

Where to claim harassment? Employment Tribunal or Civil Courts?

An article concerning the differences in harassment under the Protection from Harassment Act 1997 and the Equality Act 2010

Since the decision of the House of Lords in *Majrowski v Guy's and St Thomas's NHS Trust* [2006] IRLR 695 claims for workplace harassment have no longer been the exclusive preserve of the Employment Tribunal. They can now be the subject of a civil claim for harassment under the Protection from Harassment Act 1997. The question thus arises of whether prospective claimants, complaining of workplace harassment, would be best advised to rely on the Equality Act 2010 and the Employment Tribunal or the 1997 Act and the Civil Courts.

The scope of the 1997 Act, in the employment context, is of considerable practical interest. This is chiefly for two reasons. Firstly, a claim for harassment under the 1997 Act has two clear advantages over claims under the 2010 Act – no requirement to show that the conduct complained of related to a protected characteristic and a limitation period of six years rather than three months. Secondly, general damages are not confined to personal injury and, in particular, as regards psychological or emotional injury, a clinically recognised illness. Thus the 1997 Act not only offers a mean of circumventing certain requirements of the Equality Act 2010 but also the decisions of the Court of Appeal in *Hatton v Sutherland* [2002] IRLR 263 and the House of Lords in *Waters v Commissioner of Police of the Metropolis* [2000] IRLR 720.

In the former the Court of Appeal held that negligence claims for stress at work are confined to incidents of clinically recognised illnesses and placed considerable limitations on the employer's duty to investigate and be alert to whether the employee is working in conditions likely to cause the injury alleged. In *Waters* the House of Lords held the employer's common law duty to provide a safe working environment encompasses a duty to prevent harassment. This included harassment of the kind prohibited in the anti-discrimination legislation (now, of course, found in the 2010 Act). However, their Lordships made it clear that such claims were confined to personal injury.

Before the comparison is made between the two Acts it is first convenient to make two observations in respect of the 1997 Act. Firstly section 2 makes it clear that conduct amounting to harassment under section 1 (which prohibits harassment) is a criminal offence as well as a civil tort. Secondly, as far as civil claims are concerned, the act is not just confined to employment. Thus the discussion below involves consideration of both criminal cases and civil cases beyond the employment sphere.

Similarly it must be noted that the Equality Act codified, albeit to some extent, the antecedent anti-discrimination legislation. Thus the following discussion

includes analysis of authorities pre-dating the Equality Act. Material differences in the wording of the Equality Act and its predecessors, which in turn affect the extent to which older authorities accurately reflect the law, will be noted and discussed.

Vicarious Liability

It is convenient to start the comparison of the two regimes with their different approaches to vicarious liability. This is because *Majrowski* was based on the applicability of the common law rules of vicarious liability to the 1997 Act.

Unlike the 1997 Act the 2010 makes express provision for vicarious liability. Section 109 (1) provides: “*Anything done by a person (A) in the course of A’s employment must be treated as also done by the employer*”.

This certainly seems less demanding than the common law position which, by virtue of *Majrowski*, applies to the 1997 Act. The common law test is set out in the decisions of the House of Lords in *Lister v Hesley Hall Ltd* [2001] IRLR 472 and *Dubai Aluminium Co Ltd v Salaam* [2003] IRLR 608 and the Privy Council in *Barnard v The Attorney General of Jamaica* [2005] IRLR 398. Auld LJ and May LJ, at paragraphs 31 and 84 respectively of the Court of Appeal’s decision in *Majrowski* ([2005] IRLR 340) cited the following passage from Lord Steyn’s judgment in *Barnard*:

The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable

May LJ, whilst acknowledging this was a “wide fact specific test” stressed its limitations. He held that “there has to be a sufficiently close connection between the work which the employee is employed to do and the particular tort, that is harassment.” He considered Lord Clyde’s speech in *Lister*. He held that the effect of his judgment was that “the sufficiency of the connection may be gauged by asking whether the wrongful actings can be seen as ways of carrying out the work which the employer had authorised.” He further noted passages where Lord Clyde had held that the employer giving an employee the opportunity to carry out the Tort by, say, employing him and the victim on the same premises, is not sufficient. He noted that Lord Millet held that the employer “is liable only if the risk is one which experience shows is inherent in the nature of the business.”

His Lordship then, by means of hypothetical examples, illustrated how this approach would apply under the 1997 Act:

if two employees, neighbours perhaps, who have a confrontational relationship outside and unconnected with their work, continue the confrontation at work so that one harasses the other, there would be no sufficient close connection between the nature of their employment and the harassment. By contrast, if a manager is alleged in

the course of management to have harassed a subordinate, this may, depending on the facts, give rise to vicarious liability.

In contract section 109 (1) makes no mention of the closeness of the connection between the discrimination/harassment and the employment. It suffices that it was done in the “course of employment”. The Court of Appeal in *Jones v Tower Boot Co Ltd* [1997] IRLR 168 made it clear that the phrase “course of employment” cannot be read as “subject to the gloss imposed on it in the common law context of vicarious liability (per McGowan LJ – at paragraph 36).” Several of the Claimants’ colleagues, during working hours, racially abused him and burnt him with a hot screwdriver. The employers, relying on the common law principles, argued they could not be vicariously liable as whilst they had provided the screw driver they had not authorized it to be used in this way. The Court of Appeal upheld the Tribunal’s finding of vicarious liability and in so doing held that the common law approach did not apply. Waite LJ held: “*The tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words ‘in the course of employment’ in the sense in which every lay-man would understand them.*”

This broader approach means that the employer can be vicariously liable even when the harassment occurs outside of working hours. For example in *Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81 the EAT held the Tribunal had been entitled to find the employer vicariously liable in respect of sexual harassment that occurred during social gatherings of work colleagues outside of working hours. The events were “an extension of employment” and thus the harassment could be regarded as occurring during the “course of employment”.

May LJ in *Majrowski* opined that if two neighbours, who also happen to be employed by the same employer, continue their dispute at work the employer could not be vicariously liable. It is submitted that this would not necessarily be so for section 109 (1) purposes. It would not matter their dispute was unconnected to work. All that matters is that it takes place during the course of employment.

Thus far it would appear that the prospective Claimant will be more likely to establish vicarious liability under the 2010 than the 1997 Act. However, the 2010 Act, unlike the position at common law, contains a defence to vicarious liability. This is found at section 109 (4) which provides:

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

The decision of the EAT (Burton J Presiding) in *Canniffe v East Riding of Yorkshire Council* [2000] IRLR 55 suggests that little is required of this

statutory defence. They did accept that the employer may be vicariously liable even when the steps which could have been taken would have been unlikely to have made any difference “if it was reasonably practicable for them to do be done”. However, that begged the question of what such steps could be. The EAT suggested that “where there is no knowledge on the part of employers or managers of risk of any harassment or inappropriate sexual behaviour by an employee, or indeed in particular by one employee towards another particular employee or employees” then the employers merely having an anti-discrimination/harassment policy will suffice:

In those circumstances it may well be sufficient for there to be adequately promulgated a sexual harassment policy, particularly where it can be said that when a one-off incident occurs of a seriousness of the kind that occurred in this case, it must in any event have been known to any employee, never mind a reasonable or honest employee, that the conduct could not possibly be condoned or encouraged by employers. In those circumstances, it may be sufficient for the question simply to be addressed as to whether there was a policy and whether it was promulgated without more.

