EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2013/21 Is post-employment victimisation unlawful? (UK)

<p>Under the Equality Act 2010 (the “Act”), victimisation occurs where a person (A) subjects another person (B) to a detriment because either</p>
<p>(i)B has done a protected act, or (ii) A believes that B has done, or may do, a protected act. A protected act includes bringing proceedings under the Act.</p>
<p>In two recent cases, the UK Employment Appeal Tribunal (EAT) has come to different conclusions about whether the Act also prohibits acts of victimisation which take place after an employment relationship has ended. A decision of the Court of Appeal is now needed to determine the correct approach.</p>
<p>The Act consolidates and replaces a number of older pieces of legislation which did protect former employees against victimisation by their previous employers (in accordance with EU law). The question now arises whether the Act altered the pre-existing law.</p>

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Facts

The events in *Rowstock - v - Jessemey* occurred at a time when retirement was still a potentially fair reason for dismissal under the law of England and Wales. The employer compulsorily retired the employee, Mr Jessemey, without following the correct procedure. Mr Jessemey brought claims for unfair dismissal and age discrimination. He was successful in his discrimination claim. His employer gave him a poor reference, referring to the fact that he had brought a claim. Mr Jessemey then brought a further claim of victimisation, alleging that his employer's poor reference was its 'revenge' for him having brought a claim of discrimination. He claimed monetary compensation.

In the later case of *Onu - v - Akwiwu*, Ms Onu was employed as a domestic servant for Mr and Mrs Akwiwu, following them from their native Nigeria to the UK. Eventually, she resigned and brought claims against her employers on the ground that she had been mistreated. Her claims for discrimination, harassment and failure to pay the minimum wage are not relevant here, but she also brought a claim for victimisation[1]. This was based on a call from her employer to her sister, some six months after Ms Onu's employment had ended, saying that Ms Onu had sued him, that "*if she thought things would end there she was wrong*" and that Ms Onu would "*suffer for it*". The employer later retracted his statement. The Tribunal rejected the victimisation claim based on the evidence.

Judgment

The relevant question for the EAT in each case was whether the Act provides a remedy for acts of victimisation which occur after the employment relationship has ended. In particular, the EAT had to consider the meaning and effect of section 108(7) of the Act.

Section 108 relates to "*relationships that have ended*" and extends the prohibition against

discrimination and harassment to situations arising after a relationship has ended. Section 108(7) states: "*But conduct is not a contravention of this section insofar as it also amounts to victimisation of B by A." As both tribunals acknowledged, the meaning of these words, in context, is not clear.*

In *Jessemey*, the Equality and Human Rights Commission (EHRC) intervened to support the view that the Equality Act did – and should be interpreted to – provide a remedy for post-termination acts of victimisation. The EHRC's arguments were as follows:

| The provision in section108(7) was apparently made in error, or is, at least, an instance of poor drafting;

| The Explanatory Notes to the 2010 Act do not refer to any intention to change the law, as would be expected if this had been the intention; the fact that section 108 is in a section of the Act entitled "*Ancillary*" is also inconsistent with this section being intended to effect a change in the law;

| The EHRC's Code of Practice, which was approved by Parliament, states that victimisation occurring after the end of the employment relationship is unlawful;

| If post-termination victimisation was not covered by the Equality Act, the UK would not be compliant with the requirements of EU Directives;

| Words could easily be read into the section (namely by a reference to "current and/or former" employment) to 'correct' the error, and to adopt the purposive interpretation required by EU Directives.

The EAT in *Jessemey*, however, refused to take such a "*bold*" approach. It was heavily influenced by the fact that the remit of section 108 extends to all post-relationship scenarios (not just employment relationships) and therefore by the potentially far-reaching implications of its decision. It was of the view that it was being asked to find a meaning for these words which was "*the exact reverse*" of what they said. The Tribunal accepted that its literal reading of the words in section 108(7) left a "*lacuna*" in the statutory scheme of protection from victimisation, which the UK is required by EU legislation to enact. It considered whether it was within its legitimate power to plug the gap – and decided that it was not. It did, however, give Mr Jessemey permission to appeal the point, given its general importance.

The EAT in Onu characterised the difficulty as follows: "*The Equality Act does not expressly provide that victimisation of a former employee by her erstwhile employer is compensable, whereas it does provide specifically that both discrimination and harassment occurring after termination of*

the employment relationship are." The EAT in *Onu* decided that section 108(7) does not expressly exclude post-termination victimisation claims, and that such claims are actionable. Its reasons were that: this conclusion was required under EU law; it was in accordance with previous statutes on discrimination and the EHRC Code of Practice; there was no Parliamentary material to suggest that it considered this section would be a dramatic shift in the law; there was no sensible purpose for section 108(7) if there was no right to sue for victimisation after the employment relationship has ended; and, drawing on previous discrimination case-law, given that the intention of the legislation is to protect employees from discrimination in respect of all benefits arising from the employment relationship, it would make no sense to draw an "*arbitrary line*" at the precise moment that relationship ends. According to the EAT in Onu, the purpose of section 108(7) was simply to prevent double recovery where there is also a discrimination and/ or harassment claim arising out of the same facts. The EAT also gave leave to appeal.

