SQUIRE SANDERS

WATCH OUT IF…

YOU HAVE AN EMPLOYEE WHO HAS RAISED MULTIPLE DISCRIMINATION GRIEVANCES

Most employers will have had at least one employee who is convinced he is being discriminated against and brings grievance after grievance, regarding every decision that goes against him as yet another act of discrimination. If the allegations are unfounded you may get to the stage where you think "enough is enough" and simply dismiss him, but the EAT's recent decision in ***Woodhouse v West North West Homes (Leeds) Ltd*** should make employers stop and think.

During a five year period Mr Woodhouse (W) brought no less than ten separate grievances against his employer (WNWH), all containing allegations of race discrimination. All of the grievances were investigated but the discrimination allegations were rejected. W also lodged seven Employment Tribunal claims during this same period, also alleging race discrimination by his employer and its managers.

In October 2010, WNWH reached the end of its tether and dismissed W. It told W that it could not continue to employ him when he clearly had lost all trust and confidence in his employer. Needless to say W took this as an opportunity to bring another Tribunal claim alleging, amongst other things, that his dismissal was an act of victimisation. Almost all the grievances and Tribunal complaints were found baseless but, crucially, it was never suggested by WNWH that they were brought in bad faith.

Under the Equality Act 2010, an employer will be treated as having victimised an employee where it subjects him to a detriment (here, by dismissing him) because he has done a protected act. Bringing a discrimination claim in the Tribunal or raising a grievance which contains allegations of discrimination by the employer both constitute "protected acts" for these purposes.

At first instance the Tribunal rejected W's victimisation claim because it was satisfied that any other employee who had brought so many unfounded grievances would have been treated in the same way, i.e. W's dismissal had nothing to do with the fact that he had brought claims of race discrimination and everything to do with his having become (and showing no signs of ceasing to be) a severe nuisance for his colleagues and his employer. He had so often professed his own loss of trust and confidence in WNWH that continuing his employment through an infinite number of future grievances became untenable, and WNWH dismissed him for Some Other Substantial Reason. While stating its great sympathy for the employer, the Tribunal found the dismissal unfair on the somewhat dubious basis that no one had warned W that if he continued to bring baseless race complaints he was putting his job at risk. This seems particularly harsh, given that normally your very fastest route to the receipt of a victimisation claim would be to tell the employee that if he alleged discrimination he would be dismissed. The Tribunal mitigated this by a 90% contributory fault deduction, which W also appealed against.

The EAT disagreed and upheld W's victimisation complaint, not least because it said the Tribunal had erred in looking at how a comparator would have been treated. It said the key question was whether W's dismissal in isolation was because he had done a protected act. No matter how you looked at it, said the EAT, the real reason for W's dismissal was because he had brought so many grievances complaining of race discrimination and was likely to continue to do so in the future. This was ultimately what had caused the so-called breakdown in trust and confidence between the parties. It did not matter that there was no merit in most of W's grievances. The legal test for victimisation is not concerned with whether the discrimination allegations actually have any merit – the question was simply whether W had accused his employer of race discrimination in good faith and been dismissed as a result. There was no suggestion here that W had acted in bad faith – it was accepted that he genuinely believed that WNWH and its managers had discriminated against him.

The EAT was also at pains to discourage reliance on the decision in ***Martin v Devonshires Solicitors*** [2010] to justify the dismissal of employees who have brought multiple discrimination grievances by separating the content of grievances from the manner of bringing them. ***Martin*** was "exceptional" because the employee's grievances in that instance were based on paranoid delusions about events which had never taken place, and the employer's real reason for dismissing her was "sufficiently separable" from the protected acts themselves. Discouragingly, ***Woodhouse*** suggested that Tribunals should not regard multiple grievances or "obsessive over-reaction" by an employee as unusual and that it would be 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 outside the scope of victimisation. As to the manner of bringing the complaint, how about this in ***Martin*** for carte blanche to the employee?: "It would be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to 'ordinary' unreasonable behaviour of that kind should be treated as objecting to the complaint itself".

This case will make bleak reading for most employers. What are they supposed to do when faced with an employee who believes absolutely (though wholly without basis in fact) that he is being discriminated against and sees every decision against him as further evidence of discrimination? Surely there comes a time when an employer is entitled to say "enough is enough"? Perhaps not, in light of the EAT's decision here. This case makes it clear that if the reason for dismissal is the fact an employee has brought discrimination grievances against his employer (however numerous and/or unmeritorious they may be) this will constitute unlawful victimisation.

When dealing with employees who raise multiple grievances we would recommend that employers take the following practical steps:

- It is important to deal with each grievance separately and not to form an opinion based on the previous history with the employee. Having said that, if an employee is seeking to re-open issues that have already been dealt with, you are entitled to say that a line has been drawn under those earlier matters.
- Be careful not to use the fact the employee has raised grievances in the past as a reason not to complete the grievance procedure properly – always ensure that processes are followed and concluded, and that proper records made. Each grievance must stand or fall on its own merits. Employers should always be aware of their obligations under the Acas Code of Practice on Disciplinary and Grievance Procedures.
- Mediation – an increasing number of employers are turning to mediation/facilitation in an attempt to resolve internal complaints. Mediation is clearly not going to be appropriate in all circumstances, but the earlier it is suggested, the smaller the chance of positions being irretrievably entrenched, and the greater its prospects of success.
- If there **is** evidence that the employee has raised a grievance in bad faith, i.e. for personal gain or without genuinely believing the facts alleged, this **may** form the basis of disciplinary action after appropriate investigation, but employers have to tread **very** carefully before going down this route to avoid claims of unfair dismissal, discrimination or victimisation. The mere allegation of bad faith without good reason could significantly increase the risk of an injury to feelings claim.
- Despite the views of the Tribunal, do **not** warn the employee that bringing future grievances about discrimination would put his job in jeopardy.
- And last, notwithstanding the enormous temptation to do so, do not approach the employee with a "protected conversation" offer to push off quietly in return for money. Not only do discrimination claims fall outside the rules relating to such conversations, but the mere fact of the overture will itself be alleged to be further less favourable treatment.

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