

# Employment Law and PI

**Nicholas Smith, Guildhall Chambers**  
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# Inherent jurisdiction of the ET

- Are pecuniary and non pecuniary losses for personal injury recoverable in the ET?
- ***Sheriff v Klyne Tugs (Lowestoft) Ltd*** [1999] IRLR 481
- Res judicata issues.
- Settlement of ET claim sufficient to prevent further PI claim on same facts.
- ET has jurisdiction to award damages for PI caused by statutory tort of discrimination.

# What types of discrimination are covered?

Equality Act 2010 - Protected characteristics:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion/belief
- Sex
- Sexual orientation

# Prohibited conduct under the Equality Act 2010

- Direct discrimination
- Indirect discrimination
- Failure to make a reasonable adjustment
- Harassment
- Victimisation

# Prohibited conduct under the Employment Rights Act 1996

- Protected disclosures or 'Whistleblowing' sections 43 A to H & 47B

# The role of the ET

- Assess damages on the ‘standard’ basis.

- ***Ministry of Defence v Cannock***

“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”

# Forseeability of loss - is it required?

- *Essa v Laing*
- Natural and direct loss as a consequence of the statutory tort?
- Causation only
- All forms of discrimination?
- Only those akin to assault / battery?
- What about non deliberate / accidental discrimination?

# The 'Chagger' approach

- ***Abbey National v Chagger***
- Treat Essa with care save for malicious and knowing conduct.
- The exception rather than the rule?



# Overlap with injury to feelings awards

- Injury to feelings awards for “upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation stress AND depression”  
***Vento - the three bands.***
- ***HMP v Salmon***
- Injury to feelings and psychiatric injury are separate.
- Vento guidelines are not ‘a cap’ on combined claims.

# Mechanics of the ET's PI function

- Split trial very common
- THIS IS WHERE YOU COME IN!
- Expert evidence
- JSB Guidelines
- Comparable authorities
- Future financial losses don't use Ogden tables
- Pension loss used on career loss basis

# Vicarious liability

- **Common law v *Tower Boot***
- ‘In course of employment’ given much wider scope.
- Liability even where behaviour has nothing to do with the work the employee is employed to do.
- Off the premises? ***Stubbs*** and ***Sidhu***.

# The 'Statutory defence'

- S109 (4) the employer took 'all reasonable steps' to prevent the discriminatory act.
- Onus discharged where nothing could reasonably have been done - very rare.
- ***Davies v DWP***
- Size of resource, training and reaction to a problem.

# Court v ET

## Pro ET - Pro Claimant?

- It's fast
- Loser pays no costs
- Causation of loss likely to the main issue
- Vicarious liability much easier to prove
- Will get 'injury to feelings' award as a minimum
- Much less front loading of costs
- Questionnaire procedure instead of interrogatories
- Finality of litigation

# Cons

- No cost regime in typical case.
- Most EJ's are not PI lawyers.
- Too fast?