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Features - Focus on bullying

Discrimination - Managers can be personally liable for bullying by others

It has long been the case under the Sex Discrimination Act 1975 (SDA) that individual employees can be personally liable for their acts of discrimination. The landmark Court of Appeal case of *Gilbank v. Miles* (2006) now broadens the position. This decision is the first authoritative judgment to hold that a manager can be personally responsible to pay compensation for aiding acts of discrimination carried out by other employees. The case should serve as a strong reminder to managers that if they allow their staff to discriminate or harass others, they might be hit where it hurts – in their own pockets.

Individual liability

Under s42 of the SDA, a person may be individually liable to pay compensation if he/she knowingly aids another person to discriminate unlawfully. If an employee discriminates against another employee in the course of employment, the perpetrator is deemed by the SDA to have aided the discriminatory act of the employer (who will also be responsible for the act). Traditionally, employment tribunals commonly made substantial discrimination awards against an employer, and only small awards against the individual harasser. Last year, in *Way & IntroCate Chemicals v. Crouch* (2005) the Employment Appeal Tribunal (EAT) held that an award in a discrimination claim could be made jointly and severally against both an individual employee and the employer. This gives a claimant the right to pursue the individual discriminator for the full amount of compensation (which can be potentially unlimited), which might happen if, for example, the employer company is insolvent. Whilst the EAT set out some guidelines for these types of awards – including apportionment of the award on grounds of blame – meaning it will not be appropriate in all cases, it is now much more likely that individual employees will be pursued for large proportions of discrimination awards.

The case

Janine Gilbank was employed by Quality Hairdressing Ltd (QH) for several years, first as a trainee hairdresser and then a senior hair designer and trainee manager. The business was run by Maxine Miles, a director and majority shareholder. Ms Gilbank had a good working relationship with Ms Miles until she announced that she was pregnant. This was when the atmosphere in the salon changed – she was then subjected to a 'vicious' campaign of bullying by Ms Miles and QH employees. She was prevented from taking breaks to rest or eat and she was not permitted to attend ante-natal appointments. QH refused to listen to medical advice, carry out a risk assessment or to make any adjustments to Ms Gilbank's working practices to allow for her pregnancy. She was also humiliated and bullied in front of other staff and clients. When she voiced fears of a miscarriage, she was forced to carry on working by another manager.

Ms Gilbank subsequently brought a sex discrimination claim against QH and Ms Miles. The employment tribunal found conclusively in her favour and made an award jointly and severally against QH and Ms Miles on the grounds that Ms Miles had aided QH's act of unlawful discrimination. The tribunal decided that Ms Miles had 'consciously fostered and encouraged a discriminatory culture to grow up', which targeted Ms Gilbank. They found that she did this by her behaviour and the example she set other managers. The decision stated that there was a catalogue of behaviour on the part of Ms Miles and the other managers, which went beyond malicious and amounted to 'downright vicious ... It was targeted, deliberate, repeated and consciously inflicted.' The award included £25,000 for injury to feelings – the maximum possible award for damages in this category, according to the guidelines set by the Court of Appeal in *Chief Constable of West Yorkshire Police v. Vento* (No. 2) (2003).

QH was then dissolved so could not pay the compensation. Ms Miles appealed on the grounds that the award should not have been joint and several because she did not carry out some of the acts of discrimination.

The EAT and Court of Appeal upheld the tribunal's decision that Ms Miles should be personally liable for the acts of her fellow employees. This was because she consciously encouraged them to discriminate. Her actions had gone beyond simply creating an environment in which discrimination could occur. By her own behaviour and the manner in which she dealt with Ms Gilbank's complaints of mistreatment by other managers, she sent out a message to staff that their actions were perfectly acceptable. Ms Miles had the authority to be able to stop the discrimination, but instead had encouraged it. The Court of Appeal also said that it had no grounds for interfering with the £25,000 award for injury to feelings, on the basis that the QH management had demonstrated a 'callous disregard or concern for the life of her unborn child'.

