Stigma damages in breach of contract

BCCI v Ali (No 3) [1999] IRLR 508

The long running saga following the collapse of the Bank of Credit and Commerce International in 1991 continues. The House of Lords decision in Malik v BCCI established the principle of stigma damages.[1997 IRLR 462] LELR Issue 14. Where the employer's breach of the contractral duty of trust and confidence creates a stigma, which in turn results in a handicap in the market place, damages are recoverable if the employee can prove a financial loss.

BCCI v Ali was one of the five test cases brought to determine whether the Bank's conduct was of sufficient gravity to be a breach of the duty of trust and confidence and, if so, what was the employee's loss as a result of the breach and whether it should be compensated in damages.

In Ali the High Court dismissed the claims for stigma damages saying that the employees were unable to establish that the negative publicity given to the Bank prevented them getting new work and caused them financial loss. The case means that the precluded flood of stigma damages cases are unlikely to succeed, without proof of actual loss. One of the Court's suggestions for proving loss is for the employees to call prospective employers who turned them down, as witnesses. Not a realistic proposition in many cases! But the evidence of a recruitment agency could be a possibility.

The case however, also gives guidance about the duty of trust and confidence in the context of an employer's general misconduct not aimed at a particular employee.

'Where the employer's breach of the contractral duty of trust and confidence creates a stigma, which in turn results in a handicap in the market place, damages are recoverable if the employee can prove a financial loss.'

In Ali there was a document detailing the Bank's dishonest conduct of its business. This "agreed misconduct" included systematic fraudulent activities over a long period of time and on a massive scale, designed to conceal and disguise the Bank's true financial position so as to enable it to continue operating when it was unlawful. The employees were persuaded that the Bank was both respectable and solvent, and were under constant pressure to persuade family, friends and acquaintances to put their money in the Bank. Mr Justice Lightman says in his judgment "The Bank in a very real sense traded on their [the employees] loyalty and integrity".

The Judge says that misconduct on the part of an employer amounting to the breach of the duty of trust and confidence "must be serious indeed". Is the conduct such that "the employee cannot reasonably be expected to tolerate it a moment longer after he has discovered it and to walk out of his job without prior notice?"

A high threshold is required to establish a breach and the conduct must be "grave". It also must be "likely" to "destroy or seriously damage" the relationship of trust and confidence with the employee who makes a claim. The Judge defines "likely" as meaning more than 51% and has "a pretty good chance". He also states that although carrying on a business in a corrupt and dishonest manner is an example of such a breach, carrying on an insolvent business would not necessarily be enough.

Whilst the case makes is no more likely that employees' claims of constructive dismissal will succeed where the conduct complained of is general, not specific to an individual, it does give guidance which will assist advisors. It demonstrates the difficulties in constructive dismissal cases and the full weight of the evidential burden on the employees in these cases.

Don't bank on statutory maternity pay, mum!

Banks v Tesco Stores (IDS Brief 648)

The case of Banks v Tesco Stores Ltd , Employment Appeal Tribunal 15 September 1999 is yet another episode in the now long line of decisions, from Employment Tribunal to European Court of Justice, restricting the use of the discrimination legislation to enhance maternity benefits.

Mrs Banks worked part-time for Tesco, earning £56 gross per week. She became pregnant and took maternity leave, and sought to claim statutory maternity pay. Her claim was refused on the basis that her earnings were below the qualifying threshold. Under the Statutory Maternity Pay Regulations 1986, a woman is only entitled to statutory maternity pay if her normal weekly earnings are above the lower earnings level, which at the relevant time was £57 per week. She was also not entitled to maternity allowance, incapacity benefit, or income support.

Mrs Banks argued that by refusing her any state benefits at all, there was a breach of Article 119 (now Article 141), in particular as interpreted by the European Court of Justice decision of Gillespie v Northern Health Board 1996 ICR 498.

According to Gillespie, Article 141 did not lay down any specific criteria for determining the minimum amount of maternity pay, providing "that the amount is not set so low as to jeopardise the purpose of maternity leave." Mrs Banks argued that her ineligibility for statutory maternity pay did precisely that.

The Employment Appeal Tribunal, "with some diffidence" disagreed. They relied on the terms of the Pregnant Workers Directive 1992, which postdates Gillespie, and which states in clause 11 that maternity payments may be made conditional upon the woman fulfilling some criteria. Accordingly, they concluded, it was lawful for the Statutory Maternity Pay Regulations to require some minimum earnings threshold.

