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Suspensions damaging to your health

Gogay v Hertfordshire County Council (2000 IRLR 703) CA

IN THIS case a residential care worker obtained substantial damages from her employers following her wrongful suspension from work pending a Children Act investigation into allegations of abuse.

The investigation concerned a very disturbed child who had learning difficulties and a history of family abuse. During therapy sessions the child had made remarks which could have been interpreted as allegations of abuse. As a result a strategy meeting was called and it was decided to carry out a Children Act investigation. It was also decided to suspend the worker whilst that investigation was carried out. As a result of the investigation it was decided that there was no case for the worker to answer. However, following her suspension and the allegation contained in the suspension letter that the authority were "investigating allegations of sexual abuse" Ms. Gogay had suffered a severe psychiatric reaction. The medical evidence was clear that the suspension was a "substantial cause" of this reaction. There was no pre existing psychiatric history.

Ms Gogay brought a case based upon a breach of her contract of employment, and in particular the implied terms of trust and confidence. It is important to note that there was a specific term in the contract allowing for suspensions during such investigations.

Nevertheless the Court of Appeal held that suspending someone in these circumstances, particularly with the allegations made in the suspension letter, were calculated to destroy the trust and confidence between employer and employee and would, therefore, found a claim for breach of contract unless the employers could lawfully justify their actions.

There were two significant failures on the part of the Council. First, they had suspended before carrying out preliminary investigations to ascertain if there was a case to answer. The suspension commenced at the beginning of the investigation process and was held to be a "knee jerk reaction". Secondly, no realistic consideration was given to alternative employment during the period of the initial investigation. The Court of Appeal held that they did not believe that no alternative duties could be found during this period. The initial investigation lasted just over one month.

The employers also argued that Ms. Gogay was not entitled to damages but this was also rejected by the Court of Appeal. Psychiatric injury was not the same as injury to feelings and, provided there was appropriate medical evidence, the employee was entitled to damages for the loss of earnings and psychiatric injury she had suffered as a result of the unlawful suspension.

Although it might be argued that it was significant in this case that the result of the investigation was that there was no case to answer, it is extremely common for employers to suspend automatically if there is an allegation of gross misconduct. Clearly this case indicates that the reasons for and the timing of any suspensions in such cases should be questioned closely. But the distress alone caused by suspensions is not enough to found a breach of contract claim, there has to be real psychiatric harm.

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Redundancy pool dries up

Russell v London Borough of Haringey IRLB 649 September 2000 CA

THE SELECTION of pools for redundancy is always a hotly contested area. In this case a worker argued that his job was interchangeable and that he therefore should not have been selected for redundancy. The Court of Appeal had to consider the effect of a job description requiring flexibility of a worker in relation to the drawing of the pool for potential redundancies.

Mr Russell was employed by the Council as Panel Administrator in the administrative section of the Children's Care Service. He was dismissed as redundant following the deletion of the post of Panel Administrator. His job description contained a general paragraph requiring him to provide cover for other administrative posts and to undertake other duties consistent with the objectives of his post. It was a fairly standard flexibility clause now found routinely in contracts and job descriptions.

The Council's redundancy procedure said "The identification of a unit or section for closure will not automatically result in the people who work within it being declared redundant… Consideration will be given to whether the affected employees are interchangeable with other employees elsewhere in the organisation… Only if there is evidence that the employees are not interchangeable will they be declared redundant without any further selection".

Mr Russell complained of unfair dismissal and breach of contract. The Employment Tribunal found that he had been fairly dismissed and that as his "post was considered a specific unit, there was no need to apply a selection criteria". After losing in the EAT, he appealed to the Court of Appeal on "the interchangeability point".

The Court of Appeal considered that it could be inferred from all the circumstances that the Council's redundancy procedure was complied with. They commented that there was no evidence that the job of Panel Administrator was interchangeable, the post was not the same as any other post in the section, there were no other employees who carried out the function of the job, the requirement that Mr Russell could be contractually obliged to cover for other and he did other work to make up for the reduced value of his job did not make him interchangeable. Mr Russell's appeal failed.