What this means for employers

Why does this case matter to employers? Under s41 of the SDA, employers will be vicariously liable for acts of discrimination perpetrated by their employees in the course of employment. Generally, any discriminatory acts committed by employees during working hours - and in some circumstances outside of business hours if the environment is an extension of employment - will be deemed to have been committed 'in the course of employment'. It is an extremely wide test. However, the employer does have a potential defence – that it took such steps that were reasonably practicable to prevent the employee from doing the act in question, or similar acts. An employer can distance itself from the discriminatory actions of its staff by proving that it is genuinely an equal opportunities employer, with a well-publicised policy that is backed by management and is properly enforced.

What action should be taken

Although *Gilbank v. Miles* is a case under the SDA, the principle should apply equally across all of the other discrimination laws. Employers should take the following steps to try to prevent their staff from suffering discrimination and to create a potential defence to harassment by maverick individuals:

- Ensure that there are comprehensive written equal opportunities policies in place – these should be up to date (covering harassment/bullying and victimisation laws) and should be reviewed in light of new age discrimination legislation to be introduced on 1 October 2006.
- Publicise the policies through whatever means is appropriate to your organisation. For example, in an office environment, make a launch announcement, email the policy to employees and put it on the intranet.
- Ensure that managers consistently implement those policies and that any employee grievances or complaints are treated seriously and in a consistent manner in accordance with relevant company policies.
- Require all employees and managers to be given equal opportunities and harassment training, emphasising that they face being sued personally if they either discriminate or encourage others to discriminate.

With the introduction of new age discrimination legislation on 1 October 2006 - which is expected to have as large an impact as current sex and race laws which have been in place since the mid 1970s - it will become more important than ever for employers to treat discrimination issues seriously.

By Charlie Pring

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Employers are treading on eggshells in relation to harassment and bullying at work

The recent House of Lords case of *Majrowski v Guy's and St Thomas' NHS Trust* has considerably widened the scope for claims brought by individuals against former employers resulting from harassment. Following this case, an employer may be vicariously liable for a course of conduct by an employee which amounts to harassment of another employee.

The case

Mr Majrowski was employed from November 1998 to June 1999 by Guy's and St Thomas' NHS Trust (the 'Trust'). During his employment, he complained of his treatment by his manager, claiming that she was rude and abusive to him in front of other staff, that she was excessively critical of his time-keeping, that she imposed unrealistic performance targets for him and threatened disciplinary action if he failed to meet them and, more generally, that she isolated him by refusing to talk to him. On investigation by the Trust, harassment by the manager was found to have occurred.

In 2003, Mr Majrowski brought civil proceedings against the Trust pursuant to the Protection from Harassment Act 1997 (the 'Act'), claiming damages for distress and anxiety and consequential losses caused by the harassment he suffered. Although the manager had been the individual who had conducted the harassment, Mr Majrowski claimed the Trust was liable vicariously as her employer.

Vicarious liability

Vicarious liability is a long-established principle under which a blameless employer is liable for a wrong committed by an employee whilst the employee acts 'in the course of his or her employment'. The rationale behind the principle is that it is fair for the injured person to look to a more financially secure source than the individual responsible, and to allow for a spreading of financial loss. The principle encourages employers to maintain standards of good practice by their employees.

Following the *Majrowski* case, an innocent employer, whose employee's conduct in the course of his or her employment amounts to harassment under the Act, may be liable in damages vicariously.

Harassment under the Act

The Act was created with a view to protecting individuals from harassment from other individuals, such as stalkers. The use of this Act in the context of employment disputes is a new and unexpected (and probably unintended) interpretation of the legislation.

The Act prohibits a course of conduct which amounts to harassment of another and which the harasser knows or ought to know amounts to harassment of the other. The harasser ought to know that the course of conduct amounts to harassment if a reasonable person with the same information as the harasser would think the conduct amounted to harassment of the other.

A course of conduct means two or more instances, but harassment may be of more than one person. Unfortunately, there is no definition of harassment in the Act, but the Act explicitly refers to it including 'distress or alarm', whilst *Majrowski* refers to such conduct 'causing anxiety or distress'.

Before *Majrowski* the potential options available to an employee who had suffered harassment were (i) a discrimination claim, (ii) a stress claim for personal injury, and (iii) resigning and claiming constructive dismissal. This new claim could most easily be 'tacked on' to a stress claim, which has always had to be brought in the courts, as opposed to the employment tribunal.

