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Albion Chambers EMPLOYMENT NEWSLETTER

Rowstock v Jessemey

A lacuna in The Equality Act means no protection against post-employment victimisations. But what about whistleblowers?

The background; Mr Jessemey, a car body repairer employed by Rowstock Ltd turned 65 on 17th January 2010. Over a year later, on 10th June 2011, a Company Director told him that he did not want to employ men over the age of 65 and he was given two weeks notice. He then sought assistance from an agency to find other work. The company provided the agency with a very poor reference. The Employment Tribunal concluded that he had been unfairly dismissed and that this amounted to an unlawful act of age discrimination. The Tribunal also found that the poor reference had been given because the ET proceedings had been pursued. It was so poor, in fact, that the Tribunal felt that no employer would hire him on the basis of such a reference. However, given the terms of the Equality Act 2010 s. 108 (7), the Tribunal found that it had no jurisdiction to give any remedy for such post-dismissal victimisation. The matter thereafter came before the EAT; *Rowstock Ltd & Anor v Jessemey (EHRC Intervening)* [2013] UKEAT/0112/12/DM.

The EqA, Part 8 addresses "Prohibited Conduct: Ancillary", and s. 108 ('Relationships that have ended') prohibits discrimination and/or harassment against anyone if it arises out of and is closely connected to a relationship which used to exist and it would have contravened the Act if it had occurred during the relationship. However s. 108 (7) provides as follows;

'But conduct is not a contravention of this section in so far as it also amounts to victimisation.'

As the EAT observed, s. 108 was intended to extend the reach of the EqA into dealings between parties who were previously in an employment (or other) relationship which had ended. However, post employment acts, such as victimisation, were not rendered unlawful by s. 108(7). The EAT noted that there were clearly knock on effects given s. 108 runs well beyond employment relationships (for example, the provision of service and goods). It followed that the lack of a remedy for such victimisation remedy bit in those areas too.

The EAT declined the invitation to adopt the approach of the ET in *Taiwo v Olagigbe* (unreported, 239629/2011), in which an Employment Judge had allowed a claim for post-employment victimisation on the basis that s. 108 (7) seemed to have been drafted 'in error', and set about correcting the error by inserting the words 'current and/or former' before the word 'employment.'

The EAT also explored other routes which might have navigated around the thorny problem presented by s. 108 (7). However, it came to the conclusion that, even if the section was a 'legislative blunder' or a 'drafting error', its effect was to create a lacuna in the scheme of the statutory protection from discrimination, harassment and victimisation which the UK was required by EU legislation to enact. It was clear to the EAT that it was highly unlikely that it was ever intended to legislate away (or fail to make provision for) any redress for post-employment victimisation. Following some argument over whether the EAT had the power to eliminate the lacuna, it concluded that to do so would have been to hold that s. 108 (7) meant exactly the reverse of what it said and, whether for good or bad reason, that would have flown in the face of what Parliament had enacted. Given the absence of Court of Appeal authority on the subject, and the general importance on the point, leave was granted to appeal. That hearing is awaited.

The House of Lords decision in *Rhys-Harper v Relaxation Group PLC* [2003] UKHL 33 was touched on. In that case, however, the ET's jurisdiction to hear victimisation claims arising out of the failure to provide a reference hinged upon whether the employment relationship was still in existence, which depended upon there being on-going internal disciplinary proceedings.

For those anticipating the Court of Appeal adopting the same approach as the EAT, the courses available seem to be some form of construct to bring the issue within the ambit of Rhys-Harper or taking up the cause with the Government (applying the *Francovitch* Principle) for a failure to implement the Equal Treatment Directive.

The decision in *Jessemey* in relation to s. 108(7) sits uncomfortably with the whistle blowing conundrum presented by the case of *Woodward v Abbey National PLC* [2006] EWCA Civ 822. Diana Woodward had, throughout her employment, voiced her concerns about what she thought was the reckless and negligent manner in which the Abbey National were handling certain funds. Having been made redundant, she said that her employers had subjected her to a detriment by failing (amongst other things) to provide her with a reference. Under s. 47(B) of the Employment Rights Act 1996, a worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, done on the ground that the worker had made a protected qualifying disclosure.