Date fixed in concrete

London Fire & Civil Defence Authority v Samuels, EAT 22/6/ 2000 (450/00)

THIS CASE is a reminder of the risk of agreeing to hearing dates in the Tribunal, without first checking if all your witnesses are available.

Samuels, a fire fighter, was claiming race discrimination against his employers. At a directions hearing, a hearing date was fixed for August 2000 without any comment from the barrister for the employer. The employer, LFCDA, had only checked witness availability for May and June 2000.

But one of the employer's key witnesses, B, had already planned his holiday in August and would be abroad for some of the hearing time. The employers requested an adjournment to a later date. The Tribunal checked and found that B's travel booking had not yet been made and that the barrister had not known of the witnesses' availability in August as it was thought that the case would be listed before then.

The postponement was refused on the basis that the parties had been asked to check dates of availability, no objection was made to the dates fixed and because the holiday had not been booked.

The employers lost their appeal to the EAT. The Tribunal had not erred in law. The EAT emphasised that the it was in the interests of parties to have the case heard as soon as practicable.

Full pay for holidays

Davies and others v MJ Wyatt (Decorators) Ltd IDS Brief 670 (EAT 13/7/00)

THE SCHEMES employers think up for avoiding their obligation to pay for holidays are seemingly endless. Few, if any, work.

Mr Davies and his colleagues were decorators. Their employer deducted money from their wages to pay into a holiday fund, out of which a flat rate was paid to them for annual holiday. When the Working Time Regulations came into force on 1 October 1998, they became entitled to paid annual leave based upon their normal week's pay. Their employer's response was to meet the additional cost by making a unilateral pay cut of 30 pence per hour.

The Employment Appeal Tribunal said that the employer's actions amounted to an unlawful deduction from wages. There had been no agreement. The employers were not entitled to make a unilateral change. Neither did the reduction discharge the employer's obligation under the Regulations to provide paid holidays.

Many employers have sought to get round the requirement for paid annual leave by reducing pay rates. This will be a breach of contract and an unlawful deduction if the reduction is not agreed by the worker.

There have also been cases where employers have argued that a higher hourly rate to contract workers amounts to "buying out" or paying for annual leave, even where no payment is made for leave itself and their is no payment on termination for leave accrued but not taken. This argument has been rejected in Tribunals, as in **Pitt and others v Driving Standards Agency,** (ET Nottingham, October 2000), where again it was found to be an unlawful deduction.

Assumed Discrimination

Coyne v Home Office [2000] IRLR 838

IN THIS case the Court of Appeal conclude that an employer was not guilty of sex discrimination in assuming that a female employee was to blame for an incident of sexual harassment of which she was the victim, and in then failing to deal properly with her complaint of harassment.

Ms Coyne, employed by the Home Office, was subjected to sexual harassment from a colleague, Mr Smith, who had been seconded by the local authority to work with her. In response to Ms Coyne's complaint about the sexual harassment, Mr Smith's line manager took the view that the problem lay with her, not Mr Smith. Her own line manager agreed. She lodged a formal complaint about the harassment with the Home Office, who did nothing about it for two years.

The Employment Tribunal found in her favour, as did the Employment Appeal Tribunal. In their view, the Home Office unlawfully discriminated in taking the view that the harassment meted out to Ms Coyne was her fault. In the words of the EAT, this attitude was typical of the commonly held stereotypical assumption that a woman is responsible for harassment to which she is subjected by a man. The Home Office's treatment of Ms Coyne was based on her gender and the Tribunal were entitled to decide that her treatment amounted to unlawful discrimination.

In a majority decision, the Court of Appeal disagree. The fact that Ms Coyne's line manager took the view that the sexual harassment was her fault did not in itself mean that he was treating her differently on the grounds of her sex. Likewise the Home Office's failure to deal properly with her complaint of harassment did not necessarily indicate sex discrimination. The conclusion that the employer's view of Ms Coyne's conduct rested on sexist stereotypical assumptions was not supported by the findings of fact by the Tribunal. This case emphasises the importance of a Tribunal having the facts to sustain conclusions of discrimination.

