

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 Question

What if all the grievances are found to be unsubstantiated?

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

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

To justify must be a “substantial reason.”

Not a mantra to be mouthed whenever faced with difficulties in establishing a more conventional conduct reason

Frenkel Topping v King

Seriously damage

Demanding - Stringent

Not just unreasonable manner

The conduct must be sufficiently serious so as to be repudiatory - fundamental

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.

One person's conviction of discrimination generate polar opposite against accused

Woodhouse

Experience of this type of litigation teaches that grievances multiply

Series of them not unusual

Slippery slope towards neutering the concept of victimisation if irrationality and multiplicity of grievances routinely leads to loss of victimisation protection

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.

Lambert v Home Office

Binary

Where the reason for the detrimental treatment complained of is an innocent one and not the protected act then the victimisation claim will fail.

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
