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Bullying at Work Briefing

Tribunal Case Note

A judgement has been issued in the first case to reach the decision process under the Employment (Bullying at Work) Act 2014. The various claims brought before the Industrial Tribunal included allegations of bullying and victimisation in the workplace. The judgement is important in that the statute is a ‘Gibraltar-born animal’ and outside the Act no statutory definition of ‘bullying’ exists. Moreover, there is no equivalent of the Act in England & Wales and no guidance is to be had from previous case law. The judgement will, no doubt, be the first of many dealing with this relatively new and untested piece of legislation.

Conclusion

The Tribunal ruled that the Respondent had not contravened the Employment (Bullying at Work) Act 2014, that the Complaint was not well founded and failed.

Background

The Complainant filed an Originating Application making claims for unfair dismissal; under the Employment (Bullying at Work) Act 2014 (“the Act”); under the Working Time Act 1999; and under the Equal Opportunities Act 2006. The Grounds of Resistance stated that the Complainant was dismissed for gross misconduct and that the Complainant did not have the required continuity of service to bring a claim for unfair dismissal. As a result, the Tribunal was left to determine whether the Complainant was: (i) subjected to bullying in breach of the Act on the various occasions set out in the Originating Application, and (ii) subjected to victimisation in breach of the Act.

The Law

Bullying

Under Section 6(1) of the Act, an employer must not subject an employee to bullying. The Act defines “bullying” as follows:”

4.(1) A person (‘A’) subjects another person (‘B’) to bullying where A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.

(2) In subsection (1) the reference to conduct includes-

- (a) persistent behaviour which is offensive, intimidating, abusive, malicious or insulting;
- (b) persistent unjustified criticism;
- (c) punishment imposed without justification;
- (d) changes in the duties or responsibilities of B to B’s detriment without reasonable justification.

(3) Bullying does not include reasonable action taken by an employer relating to the management and direction of the employee or the employee’s employment.”

Victimisation

Section 7 provides that an employer must not subject an employee to victimisation (a) as to the terms of employment, (b) in the way he affords access, or by not affording access, to opportunities for promotion, transfer or training or for any other benefit, facility or service, (c) by dismissing that employee, or (d) by subjecting that employee to any other detriment.

Essentially, Victimisation is defined as treating an employee less favourably than the employer treats or would treat other employees in the same circumstances, by reason of the fact that, or by reason of knowledge or suspicion that that employee has (a) brought or intended to bring, or intends to bring, proceedings under this Act, (b) given or intended to give,

or intends to give, evidence or information in connection with proceedings under this Act, (c) otherwise done, intended to do, or intends to do, any other thing under or by reference to this Act, (d) has alleged or intended to allege, or intends to allege that A or any other person has contravened this Act.

Burden of proof

The burden of proof is initially upon the Complainant to prove facts from which the Tribunal could conclude that, in the absence of an adequate explanation, the Act has been contravened and the Tribunal must uphold the complaint unless the Respondent proves that he did not do so. The burden of proof thereafter passes to the Respondent to prove that he has not contravened the Act (i.e. by providing an adequate explanation).

Interpretation of the Act

Outside the Act, no statutory definition of bullying exists and there is no equivalent of the Act in the law of England and Wales - it is a ‘Gibraltar-born animal’. There is also no guidance to be drawn from previous case law on the Act, as this is the first case to reach the Decision stage.

In respect of victimisation, Counsel agreed that there was no requirement that the employee has to make express reference to the Act. It was also not disputed that the less favourable treatment can be suffered before or after proceedings under the Act are alleged or a complainant takes any action by reference to the Act.

As regards the bullying claims, the Tribunal found that the 4 sentiments specifically prescribed in Section 4(1) of the Act are strong ones and that their ordinary meanings include -

- alarmed - frightened;
- distressed - deeply upset;
- humiliated - made to feel ashamed, stupid; and
- intimidated - coerced, frightened, especially with threats.