In the face of the obvious conflict between the decision in Gillespie, and clause 11 of the Pregnant Workers Directive, the Employment Appeal Tribunal opted for the interpretation which favoured the clear terms of the Directive, as opposed to the potentially open-ended discrimination point. In the light of the European decision in Boyle v EOC 1998 IRLR 717, this disappointing decision can come as little surprise.

The one positive part of the judgment is the confirmation that SMP comes within the definition of 'pay' for Article 141 and equal pay purposes.

Top brass defeated

Lustig-Prean and Beckett v the United Kingdom September 27 1999

The European Court of Human Rights in their decision of Lustig-Prean and Beckett v UK suggest that the arrival of the Human Rights Act 1998 may well have some significant impact on British employment law, at least in relation to the vexed issue of discrimination against gays and lesbians in the work place.

Mr Lustig-Prean and Mr Beckett both had enjoyed glittering careers in the Royal Navy, when they were investigated by the service police regarding possible homosexual tendencies. Both were asked for explicit details of their homosexual relations and activities, and both openly admitted their homosexuality in response to the questioning. Despite their exemplary records, both were discharged from the Navy.

In judicial review proceedings involving similar circumstances (R v Ministry of Defence ex parte Smith 1995), the Government had previously maintained that such discharges were necessary to maintain morale and unit effectiveness.

In the review proceedings, the Government's defence was accepted by the Court, and the applications were dismissed on the grounds that the policy of discharge did not breach the stringent test for judicial review requiring a decision that "outrageously defies logic or accepted moral standards".

The more recent equal pay case of Grant v South West Trains Ltd (1998) was referred to the European Court of Justice for determination as to whether the Equal Pay Directive extended to outlaw discrimination on the grounds of homosexuality.

Following the unfavourable decision in favour of South West Trains and against Ms Grant, Mr Lustig-Prean and Mr Beckett withdrew the similar Tribunal claims that they had lodged, under the Sex Discrimination Act 1975.

There remained, however, their applications to the European Court of Human Rights in Strasbourg, which proceeded on the basis that the manner of the investigations by the Navy into their homosexuality and their subsequent discharges breached Article 8 (and the catch-all Article 14) of the European Convention of Human Rights. Article 8 provides that "Everyone has the right to respect for his private… life…There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security…for the prevention of disorder…"

As the law now stands, the United Kingdom has ratified the Convention and is meant to abide by its decisions but the Convention has not actually been written into British law which means, that in pursuing rights under it, claimants have to apply directly to the Strasbourg Court.

In Mr Lustig-Prean's and Mr Beckett's cases, the Court decided that the investigations by the service police, including detailed interviews regarding their homosexual practices and their consequent discharge, constituted an interference with their right to respect for their private lives.

The Government's arguments – that homosexuality had an adverse impact on unit cohesion and morale and operational effectiveness – were insufficient and unsubstantiated. Such views were founded solely on the negative attitudes of heterosexual personnel, and as such could not amount to adequate justification.

After the long run of unsuccessful decisions precluding gays and lesbians from taking advantage of the Sex Discrimination legislation, this decision represents a tremendous victory for justice and common sense. The question that still remains to be addressed, however, is what impact the decision will have on domestic employment law, particularly in relation to discrimination on the grounds of sexual orientation.

With effect from October 2 2000, the main provisions of the Human Rights Act 1998 will come into force in Britain, making the Convention directly enforceable in the domestic Courts. In effect,

Mr Lustig-Prean and Mr Beckett would have been able to pursue their cases in this country without the considerable expense and inconvenience of going to Strasbourg – where the average cost of each case is £30,000.

The rights under the Act are enforceable against the state and public authorities and not against private individuals or private organisations. In previous Strasbourg case law, it has been suggested that even public bodies exercising private rights, such as in relation to employment matters, may not be covered. Bodies with both private and public responsibilities are covered only in respect of their public functions, not their relations with their employees.

In the case of Mr Lustig-Prean, this public and private divide was not referred to. Clearly, the policy of automatic discharge for all gay service personnel was very much a matter of Government policy as opposed to a particular act just involving an employer and employee.

Nonetheless, it simply seems to have been assumed that the Convention should apply in these circumstances, even though the case in one sense did simply relate to what were essentially private rights between Mr Lustig-Prean and his employer. It is very likely that the decision will be regarded as having broader public sector application.

