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Compensation limited

Dunnachie -v- Kingston upon Hull City Council; Williams -v- Southampton Institute; Dawson -v- Stonham Housing Association Ltd [2003] IRLR 385

Can employment tribunals make financial awards to compensate employees for non-economic losses such as injury to feelings in unfair dismissal claims? This is the £53,500 question (it cannot be the million dollar question as tribunals can only award up to £53,500 in compensatory award for ordinary unfair dismissal cases).

In the House of Lords' judgment in **Johnson -v- Unisys [2001] IRLR 279** (see LELR 60, July 2001), there was a reference to possible compensation for dismissed employees in unfair dismissal claims for non-financial losses caused by the dismissal. This would cover such things as injury to feelings in the manner of dismissal and psychological damage, in appropriate cases. There was uncertainty about the legal status of the comments in the Lords' judgment as the case was brought, not as an unfair dismissal claim, but as a breach of contract. In essence the Lords held that compensation for the manner of dismissal was not available for breach of contract but referred to its availability in unfair dismissal cases.

Since then, practice has varied from tribunal to tribunal as to whether to award this form of compensation in unfair dismissal claims, relying on the Johnson -v- Unisys judgment. It was only a matter of time before the issue was appealed and in these three conjoined cases the Employment Appeal Tribunal has considered the issue. Unfortunately for applicants and their advisors, the EAT has come down against employment tribunals awarding compensation for non-economic loss.

The House of Lords, in Johnson -v- Unisys, held that, since the statute allows tribunals to award amounts, the tribunal "considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer" (Section 123 Employment Rights Act 1996). There was "no reason why in an appropriate case it should not include compensation for distress, humiliation, damage to reputation in the community or to family life". On the face of it, it would seem an uncontroversial proposition and very much in line with the way in which a tribunal approaches loss calculation in discrimination cases. Courts and tribunals spend a lot of time putting a figure on that which cannot easily be calculated in monetary terms.

But that would be to reckon without case law and the power of precedent. A 1972 case (**Norton Tool Co Ltd -v- Tewson** [1972] IRLR 86), before the National Industrial Relations Court (which predated the Employment Tribunal) held that "loss" in the context of unfair dismissal means economic loss. Since the Norton Tool case was neither referred to, nor directly overruled by the Lords in Johnson -v- Unisys, it could not be said to have been overturned and therefore was still binding.

The **Dunnachie** case is likely to be appealed, perhaps as far as the Lords if necessary, for a ruling which acknowledges that the task of Tribunals under their statutory powers in unfair dismissal cases is to assess and calculate compensation whether the loss is in pure arithmetical form or otherwise.

Stressing the breadth of the concept of dismissal

Thanet District Council -v- Webster (EAT, case no. 1090/01, unreported)

One of the ways a dismissal can occur, for the purposes of the unfair dismissal provisions, is by an employee terminating their employment contract in circumstances in which they are entitled to do so as a result of an employer's conduct. To rely on a constructive dismissal claim, an employee must show that the employer was guilty of a fundamental breach of the contract. Further, such a breach must be one that goes to the root of the contract and shows that the employer no longer intends to be bound by one or more of its essential terms.

In this case, an employee had been absent from work for 12 months with work-related stress and was refused alternative work in a different department by his employer. The applicant resigned and claimed constructive dismissal on the basis that the employer had failed in its implied contractual duty to provide him with a safe place of work.

The employer's occupational health officer found that the applicant's stress was related to his circumstances at work rather than to a specific medical condition. The officer expressed the view that the applicant would not be able to return to his current job but his problems might be resolved if the employer found him alternative work in a different department. However, the employer informed the applicant that they would attempt to find him an appropriate post in the department he was already employed in. The applicant had made it clear that he did not wish to continue working in the same department. He therefore resigned and claimed he had been constructively dismissed and that his dismissal had been unfair.

The tribunal found that there had been an implied term in the applicant's contract that the council would safeguard his health and safety at work. Further, the tribunal found that the council, by insisting that the applicant transfer to a different post within the same department, had acted in breach of that term and therefore the applicant had been constructively dismissed.

Contrary to guidelines

The EAT concluded that the failure by the employer to conduct a full investigation before taking action in respect of the applicant's ill health was contrary to the guidance laid down in the EAT case of **East Lindsey District Council -v- Daubney [1977] IRLR 181**. The EAT stated such an investigation would have led to the council establishing the exact position and enabled it to examine other alternatives as to his return to work.