The Tribunal found that the employer's conduct "should be assessed subjectively and can be an isolated action or manner of behaviour or a series of actions or manner of behaviour. Although the employer's conduct may be unintentional...the conduct must be of sufficient force and I think will generally carry some element of injustice - in order to cause (or be intended to cause) the serious adverse sentiments prescribed in Section 4(1)." The Tribunal also found that the conduct in question will "...often carry an element of an abuse or misuse of power, and this is reflected in Section 4(1) of the Act by use of the verb "subjects" and by the examples of bullying provided in Section 4(2)."

The Tribunal stated that all that is required under Section 4(1) of the Act is "...that the bully's conduct has 'the effect of causing' the victim to be alarmed, distressed, humiliated or intimidated and the alleged bully's intent may therefore be irrelevant when assessing the effect of the conduct complained about." Importantly, however, the Tribunal also found that there was a line of English authority, with which it agreed, that "...when assessing "effect" it is unlikely to be the case that the purpose of the counter-party is completely irrelevant, since the context in which a statement is made or an act undertaken is likely to be material and relevant to assessing effect."

The Tribunal further found that, depending upon the circumstances, a dismissal may constitute bullying under the Act and that Parliament cannot have intended that dismissals effected in breach of the Act should be lawful. It was further held that Section 4(3) of the Act (i.e. Bullying does not include reasonable action taken by an employer relating to the management and direction of the employee or the employee's employment) was the necessary correlative exclusion, since it must be that many employees facing a performance, disciplinary or dismissal process will feel some degree of alarm, distress, humiliation and/or intimidation and that without Section 4(3), employers would be exposed to claims under the Act whenever taking disciplinary/dismissal action in respect of employees.



Findings

The Tribunal found that a normal disciplinary process was undertaken, which was handled reasonably and as sympathetically as possible by the Respondent. It further found that the investigation/disciplinary/dismissal process was not suggested, prompted or engineered (whether alone or in conjunction with other employees) in bad faith (for example, in order to remove the potential problems which the Complainant might cause) and that the process actually commenced was in the event based on one or more real and reasonable grounds (i.e. was not a sham) and was conducted reasonably. Thus, in any event, the investigation/disciplinary/dismissal process would fall under Section 4(3) and so would not constitute bullying under the Act.

Leaving aside the issue of the investigation/disciplinary/dismissal process, there was also the issue of whether there were individual instances of bullying. It was claimed that each or all of the incidents constituted bullying under Section 4. The Tribunal ruled that none of the alleged incidents caused or had the purpose of causing the Complainant alarm, distress, humiliation or intimidation in breach of the Act. It added that had the Complainant viewed any of the incidents as sufficiently serious to have caused her to feel any of the prescribed emotions in breach of the Act, then "...she surely would have raised a grievance at the time, or at least would have articulated a complaint to someone sufficiently strongly for there to be evidence that there had been such a breach of the Act."

In respect of each element of the bullying claim, the hurdle which the Complainant did not succeed in overcoming was proving that she had suffered any of the emotions prescribed in the Act (i.e. alarm, distress, humiliation or intimidation). Save for her own, the Complainant did not put in any evidence in this regard, for example, from third parties (family members, colleagues, for example) who could corroborate that she had suffered

any of the prescribed emotions. Accordingly, the Complainant's various claims that the Respondent bullied her in breach of the Act failed.

The Tribunal went on to say that "...had the Complainant succeeded in surmounting this hurdle, I accept that, as per Section 4(2) of the Act, "punishment imposed without justification", one of the statutory examples of bullying, would include a conspiracy to commence and the undertaking of a sham investigation/disciplinary/dismissal process. However, dismissing an employee (preceded by a disciplinary process) on its own cannot amount to bullying conduct if (i) the employee did not thereby experience alarm, distress, humiliation or intimidation; or (ii) the process was justified; or (iii) the process was reasonable action under the exclusionary Section 4(3) of the Act."

As regards the victimisation claim, the Tribunal found that the Complainant had not discharged the burden of proof that there was any connection between the encounters with a fellow employee and the Complainant and the events leading up to the investigation/disciplinary/dismissal process and/or the process itself and as such the Respondent had not contravened Section 7 of the Act.

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