Further, if cases under the Human Rights Act are successful against public organisations, then the incongruity in having inconsistency in key employment principles between public and private employment will create an unanswerable case for change. So, for example , in the Equal Pay context, the rights of employees in the public sector and not the private sector to recover compensation in indirect sex discrimination cases, did eventually lead to an amendment to bring the two broadly in line.

Section 2 and 3 of the Act also impose an express obligation all Courts and Tribunals to interpret all legislation so as to be compatible with the Act. This will mean that Tribunals will not necessarily be bound by previous decisions made before the coming into force of the Act. Where the Act has relevance, then previous principles may be revisited. In the context of discrimination on the grounds of sexual orientation, the combined effect of the Lustig-Prean decision, and section 2 of the Act may well lead to Tribunals holding that discrimination by public authorities against gays and lesbians is, at the very least, unfair, arguably also a breach of contract.

We also have the Government's White Paper on the Human Rights Bill, where it is clearly stated that the Government will ensure that its internal laws are rectified so as to bring them in line with Convention decisions (restating what was in theory anyway always the case).

All these factors, combined with the fact that the reasoning and circumstances of the Grant case are generally regarded as inconclusive, and the unequivocal way in which the Court of Human Rights find in favour of Mr Lustig-Prean, mean that it can realistically be only a question of time before discrimination at work on the grounds of sexual orientation in itself is finally and conclusively declared to be unlawful in domestic Courts and Tribunals. It will not be before time.

Pay in lieu of notice liable to tax

EMI Group Electronics Ltd v Coldicott (HM Inspector of Taxes) [1999] IRLR 630 CA

Cerberus Software Ltd v Rowley 14.7.99 EAT (reported IRLB 626)

T and K Home Improvements Ltd v Skilton 18.3.99 EAT (reported IRLB 626)

The Court of Appeal has decided that where a payment in lieu of notice is made on the termination of employment, and that payment in lieu of notice forms part of the contract of employment, the payment is taxable.

Where, however, there is no provision in the employment contract to make a payment in lieu of notice a payment made in lieu of notice as compensation or damages for breach of the contract of employment will not be taxable as long as it is less than £30,000. This decision is of great significance when negotiating termination packages and will mean that employees who have pay in lieu of notice clauses in their contracts will need to be advised of their tax liability as will the employers concerned.

In the EMI case two managers were dismissed as redundant. Their contracts entitled them to six months notice of termination with the company reserving their right to make a payment of the equivalent of salary in lieu of notice.

The Inland Revenue determined that the payments made in lieu of notice were taxable as emoluments from their employment in accordance with s19 of the Income and Corporation Taxes Act 1988.

The Revenue tried to recover from the employers the tax which should have been deducted and paid. The company appealed. The High Court decided that the payments were emoluments and taxable. The fact that the payments were due under the contract was relevant in suggesting that they "derived from" the employment and were part of the package of benefits which the company as a prospective employer offered to the employees to induce them to take employment.

The company appealed to the Court of Appeal, who agreed with the High Court. Lord Justice Chadwick saying " The point can, I think, be illuminated by considering the related question 'why is the employee entitled to six months' notice of the employer's intention to terminate his employment?' The answer must be because that was the security, or continuity, of employment which the employee required as an inducement to enter into the contract of employment".

Take no notice

Cerberus Software Ltd v Rowley also concerns a pay in lieu of notice clause. In this case Mr Rowley was employed by Cerberus on a contract with a six months notice clause. The contract also allowed the employer to dismiss summarily making a payment in lieu of notice. Mr Rowley was summarily dismissed and did not receive his pay in lieu of notice. He complained of wrongful dismissal in an employment tribunal. Just five weeks into his notice period he got a new job with better pay. The Tribunal found that he had been wrongfully dismissed and awarded him compensation for his full six months notice. They did not take into account his earnings from his new employment. The company appealed.

The Company argued that under his contract – as well as giving him proper notice or paying him in lieu of notice – they could give him no notice and make no payment in which case they would have wrongfully dismissed him and he would be entitled to the pay he would have received during his notice period less earnings actually received during the period.

The EAT disagreed. They did not accept there was a third choice in the contract to dismiss without payment. They therefore found that whether or not the company broke the contract by the summary dismissal itself, it was in breach

of the contract by not making a payment in lieu of notice which was what it had promised to do in the event of summary dismissal.