There is a defence under discrimination legislation for employers who took 'such steps as were reasonably practicable to prevent employees committing a particular discriminatory act'. This defence is not available under the Act, so the adoption by a diligent employer of detailed equal opportunities and anti-harassment and anti-bullying policies, and related training, whilst certainly recommended, may not prevent the employer being liable vicariously under the Act, even if it would protect an employer from a discrimination claim.

Harassment under the Act is therefore far broader than it is under the various discrimination laws, where it is limited to specific grounds (sex, race, disability, sexual orientation, religion or belief and, from 1 October 2006, age).

The limitation period for bringing a civil claim under the Act is six years, significantly longer than the usual three month period for bringing a claim under discrimination legislation in the employment tribunal and the three year limitation period for stress claims.

The scope for action under the Act is also broader than it is under a stress claim against an employer for failure to take reasonable care: the concept of harassment will be more liberally interpreted than psychiatric injury or illness arising from stress in the workplace.

Considerations for employers

Following *Majrowski*, employers could remain liable for their employees' conduct, of which they may be unaware and which they would certainly not condone, for six years after the conduct in question. The costs associated with a court action tend also to be higher than costs of an employment tribunal action. The much broader scope of 'harassment' under the Act when compared with that under discrimination legislation or personal injury principles is a further worry. The combination of these factors may also impact on the cost and availability of employer's liability insurance.

There are a number of drawbacks to employees and former employees bringing an action under the Act. The claiming employee faces similar costs risks to the employer by bringing an action in the courts and, as the successful party will usually be able to recover its costs from the unsuccessful party (subject of course to the other party's solvency), there may be less pressure on an employer to settle a case than there is in the employment tribunal. Civil procedure requirements and costs penalties can help in deterring claimants with weak claims who might otherwise pursue the less risky employment tribunal route. As discussed above, a 'course of conduct' under the Act involves at least two harassing acts, so employers will hopefully be alerted to and take steps to avoid subsequent conduct upon the first occurrence.

Green v Deutsche Bank

The recent high profile High Court decision in *Green v DB Group Services (UK) Ltd*, in which the employer was liable for significant damages which were in the main committed by other employees rather than directly by the employer, highlights the extent of the potential vicarious liability of employers under the Act.

Helen Green, a Company Secretary Assistant, was subjected to workplace bullying by a group of employees and by an individual, both of which amounted to harassment under the Act. She had a history of depression known to the employer and the bullying she suffered was materially found to be the cause of her suffering two breakdowns and severe depression during her employment. The employer was found to be liable vicariously under the Act and in negligence for the 'mob' bullying and for the individual bullying campaign. In addition it was found to be directly negligent for its failure to take adequate steps to protect her. The damages awarded, which were in excess of £800,000, were mainly comprised of future loss of earnings and pension and other benefits and lost salary and bonuses, but also included £60,000 for general damages and disadvantage in the labour market. Significant costs were also awarded against the employer.

Conclusion

The *Majrowski* and *Green* cases demonstrate the real risk of being found to be vicariously liable for harassment committed by employees. Employers should be more vigilant than ever in this regard and take steps to discourage harassment from taking place.

As ever, prevention is better than cure, so employers should maintain and regularly review their anti-harassment and anti-bullying policies and training. It should be made clear that harassment and bullying extend beyond the protected grounds under the discrimination legislation. Whilst this will not provide a defence to a breach of the Act, it should at least clarify the conduct and behaviour expected of employees and thereby minimise the likelihood of harassment occurring. In addition, if an employer becomes aware that an employee is being harassed by other employees, the price of not taking immediate action, could be very high.

By John Plant

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Case law update - Focus on disability discrimination

In this edition of Case Law Update, we focus on disability discrimination. Legislation provides that an employer is under a duty to make reasonable adjustments to working environments and practices which place disabled workers at a substantial disadvantage to non-disabled workers. Failure to comply with this obligation will amount to an act of discrimination and employers no longer have the defence of justification available to them.

What is required of an employer and what considerations need to be taken into account in order to comply with this obligation have, in many respects, been subject to uncertainty. We look at some of these issues below.

The duty to make reasonable adjustments – Failure to consult disabled employees is not of itself discrimination

Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06/LA

Why care?