In *Woodward*, acts of detriment were not limited to the currency of the employment relationship and the Court of Appeal was of the view that it was not Parliament's intention to form a distinction between current and

former employees, particularly bearing in mind the public interest that legitimate whistle blowers serve.

At para 68, Ward LJ set out the public interest in protecting whistle blowers from such detriment as follows;

"It simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted."

How a future whistleblowing case will seek to rationalise Ward LJs judgment and the interpretation of s. 47 (B) of the ERA with *Jessemey* and the interpretation of s. 108 (7) of the EqA remains to be seen although the recent decision of the EAT in *Onu v Akwiwu* [2013] UKEAT/0022/12/0105 suggests that the tide is turning against a restrictive construction. When considering s. 108 (7) at para 73, the EAT in Onu noted;

"We are troubled by the exact meaning and purpose of subsection 7... and by the U-turn which the law would then have taken to set its face against the UK's European obligations to remedy post-termination victimisation without any obvious indication, in any contemporaneous material of which we are aware, the Parliament considered that was what it might be doing".

The EAT then set out upon an ingenious course of legislation construction, or rather de-construction. It concluded that s. 108 (7) does not expressly *exclude* victimisation from being a permissible head of claim in respect of relationships that have ended. If the intention was to exclude it, then the EAT believed that s. 108 (7) would not exist at all.

A way through was found by an analysis of the word 'also' in s. 108 (7), the EAT concluding that the effect of the section was simply to prevent double recovery where it overlapped with the other heads (discrimination and harassment).

At paragraph 106 the EAT found themselves having 'the misfortune of disagreeing' with the views expressed by the Tribunal in *Rowstock Ltd v Jessemey*. Interestingly, one of the EAT's members was a party to the Rowstock decision and seems to have recanted from the view there expressed!

The Court of Appeal are expected to consider *Rowstock Ltd v Jessemey* between now and January 2014. It is hoped that then there will be some clear direction given then.

Paul Cook

Out with the old, in with the... old?

The 'new' rule 50

The new Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 came into force on 29 July 2013. The Regulations introduced many changes, none more so than to Rule 50. Originally a rule with very narrow application for the granting of restricted reporting orders, it has expanded over the years through the influence of EU law and human rights legislation to produce a much wider power than initially imagined. The new Rule 50 is essentially a codification of that common law development, allowing for a greater range of orders to be made on a wider basis at any stage of any proceedings before the tribunal. The question therefore arises: what practical difference will the new Rule 50 make to an advocate?

The Old Rule 50: Restricted Reporting Orders

The old Rule 50, entitled *'restricted reporting orders',* was restricted to cases involving allegations of sexual misconduct (as defined in section 11(6) of the Employment Tribunals Act 1996) or a complaint under the Disability Discrimination Act 1995 for cases where evidence of a personal nature was likely to be heard (ET Rules Rule 50(1)). For the purpose of preventing undue pressure on parties and witnesses, a restricted reporting order could be made which prohibited the publication in Great Britain of any matter likely to lead members of the public to identify a person as the person making, or a person affected by, the allegations of misconduct or, in a disability case, to identify the complainant or any other person named in the order (ETA 1996 ss11(2), 12(3)).

An important point to note is that these orders only lasted for the duration of the proceedings, reflecting the fact that the purpose of the order was to ensure individuals were not unduly pressured by the fear of publicity in giving their evidence. This was different from the power under the old Rule 49 which enabled the Tribunal to delete any matter from the public register of judgments and any other public documents relating to the proceedings likely to identify specific persons in cases where there were allegations of a sexual offence (anonymity orders).

Expanding Case-law

The restrictive nature (no pun intended) of the circumstances in which restricted reporting orders could be made led tribunals to use EU law to increase the use of such orders in other cases where they were necessary to ensure that a claimant could protect their enforceable rights. The Employment Appeal Tribunal in *Chief Constable of West Yorkshire Police v A* [2001] ICR 128 and X v Stevens [2003] IRLR 411 both used Article 6 of the Equal Treatment Directive 1976 (member states to afford access to effective remedies for victims of unlawful sex discrimination) and its own inherent jurisdiction to regulate their own procedure, to make restricted reporting orders and permanent anonymity orders in circumstances where such was necessary for a claimant to bring their claim.