Thus it may well be that the prospective Claimant may, after all, be more likely to establish vicarious liability under the 1997 Act. Lord Nicholls in the House of Lord’s decision in *Majrowski* was well aware of the absence of a defence to vicarious liability at common law. He accepted that the effect of the House of Lord’s decision was that victims of harassment “can in some circumstances bypass the defence intended to be available to employers” under the Equality Act. Whilst he did not consider the statutory defence to be relevant to the interpretation of the 1997 Act he acknowledged that there was a “discordant and unsatisfactory overlap.”

Principal and Agency

Section 110 of the Equality Act provides that the harasser can be liable as an agent of the principal. Section 109 (2) provides that the principal is vicariously liable. It seems the statutory defence does not apply. Section 109 (4) which sets out the defence refers only to proceedings against an employer – not a principal.

There are no corresponding provisions in the 1997 Act. However, just as, further to *Majrowski*, the common law rules on an employer’s vicarious liability apply it must also be the case that the common law rules on principal and agent apply.

If this is right then here, at least, there is no difference between the two Acts. This is because the Court of Appeal in *Kemeh v Ministry of Defence* [2014] IRLR 377 has held that the common law rules apply to the construction of sections 109 (2) and 110. Mr Kemeh was black. He was employed by the British Army as a cook. A caterer, employed by a third party with whom the Ministry of Defence had contracted so they would provide catering services, refused to give him more than two pieces of chicken. She said that this was

because he was black. The Tribunal found the Ministry liable on the basis that they acted as her principal.

The EAT and the Court of Appeal disagreed. Elias LJ was satisfied that “Parliament must have intended to adopt the common law concept of agency.” As for the case before the Court he held:

it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents.

Aiding, Abetting, Counselling, Procuring, Causing, Instructing and Inducing

Section 7 (3A) of the 1997 Act provides:-

A person’s conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another—

(a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and

(b) to be conduct in relation to which the other’s knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.

This means that not only can an employer be vicariously liable but also someone (i.e. “the other”), besides the actual harasser, can be liable for aiding, abetting, counselling or procuring the harasser’s course of conduct. In other words both the actual harasser and the other are treated as responsible for the same course of conduct. What the other knew or ought to have known are what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring. This suggests that the other is liable if either he knew or wished that the complainant would suffer harassment or whether, objectively speaking, it was reasonably likely that that would be the consequence of the aiding abetting, counselling or procuring.

Sections 111 and 112 of the 2010 Act contain similar provisions. Section 111 is concerned with “instructing, causing or inducing contraventions”. Section 112 is concerned with “aiding contraventions.” However, the differences in terminology are subtle and unlikely to be material – the basic point is that both Acts prohibit encouraging or assisting harassment.

A major difference is that section 111 does not contain any requirement in respect of the other’s knowledge. Further, section 111 (2) provides that a person “must not cause” someone to carry out a contravention of the Act. Section 111 (4) provides that an inducement to contravene the Act may be direct or indirect. This seems to make it clear that knowledge is not a

requirement. It suffices that the other had a material impact on what made the harasser carry out the contravention.

Section 112 (1) however does expressly provide that the other “must not knowingly” help the harasser carry out the contravention. This reflects section 7 (3A) as regards aiding. However, section 112 (2) interestingly sets out a defence. This arises when the other relies on a statement from the harasser which states that the act for which help is required does not contravene the 2010 Act and it is reasonable for the other to rely on that statement. However, if the statement is false or misleading then the harasser is guilty of a criminal offence and liable on summary conviction to a fine.

Must the conduct be targeted at the victim of harassment?

So much for the various forms of liability. What of the conduct itself that amounts to harassment? Must it be targeted at the victim? The relevant sections of the 1997 Act do not answer the question directly. There is no definition of harassment. Section 1 (1) merely provides that “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”. Nonetheless, Lord Phillips MR, in the Court of Appeal’s decision in *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, opined that “harassment...is generally understood” and “describes conduct targeted at an individual”.

In the employment context the Court of Appeal in *Banks v Ablex Ltd* [2005] IRLR 357 agreed. Mrs Banks worked at a factory and complained that her manager repeatedly shouted and used abusive language. However, the County Court rejected her claim as the conduct was not specifically targeted at her – he spoke to various employees in this way and often aimed his remarks at the machinery rather than at anyone in particular. The Court of Appeal upheld the decision. Kennedy LJ held it “also seems to me to be clear beyond argument that the same person must be the victim on each occasion when harassment is alleged to have occurred.”

In contrast targeting is not a strict, specific requirement of harassment under the 2010 Act. To what extent it is required depends on the circumstances. Section 26 (1) defines harassment in the following terms:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

As the EAT (Underhill J Presiding) observed in *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 there are three elements to liability: (1) The unwanted conduct: Did the Respondent engage in unwanted conduct? (2) The purpose or effect of that conduct: Did the conduct in question either (a) have the purpose or (b) have the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her and (3) did the conduct relate to a relevant protected characteristic?¹ The EAT described the consequences set out in section 26 (1) (i) and (ii) as the "proscribed consequences".

The first question is the question that concerns whether targeting is required. The EAT (Ansell J Presiding) made it clear in *Moonsar v Fireways Express Transport Ltd* [2005] IRLR 9 that targeting is not necessarily required. Mrs Moonsar worked in close proximity to male colleagues who downloaded pornographic images on to their computer screens. Although they did not intend that she witness these images the EAT upheld the Tribunal's finding of sexual harassment. They accepted a submission that "this sort of sexual behaviour, carried out by male office workers in the presence of a female whether or not actually directed towards her, clearly had the effect of amounting to an affront to her dignity and... the facts of the matter were so obvious that the tribunal were bound to come to the conclusion that, viewed objectively, this behaviour certainly did have the potential of amounting to an affront to this lady's dignity."

However, whilst the conduct being targeted at the complainant is not a strict requirement of liability it can be relevant. So said the EAT (Langstaff J Presiding) in *Weeks v Newham College of Further Education* [2012] UKEAT/0630/11. One of the Claimants' male colleagues distributed a cartoon (though not to the Claimant) of an elderly woman screaming and containing various disparaging remarks (though, again, not to the Claimant) referring to "girlie chat" and female directors who did "nothing but look nice" and who "power dressed". The EAT held that the Tribunal were entitled to find this did not amount to sexual harassment.

They held that:

The fact that unwanted conduct was not itself directed at the Claimant is a relevant consideration. It does not prevent that conduct being harassment, and will not do so in many cases, but we cannot say it is an irrelevant consideration.

What was crucial was that there must be an "environment." Further, "an environment is a state of affairs. It may be created by an incident, but the

¹ The EAT, in fact, referred to the grounds of the conduct rather than conduct related to the protected characteristic. This is because the claim was brought under the Race Relations Act and thus prior to the Equality Act – the latter providing that the conduct has to be related to a protected characteristic. However, it is submitted, *Dhaliwal*, once the words "grounds of" are replaced with the new statutory language, remains good law. For this reason the new terminology is used.

effects are of longer duration.” Thus the fact that the incidents in question were few and far between and were not targeted at the Claimant meant that the Tribunal was entitled to find, objectively speaking, there was not an intimidating, hostile, degrading, humiliating or offensive environment.