Knowing About Disability

Kapadia v London Borough of Lambeth [2000] IRLR 699 CA

Davis v Coutts & Co (EAT 306/99 unreported 9.10.00)

Farnsworth v London Borough of Hammersmith & Fulham [2000] IRLR 691EAT

Quinn v Schwarzkopf Ltd (EAT.409.00 unreported 10.10.2000)

RECENT DISABILITY Discrimination Act decisions focus on the fundamental question of who is and who is not disabled, and also the extent to which an employer has to have knowledge of an employee's disability to be liable under the Act.

In **Kapadia v London Borough of Lambeth**, the Court of Appeal address the issue of whether the Employment Tribunal were entitled to reject the unchallenged evidence of the medical experts regarding the Applicant's disability and substitute their own opinion. The medical experts took the view that Mr Kapadia's symptoms of extreme depression and anxiety were such as to have a significant effect on his day to day activities. The Tribunal rejected this evidence on the basis of their observation of Mr Kapadia before the Tribunal to hold that he was not disabled. The Tribunal's decision was rejected by both the Employment Appeal Tribunal and also the Court of Appeal. The Court of Appeal held that the Tribunal were not entitled to ignore such persuasive and unchallenged expert evidence on matters relating to an individual's medical condition.

The difficulty of showing that mental illness amounts to a disability is again illustrated in the EAT decision of **Davis v Coutts & Co.** Mrs Davis, like Mr Kapadia, suffered from depression. Her symptoms included extreme anxiety, sickness, sleeplessness, introversion, and loss of interest in her usual hobbies. But to prove that she was disabled she had to show that her normal day to day activities were affected in at least one of a fixed category of capacities (Schedule 1, para 4, DDA). In her case the relevant set of capacities was "memory or ability to concentrate learn or understand". The evidence did not suggest that these particular capacities were affected. Her employers therefore argued that she could not be regarded as disabled. Both the Tribunal and the EAT agreed. In reaching this conclusion, the EAT stated their concern about this state of affairs. "We cannot leave the subject of disability without expressing some concern that one can have a person put at huge disadvantages such as, for example, being unable to sleep or being in frequent pain who yet, for want of being within one of the boxes of para 4(1)(a) to (h), must be taken not to be disabled…"

In the EAT decision of **Farnsworth v London Borough of Hammersmith & Fulham**, Ms Farnsworth claimed that she had been discriminated against when she was rejected for the post of residential social worker by reason of her past medical history. She had in the past suffered from depressive illness, but the condition was controlled and she had glowing references from previous employers with whom her attendance record had been good. The London Borough of Hammersmith and Fulham had offered her the job of social worker subject to medical assessment. The Occupational Health Physician had then prepared a report based on a medical examination and consideration of her medical records, and concluded that "I am concerned that she may be liable to further recurrences [of ill health] in the future." Effectively therefore, the Occupational Physician had simply made an assumption about her likely future attendance, despite the reality of her actual past performance. Relying on the medical report, the Council withdrew the job offer.

The EAT upheld the decision of the Tribunal which concluded that the Council had discriminated against Ms Farnsworth. A case could not be made out directly against the Occupational Health Physician, since she was only an agent of the Council and not employed by them, and so was not in any sense Ms Farnsworth's employer, or future employer. As agent of the Council however she was part of the "decision making team" who took the decision not to employ. No valid distinction could therefore be made between her acts and those of employees of the Council. To the extent that her judgement that Ms Farnsworth's attendance was likely to be poor was based on discriminatory assumptions, so the Council were liable for her conduct.

