High Court or Employment Tribunal?

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&
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Why does it matter?

- Employment Tribunal jurisdiction
- Causes of action
- Remedies
- Practical implications

Employment Tribunals are increasingly becoming part of the civil court system.

- Growth of legislation and case law
- Increases in procedural formality
- Greater barriers to accessibility
- Further limitations on tripartite adjudication
- Merger of ETs with HM Court Service in April 2011
How do we decide

- Legal differences.
- Procedural and technical differences.
Wrong or Remedy

- Reason from the wrong

  v.

- Reason from the remedy

- …and don’t forget costs!
Options for breach of contract

- ET – only when employment contract has come to an end.
- 3 month time limit.

Two options during currency of employment:

- Contractual claim in County Court or High Court
- Statutory claim before ET under Part II of ERA (protection of wages)
Breach of contract - High Court/County Court

- Power to give summary judgment (i.e. on affidavit evidence alone).
- Important in breach of contract claims where issue is likely to be the remedy, not question of liability.
- CPR gives Defendant a right to apply for summary judgment too
  - Including on particular issues
  - Interim payments
  - Limitation – six years
  - Counterclaims – restrictions in ET?
- No need to raise grievance under ACAS Code
Breach of contract - ET

- Maximum of £25,000
- **Aggregate** limit
- Claim must fall within jurisdiction of civil courts
- On termination of employment
  - Claim for damages for breach of contract of employment or other contract connected with employment
  - Claim for sum due under contract
  - Claim for sum in pursuance of any enactment relating to terms of performance of the contract
<table>
<thead>
<tr>
<th>Civil Courts</th>
<th>Employment Tribunal</th>
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<tbody>
<tr>
<td>If value likely to be &gt; than £25,000</td>
<td>If value likely to be no more than £25,000</td>
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<tr>
<td>6 year limitation</td>
<td>3 month time limit</td>
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<tr>
<td>Irrespective of whether employment has ended</td>
<td>Employment must have terminated</td>
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<tr>
<td>No need to raise ACAS Code grievance</td>
<td>ACAS Code grievance, or risk reduction in compensation</td>
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<td>Greater potential costs liability</td>
<td>Related complaints (e.g. unfair dismissal) dealt with at same time</td>
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Res judicata

F succeeded in his claim for wrongful dismissal in ET, awarded £25,000.

Total loss was £80,000.

F was debarred from bringing action in High Court to recover the difference

Claim was struck out

Even though his tribunal application stated that he reserved right to bring claim in High Court

Upheld in C/A
Wrong or remedy?

Stress at work?
How stressed are we?

- One in five people find their work either very, or extremely, stressful (Bristol Stress and Health at Work Study (SHAW, 1998)).

- The HSE estimated that work-related stress costs the economy between £3.7 and £3.8 billion a year.

- Estimated 21.8 million working days lost

» Source: ACAS Stress at Work (April 2009)
Walker v Northumberland CC - Mr Walker?

- A breakdown as a result of excessive workload
- Advice on the future from the doctors instructed
- A suitable plan for the future put in place
- Plan for the future ignored by the employer
- Mr Walker breaks down again
How would we bring this claim today?

- An obvious EA 2010 claim if an employment lawyer had seen the papers in time

- Instead it was brought in the High Court as it was pre DDA / EA 2010
Before Hatton v Sutherland, stress was an injury.

If stress was a foreseeable consequence the employer was liable.

The employer was liable for the whole of the injury suffered irrespective of other contributing factors.
Hatton v Sutherland

- Decided that stress was not an injury.
- Foreseeability of stress was not sufficient.
- Foreseeability of psychiatric injury was required.
- Adjusted the standard of care; 16 “practical propositions”....
- Apportionment?
Negligence

- Duty
- Breach
- Damage

Foreseeability?

Causation?

Apportionment?
Damage

- Definitions

- Stress on its own not sufficient.

- Expert evidence will almost always be necessary.

- DSM IV (American Association of Psychiatrists) or ICD (World Health Organisation)
Psychiatric damage; Maximum – £82,750
- Ability to cope with life and work
- Effect on family and friends
- Extent to which treatment will be successful
- Future vulnerability
- Prognosis
- Medical help sought
- Sexual or physical abuse

PTSD; Max - £71,850
- Reactive psychiatric disorder
- …as a result of a distressing event
- Permanent effects include inability to work
Primary / secondary victim distinction does not apply.


But...Foreseeability

- Whether a harmful reaction to the pressures of the workplace is reasonably foreseeable in the individual employee concerned?