In brief the conduct being targeted at the complainant is always required under the 1997 Act. To what extent it is relevant under the 2010 Act depends on the circumstances.

Intention

There is a distinction between conduct which is targeted in the sense that the alleged harasser intends the complainant to be the subject of the conduct and conduct which the alleged harasser intends not only to target at the Claimant but which he knows amounts to harassment. Section 1 (2) of the 1997 Act provides:-

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 reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

In *Banks Kennedy LJ* considered the effect of the subsection:

So the conduct...must be intentional and such as to harass some other individual ('the other'), but in deciding what the alleged offender knew or ought to have known at the relevant time the court applies, on the basis of information available to him, an objective standard.

In other words whether the conduct was targeted at the complainant is subjective but whether the alleged harasser knew the conduct amounted to harassment can be either subjective or objective. That is the alleged harasser's knowledge may be actual or constructive.

In contrast intention (whether actual or constructive) is a not a necessary requirement of liability under section 26 (1) of the 2010 Act. The words “unwanted conduct” in section 26 (1) (a) require examination of how the complainant, rather than the alleged harasser, perceives the conduct. Section 26 (1) (b) does concern the alleged harasser but expressly refers to the “purpose” or “effect” of the conduct. As the EAT held in *Dhaliwal*:

That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose.

In other words under the 1997 Act the conduct is not sufficient. The consequences of that conduct must also have been intended. In contrast under the 2010 the conduct alone, provided it has the proscribed consequences, is sufficient (although, of course, it must, unlike under 1997 Act, relate to a protected characteristic).

The form of the conduct

Does it matter, under either Act, what form the conduct takes? Does it suffice that the conduct has the required intention or effect? As regards the 1997 Act Lord Phillips MR in *Thomas* held that the Act was concerned with “the effect of the conduct rather than with the types of conduct that produce that effect”. As regards effects his Lordship was mindful of section 7 (2) which provides: “References to harassing a person include alarming the person or causing the person distress”. Thus his Lordship defined harassment under the 1997 Act as “conduct targeted at an individual which is calculated to produce the consequences described in s.7 and which is oppressive and unreasonable”.

However, whilst harassment is primarily found by reference to the intention and effect of the conduct in question the Act does make some provision as to the form of the conduct required. Section 7 (4) provides that conduct “includes speech.” Section 7 (3) provides that “a course of conduct” must involve – (a) in the case of conduct in relation to a single person (see section 1 (1)), conduct on at least two occasions in relation to that person.”

Section 7 (3) is a clear control mechanism. Logically it can be said it makes no sense – it is not hard to imagine one act which can be more damaging in its consequences than two combined. The effect of section 7 (3) is to restrict the scope and number of claims. In contrast nothing in section 26 (1) of the 2010 Act places a similar restraint on the forms of conduct that can amount to harassment under the 2010 Act. All that matters is the purpose or effect of the conduct and the reason for it.

Indeed it is possible that conduct can amount to harassment under section 26 (1) when it does not result in the proscribed consequences. The EAT in *Dhaliwal* explained that the alleged harasser “may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so).”

Nonetheless, they acknowledged that:

It might be thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of 'element (3)' as discussed below).

Whereas harassment under the 1997 Act requires a course of conduct consisting of at least two acts there is no such minimum requirement under the Equality Act. As the EAT (Morison J Presiding) put it in respect of the antecedent legislation in *Reed & Bull Information Systems Ltd v Stedman* [1999] IRLR 299:

A one-off act may be sufficient to damage her working environment and constitute a barrier to sexual equality in the workplace, which would constitute a detriment.

Dhaliwal itself is an example. Mrs Dhaliwal's manager said to her that after she left he might see her again unless she was "married off" in India. The Tribunal found that this was a derogatory reference to arranged marriages. The EAT whilst accepting that "that the facts here may have been close to the borderline" upheld the Tribunal's decision.

What threshold is required?

What, under both Acts, is the threshold that the conduct in question must cross so as to amount to harassment? As for the 1997 Act in the House of Lords' decision in *Majrowski* Lord Nicholls held that harassment must be more than what is "unattractive" and "unreasonable". Similarly Lady Hale held it must go beyond "the ordinary banter and badinage of life."

It has already been noted at the outset of this article that liability under the Act can be criminal as well as civil. Accordingly, in the context of civil claims, it has been held that the threshold is high. This was made very clear by the Court of Appeal in *Sunderland City Council v Conn* [2008] IRLR 324. The County Court found two acts and was satisfied that they both constituted a "course of conduct". The first was Mr Conn's manager threatening to smash windows on the premises if Mr Conn did not tell him why several of his colleagues had walked off site. The second was him threatening to give Mr Conn a "good hiding" if he persisted in giving him the "silent treatment".

The Court of Appeal reversed the County Court's decision. Gage LJ was cognizant that "a civil claim is only available as a remedy for conduct which amounts to a breach of s.1, and so by s.2 constitutes a criminal offence." Thus, "the touchstone for recognising what is not harassment for the purposes of ss.1 and 3 will be whether the conduct is of such gravity as to justify the sanctions of the criminal law."

With this in mind he turned to the first of the two acts - namely, the threat to smash windows. The incident was "no doubt an unpleasant one." However, it came "well below the line of that which justifies a criminal sanction." Thus whilst he was prepared to accept that the second act crossed the necessary threshold given the necessity for two acts there was no harassment.

However, the Court of Appeal in *Veakins v Keir Islington Ltd* [2010] IRLR 132, did not place the need for conduct which would constitute a crime as the cornerstone of civil liability. Mr Veakins, ordinarily a reasonably robust woman, was persistently picked on by her manager. Consequently she suffered from clinical depression. However, the County Court was satisfied that no sensible prosecuting authority would have prosecuted the manager. Hence the claim failed.

The Court of Appeal reversed the decision. Maurice Kay LJ held that the “primary focus is on whether the conduct is oppressive and unacceptable, albeit the court must keep in mind that it must be of an order which ‘would sustain criminal liability’.” The County Court had erred in focusing on what a prosecuting authority would have done rather than in focusing on whether the conduct in question was “oppressive and unacceptable”. He was satisfied that the treatment of Mrs Veakins engaged this requirement.

Thus the test is not whether the conduct would lead to a prosecution or conviction but whether it is oppressive and unacceptable. The danger in placing too much emphasis on criminal liability is that this can lead to the focus being on what a prosecuting authority, magistrate or jury would have done rather than on what the evidence itself establishes. The requirement that the conduct be criminal merely serves as a reminder that the threshold is high going beyond the unattractive and unreasonable and the normal banter and badinage of life.

The High Court’s decision in *Dowson v Chief Constable of Northumbria Police (No 2)* [2010] EWHC 1612 demonstrates the importance of context in determining what is oppressive and unacceptable. Simon J held: “*What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.*”

The Claimants were Police Officers. They complained that their manager made vulgar remarks and unfair criticisms about them. His Lordship was mindful they were case hardened officers used to dealing with criminals, that the Police was a hierarchical organization and some of the criticisms were justified. Accordingly, they had been “oversensitive”.