The payment in lieu of notice meant payment without deduction for mitigation. Mr Rowley was entitled to be into the position he would have been in had the breach not been committed, so he was entitled to the full amount. The company had promised to pay the whole sum, they were not entitled to receive the benefit of his mitigation of his loss.

Clear and simple

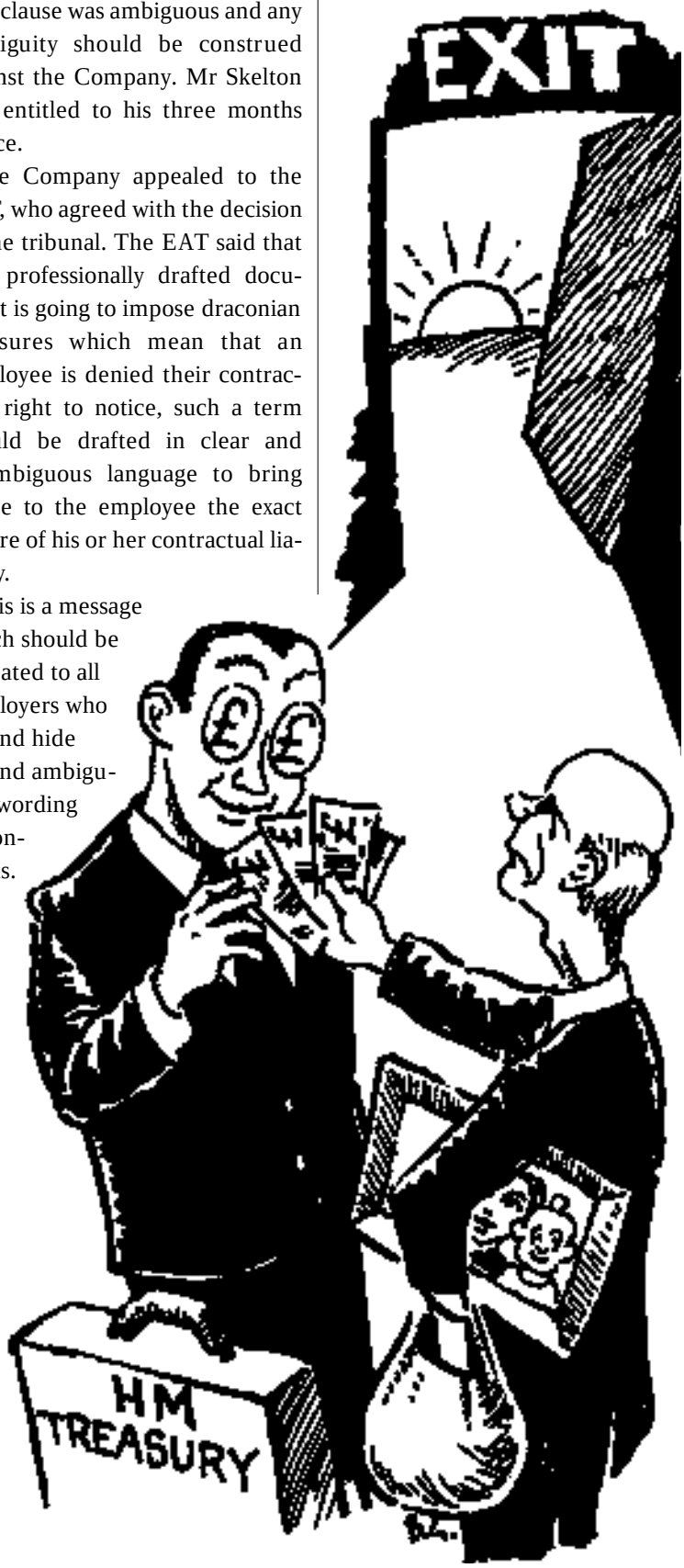
In T&K Home Improvements the EAT considered the issue of pay in lieu of notice in the context of an ambiguously worded provision in a contract of employment. Mr Skelton had a contract of employment drafted by the employer's solicitors. It contained a three month notice clause. It also allowed the employers to dismiss without notice or pay on various grounds including "gross incompetence". The contract also set out Mr Skelton's performance target for the first three months of the financial year and said "If over any quarter you fail to achieve your performance target as outlined… you may be dismissed with immediate effect".