The EAT also addressed the vexed question of whether an employer has to have knowledge of a disability before they can be liable under section 5 (1) (a) of the Act in treating an employee less favourably for a reason relating to their disability. Relying on the Court of Appeal decision of **Clark v TDG Ltd t/a Novacold** ([1999] IRLR 318, LELR 34), the EAT conclude that knowledge is not necessary. Instead the test is one of causation. In other words, is the objective reason for the less favourable treatment due to the disability, regardless of knowledge. The EAT give as an example a visually impaired person with a guide dog being refused entry to a café because of the dog. That is section 5 (1) (a) discrimination even though the café owner did not know that the person was visually impaired. The reason for the refusal was the dog, and that is causally connected with the visual impairment. So for Ms Farnsworth, even if the Council had not known that her medical condition amounted to a disability, nonetheless any less favourable treatment by reason of her history of depression would amount to section 5 (1) (a) discrimination regardless of what they knew or did not know about the extent and implications of the condition. Further, the EAT also confirm that although knowledge of a disability may well be relevant to the issue of justification under section 5 (1) (b), it is not essential. They refer again to the café owner example, and state that whether or not the café owner was justified in refusing entry to the dog does not depend on knowledge of the dog-owner's visual impairment. It is about what, objectively, was the reason for the treatment.

This clear restatement of the Clark decision is welcome. The next stage in the debate is how far the Clark principles apply to other aspects of the DDA, such as the justification provisions. In **Quinn v Schwarzkopf Ltd** where the Scottish Employment Appeal Tribunal were again dealing with a situation where the employers were maintaining that they did not know of Mr Quinn's disability. The original Employment Tribunal had held that the employer had unjustifiably discriminated, and they should have appreciated that Mr Quinn's condition amounted to a disability. The Appeal Tribunal agreed. They held that in these circumstances it was not open to the employers to advance a defence of justification. Having not realised that Mr Quinn was disabled, the employers could not subsequently think up a justification defence. Accordingly Mr Quinn was entitled to succeed. Although undoubtedly the right decision, what underpins this decision is the EAT's assumption that knowledge is a prerequisite for a justification defence. This may not be correct as different divisions within the EAT have adopted different approaches as to whether it is necessary for an employer to know of a disability or of its effects in order to be able to justify both less favourable treatment and a failure to make reasonable adjustments. It will take a decision from the Court of Appeal to clear the matter up.

Putting a figure on it

Stubbs v Chief Constable of Lincolnshire Police (ET unreported)

ICTS (UK) v Tchoula [2000] IRLR 643

Martin v Unilever UK Central Resources Ltd (1.3.1999 case no 64272/95 ET)

Akkerman v City Centre Restaurants (UK) Ltd (ET unreported)

Wilson v Tesco Stores v Abrahams (EAT 12.1.00 unreported)

Hussain v Mann, Kellock, and JCT (ET unreported)

Sheriff v Klyne Tugs (Lowerstoft) Ltd LELR 40

CALCULATING compensation can be an imprecise science and one of the best guides to what particular forms of discrimination are worth can be gleaned from previous cases. The most up-to-date summary of awards by employment tribunals in discrimination cases was published in the September Equal Opportunities Review. It covers 1999 awards. The summary provides a useful picture of general trends in awards and differences across types of discrimination. Negotiated settlements are not included in the statistics.

Compensation increased by at least 30% in all discrimination areas and by 65% in race cases. Tribunals only awarded compensation in 300 discrimination cases and 200 of these were sex discrimination cases. However more compensation was awarded in race and disability cases than sex discrimination.

More useful information is suggested by the average awards which in all categories were under £10,000. This includes both injury to feelings and loss of earnings awards. In race and disability areas the average award was £9,948 and £9,981 respectively but in sex discrimination claims it was £7,208. This reflects injury to feelings average awards which for race was near £5,000 but for each of sex and disability the average award was under £4,000.

A closer look at the range of awards show compensation ranged from a paltry £100 to a high of £182,247 in sex discrimination claims. Awards in race and disability were between these perameters. Big awards are rare, in 1999 only 25% of race and disability claims are for more than £10,000 and in sex discrimination claims the proportion is less, at 20%.