The decision of the Court of Appeal in *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123 seems to lower the threshold. Mr Iqbal was a solicitor. Whilst employed by the Defendant he acted for a client who, after he left, claimed that their fees had been guaranteed by a third party. Thus the Defendant firm sued them for the fees. Sure enough they instructed Mr Iqbal who had, since leaving the Defendant’s employ, set up his own firm. The Defendants considered it professionally inappropriate that he was acting for him. They wrote him three letters making serious allegations regarding his professional integrity. It was common ground, however, that the first letter was less severe. Whilst it stated that the its purpose was to raise concerns about his integrity it went on to merely ask if his client would be happy to know he used to be employed by the Defendant and to suggest that he left in acrimonious circumstances. The Court County Court and, on appeal, the High Court found the Act did not apply. The Court of Appeal disagreed.

Rix J accepted that it was right “not to set up every complaint between lawyers as to the conduct of litigation as arguably a matter of harassment within the Act. It must be rare indeed that such complaints, even if in the heat of battle they go too far, could arguably fall foul of the Act.” However, the letters went beyond the normal cut and thrust of litigation.

Further, “the Act is concerned with courses of conduct which amount to harassment, rather than with individual instances of harassment. Of course, it is the individual instances which will make up the course of conduct, but it still remains the position that it is the course of conduct which has to have the quality of amounting to harassment, rather than individual instances of conduct.”

Accordingly, a “first letter, by itself, may appear innocent and may even cause no alarm, or at most a slight unease. However, in the light of subsequent letters, that first letter may be seen as part of a campaign of harassment.” The Courts below had erred in failing to ask “whether the three letters as a whole could amount to a relevant course of conduct.”

It is difficult to reconcile *Iqbal* with *Conn* and, indeed, surprising and unfortunate that the Court of Appeal in *Iqbal* did not refer to *Conn*. In *Conn* the Court of Appeal found no harassment by looking at each of the acts and asking if each crossed the required threshold. In contrast *Iqbal* provides that it matters not if any of the acts falls below the threshold provided that when taken as a whole they do.

Perhaps reconciliation can be found in the fact that in *Conn* there were two acts whereas in *Iqbal* there were three. As there must at least be two acts it could be said then when only two acts are found each must cross the threshold whereas in cases where there are more than two it suffices that only two do. However, it is submitted, *Conn* and *Iqbal* cannot be reconciled on this basis and are, indeed, irreconcilable. This is because in *Conn* the Court clearly focused on each of the acts whereas in *Iqbal* the Court expressly held that what matters is whether the course of conduct, and not any or all of the acts which comprise it, amounts to harassment. Thus, it is submitted, that applying *Iqbal* harassment can be found in cases where one or even all of the acts do not satisfy the required threshold.

The Inner House of the Court of Session followed and approved *Iqbal* in *Marinello v The City of Edinburgh Council* [2011] CSIH 33 (again no mention of *Conn*). Mr Marinello’s work often involved working outdoors. Throughout 2004 and 2005 two of his managers constantly unfairly criticised and picked on him. Seventeen months later he saw one of them drive by him and gesticulate and clench his fist towards him. The Lord Ordinary was satisfied that the 2007 incident reached the required threshold but that it could be linked with the incidents in 2004 and 2005 so as to form a course of conduct. Whilst the earlier incidents did amount to harassment the finding that the 2007 incident was not part of the course of conduct meant that the claim was out of time – the limitation period in Scotland being three years.

The Inner House reversed the decision. The issue, they held, was “whether the alleged incident on 18 March 2007 forms part of that course of conduct or whether it was an isolated, unrelated incident.” They were satisfied that it could be linked with the earlier incidents given that Mr Marinello often worked outdoors and several of the earlier incidents had taken place outdoors. The question then arose of whether the course of conduct amounted to

harassment. They agreed with *Iqbal* that the “the proper test is whether the course of conduct amounts to harassment rather than the individual incidents comprising that course of conduct.” They were satisfied that was arguable in the case before them.

Whilst *Marinello*, just like *Iqbal*, lowers the threshold in respect of what constitutes harassment it, nonetheless, makes it clear there is an additional requirement which must be satisfied before the question of the threshold arises. That is there must be a course of conduct and for there to be a course of conduct it does not suffice that there are two acts – there must be something that links them. It is only when a course of conduct is found that the question arises of whether it amounts to harassment. Thus *Marinello* gives with one hand but takes with the other.

Marinello brings the employment cases in line with the criminal authorities. Here Maurice Kay LJ summarised the position in the Court of Appeal’s decision in *R v Nitin Patel* [2004] WL 2678548:

It is not just a matter of counting the incidents and saying, “We have two, that is enough.” It is necessary for the jury to be given some guidance so that they address the question of whether the incidents give rise to a nexus sufficient for there to be a “course of conduct”. As Latham LJ said in *Pratt*, the issue is whether or not the incidents, however many there may be, can properly be said to be so connected in type and in context as to justify the conclusion that they can amount to a course of conduct.

The required nexus was missing in a case where there were only two incidents, six months apart, the first being the Defendant slapping his ex girlfriend the second being him threatening her new boyfriend in his presence. The link was missing as different people – namely the ex-girlfriend and the new boyfriend – were the subject of each act (*Lau v Director of Public Prosecutions* [1999] WL 1489617). However, the necessary link was present in a case where a husband threw water over his wife’s head and then, later, chased her through the house shouting and swearing at her. What linked the two incidents was that the couple lived together and, clearly, were not on amicable terms (*Pratt v Director of Public Prosecutions* [2001] WL 753479).

Hamblen J, delivering the judgment of the High Court in *Saha v Imperial College* [2013] EWHC 2438 considered *Conn*, *Veakins* and *Iqbal* and summarized the law in the following terms:-

In summary, harassment is a course of conduct:

- (1) which is targeted at the claimant;
- (2) which is calculated in an objective sense to cause alarm or distress; and
- (3) which is objectively judged to be oppressive and unacceptable.

To determine what is oppressive and unacceptable the context will be important and a line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways, such as 'torment' of the victim, 'of an order which would sustain criminal liability.

In contrast there is not a line of authority under the Equality Act (and its predecessors) emphasizing that the conduct must reach a minimal level of severity. Nonetheless, it is clear that there is an objective element to the test which ensures that trivial or frivolous incidents will not engage the Act.

Section 26 (4) provides that in deciding whether conduct has the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment that "each of the following must be taken into account:

- (a) the perception of B [that is the complainant];
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect"

In *Dhaliwal* the EAT assessed the effect of the subsection:

A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be *reasonable* that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard...The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt

The EAT went on to hold:

We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

Thus whilst there is a subjective element, namely the requirement that the complainant's perception be taken into account, overall the test is objective as the question is whether those perceptions and feelings were reasonable. The application of the reasonableness test must not encourage a culture of hypersensitivity.