- Injury to health

- Attributable to stress at work
Foreseeability

- Nature and extent of work being done by the particular employee.
- Warning signs
  - Hiles v South Gloucestershire NHS PCT [2006]
- Knowledge of pre-existing vulnerability
- BUT employer is entitled to assume that that his employee is up to the normal pressures of the job
- AND is entitled to take what he is told by on or behalf of his employee at face value
- Expert evidence may be helpful but is not determinative.
Breach of duty

- Sabbaticals
- Transfers
- Redistributing work
- Extra help
- Treatment
- Counselling
  - Daw v Intel Corp (UK) Ltd [2006] EWCA Civ 70
- Mentoring and support
Breach of duty

- Size of business?
- Public or private sector?
- Interests of other employees?
- Whatever is reasonably expected to do some good – including dismissal or demotion.
Causation

- Identify the relevant breach of duty.
- Other causes?
- Material contribution.
Hatton v Sutherland
- A “sensible attempt” should be made to apportion liability
- Broad brush approach
- Burden on D
- HoL – not expressly approved.

Dickins v 02
- 50% apportionment
- Court of Appeal – approach in Bailey v MoD; divisibility of injury
- But obiter…
The need for a solution

- The ideal cause of action would be one which
  - Allowed for damages for *emotional distress*
  - Had **no requirement for foreseeability** of psychiatric injury, but allowed for recoverability of damages for psychiatric injury if it occurs.
Where to look?

- Management of Health and Safety at Work Regulations
- Working Time Regulations
- Breach of contract
- Protection from Harassment Act 1997
- Statutory discrimination claim in the ET
- Management of Health and Safety at Work Regulations 1999
  - Mullen v Accenture Services Ltd [2010] EWHC 2336 QB
- Working Time Regulations 1998
  - Paterson v Surrey Police Authority [2008] EWHC 2369 QB
  - Sayers v Cambridge CC [2006] 2029 QB
- Contract
  - Contractual or tortious principles?
Common law negligence claim failed

Contractual status of the Trust’s disciplinary and capability procedure?

Implied term approach (Laksmi v Mid Cheshire Hospitals NHS Trust [2008] IRLR 956) was followed.
Where to look?

- Management of Health and Safety at Work Regulations
- Working Time Regulations
- Breach of contract
- Protection from Harassment Act 1997
- Statutory discrimination claim in the ET
1. --(1) A person must not pursue a course of conduct
  [a] which *amounts to harassment* of another, and
  [b] which he knows or ought to know amounts to harassment of
  the other.

(2) For the purposes of this section, the person whose course of
conduct is in question ought to know that it amounts to
harassment of another if a course of conduct amounted to
harassment of the other.

(3) Subsection (1) does not apply to a course of conduct
if the person who pursued it shows –

[a] ……..,

[b]……….., or

[c] that in the particular circumstances the pursuit of the
course of conduct was reasonable.
3.--(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

7 (2) provides:

"References to harassing a person include alarming a person or causing the person distress"
[I]t has become more difficult for an employee to succeed in a negligence action based on stress at work...there is nothing in the language of the act which excludes workplace harassment....I have found the conduct in this case to be oppressive and unacceptable but...I have also described it as extraordinary...It is far more likely that, in the great majority of cases, the remedy for high handed or discriminatory misconduct by or on behalf of an employer will be more fitfully in the employment tribunal. (per Kay LJ).
Where there is no express provision in a statute as regards the vicarious liability of an employer for its employees’ actions, common law principles apply.

Majrowski v Guys & St Thomas’ NHS Hospital Trust (2006)
Vicarious Liability 2

- Carlisle-Morgan v Cumbria City Council (2007)

- Gravill v Carroll (2008)

- Sidhu v Aerospace Composite Technology (2000)
Course of conduct required.

Vicarious liability only applicable if the harassing employee would be guilty of harassment under the act. i.e. they have to be responsible for a course of conduct or acting in concert.
Advantages.

Very generous liability test.

Damages for emotional distress available.

6 year limitation period.

No requirement that damage has to be foreseeable.
Discrimination claims in the ET

- Sherrif v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170
  - Injury to feelings leading to psychiatric illness; compensation recoverable in ET

- No need for foreseeability of psychiatric injury (Essa v Laing Ltd [2003] ICR 1110, EAT).

- Distinction between race cases and others ([2004] EWCA Civ 2)

- **Disability discrimination**
  Equality Act 2010, sections 13, 15, 19, 20

- **Other types of discrimination**
  Equality Act 2010, sections 26, 27
Injury to feelings

- Vento v Chief Constable of West Yorkshire Police No2 [2002] EWCA Civ 1871
  - £500 - £5000
  - £5000 - £15,000
  - £15,000 - £25,000

- Da’Bell v NSPCC [2010] EAT
  - £6,000, £18,000, £30,000

- Sherrif v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170

  - Tribunal can make single award for injury to feelings to include damages for psychiatric illness
Sex discrimination.

Numerous contributing causes.

Apportionment upheld.
Claimants who are time-barred from presenting equal pay claims in the ET can nonetheless present such claims in the civil courts save where it would be an abuse of process to do so.

- S.128 of Equality Act 2010?
- Costs.
Conclusion

Legal differences

- Reason from the wrong v.
- Reason from the remedy

Practical and technical differences

- Time limits
- Cost(s)
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