The highest award in 1999 at £182,247 was in **Stubbs v Chief Constable of Lincolnshire Police**. This was a sexual harassment case where significant injury to feelings amounting to long term mental distress combined with loss of career, pension and a higher than average salary. This case reflects the rule that the larger awards are calculated by the multiplication of a reasonably high salary and a significant number of years where this loss will continue. The loss of earnings claim is the most significant part of the total compensation in high value cases.

'Big awards are rare, in 1999 only 25% of race and disability claims are for more than £10,000 and in sex discrimination claims the proportion is less, at 20%.'

But in the average award the injury to feelings sum is as much as the future or immediate loss. In race and sex they contribute to over 50% of the average award. This reflects the fact that claimants may be able to work again fairly soon after a discriminatory dismissal. Injury to feelings is therefore an important element in calculating loss.

To date injury to feelings has been informed guesswork. But there is now an established practice of bracketing awards and reflecting (to some extent at least) personal injury awards.

In **ICTS (UK) v Tchoula** the EAT set down a general rule that less serious injury should be compensated at £10,000 or below. The EAT regarded an award of £27,000 as being excessive for temporary injury to feelings or one where the campaign of harassment was not over a long period of time.

£10,000 seems to be the top end of the lower bracket of non personal injury type awards. In Tchoula it needs to be borne in mind that even though there was not any serious personal injury there was aggravated damage and the award was high because of victimisation.

While the top of the lower bracket at £10,000 seems clear enough, placing a case within the bracket is more difficult. In **Martin v Unilever UK Central Resources Ltd** a tribunal awarded £1,500 for "minor psychiatric damage" reflecting Judicial Studies Board Guidelines for personal injury awards. In **Akkerman v City Centre Restaurants (UK) Ltd** a failure to carry out a reasonable adjustment in a DDA case of decreasing hours of work was also awarded at £1,500. Yet in **Wilson v Tesco Stores v Abrahams** the EAT ruled that an award for £5,500 was correct for a racist comment and discrimination. A security guard employed by the respondent company had referred to the applicant as "you lot". The tribunal found it was a racist reference intended for the applicant. The EAT rejected the employer's argument that the award should be lower because of personal injury guidelines which suggested a sum nearer £3,000. The appeal tribunal were content that the award was in the right bracket and would not interfere with the tribunal findings on the exact amount.

'To date injury to feelings has been informed guesswork. But there is now an established practice of bracketing awards and reflecting (to some extent at least) personal injury awards.'

The EAT were both legally and politically right to reject a solely personal injury approach. Other elements make up an injury to feelings award – vulnerability or youth in harassment cases, loss of confidence, despair, loss of career or opportunity to work all contribute to loss. These are by definition less tangible but can be especially important in the claims for failure to promote or interview or shortlist for a post and exclusion from career opportunities where personal injury and mental distress may not be provable.

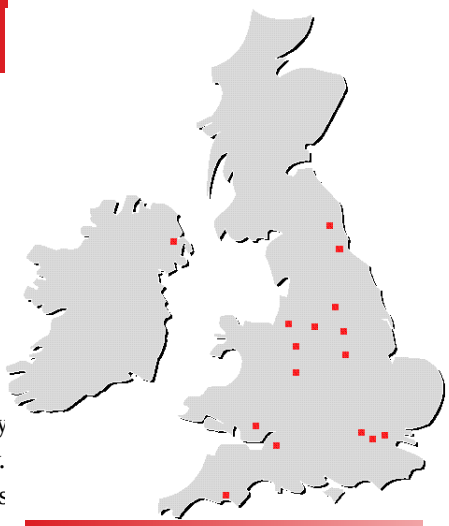
Injury to feelings awards were also increased in **Hussain v Mann, Kellock, and JCT** where the employer victimised the applicant and aggravated the situation. This included suggesting that a tribunal claim was vexatious and making unfounded counter allegations against the applicant. There a £10,000 injury to feelings award was multiplied by three for a total award of £30,000. The importance of adding victimisation claims in harassment or discrimination cases cannot be overestimated.