Hence, in the following cases, the EAT, mindful of the objective nature of the test, found there was no harassment: (1) *Smith v Vodafone Ltd* [2001] UKEAT/0564/01 – a female employee, with large breasts, was not sexually harassed when a male colleague, seeing that she had bought two large melons to work to eat for lunch, said to her “what a lovely pair of melons”, (2) *Thomas Sanderson v Blinds Ltd* [2010] UKEAT/0316/10 (Richardson J Presiding)– an employee was not harassed on grounds of sexual orientation for being teased about being homosexual when he himself had engaged in similar banter at work, admitting himself he had overstepped the mark, and when those teasing him were his friends and he still got on with them, (3) *Healfield v Times Newspapers Ltd* [2013] UKEAT/1305/12 (Underhill J Presiding)– a catholic employee was not harassed on grounds of religion when a colleague shouted “who is the fucking pope” – that he did not know she was catholic and that the remark was not directed at her were relevant to determining whether it was reasonable for her to feel that her dignity had been violated or an adverse environment created.

The Court of Appeal in *Grant v HM Land Registry* [2011] IRLR 748 stressed the importance of context in determining whether the effect was objectively justified or a mere case of hypersensitivity. Mr Grant was homosexual. He had “come out” and thus his work colleagues were all aware of his sexual orientation. His manager, during the course of a work dinner, asked him how his partner was. On another occasion she told a female colleague not to flutter her eyelashes at him as he was a gay. The Tribunal found harassment. The EAT and the Court of Appeal did not.

It was submitted on behalf of Mr Grant that the EAT in *Dhaliwal* had erred in finding that whether it was reasonably apparent that the conduct was intended to cause hurt is relevant in determining whether the complainant's dignity was violated or an adverse environment created. Elias LJ rejected the submission holding:

When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.

He accepted that a homosexual coming out did not mean *per se* that the treatment in question could not amount to harassment. However, in the circumstances, the treatment complained of did no more than indicate his sexual orientation and given that he had already revealed it to his colleagues it could not be said that the treatment had the required effect.

However, it should be noted that in *Stedman* the EAT attached greater deference to the subjective element. They held:

Because it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what a tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed.

They went on:

Tribunals will be sensitive to the problems that victims may face in dealing with a man, perhaps in a senior position to herself, who will be likely to deny that he was doing anything untoward and whose defence may often be that the victim was being over-sensitive. Provided that any reasonable person would understand her to be rejecting the conduct of which she was complaining, continuation of the conduct would, generally, be regarded as harassment.

This approach puts the main focus on the complainant's subjective reaction. The objective element is confined to asking whether a reasonable person would understand the complainant to be rejecting the conduct.

However, it is submitted that *Dhaliwal* and *Grant* and not *Stedman* correctly reflect the law. *Stedman* was determined before harassment was a free standing tort under the anti-discrimination legislation. In other words it was a detriment in the context of a claim for direct discrimination. *Dhaliwal* and *Grant* thus set out constructions of the provisions in the legislation concerning the purpose and effect of the treatment whereas *Stedman* does not.

Overall the threshold under the 2010 Act seems lower than that under the 1997 Act. Whereas in *Majrowski* Lord Nicholls expressly held that the harassment, under the 1997 Act, must be more than what is unreasonable section 26 (4) (c) of the 2010 Act provides that whether the conduct has the required effect account entails taking into account whether it was reasonable for it to have that effect. This thus implies that the 2010 Act does not require the conduct and its effect to be anything more than unwanted and unreasonable. Further, section 26 (4) (a) provides that the complainant's perception must be taken into account thereby implying there is a subjective element. In contrast the authorities under the 1997 make it resounding clear that the test is objective.

Nonetheless, the difference may be more apparent than real. It is clear, in the light of *Dhaliwal*, that the test under the 2010 is predominantly objective and that even conduct, which is clearly specific to a protected characteristic (such as, for example, in *Thomas Sanderson* homophobic remarks or, as in *Healfield*, disrespectful references to a religion) will not necessarily engage the Act.

The reason for and nature of the harassment

What of the reason for harassment? No mention at all is made of this in the 1997 Act. It is clear that all that matters is that there has been harassment. In contrast section 26 (1) of the Equality Act provides that the unwanted conduct must be “related to a protected characteristic”. Section 4 provides that the protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Section 26 (1) undoubtedly constitutes a hurdle that does not exist in the 1997 Act. Nonetheless it is worth noting that it is a broader and less demanding requirement than the corresponding provisions in the antecedent legislation which provided that the unwanted conduct had to be “on the grounds” of the protected characteristic. The change in the statutory language was brought about due to the High Court’s decision in *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry* [2007] ICR 1234. Burton J held that the words “on the grounds of” offended the Equal Treatment Directive which referred to harassment “related to” sex. He found that the words “related to” in the Directive served to “expand the causation”.

In so holding he considered the EAT’s decision (Birtles J Presiding) in *Brumfitt v Ministry of Defence* [2005] IRLR 4 where, applying the “on the grounds of” test, the EAT had held there was no sexual harassment. Mrs Brumfitt complained that a colleague, in delivering a training session, had used sexual offensive language. The Tribunal and the EAT both found that the language was not on the grounds of her sex as it was directed at men who also attended the course. However, in *EOC* Burton J noted that the Tribunal had found that she found the language offensive “as a woman” and thus opined that “it appears likely that she would have succeeded in a claim in respect of unwanted conduct related to her sex.”

Similarly he considered the EAT’s decision (McMullen J Presiding) in *Kettle Product Ltd v Ward* [2006] UKEAT/0016/06. There the EAT had held there was no sexual harassment when Mrs Ward’s manager barged into the ladies toilet and reprimanded her for skiving. In *EOC* Burton J held that “such conduct would be likely to be conduct related to sex.”

His analysis of the EAT’s decision (Smith J Presiding) in *B v A* [2007] UKEAT/0450/06 was the same. The Claimant was a secretary and had an affair with her manager. He dismissed her in a fit of jealousy when he saw her with another man. The EAT held that the Tribunal had erred in finding sex discrimination as the reason for the treatment was not her gender but the fact that the relationship had broken down. In *EOC*, however, Burton J held that on such facts a claimant “would appear likely to be able to succeed in a claim for harassment by reference to unwanted conduct related to her sex.”

Thus the words “related to a protected characteristic” appear to be wide ranging. They do not require that there be a reason related to the protected characteristic. Rather the protected characteristic must relate to the conduct. Thus sexually offensive words, as in *Brumfitt*, barging into the ladies’ toilet, as

in *Ward*, and dismissing a female lover out of jealousy were conduct which related to the gender of the complainants in both cases. Similarly, section 26 (2) (a) provides that harassment occurs in cases of “unwanted conduct of a sexual nature” which violates the complainant’s dignity or creates an adverse environment. Again the focus is on the nature of the conduct rather than the reason for the conduct.

Furthermore, the complainant does not even need to possess the protected characteristic. This is because section 26 (1) (a) refers to conduct related to a protected characteristic not the complainant’s protected characteristic. This codifies the decisions of the ECJ in *Coleman v Attridge Law* [2008] IRLR 722 and the EAT (Underhill J Presiding) in *EBR Attridge Law LLP v Coleman (No 2)* [2010] IRLR 10. That was a case where the EAT, following the ECJ’s construction of the relevant directive, held there was no reason in principle why Mrs Coleman, a legal secretary, could not claim disability discrimination based on her being her disabled son’s principal carer even though she was not disabled herself. Hence discrimination by association was born.