Commentary

The decision in *Jessemey* was widely regarded as wrong. Now, it seems that this is acknowledged by the decision-makers themselves. One of the members of the EAT in *Jessemey* was also a member of the panel in *Onu*, and was persuaded in the latter case that post- termination victimisation is actionable on a proper construction of the Equality Act. The decision regarding victimisation in *Onu* is clearly the better one, as it is in accordance with the EHRC Code of Practice, achieves compliance with the UK's EU obligations, corresponds with the Equality Act's general aim of preventing discrimination in all its forms and is most probably what Parliament intended. Further, many victimisation claims brought under the previous discrimination laws were acts which occurred after the end of the relationship – such as bad references being given. Post-termination acts are therefore at the heart of the prohibition of victimisation.

Although future tribunals are likely to follow the Onu decision, rather than relying on *Jessemey*, conflicting authorities at EAT-level exist. A Court of Appeal decision would therefore be welcome to confirm the common sense view that employees who are victimised by their former employers can bring a claim and expect a remedy.

We understand that Mr Jessemey has appealed the decision to the Court of Appeal, so binding authority in this matter is due to be available later this year or early next year.

Comments from other jurisdictions

Germany (Klaus Thönißen): From a German point of view both Mr Jessemy and Ms Onu would have had a valid claim under sec. 16 (1) – Prohibition of Victimisation – of the General

Equal Treatment Act (the "AGG"). This section provides the following wording:

"The employer shall not be permitted to discriminate against employees who assert their rights under Part 2 or on account of their refusal to carry out instructions that constitute a violation of the provisions of Part 2."

The main issue in the cases at hand – whether post-employment victimisation is covered by the Act – would not be an issue within the rules of the AGG. The German lawmakers considered that issue and therefore incorporated sec. 6 (1) no. 3 into the AGG:

"Employee shall here also refer to those applying for an employment relationship and persons whose employment relationship has ended."

Since both plaintiffs did not suffer any economic loss, they could demand appropriate compensation in money by filing a complaint under sec. 15 (2) of the AGG with a Labour court.

Luxembourg (Michel Molitor): Under Luxembourg law, the above situations are unlikely to come to court. Concerning *Rowstock - v - Jessemey*, the employer would have no duty to deliver a reference letter to the employee. The employer would only be obliged to give a neutral work certificate, which lists the jobs that were carried out and their length. No ambiguous or negative comment of any kind is allowed, although there is no prohibition on making positive remarks in favour of the employee in the work certificate. As regards *Onu - v - Akwiwu*, it is unlikely that one call by the employer to the employee's sister alone would be considered as moral harassment, as this requires repeated acts, according to Luxembourg case law. It should be noted that the concept of moral harassment is restrictively construed in Luxembourg, which as yet has no laws on moral harassment.

The Netherlands (Peter Vas Nunes): In neither of the two cases reported above did the English court cite provisions of EU law. However, the court did accept that UK law would not be compliant with EU law if there was no remedy for post-employment victimisation. This must refer to Article 9 of the Race Directive 2000/43 and Article 11 in conjunction with Article 9 of the Framework Directive 2000/78. Article 9 of the Race Directive requires Member States to "introduce into their national legal systems such measures as are necessary to protect *individuals* from any adverse treatment or adverse consequence as a reaction to a complaint" [*emphasis added*]. Article 11 of the Framework Directive provides for a similar requirement "to protect *employees* against dismissal or other adverse treatment by the *employer* as a reaction to a complaint" [*emphasis added*]. This might seem as if the Framework Directive limits the prohibition of victimisation to situations where there is still an employment relationship. However, Article 11 forms part of Chapter II of the directive headed "Remedies and Enforcement", of which Article 9 also forms a part. Article 9(1) requires

Member States to ensure that persons who consider themselves wronged can seek judicial redress "even after the relationship in which the discrimination is alleged to have occurred has ended". Arguably, therefore, the words "employees" and "employer" in Article 11 should be interpreted as including former employees and a former employer.

Subject: Other forms of discrimination

Parties: 1. Rowstock Ltd - v - Jessemey (Equality and Human Rights Commission intervening); 2. Onu - v - Akwiwu and another

Court: *Employment Appeal Tribunal*

Date: 15 March 2013; 21 May 2013

Case number: UKEAT/0112/12 and UKEAT/0022/12

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