In determining what steps an employer must take to comply with the obligation to make reasonable adjustments, various considerations should be taken into account, for example, the extent to which the step would prevent the substantial disadvantage and the cost and practicability of taking the step.

This case seeks to resolve previous uncertainty as to whether or not employers are under a duty to consult a disabled worker about the adjustments which are necessary. It is now clear that employers have no separate, distinct duty to consult disabled workers about the adjustments which ought to be made. What is required is an objective assessment of the adjustments (if any) which are in fact made.

The case

Dr Tarbuck worked as an IT project manager and business analyst for Sainsbury. Following a period of absence due to ulcerative colitis and depression, a rehabilitation programme allowing for her phased return to work commenced. Some months after her return, Dr Tarbuck was placed at risk of redundancy and was given the opportunity to apply for vacant internal positions, with priority over other employees not at risk of redundancy. Following her claim that her 'at risk' status hindered her return to work by placing her under greater pressure to secure an alternative position, she was removed from that category. Shortly after, Dr Tarbuck unsuccessfully applied for an internal vacancy and complained that she had not been given priority status. She was again placed at risk of redundancy and her employment was subsequently terminated.

Dr Tarbuck brought a number of complaints to the employment tribunal, including disability discrimination. One of the main issues in point was whether Sainsbury had breached its duty to make adjustments by failing to consult with Dr Tarbuck about what steps could be taken to remove her disadvantage in obtaining an alternative position following the revocation of her 'at risk' status. Finding in favour of Sainsbury, the Employment Appeal Tribunal ('EAT') held that no duty existed which required employers to consult with disabled workers before making any adjustments. In determining whether the duty to make adjustments was met, the law required an objective analysis of the steps taken. Provided adequate measures were taken, the existence or otherwise of prior consultation with the affected worker was irrelevant. Conversely, an act of discrimination caused by a failure to make appropriate adjustments could not be avoided by virtue of even the most thorough prior consultation.

What to take away

This case removes the uncertainty about whether a free standing duty exists that requires employers to consult disabled workers about what adjustments are needed. The absence of such a duty may appear to ease the burden on employers, with attention now firmly focused on the actual steps taken (if any) to eliminate any substantial disadvantage.

However, employers should still take every practicable opportunity to consult with disabled workers and continue to make wider assessments of what action is appropriate. As acknowledged by the EAT, consultation will allow employers to become better informed about what adjustments could and should reasonably be made, with the knock-on effect that they are more likely to fulfil the overarching duty to make reasonable adjustments. Ignorance of appropriate measures will be no defence.

Employer not required to extend company sick pay to disabled worker

O'Hanlon v HM Revenue and Customs [2006] UKEAT 0109/06/0408

Why care?

As a consequence of their disabilities, disabled workers may be subject to lengthy periods of sickness absence which extend beyond their employer's normal sick pay period, placing them at a substantial disadvantage to their non-disabled colleagues.

Previous case law had failed to clarify whether or not employers are under a duty to adjust their sick pay policies in order to pay full pay to disabled workers following the exhaustion of any contractual sick pay entitlement. This case attempts to resolve the issue and concludes that employers would only very rarely be required to continue full pay - for example, where the absence is caused by the employer's failure to make adjustments which would have enabled the worker to return to work. Therefore, in most cases, compliance with the duty to make reasonable adjustments would not necessitate the extension of full pay.

The case

Mrs O'Hanlon was clinically depressed and disabled within the meaning of the disability discrimination legislation. During a four year period, she had a number of sickness absences from work comprising 396 days, of which 320 related to her disability. Under its sick pay policy, HM Revenue and Customs ('HMRC') provided for six months' full pay followed by six months' half pay in any four year period. Mrs O'Hanlon claimed that she ought to have been given full pay for her absences and failure to make such payments constituted both disability related discrimination and a failure to make reasonable adjustments.

The EAT held that the reduction in Mrs O'Hanlon's pay during her disability-related absence did amount to discrimination. However, other than in exceptional circumstances, the duty to make reasonable adjustments did not require an increase in sick pay and the discrimination could therefore be justified on grounds of cost. One conceivable exceptional case would be where the employer had itself caused the disability-related absence by failing to make reasonable adjustments which facilitated the employee's return to work.