Whether the statutory language covers discrimination by perception is less straightforward. However, the language of the antecedent legislation, which referred to the grounds of rather the conduct related to a protected characteristic, did not prevent the Court of Appeal in *English v Thomas Sanders Ltd* [2009] IRLR 206 from finding that even a false perception was sufficient. Mr English was not gay and his colleagues knew he was not. However, they often joked that he was as he had gone to a public school. Laws LJ held noted that then statutory language referred to the “grounds of” sexual orientation rather than the complainant’s sexual orientation.

However, the EAT (Underhill J Presiding) in *J v DLA Piper UK LLP* [2010] IRLR 936, in a case under the antecedent Disability Discrimination Act 1995, had doubts. The relevant protected characteristic was disability. The EAT was mindful a non-disabled person may, due to a certain condition, have the same symptoms as a disabled person. However, due to differences in the conditions severity or duration the non-disabled employee’s condition does not amount to a disability. The manager who discriminates against the employee is unlikely, at the time of the mistreatment, to ask themselves or be aware how serious the condition is or how long it will last. The EAT considered referring the matter to the ECJ but decided otherwise as, in the circumstances, the appeal did not turn on and require determination of the question. Thus the question remains unanswered.

However, it must be stressed that not only was this not a claim under the Equality Act it was a claim of direct discrimination and not harassment. Direct discrimination concerns the alleged discriminator’s state of mind. Hence the observations of the EAT. However, harassment does not. Hence it matters not if the manager is aware of the severity of the condition or how long it will last.

Thus the difference between the 1997 and 2010 Acts is perhaps not as great as it might first seem. Neither require a reason for the harassment. The

difference is merely that the 2010 requires conduct that relates to the Protected Characteristic.

However, these propositions need to be considered in the light of the EAT's decision (Langstaff J Presiding) in *Warby v Wunda Group plc* [2012] UKEAT/0455/11. Mrs Warby's manager accused her of lying about her pregnancy and her miscarriage. It was argued on her behalf that this amounted to sexual harassment as given that only women can be pregnant the accusation evidently related to Mrs Warby's gender. The EAT disagreed holding that "the words are to be seen in context; the context here was that the dispute and discussion was about lying. The conduct complained of, as the Tribunal saw it, was a complaint emphatically made about lying; it was not made to the Claimant because of her sex."

It is noteworthy and regrettable that neither *EOC* nor *English* were referred to. It is submitted that that the EAT's decision is wrong. The EAT in holding that the conduct was not made out focused on the reason for the conduct rather than the nature of the conduct.

In any case it is clear that in so far as the 1997 Act clearly contains no requirement that the harassment be on particular grounds or be of a particular nature it is, in this respect, less demanding than the 2010 Act.

Statutory Defence

The 1997 Act, unlike the 2010 Act, contains defences to harassment. These are set out at section 1 (3). This provides:

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

(a) that it was pursued for the purpose of preventing or detecting crime

(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

It is difficult to envisage circumstances in which (a) or (b) could apply in the employment context. There is no authority as to what (c) might require in an employment case or, indeed, any general guidance, from any other field, on the matter.

It is submitted that (c) must refer to the objective rather than the nature of the course of conduct. If it just refers to the nature of the conduct then it is not, in a true sense, a defence at all. It is just an indication that for a course of conduct to amount to harassment it cannot be reasonable – indeed, as has

been shown, the authorities make it clear that it does not suffice that the course of conduct is unreasonable. It must be oppressive and unacceptable.

However, it seems clear that subsection (3) is intended as a defence. Hence it must refer to a reasonable objective of the course of conduct. Such objectives could include trying to improve an employee's performance or general business needs.

However, it would be surprising if the reasonable objective alone meant the defence was engaged and there was no actionable harassment. If so even the most appalling harassment would not result in liability simply because of its objective. Thus, it is submitted, a proportionality test must be implicit in subsection 3 (c) –namely, was the course of conduct a proportionate means of achieving that reasonable objective.

Harassment before and after employment

Workplace harassment is not necessarily confined to the actual period of employment. The prospective employee may be harassed during the recruitment process. Similarly, he may be harassed by his former employer after the termination of his employment.

Section 40 (1) (b) of the Equality Act provides that an employer must not, in relation to employment by him, harass a person who has applied to him for employment. The EAT (Langstaff J Presiding) was satisfied, in *Wijesundera v Heathrow 3PL Logistics* [2014] ICR 523 that the “Act thus contemplates that a person who is not an employee may successfully complain of harassment where he has applied for employment.” Nonetheless, “there has to be a link between the harassment and the employment.” However, in the circumstances of the case there was, the EAT held, such a link. This was because the “harassment which the Tribunal found to have taken place was committed upon her [by her prospective employers]... when she was expecting employment... having applied for it.”

As for post termination harassment section 108 (2) provides:

A person (A) must not harass another (B) if—

(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.

Thus not all post-termination harassment is actionable. There must be a nexus between the harassment and the former employment.

What, then, of the 1997 Act? It says nothing of employment and thus it says nothing of dealings between prospective and former employees and employers. However, its silence on employment did not prevent the House of

Lord in *Majrowski* from holding that the common law rules in vicarious liability applied and hence workplace harassment came within the ambit of the Act.

Does it then follow that the pre and post employment harassment also do? It depends, it is submitted, on who the harasser is and what relationship he has or had with the complainant. The common law rules on vicarious liability restrict the liability of the employer to harassment which has a close connection with the employment. The common law position thus seems to envisage that a contract of employment has been entered into and is extant. Thus the employer cannot, it seems, be vicariously liable for pre or post employment harassment.

However, there is no reason why the actual harasser cannot be. Further it would matter not whether the harassment was in any way connected to any employment that there might be or once was. All that matters is that there is harassment.

The burden of proof

One potential advantage of a claim under the 2010 is the reverse burden of proof provision set out at section 136 (2). This provides that:

If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

Hence the burden is on the complainant to show there could be harassment, the burden then shifts to the defendant to show, in the light of their explanation, that there was no harassment. There is no corresponding provision in the 1997 Act. Hence there the burden remains on the complainant.

As regards the reverse burden of proof in the discrimination context the Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 and *Madarassy v Nomura International plc* [2007] ICR 867 gave extended guidance detailed analysis of which falls outside the scope of this article. What matters for present purposes is that the Court of Appeal held that all the evidence, including that relating to the employer's explanation (though not the explanation itself) is to be considered at stage one in determining whether the complainant has proven facts which could show discrimination.

The EAT (Richardson J Presiding) made it clear in *Nazir v Asim* [2010] ICR 1225 that this principle also applies in harassment cases. Mrs Nazir's claim was based on a board dispute. The Tribunal found there was evidence to infer that the treatment complained of was on the grounds of gender. They considered the employer's explanation, namely that the reason was the board dispute, at the second stage and found that explanation did not enable the employers to discharge the burden which had shifted to them. The EAT held they had erred as they "should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after

the burden of proof has passed.” The evidence relating to the board dispute thus should have been considered at stage one and not just as part of the employer’s explanation at stage two.

It must be noted that the decision was made prior to the Equality Act coming into force. Thus in so far as the EAT used the reverse burden of proof to find the grounds of the harassment their decision is no longer good law. This is because, as discussed above, the High Court’s decision in *EOC* makes it clear that the words “related to a protected characteristic” in section 26 (1) do not require causation. Nonetheless, the basic principle set out regarding the burden of proof that it sets out – namely that all the evidence is to be considered at stage one – is good law.

