

SERIAL DISCRIMINATION GRIEVANCES

OR

Dismissing the protected

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The Question

What do you do with the employee who submits serial grievances of discrimination /harassment / victimisation because of his or her protected characteristic?

The Term

What if all the grievances are found to be unsubstantiated?

The Term

without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee

Leach v OFCOM [2012] IRLR 839

The legislation is clear: in order to justify dismissal a breakdown in trust must be a “substantial reason.”

“Breakdown of trust” is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal.

Frenkel Topping

...is a demanding test. It has been held (see for instance the case of *BG v O'Brien* [2001] IRLR at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying “damage” is “seriously”. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in *Malik and Mahmud v BCCI* [1997] IRLR 462 as being “apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited”.

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Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal... in *Morrow v Safeway Stores* [2002] IRLR9

The Protection

If you dismiss because they have done something in connection with the Equality Act

The reason (if more than one reason the principal reason) for the dismissal is that the employee made a protected disclosure

Statutory rights

More than 2 years service and employed

Low Threshold

In discrimination

- Materially influenced the decision to dismiss
- Material = Not trivial

Whistleblowing

- C needs to show principal reason if more than one

The Battleground

- Chief Constable West Yorkshire v Khan [2001] UKHL 48
 - Brought race discrimination proceedings
 - No reference when requested
 - The reason was not the complaint of discrimination but the ongoing proceedings
 - Once litigation over a reference would be given

The Path

- Not a BUT FOR test
- What is the reason why you acted?

The Myth

Ezsias v North Glamorgan NHS Trust [2011] IRLR 550

- 75 complaints
- Breakdown of relationships was the cause therefore SOSR
- Responsibility for breakdown not important

Can you Separate?

Martin v Devonshire [2010] UKEAT 0086/10

- Disability and gender allegations from psychosis
- A significant influence on the outcome?
- A feature of the complaint which was separable such as the manner of the complaint

Can you Separate?

- Martin v Devonshire
- Ringing the MD at 3am in the morning to make the complaint
- Complains but it is accompanied by a threat of violence
- Wholly unreasonable, extraneous or malicious acts
- On basis of common sense and justice

The ET was not born yesterday

Woodhouse v West North West Homes [2013]
IRLR 773

- 10 grievances based on race
- Dismissed on grounds of SOSR
- Martin is not a template
- Very few exceptional cases

Woodhouse

very few cases will have grievances based on paranoid delusions about events that never happened. The process of measuring cases against such a yardstick is a dangerous one. One person's conviction that they have been discriminated against is very likely to generate the polar opposite, ie that the complainant is irrational, in the person or organisation complained about.

Woodhouse

Experience of this type of litigation teaches that grievances multiply and so the fact that there are a series of them is not unusual. 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 s.27 of the Equality Act 2010. All the more so when the origin of the problem is established to have been real, as opposed to imaginary, race discrimination.

Woods

- Woods v Pasab Ltd t/a Jhoots Pharmacy [2013] IRLR 305
- “little Sikh club which only looks after Sikhs”
- £35,000 for victimisation

The reason why?

- The reason was C was racist
- Not dismissed for disclosing an allegation of racism against the Claimant
- Dismissed for making a racist comment

Where is the line?

Panayiotou v Chief Constable Paul Kernaghan
UKEAT/0436/13

C made protected disclosures then “campaigned relentlessly” if not satisfied with action taken.

ET found C became “completely unmanageable”:

- long absence through sickness;
- sheer effort of dealing with correspondence;
- exasperation that would never accept any answer save that which he sought.

Panayiotou

- EAT considered Martin, Woods and Woodhouse.
- No additional requirement that the case be exceptional.
- Question is whether factors relied upon can properly be treated as separable.
- In this case: yes.

The Narrative

- Timing
- Compliance with policies
- Quantity of the complaints
- Manner of the complaint
 - How is it phrased
 - Language used
- Separable conduct

THE SECRET

1. No magic bullet
2. Know your LAW
3. Be patient
4. Construct the narrative
5. Act normally – Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11

Baker v Commonwealth Bank of Australia [2014] HC 42

- Term is one of social conditions and social policy
- operates in practice as a kind of Trojan Horse, wherefrom a miscellany of unforeseen obligations emerge