The EAT stated that the employer had refused to offer an alternative job to an employee suffering work related stress and had breached its implied contractual duty to provide the employee with a safe place of work. Further, the tribunal had also been entitled to find that the employee, who had resigned following the employer's breach of contract, had been unfairly and constructively dismissed.

Safe place of work

The case also shows that an employer might be obliged to make similar adjustments as under the Disability Discrimination Act 1995, for an employee who could be suffering from stress, which is not a clinically well recognised mental condition for the purposes of the Disability Discrimination Act. If the employer refuses to make an adjustment, it may be in breach of the implied term to provide a safe place of work, or indeed the implied term of mutual trust and confidence and therefore the employer is liable for unfair constructive dismissal claims.

Further, it is likely that an employee will only be entitled to resign and claim constructive dismissal where the employer's decision not to offer an alternative position or its offer of an unsuitable alternative position is final. Therefore, where unsuitable alternative positions are being offered during the course of negotiations the employee should continue to negotiate with the employer.

EU race rules now in force

The new Race Relations Amendment Act 1976 (Amendment) Regulations came into force on 9 July 2003. Implementing the European Race Discrimination Directive. The new Regulations make limited but useful changes to the Act.

The main changes are a new definition of racial harassment, a new definition of indirect discrimination and a change in the burden of proof.

The new definition of harassment provides that unlawful harassment occurs when, on the grounds of a person's race, another person "engages in unwanted conduct which has the purpose or effect of (a) violating that other's dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for that other." The Regulations provide that conduct will have the effect specified in (a) or (b) having regard to all the circumstances including in, particular, the perception as the victim of the person being harassed.

Until now, there has been no definition of unlawful harassment in the Race Relations Act. Nonetheless, case law has established that harassment is unlawful, amounting to "detriment" within the meaning of the Act. This new definition, in many ways, reflects the existing case law. So, for example, unlawful harassment can occur even if the harasser has no idea that their conduct is having the effect of violating dignity or creating an intimidating environment.

A contentious issue has always been the extent to which it is the perception of the person being harassed that defines whether the harassment was unlawful. For example, if a very sensitive person interprets the conduct of the harasser as offensive, does this mean that the conduct is automatically unlawful? The Regulations address this issue, broadly by reflecting the existing case law. In assessing whether or not behaviour is unlawful, the Regulations state that tribunals should take an objective view of what does and does not violate dignity or create an intimidating environment. In assessing this they must take into account the subjective perception of the victim as one of the most important factors. It is significant that the accompanying Explanatory Notes also add that tribunals should also take into account the motives of the harasser. It is of concern that this may represent a narrowing of the definition of harassment in comparison with the European Directive. Usually, the motive of the harasser should not be a consideration, for example where they thought the harassment "was just a joke". Now it appears that such motivation may be a factor for tribunals.

The new definition of indirect discrimination provides that indirect discrimination will apply where a person applies an apparently neutral provision, criterion or practice which puts or would put persons of a particular race at a particular disadvantage and which "cannot be a proportionate means of achieving a legitimate aim."

Broader application of the Regulations

The application of the Regulations to a "provision, criterion or practice" broadens the application of the Regulations beyond the existing "requirement or condition" in the Race Relations Act 1976. The 1976 definition meant that practices which were, in effect, preferences were not covered by the Act (so for example a "preference" for an employee for whom English was their first language). Under the new Regulations they will be. Further, the definition requiring that the practice put people at a particular disadvantage, although still requiring an Applicant to prove disadvantage, does mean that strict statistical evidence is no longer required and any way of proving disadvantage would potentially be acceptable.

However, what is different to the existing 1976 Act is the defence available to employers in indirect discrimination cases. In place of the previous test of justification (which required the practice in question to correspond to a real need on the part of the employer) we instead see a Human Rights type test of proportionality. This is likely to require a balancing of the interests of the employer and the interests of the employee. This is very much a type of "middle way" defence, balancing competing interests. It is potentially weaker so far as employees are concerned than the previous defence which required the employer to show a real need. It remains to be seen how tribunals will inter-

Employee surveillance

The Employment Practices Data Protection Code: Monitoring at Work

Understanding the legal constraints of the Data Protection Act (DPA) and its implications in the field of employment and industrial relations is a growth area. It affects everyone – employers, employees, workers, trade unions and their members. The Information Commissioner (a post established by the Data Protection Act) has now issued a new statutory code of practice setting out his views as to how employers can comply with the DPA. It is not legally enforceable, but can be used as evidence in the courts and tribunals.

