Victimisation – a trap for the unwary

The recent case of Woodhouse v West North West Homes emphasises that even employers who do their best to avoid discriminatory treatment can fall foul of the law on victimisation.

Sarah Bull examines the case and how to avoid a claim of victimisation

Victimisation is quite a common, and commonly successful, claim in the Employment Tribunal (‘ET’), especially since the Equality Act 2010 came into force. This altered the definition of victimisation: where previously the test had been whether a claimant was treated less favourably than another person would have been treated after doing a protected act, now it is classed as victimisation if they are ‘subjected to a detriment’ as a result of doing a protected act. The comparative element has been removed. Protected acts include most actions taken in relation to equality legislation, from bringing ET or court proceedings to simply making allegations of discrimination. This means that employers must be careful when taking decisions in relation to employees who have done a protected act, and be sure that they can justify their decisions without reference to that protected act.

Woodhouse – A case in point

In the case of Woodhouse, an employee had made allegations of racial discrimination and, over the course of four years, he submitted 10 grievances and eight ET claims in relation to this alleged discrimination. Of the grievances, only the first two were at all well founded, and when they were badly handled and not upheld, the employee’s sense of ill-treatment snowballed out of all proportion, such that every grievance decision that went against him appeared to him to be racially motivated, and therefore founded another grievance. He was eventually dismissed, with the employers citing an irretrievable breakdown in trust and confidence as a reason.

The Employment Appeal Tribunal (‘EAT’) said that a dismissal because of the continual raising of grievances in relation to racial discrimination was by definition a detriment suffered because of the doing of a protected act, and was therefore victimisation. The only exception to this, they said, was where false allegations were made in bad faith, in which case the allegations would not be protected acts. In this case, while the claimant had made unfounded allegations, they were made in good faith, and therefore the exception could not apply.

This leads to something of a catch-22 for employers, who cannot keep on an employee who is costing them time and money by putting in multiple unfounded, though well-intentioned, grievances, but cannot dismiss them because if they do, they then expose themselves to costly claims for victimisation. The best possible outcome is to negotiate a settlement agreement, and attempt to allow the employee to leave amicably. However, because of the discrimination angle, it will not be possible to have a confidential pre-termination negotiation with them about the possibility of a settlement agreement (see William Garnett’s article on page 4 and Paul Jennings’ Q&A on page 6 for more detail on these procedures).

A glimmer of hope emerges from the EAT’s discussion of the case of Martin v Devonshires Solicitors, in which a mentally ill employee who claimed sex discrimination had delusions about events that never happened, and was dismissed for raising grievances based upon these figments of their imagination. The EAT found in this case that there was an exception, as the dismissal was based on ‘genuinely separable features’ – factors that were not connected to the protected act of the claim for discrimination. The EAT was keen to limit the application of such an exception, and said that merely unreasonable behaviour in bringing protected grievances – such as using ‘intemperate language’ and ‘making inaccurate statements’ – would not justify a dismissal or detriment.

Avoiding victimisation

Naturally, the best way to avoid claims of victimisation is to deal fairly and thoroughly with grievances and allegations of discrimination when they arise, so as to give employees no reason to submit further grievances. Having clear and transparent policies in place to deal with issues as they arise will help in this regard, as will paying close attention to matters raised informally by employees. The earlier matters are caught and rectified, the less likely an employee will become aggrieved in the first place.
In some circumstances, though, this will not be enough, and the gap between the employee’s perceptions and those of the employer may be too great to bridge. In this situation, with grievances snowballing into yet further grievances, it will be tempting for employers to look for the exit. Employers who take this route should be sure either that they have a genuinely separable reason for dismissal, or that they are prepared to meet the cost, both financial and reputational, of a victimisation claim. It should also be remembered that any measures taken prior to dismissal may also count as a detriment, and so detailed records should be kept of the reasons for any steps taken that could be construed as detrimental.

Alternatively, employers can attempt to hold out either until the grievances stop, or the employee decides to leave. This can be a difficult task, because an employee could still bring a claim for victimisation or constructive dismissal if they decide to leave, so employers who decide on this option should be diligent about following policies strictly, and ensuring that all their processes are fair and do not subject the employee to a detriment.

**Conclusion**

The decision in *Woodhouse* is likely to be a deeply problematic one for any employers whose employees maintain grievances in the face of all reason. Unless they stray into the realms of bad faith, they cannot be legitimately dismissed. Good relationship management and solid equality policies are the first and best bulwark against having to deal with victimisation claims, by preventing grievances from ever arising. If that fails, however, and grievances begin to get out of hand, then employers can either hold on and hope for the best, attempt to negotiate a settlement or bite the bullet, dismiss, and accept the consequences that result.

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