Mr Skelton was not able to meet the performance targets and it was made clear to him that he had little choice but to resign. Mr Skelton complained to an employment tribunal that he was dismissed in breach of contract. They decided that he was dismissed and the dismissal was in breach of contract. The Company relied on the ambiguously worded clause "you may be dismissed with immediate effect".

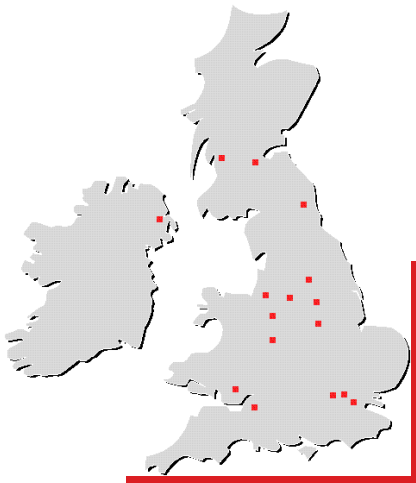
The Tribunal said that for the contract to deprive Mr Skelton of the right to notice or pay in lieu of notice, there had to be a clear and specific provision to that effect. The clause was ambiguous and any ambiguity should be construed against the Company. Mr Skelton was entitled to his three months notice.

The Company appealed to the EAT, who agreed with the decision of the tribunal. The EAT said that if a professionally drafted document is going to impose draconian measures which mean that an employee is denied their contractual right to notice, such a term should be drafted in clear and unambiguous language to bring home to the employee the exact nature of his or her contractual liability.

This is a message which should be repeated to all employers who try and hide behind ambiguous wording in contracts.



Recovering personal injury compensation as well?



Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481 Court of Appeal

Can an applicant in a Race case in an Employment Tribunal recover compensation for personal injury as well as any injury to feelings? If a claim in an Employment Tribunal is settled with payment being made to cover injury to feelings can an applicant subsequently start a personal injury action in a County Court?

Mr Sheriff was employed as a second engineer. He alleged that during the course of his employment he suffered racial harassment, abuse, intimidation and bullying by the ship's master. As a result of the abuse he suffered a nervous breakdown and was later dismissed. He brought an Employment Tribunal claim which was settled, the terms of settlement were recorded in an agreement and he received £4,000 compensation. The agreement was said to be "in full and final settlement of all claims which he has or may have against the respondent arising out of his employment".

Mr Sheriff later issued a summons in the County Court claiming damages for personal injury. The details given of the treatment he had received from the master were almost the same as on his Employment Tribunal claim. A medical report gave details of the post traumatic stress disorder he had suffered. His summons was struck out as an abuse of process on the grounds that the claim was in breach of the agreement which settled the Employment Tribunal claim.

The Race Relations Act 1976 creates a "statutory tort" to unlawfully discriminate on the grounds of race. Section 57 (4) of the Act states "For the avoidance of doubt it is hereby declared that damages in respect of an unlawful act of discrimination may include compensation for injury to feelings whether or not they include compensation under any other head". The Court of Appeal say that the language is clear and the principle must be that the claimant is entitled to be compensated for the loss and damage actually sustained as a result of the statutory tort.

The Court of Appeal said that the Employment Tribunal does have the jurisdiction to award damages for the tort of racial discrimination, including damages for personal injury both physical and psychiatric, caused by the tort. The same is also true for disability and sex discrimination claims. Here Mr Sheriff was not able to pursue his County Court action due to the terms on which he settled his Employment Tribunal claim and that he could have been compensated for his personal injury in that case..

The Court of Appeal say it is important to take care where a claim to an employment tribunal includes, or might include, injury to health and injury to feelings. A medical report may need to be obtained.

Advisors should be careful when settling employment tribunal claims to consider potential personal injuries complaints arising out of the same complaint and not under-settle employment claims. It may be more straightforward to obtain damages for personal injury in an employment tribunal compared with a County Court, as in the latter the claimant will have to prove that it was reasonably foreseeable to an reasonable employer that the behaviour will cause an injury. In the employment tribunal the applicant will have to show the behaviour caused the injury, a lower hurdle. The standard exclusion in Compromise Agreements and COT3s excluding personal injury claims may not be sufficient to entitle applicants who claims for sex and race discrimination are settled to pursue subsequent personal injury actions.

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