On the other hand, claims in discrimination for personal injury awards must be made if there has been physical or mental injury because of the discrimination – **Sheriff v Klyne Tugs (Lowerstoft) Ltd**. In these cases the JSB guidelines ought to be helpful. It is beneficial to argue for a separate award for the personal injury so that both personal injury and the injury to feelings elements are reflected in the total award.

In the sexual harassment case of **Stubbs v Chief Constable of Lincolnshire Police** a moderate psychiatric injury attracted an award for £15,000. However it is important to note the impact of her illness which affected her relationship with parents and partner, and her future career. It is a useful reminder of the importance of having the evidence to show how an applicant has been affected by the discrimination.

There is a clear demarcation of £10,000 in injury to feelings awards. Personal injury or sustained harassment cases take awards above this level with awards above £15,000 for moderate psychiatric damage. Below £10,000 advisers should stay away from close comparisons with personal injury cases and look at other issues such sustained harassment, vulnerability, loss of confidence and loss of career or victimisation/aggravation to increase the award. The average awards of around £4-5,000 are an indication but awards of £1,500 are still being made for cases of discrimination.

TUPE and the public sector



Mayeur v Association Promotion de L'information Messine (APIM) [2000] IRLR 783 (ECJ)
Collino v Telecom Italia SPA [2000] IRLR 788 (ECJ)

THE EUROPEAN Court is still finding itself occupied with cases on TUPE and the Acquired Rights Directive.

These two latest cases concern the scope of the exclusion from the Directive of transfers of administrative functions between public authorities. This derives from the ECJ's decision in **Henke** (LELR 5) and is now enshrined in the amendments to Article 1 of the Directive which must be brought into force in the UK by 17 July 2001.

The UK Labour government takes the view that the exclusion is very limited. This is reflected in its Cabinet Office guidance "Staff Transfers in the Public Sector" where there is a general assumption that the Directive will apply and a policy statement that public authorities should behave as though it applies, even where there is doubt. Also, the power in section 38 of the Employment Relations Act 1999 to order that particular transfers of functions between state authorities should be treated as though TUPE applied, has already been exercised in the transfer of Rent Officer functions.

Fortunately, the European Court appears to take a similarly limited view of the scope of the **Henke** exclusion.

Collino concerned a telecommunications services operation managed by a public body which was transferred to a private company. The Court concluded that the fact that the service transferred was the subject of a concession by a public body could not exclude the Directive. The activity concerned amounted to a business activity rather than the exercise of public authority.

Similarly in **Mayeur** where the activities of a non-profit making association which aimed to promote opportunities offered by the City of Metz were taken over by the local authority. The Court reaffirmed the application of the Directive to public and private entities, regardless of the legal status of the entity or the manner in which it is funded.

The Court took the view that **Henke** only excluded the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities.

This restrictive interpretation is welcome and means that very few UK transfers will be caught by the Henke exclusion, as illustrated by the case of **Dundee City Council v Arshad** (EAT) which pre-dates these ECJ cases.

The Court also affirms the view long ago stated in the **Daddy's Dance Hall** case [1988] IRLR 315. Although there may be changes to terms and conditions by agreement following a transfer where that is permitted by national law, there may never be valid agreed changes where the transfer of undertaking itself is the reason for the amendment.

So an employer cannot validly introduce changes, even by agreement, where the transfer is the reason for the change. Action taken a considerable time after the transfer may still be prohibited as being connected with the transfer, as illustrated by the case of **Taylor v Connex** (IDS Brief 670) where an employee succeeded in a claim where he was dismissed long after the transfer for refusing to accept changes which were being introduced by reason of the transfer.

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TEESSIDE	01642 554 162

CONTRIBUTORS TO THIS ISSUE
STEPHEN CAVALIER
STEFAN CROSS
NICOLA DANDRIDGE
DAI HARRIS
VICTORIA PHILLIPS
JO SEERY

EDITOR MARY STACEY
PRODUCTION NICK WRIGHT
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