SUMMARY

2013/53 Dismissal after making multiple complaints of discrimination was victimisation (UK)

<p>The Employment Appeal Tribunal (EAT) has held that an employee who brought a series of grievances and employment tribunal claims against his employer over a five-year period was victimised under the Equality Act 2010 (EqA) when he was subsequently dismissed. The tribunal had wrongly decided that the employer’s reasons for dismissing him – primarily the breakdown in the employment relationship – were ‘genuinely separable’ from the protected acts of raising complaints.</p>

Summary

The Employment Appeal Tribunal (EAT) has held that an employee who brought a series of grievances and employment tribunal claims against his employer over a five-year period was victimised under the Equality Act 2010 (EqA) when he was subsequently dismissed. The tribunal had wrongly decided that the employer's reasons for dismissing him – primarily the breakdown in the employment relationship – were 'genuinely separable' from the protected acts of raising complaints.

Background

Under the EqA, an employer who dismisses an employee or otherwise subjects them to a detriment because of a 'protected act' commits unlawful victimisation. Under s27(1) EqA, protected acts include alleging or bringing proceedings for discrimination. However:

Giving false evidence or information, or making a false allegation, is not a protected act if the

evidence or information is given, or the allegation is made, in bad faith. (s27(3))

There must be a genuine belief in the truthfulness of the allegation. This is a marked simplification from the previously applicable Race Relations Act 1976 ('RRA'), which required tribunals to establish 'less favourable treatment' or 'a comparator' in finding victimisation.

In the 2010 case of Martin v Devonshires Solicitors the EAT held that a mentally ill employee who had in good faith brought multiple false grievances based on supposed discrimination, and who had been dismissed as a result, had not been victimised. The EAT found that the reasons for the employee's dismissal (including her failure to accept that her grievances were false, and the time and resources taken up in dealing with them) were "sufficiently separable" from the protected acts themselves so as to amount to grounds for a fair termination.

Facts

Over a period of five years from 2005, Mr Woodhouse, a black project manager at West North West Homes Leeds (WNW Homes), submitted ten internal grievances and nine employment tribunal claims alleging racial harassment and discrimination by his employer. These included alleged racist comments, complaints about sick pay, the refusal of a phased return to work following sickness, the allocation of staff and duties and the treatment and management of his grievances. After proper investigation into each grievance, almost all of those complaints were found to be "empty allegations without any proper evidential basis or grounds for his suspicion".

Perhaps unsurprisingly, after five years of this conduct, WNW Homes decided that mutual trust and confidence had broken down so "irretrievably" that it was no longer feasible for Mr Woodhouse to continue in his employment with them. In 2011, WNW Homes decided to dismiss Mr Woodhouse, citing his loss of trust and confidence in the company as the prime cause. Mr Woodhouse then brought employment tribunal proceedings for race discrimination, harassment and victimisation.

The tribunal accepted that Mr Woodhouse had made his allegations and had brought his claims in good faith, but it rejected his claim, finding that:

there was a pattern of grievances that had been objectively demonstrated to be false;
this pattern enabled the Employment Tribunal to say that this was not a case of victimisation;
the Appellant had become obsessed;
the rejection of one complaint would be bound to lead to another in the future;
the Respondent was no longer prepared to run the risk of further damaging and time-

consuming allegations.

Following the 'comparator' requirements of the superseded RRA, the tribunal found that WNW Homes would have treated a comparable employee who demonstrated "a long-standing lack of faith by submitting ill-founded grievances but without any racial connotation" in exactly the same manner – by way of dismissal. It was decided that Mr Woodhouse was dismissed not because of the series of protected acts he had made in the form of repeated grievances and tribunal claims, but for "*some other substantial reason*".

Mr Woodhouse appealed this decision to the EAT.

Judgment

The EAT found that the tribunal had incorrectly approached the legal test for victimisation. Unlike the RRA, s27(1) of the EqA does not require a comparative approach to determine if victimisation has occurred. The proper test is causative and the tribunal should have considered whether or not Mr Woodhouse's dismissal was due to the fact that he had made complaints and brought claims of race discrimination. The tribunal was wrong to find that there was no act of victimisation because the company would have treated any other person who had raised different complaints in the same way.

The EAT also found that the Tribunal had erroneously treated the instant case as being analogous with Martin - v - Devonshires Solicitors. That case was exceptional because the grievances raised by the individual were almost certainly based on her own paranoid delusions about events which had never occurred; very few cases would involve this type of behaviour. A key finding in Martin v Devonshires Solicitors had been that the employer's reasons for dismissal were "genuinely separable" from the individual's protected acts themselves. In contrast, the protected acts made by Mr Woodhouse were inseparable from WNW Homes' reasons for termination of his employment.

The EAT found that cases such as this, in which grievances multiply and lead to tribunal claims, are not uncommon. Martin - v - Devonshires should not be used as a 'template' into which cases of victimisation should be fitted. His Honour Judge Hand QC said obiter: "It is a slippery slope towards neutering the concept of victimisation if the irrationality and multiplicity of grievances can lead, as a matter of routine, to the case being placed outside the scope of section 27 of the EqA."

The EAT upheld the appeal and substituted a finding of victimisation.

Commentary

The EAT's decision rests largely upon the proper reading of the EqA. Unlike the old law on race relations, no comparator is required under s.27 EqA and so victimisation on the part of WNW Homes was made out upon a direct construction of that section.

Whilst sound, however, the decision does provoke some sympathy for WNW Homes. The pattern of an individual raising repeated complaints and their escalation to tribunal claims may be very familiar to employers. There is always concern about the cost and time involvement in dealing with complaints of this nature and it is easy to see how WNW Homes would have wished to end the prolonged sequence of "grievances about grievances" in this case.

The EAT's judgment does not provide practical guidance for employers on best practice in dealing with difficult employees. However, it does make clear that, in the absence of bad faith, an employer cannot simply dismiss an individual purely because of his or her misguided grievances and claims. Employers faced with a sequence of behaviour such as this must therefore carefully consider how to manage the situation fairly and effectively. Although retaining the employee and investigating each new complaint in the series might impact negatively on the business and other employees, dismissing this individual for raising complaints is almost certain to be unlawful. Where performance management or disciplinary procedures are found to be inappropriate, workplace mediation might be the least taxing way of resolving such issues. Alternatively, employers might seek a "clean break" through a settlement agreement (formerly called compromise agreement) under which the employee waives claims in return for compensation. Settlement agreements must fulfil certain statutory criteria, the most significant of which is that the individual must get independent legal advice on the agreement. However, the amount of the settlement sum would need to be negotiated with the employee and it may prove impossible to reach an agreement.

Comments from other jurisdictions

Austria (Martin Risak): Under Austrian law it is unlawful to dismiss an employee who has raised a "not obviously-unjustified claim", a concept that is not limited to equality law but to all employee rights. Thus, the test is causative (*sine qua non*) – if the dismissal was based on the fact that the worker made complaints then it is only lawful if there would be no doubt in most people's minds that the complaints were entirely baseless.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Nationality discrimination; victimisation

Parties: Woodhouse – v – West North West Homes Leeds Ltd.

Court: Employment Appeal Tribunal

Date: 25 October 2012

Case Number: [2013] IRLR 773; UKEAT/0007/12

Internet publication: http://www.bailii.org/uk/cases/ UKEAT/2013/0007_12_0506.html

---

Creator: Employment Tribunal
Verdict at: 2012-10-25
Case number: [2013] IRLR 773; UKEAT/0007/12