That said this does raise the question of whether section 136 can practically and sensibly be applied to claims under section 26. This is because the word “explanation” in section 136 implicitly suggests that the reverse burden of proof is used to find the reason or motivation for the treatment. Thus, after all, it would seem that the availability of the reverse burden of proof is not as attractive as it might at first seem to the Claimant deciding whether to sue under the 1997 or the 2010 Act.

In any case under the 1997 Act the burden does shift to the Respondent for the purposes of making out the defence under section 1 (3) discussed above. This is clear from the words “if the person who pursued it shows.”

Time limits

Here the 1997 Act is undoubtedly more generous than the 2010 Act. Under the former the Limitation Act applies – hence the complainant has six years to make the claim. In contrast section 123 of the 2010 Act provides that the claim must be made within three months.

Nonetheless, two qualifications should be noted. The first derives from the fact, as noted above, that for a course of conduct to be established, under the 1997 Act, not only must there be at least two acts but those acts must be linked in some way. Hence in *Lau v Director of Public Prosecutions* [1999] WL 1489617 Shiemann J, giving the judgment of the Divisional Court, held “the fewer the occasions and the wider they are spread the less likely it would be that a finding of harassment can reasonably be made.” In other words the more generous time limit under the 1997 Act could appear deceiving if a substantial gap between the acts relied on means there is no sufficient linkage even though, otherwise, the claim would clearly have been made in time.

However, in *Baron v Crown Prosecution Service* [2000] 2 WLR 824 102 a lengthy gap between the two acts did not serve so as to fend off the application of the 1997 Act. Mr Baron wrote two letters to the benefits agency four and a half months apart in relation to a dispute he had with them regarding his application for certain benefits. In the first he threatened to slit the throat of the officer he had been dealing with. In the second he threatened to bully her in cross-examination during his appeal against the refusal to grant

him benefits. He was convicted under the Act in the Crown Court. Kennedy LJ, in upholding the appeal, did acknowledge that:

Normally speaking a court might be slow to find that two letters, even if couched in intemperate language, which are separated by an interval of four and a half months, can amount to a course of conduct causing alarm or distress

However, he went on, whether this is so “will depend on the facts”. The Crown Court was “plainly alive” to the interval, was entitled to find as it did and hence its decision could not be disturbed. Similarly, as was shown above in the context of the discussion of the threshold required, in *Marinello* a gap of 17 months did not defeat the claim. There is thus no rule of law that a lengthy gap will deprive the acts of the required linkage. The gap is merely something to take into account.

Secondly, as regards the 2010 Act, acts which seemingly occurred considerably more than three months before the claim was presented can be regarded as one continuing act. “Continuing Act” is the colloquial phrase used to describe the circumstances envisaged by section 123 (3) (a). This provides that:

conduct extending over a period is to be treated as done at the end of the period

The incidents making up the continuing act are thus treated as one act for the purposes of determining whether the claim has been made within the allocated time limit of three months. In *Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96 Mummery LJ held:

the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

This, similarly to the 1997 Act, suggests that there must be some linkage between the different acts relied on. However, unlike the 1997 Act, this is not for the purposes of establishing liability but for the purposes of bringing the claim within the prescribed time limit.

Compensation and General Damages

For harassment, under both acts, general damages is not confined to personal injury. Section 124 (6) of the 2010 Act provides that a Tribunal can make an award of compensation for injury to feelings. This is calculated on the basis of the guidance set out by the Court of Appeal in *Vento v Chief Constable Of West Yorkshire Police* [2002] IRLR 177 as revised by the EAT (McMullen J Presiding), in *Da' Bell v NSPCC* [2009] IRLR 19, to reflect changes in the RPI. In *Da' Bell* the EAT held that the bands are 1) £600 - £6000 (minor cases), band (2) £6000 - £18000 (moderate cases), and band

(3) £18000- £30000 (severe cases). However, given that *Da'Bell* makes it clear that the bands are to be revised in the light of changes to the RPI I these figures are, again, arguably out of date and should be updated to £1, 000 - £8, 000, £8, 000 – £22, 000 and £22, 000 – £35, 000 respectively.

Section 3 (2) of the 1997 Act provides that general damages may be awarded for “any anxiety caused by the harassment.” The effect of the Court of Appeal’s decision in *Martins v Choudhary* [2007] WL 43 68 215 is that here there is no difference between the Acts as general damages under section 3 (2) are to be assessed on the basis of *Vento/Da'Bell*. The County Court Judge made an award for injury to personal feelings using the *Vento* guidance. It was not suggested that she had erred in so doing.

In *Cross v Relan* [2009] WL 2392315 the High Court considered the effect of *Martins*:

The measure of damages for anxiety and hurt feelings should broadly accord with that awarded in personal injury cases, and in the case of Choudhary the Court of Appeal gave its broad approval to the brackets used by the court for similar damages in employment cases such as *Vento v The Chief Constable of Yorkshire Police* [2003] ICR 318. The brackets used in the employment cases, which as I say it is implicit in the Court of Appeal's judgment

Further, damages for personal injury can be claimed under both Acts (as regards the Equality Act see the decision of the Court of Appeal in *Sheriff v Klynne Tugs (Lowestoff) Ltd* [1999] IRLR 481 – as regards the 1997 Act see *Martins v Choudhary* – discussed above).

Finally awards for general damages under both Acts, for claims made post 1st April 2013, are to be uplifted by 10%. The Court of Appeal in *Simmons v Castle* [2013] 1 All ER 334 so held in respect of all civil claims including, of course, harassment claims under the 1997 Act. The EAT (Eady J Presiding) followed suit in *Cadogan Hotel Partners Ltd v Ozog* [2014] UKEAT/0001/14 in respect of claims under the Equality Act.

Injunctions and Recommendations

Section 3 (3) (a) of the 1997 Act provides that the County Court or High Court may “grant an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment.”

Section 124 (2) (c) empowers the Tribunal to “make an appropriate recommendation.” This is defined at section 124 (3) as a “recommendation that within a specified period the respondents takes specified steps for the purposes of obviating or reducing the adverse effect of any matter to which the proceedings relate.”

The EAT (McMullen J Presiding) in *Lycée Français Charles De Gaulle v Delambre* [2011] UKEAT/0563/10 the EAT held that Tribunals, as regards recommendations, have “an extremely wide discretion”. The test is

practicability and that test “is met when the Tribunal focuses upon what is practicable in terms of its effect on the complainant.” The Tribunal only errs when the recommendation is “completely impracticable”. A recommendation can be applied across the board if “the effect of it will obviate or reduce the adverse effect of discrimination on the complainant.”

Thus, on its face, it seems that that a recommendation can be as wide ranging as an injunction. However, the difference lies in enforcement. Section 3 (3) (b) provides that the Court can order the arrest of the defendant if it has reasonable grounds for believing the defendant has done anything contrary to the injunction. Section 3 (6) provides that a person who, without reasonable excuse, does anything which he is prohibited from doing by the injunction is guilty of an offence. Section 3 (8) provides that conviction on indictment this can lead to imprisonment for up to five years or a fine or both. Section 3 (9) provides that summary conviction can lead to a term not exceeding six months or a fine or both.