In reaching its decision about the scope of the duty to make reasonable adjustments, the EAT gave two reasons, both of which were largely policy considerations. If Mrs O'Hanlon's claim was successful, tribunals would be forced to decide whether employers were financially able to meet the costs of modifying policies to make enhanced payments. This would necessitate an assessment of whether the claims of the disabled to receive more generous sick pay should override other demands on the employer's business, which are difficult to compare and which tribunals will know little about. In short, the EAT feared that tribunals would be entering into a form of wage fixing for the disabled sick. The EAT also considered that Mrs O'Hanlon's claim was contrary to the purpose of the disability discrimination legislation, which is to assist the disabled to obtain employment and remain integrated in the workforce. To provide long-term sick payments would act as a disincentive to return to work.

What to take away

Although there may be exceptional circumstances, which the EAT did not rule out, the duty to make reasonable adjustments does not always require the employer to provide full pay to disabled workers on long periods of sick leave.

It is important to remember, however, that whilst there is no obligation to make reasonable adjustments to the sick-pay of disabled employees, there may be a need to make other reasonable adjustments to assist the employee in returning to work. A detailed consideration of possible steps will still be required. The EAT cited as a significant factor the efforts made by HMRC each time Mrs O'Hanlon returned to work, including changing her place of work due to a difficult commute, and changing her hours of work.

Some aspects of the duty to make reasonable adjustments have been clarified in favour of employers by these decisions. However, employers should not be fooled into thinking that the duty has been made that much easier to comply with. When faced with a disabled worker suffering a substantial disadvantage in the workplace, employers should conduct detailed assessments of what steps might be possible and appropriate to assist the affected employee and take the necessary measures to implement them. This process will usually be aided through consultation with the worker and employers should consider this, whether or not the strict letter of the law demands it. Employers should be open-minded about the process. Reasonable adjustments need not necessitate significant and costly actions. For some employees, all that may be required is a small change in working hours to avoid busy commuting periods or an inexpensive piece of office equipment.

Hot topics

Age discrimination

On 1 October 2006, the Employment Equality (Age) Regulations 2006 come into force. From then, discrimination on grounds of age will be unlawful. In April's Law at Work, we looked in some detail at the changes which employers can expect and in May's Law at Work, we looked at how the new law affects pensions.

Implementation of pensions age discrimination rules delayed by two months

In response to concerns from the pensions industry, the Government has postponed implementation of the pensions provisions of the age discrimination legislation until 1 December 2006. A Department for Work and Pensions [press release](#) says, 'The additional period will give schemes more time to adjust to the new regulations following significant activity in the pensions sector. It will also allow a short informal consultation period to assess whether any amendments are required to provide greater clarity for schemes and employers.' This means that the pensions provisions are likely to change from their current form.

New guidance notes from Age Positive

Age Positive, the team in the Department for Work and Pensions responsible for strategy and policies to support people making decisions about working and retirement, has issued four new guidance notes on age discrimination entitled 'the facts, not the myths'. They cover (i) [insurance and age in the workplace](#), (ii) [age, health and employability](#), (iii) [training a mixed-age workforce](#), and (iv) [demographics and the workforce](#). One issue which is concerning some employers is the cost of providing insurance benefits for older workers, and this is addressed (though possibly not to most employers' satisfaction) in 'insurance and age in the workplace'.

Age discrimination questionnaire published

A person who believes he has been discriminated against on grounds of age may submit to his employer an age discrimination questionnaire and the Department of Trade and Industry has published the [questionnaire and response form](#). The aim of the questionnaire is to obtain information about the alleged discriminatory treatment in order to decide whether to bring legal proceedings and, if legal proceedings ensue, to present his complaint in the most effective way. Discrimination questionnaires already exist for other forms of discrimination, and this is in a similar form.

Employment Tribunal Service (ETS) Annual Report shows 33% increase in tribunal claims

The ETS' [Annual Report](#) for 2005/06 has been published. A 33% increase in tribunal claims is reported from the previous year. However, employers' concerns might be alleviated by the fact that a large proportion of the increase is made up of working time and equal pay claims, which are mostly group actions and which skew the figures. The increase in unfair dismissal claims from the previous year was 5%.

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