employment", an employment tribunal should reach its decision by reference to (a) the words "course of employment" in the sense in which they were employed in everyday speech, or (b) the principles laid down by case law to establish the vicarious liability of an employer for torts committed by an employee.
Two principles were involved. First, that a statute was to be construed according to its legislative purpose. Second, that words in a statute were to be given their normal meaning according to general use unless the context indicated otherwise.

It was held that the general thrust of the 1976 Act was educative, persuasive and, where necessary, coercive. The relief accorded to victims of discrimination went beyond the ordinary remedies of damages and an injunction, introducing provisions with a proactive function, designed as much to

eliminate the occasions for discrimination as to compensate its victims or punish its perpetrators. A purposive construction required section 32 (and the corresponding section 41 of the Sex Discrimination Act 1975) to be given a broad interpretation.

While there was a broad conceptual similarity between an employer's responsibility both in the context of tortious liability in an employment context and in discrimination in the employment field, that similarity was insufficient to justify, on a linguistic construction, the reading of the phrase "course of employment" as subject to the gloss imposed on it in the common law context of vicarious liability. To read it in such a way would cut across the whole legislative scheme and underlying policy of section 32.

The Employment Tribunals were free to interpret the ordinary and readily understandable words "in the course of employment" in the sense in which every layman would understand them, without reference to the law of vicarious liability in tort.

A detailed analysis of the development of the case law on this area is beyond the remit of this talk however the overriding principle is that it will be easier for Claimant to pursue PI claims resulting from even extreme acts of fellow employees in the Employment Tribunal than in the common law court, see: *Fecitt v NHS Manchester* [2011] EWCA Civ 1190. Here Court of Appeal has ruled that racist acts carried out by employees may be seen as done 'in the course of employment', and will thus engage the liability of the employer - even though the behaviour has nothing directly to do with the work the employee is employed to do.

Sometimes behaviour which takes place away from the working environment itself (ie not just out of working hours) may give rise to liability on the part of the employer, but it seems that whether this is so in any particular case will depend very much on the view of the facts taken by the tribunal at first instance.

In Chief Constable of the *Lincolnshire Police v Stubbs* [1999] IRLR 81, [1999] ICR 547, EAT, Ms Stubbs was subjected to sexual harassment by a police colleague in a pub, where she had gone after her duty had ended. The Employment Tribunal was held entitled to find that these acts gave rise to liability on the part of the harasser's employer, under SDA 1975 s 41(1). The words 'in the course of employment' were to be widely construed, in line with the views expressed in *Jones v Tower Boot Co Ltd*, even though they would not go so far as to cover behaviour taking place as part of a purely social gathering, or in the course of a chance meeting after hours.

In *Sidhu v Aerospace Composite Technology Ltd* [2000] IRLR 602, [2001] ICR 167, CA, the employer was held not vicariously liable for direct racial discrimination for a racialist attack on Mr Sidhu, carried out by a fellow employee out of hours at a racetrack, during a social event organised by the company. The ET was entitled to find that such behaviour did not fall with the 'course of employment' as required by RRA 1976 s 32(1). It may have been significant that the majority of those attending the event were friends and family rather than employees.

'Reasonable Steps' Defence s 109 (4) Equality Act 2010

An employer wishing to raise this defence has the burden of proof. Employers can establish the 'reasonable steps' defence by demonstrating that they attempted to prevent the particular act of discrimination or that they attempted to prevent that kind of act in general. It may also be the case that the onus is discharged if there are no practical steps which the employer can take: *Balgobin and Francis v London Borough of Tower Hamlets* [1987] IRLR 401, EAT, although in practice it may be anticipated that such circumstances will be rare (see the recent first instance case of associative discrimination in *Davies v DWP Liverpool ET* (29/05/12)). It is, however, a question of fact in every case whether the employer has taken such steps as were reasonably practicable to prevent the discrimination (cf *Enterprise Glass Co Ltd v Miles*, [1990] ICR 787, EAT). For instance, it is no defence to assert that you once sent the personnel office a memo prohibiting discrimination, if you know (or should have known) that in practice the office disregards it. Proper training in the elements of discrimination law for those in supervisory positions might be seen as necessary in order to show the appropriate standard. Much might depend on the size and resources of the employer in such circumstances. What is required is clear evidence of training. What is important is that the employer may be able to prevent further acts of harassment by taking steps after an initial event.

The Courts or the Employment Tribunal?

Factors likely to be important in determining the appropriate forum for a claim are:

(A) Factors for using the ET:

(1) Speed (3 month for bringing ET1 (originating claim) and 28 days for ET3 (defence). Speedy time table; cases in Bristol are listed for trial within 8 weeks of filing of the ET3.

(2) Typically a no costs regime, in marginal cases this will advantage the Claimant who may well have LEI cover.

(3) At common law, there is a need to prove either intention (if it is said the harm was inflicted deliberately) or, more usually, a lack of care, which involves the need to prove that the defendant/respondent appreciated that the conduct impugned might be harmful to health and safety, whereas before the ET there is no need to do so, but instead a need to prove that the conduct impugned was 'on the grounds of' protected characteristic.

(4) 'ESSA type' claims require a singular focus on causation of injury.

(5) Vicarious liability will typically be easier to establish in an Employment Tribunal than it is in the courts.

(6) The Claimant is more likely to meet the threshold of success in discrimination claims. This is because an award under the discrimination statutes may include a sum in respect of 'injury to feelings' which, is not permitted in a common law claim. As we have seen above, this is nearly always the subject of an award of Compensation, therefore, is more likely to be easily obtained through the Employment Tribunal.

(7) There is no requirement for front-loading cost and expense in an Employment Tribunal as there is in a civil claim, where protocols have to be observed, medical evidence served with the statement of case, and the probable claim for damage set out in a schedule. The process of litigation is therefore much less prescriptive.

(8) The Employment Tribunal system is generally speaking efficient and well run with specialist discrimination judges.

(9) A questionnaire procedure is available in the Employment Tribunals and widely used, for which the only civil court counterpart is the interrogatory (which is not).

(10) There are three rungs of appeal from An Employment Tribunal (EAT, CA, HL) but only two from the civil courts (CA, HL in unusual cases); but an appeal from an Employment Tribunal is on a point of law only.

(11) Finality of litigation, dispose of ET and PI claim in one go?

(B) Factors for not using the Employment Tribunal:

(1) Typically no costs awarded, this can be a huge burden for the successful party.

(2) Arguably Employment Tribunal judges are arguably not as 'intuitive' or as experienced in high value claims for damages as experienced common law judges.

(3) Employment Tribunal's can some time have unrealistic views as to the speed with which things can happen.

(4) The under-resourced litigant it at risk of a less favourable outcome despite the adoption of the CPR's 'overriding objective'.

The Employment Tribunal's capacity to deal with high value PI litigation creates a great opportunity for PI expertise to be of major assistance to employment law departments and vice versa. Insurers faced with claims brought in the ET are advised to become involved with their employment lawyers so as to provide expertise and guidance on matters of quantum and in particular the involvement of the correct expert witnesses. Employment lawyers are commonly focussed on winning discrimination, harassment/victimisation and whistle-blowing claims and can on occasion pay less attention to the issue of quantum.

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