The Employment Practices Data Protection Code has four sections: recruitment and selection (part 1); employment records (part 2); monitoring at work (part 3); and medical information (part 4).

Copies of the Code are available from the Information Commissioner's website: www.informationcommissioner.gov.uk.

Legal Compliance

The Code emphasises that employers must comply with the following legal regimes when monitoring at work:

- the DPA, which covers "data processing" in general
- EC Directive 95/46 EC on data protection
- the Human Rights Act 1998 and Article 8 of the European Convention on Human Rights – the right to respect for private and family life in the correspondence
- the Regulation of Investigatory Powers Act 2000 (RIPA) and the Lawful Business Practice (Interception of Telecommunications) Regulations 2000 (LBPR).

According to the Information Commissioner, the DPA provides that "any adverse impact on workers is justified by the benefits to the employer and others". We do not believe that this statement of the law is correct in terms of compliance with Article 8, under which any interference with the right to respect for private life and correspondence must be in accordance with the law, peruse a legitimate objective, be necessary in a democratic society and proportionate.

Definitions and Coverage

The Code covers "personal information", which is information that:

- relates to a living person
- identifies an individual, or which tends to identify an individual when added to other information, the organisation either already has or is likely to acquire (see section 1 of the DPA).

The Code applies to information processed in relation to job applicants and former applicants (successful and unsuccessful), as well as current and former employees, agency, casual and contract staff.

Section 3: Monitoring at work

The Code distinguishes between two types of monitoring – systematic (ie of all, or a group of workers as a matter of routine) and occasional (monitoring on a short term basis in response to a particular need).

Impact Assessments

To justify monitoring at work, Section 3 states that employers should carry out impact assessments involving:

- identification of the purpose of the monitoring and the likely benefits
- identification of the likely adverse impact of the monitoring
- considering alternatives to monitoring and the different ways it may be carried out
- taking into account the obligations that arise from monitoring
- judging whether monitoring is justified.

Section 3: Good Practice

The "good practice recommendations" cover seven areas:

- managing data protection
- general approach to monitoring
- monitoring electronic communications
- video and audio monitoring
- covert monitoring
- in-vehicle monitoring
- monitoring through information from third parties.

"Core principles" to be observed are:

- it will usually be intrusive to monitor workers
- workers have a legitimate expectation that they can

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- can monitoring of traffic, and not content of messages, be used? If not, can the traffic record be used to narrow the scope of content monitoring?
- is it possible to use an automated monitoring system, for example, to detect viruses or sizes of attachments?
- will monitoring breach client or worker confidentiality?
- are there secure transmission lines, not subject to monitoring, for example, for occupational health or trade-union related communications?
- can workers mark communications as "personal"?
- what effect would adjustments to the system make?
- can monitoring be confined to external rather than internal e-mail?
- can emails marked "personal" be excluded from monitoring?
- are workers authorised to use the mail system for personal purposes?
- do workers have access to separate personal email accounts?
- are systems for recording information about email use reliable?

As well as observing the core and other general principles set out above, employers also need to:

- ensure that workers are aware of the extent to which the employer receives information about the use of telephone lines in the homes, or mobile phones provided for personal use
- wherever possible, avoid opening emails, especially ones that clearly show that they are private or personal
- ensure that those sending emails to workers, as well as workers themselves, are aware of any monitoring and the purpose behind it
- if it is necessary to check the email accounts of workers in their absence, make sure that they are aware that this will happen
- inform workers of the extent to which information about their internet access and emails is retained in the system and for how long.

Employers also need to be satisfied that any "interception" in the course of monitoring will meet the requirements of Regulation of Investigatory Powers Act (RIPA) and the Lawful Business Practice Regulations (LBPR). Broadly, under RIPA, it is unlawful to intercept telecommunications except with the worker's consent or where the communication is connected with the operation of the communication system itself. There are however further authorised business purposes contained in the LBPR which allow interception. Helpful guidance is contained in the Information Commissioner's supplementary guidance.

Two important points to note are:

- "interception" occurs "in the course of transmission"– it does not therefore include access to stored emails that have already been opened by the intended recipient
- the DPA operates independently from RIPA and the LBPR – just because interception may be allowed under RIPA or the LBPR does not mean that any "data processing" involved complies with the DPA.

Sanctions

There are no specific sanctions for a failure to abide by the Code. But, under the DPA, an aggrieved worker whose claim is upheld has a right to compensation from the data controller, including, in certain circumstances, for distress as well as being able to complain to the Information Commissioner, seeking an enforcement notice.

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