This expansion was further consolidated by the influence of the Human Rights Act 1998 and the obligation of an employment tribunal as a public body to give effect, so far as it could, to the rights protected in the ECHR, including the right to privacy (Article 8). It was this right that led to permanent anonymity orders being made by the EAT in *A v B* [2010] IRLR 844 and *B and C v A* [2010] IRLR 400 where identification of the individuals concerned was considered to have been a sufficiently serious and unjustified interference with their privacy to warrant the making of such an order.

In *F v G* [2012] ICR 246, it was clearly stated that in cases where anonymisation or restricted reporting orders were sought in order to protect Article 8 rights, the tribunal's powers do not have to be derived from the old Rules 49 or 50, but could be taken as part of the tribunal's wide powers to take appropriate steps, unconstrained by the specific terms of the rules (para. 22, per Underhill P). This case was heralded as the introduction of the so-called "extended restricted reporting order": an order derived not from the tribunal rules, but from EU law and Convention rights.

The New Rule 50

This development of case-law was welcome to address the deficiencies of the 1994 Regulations, ensure compliance with the HRA 1998 and to create effective long-term protection for all participants in employment tribunal proceedings. However, the new extended restricted reporting order was unlegislated and completely based on common law. It was also unclear whether it could be the subject of the same criminal sanctions as a breach of a "normal" reporting restriction order.

The new Rule 50 represents a codification of case-law and an establishment of structured discretion in the granting of all such orders. It is entitled *"Privacy and restrictions on disclosure"*, making it clear from the outset that the new Rule is not confined to the granting of restricted reporting orders. Instead, it lists the various restricting disclosure orders to prevent or restrict the public disclosure of any aspect of proceedings that can now be made, including an order of a hearing to be conducted, in whole or in part, in private, non-disclosure of the identities of specified persons to the public and restricted reporting orders.

The practical differences are obvious. Any order can be made at any stage of proceedings. There is no longer a "temporary" restricted reporting order. There is no requirement to give parties an opportunity to advance oral argument before the making of a restricted reporting order (although Rule 50(4) allows a party or other person with a legitimate interest who has not had a "reasonable opportunity to make representations before an order under this rule is made may apply to the tribunal... for the order to be revoked or discharged...". The list of possible orders seems to indicate that the sanctions for breach of a restricted reporting order will remain firmly attached to that order only (Rule 50(3)(d) referring to the Employment Tribunals Act 1996).

The most exciting aspect of the new Rule is the non-definitive list of orders, leaving open the prospect of other kinds of restricting disclosure orders being used. Does this mean the appearance of the infamous super-injunctions in employment tribunals if considered "necessary"? Or even an as-yet unknown species of order yet to be dreamt up by the enterprising advocate seeking to make their mark in this evolving niche of employment law?

Conclusion

Although the new rule looks dramatically different from its predecessor, this is in reality because its predecessor looked nothing like the current legal framework. The revised Rule 50 is an appreciated regulation of the discretion of the tribunals, a succinct re-statement of the law in operation and an opportunity for those who wish to use it to introduce other disclosure-preventing orders in the realms of employment law.

Erinna Foley-Fisher

Employment Appeal Tribunal

Tribunals do not have jurisdiction to apportion liability when making orders for compensation in Tort

I appeared on behalf of the Appellant in the recent case of *Country Weddings Ltd v Crossman & Ors UKEAT/0535/12/SM*, where the Employment Appeal Tribunal restated the law on jurisdiction to apportion liability and confirmed the decision in *Todd v Strain & Ors UKEATS/0057/09/BI.*

The Appellant and Second Respondent were involved in the organisation and hosting of weddings. The First Respondent was employed by the Second Respondent as a wedding planner in 2007. In August 2011, the Second Respondent began to experience financial difficulties, changed its name and shortly afterwards transferred all of its employees to the Appellant. Both the Appellant and Second Respondent operated at the same premises and the Second Respondent had been initially owned and operated by an individual who was a Director of both the Appellant and the Second Respondent. The First Respondent had not been informed or consulted with in respect of the transfer and first became aware of a potential change in her employer in September 2011, when she noticed that her payslip bore the name of the Appellant. The First Respondent did not raise the matter and continued to work as before. In December 2011 the Second Respondent passed a resolution to voluntarily wind itself up.