In contrast section 124 (7) of the 2010 Act provides that if the employer does not comply with the recommendation then the Tribunal may increase the award or make an award if it had not done so. It is perhaps implicit that an increase in the award must be punitive rather than compensatory.

Thus any prospective complainant who primarily seeks an order than their harasser refrain from treating them in the way complained of may be best advised to seek relief under the 1997 Act.

Harassment as an alternative to unfair dismissal?

This article has been concerned with comparing harassment under the 1997 and 2010 Acts. However, can the 1997 Act also be used as an alternative to claiming unfair dismissal under section 94 of the Employment Rights Act 1996? Given the increase, from one year to two years, in the qualifying period for claiming unfair dismissal and compensation now capped at the lower of 12 months gross pay or £76,574 the question is worth asking.

To be more precise the question is whether dismissal can be part of a course of conduct which amounts to harassment. It is submitted that there is no reason in principle why this should not be so. Indeed the decision of the High Court in *Rayment v Ministry of Defence* [2010] IRLR 768 seems to provide that it can be. Nicola Davies J found that the Claimant, Mrs Rayment, had been harassed on the basis of a course of conduct that consisted of putting up pornographic pictures in the room where she worked, an unfair warning and a discharge. The discharge was unfair as the Claimant was absent at the time, due to ill health. She further held:

The final discharge was unfair and unjust. The warning period had expired. The claimant had been unable to return to her normal duties due to ill health. The Regiment knew of this as appropriate medical certification had been provided. The reliance on the redress of complaints simply serves to illustrate the paucity of the HAC's reasoning. The warning and the discharge were acts on the part of the HAC

that I regard as unacceptable and oppressive and had one purpose and that was to rid the regiment of the claimant.

However, in an approach akin to that taken by Tribunals when applying *Polkey v Drayton* [1987] IRLR 503, the Court did not award any special damages (or, to use employment law parlance, compensation for lost earnings). This was because Mrs Rayment would not have passed her probation anyway and thus suffered no loss.

It is noteworthy that besides the discharge or dismissal the High Court also found that the final warning was part of the relevant course of conduct. This suggests that the Act can apply not only to a dismissal but to both disciplinary proceedings generally and other problems between managers and employers during the course of events culminating in dismissal. This, of course, is crucial as for there to be a course of conduct more than one act is required and the incidents relied on must be linked. The disciplinary context could be the linking factor. Thus the background or run up to the dismissal may often be where the other act can be found which, in addition to the dismissal, will be required for there to be a relevant course of conduct.

It has already been said that the 1997 Act circumvents both certain requirements in the 2010 Act and at common law in respect of negligence claims based on an employer's duty to provide a safe working environment. It is also arguable that the Act has the potential to circumvent the decision of the House of Lords in *Johnson v Unisys Ltd* [1999] IRLR 90. There it was held that considerations of public policy, namely the fact that Parliament intended that claims for unlawful dismissal be made as statutory claims for unfair dismissal in the Employment Tribunal, meant that as regards the implied term of trust and confidence, despite the House having already approved the term in *Malik v BCCI* [1997] IRLR 462, no term could be implied that an employer would dismiss in contravention of the term. Thus the common law position that damages for wrongful dismissal are confined to either the notice period or the period of time it would have taken to have exhausted a contractual disciplinary procedure was, and remains, unchanged.

Conclusions

Whether the prospective claimant would be best advised to claim harassment under the 1997 or the 2010 Act depends entirely on the circumstances of the case. That said in most cases the 1997 Act has two clear advantages – no requirement that the conduct complained of be related to a protected characteristic and a limitation period of six years rather than three months.

Yet these differences are, perhaps, not as profound as they may appear at first. Neither Act provides there must be a particular reason for the conduct. The 2010 does not, unlike its predecessors, provide that the conduct must be on the grounds of a protected characteristic. Rather the conduct must be related to a protected characteristic and the complainant need not even possess that protected characteristic.

As regards the seemingly restrictive limitation period of three months under the 2010 Act the concept of the continuing act means that allegations going back many months or even years before the claim was presented may be actionable. The limitation period for the 1997 Act may be considerably more generous. Nonetheless the requirement for linkage between the different incidents relied on may sometimes mean, in cases of a lengthy gap between the incidents, that in practical terms the claim is effectively out of time.

In most cases other differences between the Acts may, in practical terms, be more apparent than real. The 1997 Act requires a minimum of two acts. The 2010 Act does not. However, in most cases prospective complainants will complain of several incidents. The exceptions tend to be when one act was exceptionally severe or they found it especially offensive. There may be greater scope for relying on the Claimant's subjective perception and feelings under the 2010 Act. Nonetheless, the authorities make it clear that ultimately the test is objective and that hypersensitivity is to be discouraged. This has echoes of Lady Hale, in *Majrowski* when considering when a course of conduct amounts to harassment under the 1997 Act, opining that harassment must be beyond the normal banter and badinage of life.

Under the 1997 Act the course of conduct must be directed at the complainant. Under the 2010 this need not be so. However, whether or not it is will often be relevant in determining whether the conduct had the required effect. Similarly the 1997 Act requires intention. The 2010 Act does not but the effect being intended is often relevant to determining whether the effect occurred. For both Acts the authorities labour the importance of context. Harassment, whether under the 1997 or the 2010 Act, is a fact sensitive concept.

Different rules on vicarious liability apply. The common law regime applies to the 1997 Act. The 2010 Act has a statutory regime peculiar to it. However, this could well be a classic case of giving with one hand and taking with the other. Vicarious liability itself merely requires the act complained of take place in the course of employment – there does not, unlike the position at common law, have to be a close connection between the employment and the act. However, the employer will not be liable if he can show he took all reasonable steps to prevent the harassment in question. In many cases having a policy prohibiting such conduct will suffice. In contrast no such defence is available at common law. In brief it is unclear, and will depend very much on the circumstances of the case, under which Act it is easier to establish vicarious liability.

No such problem arises in cases where the harasser is an agent. The common law rules on principal and agency apply to both Acts. Both Acts prohibit encouraging or assisting harassment (called abetting, counselling or procuring under the 1997 Act – causing, instructing and inducing under the 2010 Act). However, knowledge is a strict requirement under the 1997 Act. Not so under the 2010 Act but in practical terms it is hard to envisage many cases when someone can cause, instruct or induce another to commit harassment without knowing, whether actually or constructively, that

harassment would occur or without intending that it occur. As regards aiding harassment both Acts require knowledge.

There is, however, a very notable difference in pre and post employment harassment. The Equality Act makes express provision for it and makes it clear that both the employer and the actual harasser can be liable. The 1997 Act makes no such provision. The common law rules on vicarious liability would not seem to stretch to pre and post employment. Thus only the actual harasser could be liable but, unlike the position in respect of the Equality Act, there need be no connection between the harassment and the employment.

Nothing separates the Acts as regards general damages. Both injury to personal feelings and personal injury can be claimed. Both are calculated in the same way. However, whilst a recommendation, made under the 2010 Act, may be as wide ranging as an injunction it is clear than an injunction, made under the 1997 Act, is easier to enforce.

Jake Dutton

Clerksroom Chambers

14th August 2014