Following a disagreement regarding the First Respondent's pay and other issues, the First Respondent resigned without notice in October 2011. The First Respondent issued successful claims against both the Appellant and the Second Respondent for, inter alia, unfair dismissal and failure to inform and consult pursuant to Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereafter 'TUPE'). The Employment Tribunal also found the Appellant and Second Respondent had breached Regulation 14 TUPE by failing to facilitate the election of employee representatives. The Tribunal awarded the First Respondent ten weeks pay for breaches of Regulations 13 and 14 TUPE.

Regulation 15 TUPE makes provision for the bringing of claims and liability under Regulations 13 & 14 TUPE. Under Regulation 15(8)(a) TUPE, where a Tribunal finds a complaint against a transferor well founded, it shall make a declaration to that effect and may order the transferor, subject the Regulation 15(9) TUPE to pay compensation. Regulation 15(9) TUPE states:

'The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph 8(a)...'

In its judgement, the Employment Tribunal referred to Regulation 15(9) TUPE and acknowledged that it provided for joint and several liability. However, the Employment Tribunal went on to say at paragraphs 133 – 134 that:

'In apportioning liability for the award the tribunal must act fairly. Ordinarily in the case of transferor default, it is the transferor who bears the brunt of the award. In light of the voluntary winding up of the Second Respondent transferor, such apportionment is entirely artificial, and in any event the [Appellant's] liability is joint...In the premises, we find that the [Appellant] should be responsible for the award in its entirety'

The Appellant appealed on the grounds that the Employment Tribunal had erred in law on the basis that apportioning liability between the Appellant and the Second Respondent was outside the remit of the Employment Tribunal's power and that pursuant to Regulation 15(9) TUPE, the Appellant and the Second Respondent were jointly and severally liable.

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The Appellant relied on *Todd v Strain & Ors*, in which the Employment Appeal Tribunal stated that the issue of apportionment under Regulation 15(9) TUPE falls to be determined, if necessary, in the ordinary courts (at paragraph 35). In Todd, the Appellant (the transferor) appealed a decision by an Employment Tribunal that the Respondent transferee was not liable under Regulation 15(9) TUPE, after the Tribunal acknowledged joint and several liability under Regulation 15(9) TUPE, but then went on to dismiss the claims of breaches of Regulations 13 and 14 TUPE against the Respondent transferee. The Employment Appeal Tribunal found that the Tribunal at first instance was obliged by Regulation 15(9) TUPE to find the transferor and transferee jointly and severally liable, allowed the appeal against the dismissal of the claim against the Respondent transferee and declared that it was jointly and severally liable for the sums ordered to be paid by the Appellant transferor (at paragraph 36).

In *Country Weddings Ltd v Crossman & Ors* the Employment Appeal Tribunal allowed the appeal, set aside the decision of the Employment Tribunal and instead substituted an order that the Appellant and Second Respondent would be jointly and severally liable for the compensation ordered pursuant to Regulation 15(9) TUPE. In its judgement the Employment Appeal Tribunal noted the general principle applied in Employment Tribunals: that where orders for compensation are made in cases involving liability of more than one party, it does not have the power to make any orders other than one for joint and several liability. It also made reference to the case of *London Borough of Hackney v Sivanandan & Ors [2013] IRLR 408* which confirms that there is generally no power in an Employment Tribunal to apportion liability in relation to any awards of compensation for what might be regarded as tortuous activity.

In addition, during the course of the appeal, the Employment Appeal Tribunal's attention was drawn to the March 2011 edition of the IDS Employment Handbook, on Transfer of Undertakings at paragraph 3.1.20 which suggested that in such applications, Employment Tribunals have the jurisdiction to apportion liability. In a supplement to its judgement, The Employment Appeal Tribunal made it clear that it was satisfied this was not the correct approach and that the matter had been disposed of by *Todd v Strain & Ors*. It was clarified that in the event that there is an issue between the parties who have been found liable as to the relative share of liability that they should bear, this is an issue that falls to be determined in the County Court or the High Court under the provisions of the Civil Liability (Contribution) Act 1978.

Monisha Khandker