SOLICITORS JOURNAL

Taking on the bullies: on what basis and in which court?

Time limits and the defendant's solvency are just two of the key elements to consider when seeking compensation for harassment, warns Jonathan Wheeler

Jonathan Wheeler

Jonathan Wheeler is managing partner at Bolt Burdon Kemp
boltburdonkemp.co.uk

Early consideration of the defendant's assets will be required – there is little point in pursuing an action where the prospects of recovery are slim

I am certain that all responsible employers will say they have zero tolerance to bullying and harassment in the workplace. This goes for law firms, the NHS, Philip Green's Arcadia group, The Weinstein Company, and Chelsea Football Club. However, in recent months many have been mired with accusations of widespread bullying, sexual or racial harassment.

The British Medical Association has reported from surveys that one in five doctors have been bullied at work.

In law, the situation would appear even worse – the International Bar Association's survey of over 5,000 lawyers in October 2018 revealed that half of female respondents and a third of male respondents have been bullied by their bosses, with one third of women and one in fifteen men reporting sexual harassment.

The allegations against Harvey Weinstein launched the #MeToo movement which has done much to explode the myths of the casting couch and its equivalent in other professions. But it is universally understood that the problem is widely under-reported, with employees fearing reprisals, or damaging their career prospects if they speak out. What we appear to be seeing then in these alarming statistics is more reporting – often anonymously to surveys – rather than a growing problem.

However, increasing publicity and empowerment of victims has led to more claims for compensation from those affected. Employment lawyers are well used to taking discrimination claims to tribunals and in some cases, the tribunal route may be the best one depending on the facts – but beware the very short time limits for making such a claim.

In other cases, particularly where the three-month period has long expired, the civil courts provide remedies, and PI lawyers are being called upon to pursue and defend such cases. What, then, are the practicalities of claiming compensation in the civil courts? First – let's start with the law.

COMMON LAW TORTS

On the facts of the case has a tort been committed? Has there been a trespass to the person (assault, battery, false imprisonment)? It is unlikely that negligence would come into the mix as bullying and harassment is a deliberate, rather than a careless act. However in a case involving a medical professional engaging in a (consensual) sexual relationship with his patient, one could argue that (as well as being unethical) the relationship itself became a barrier to the patient's recovery, and the doctor was therefore negligent in his treatment.

If trespass or negligence does not apply on the facts, consider the Victorian case of *Wilkinson v Downton* [1897] EWHC 1 (QB) which created a tort of doing a wrongful act to cause the intentional infliction of mental shock: The defendant was found liable in damages to Mrs Wilkinson when as a practical joke, he had erroneously told her that her husband had been seriously injured. Since there was no physical touching of the plaintiff, and she was never under the apprehension that she would be harmed herself, the tort of trespass did not apply. So bullying by words alone, not deeds are covered here. Certainly my firm is relying on this case as we sue Chelsea Football Club for the alleged racial harassment of youth players back in the 1980s. Wilkinson has been deployed too in some analogous cases, most recently giving rise to a liability to a pupil in receipt of inappropriate sexualised text messages from her teacher *(ABC v West Heath 2000 Ltd & Whillock* [2015] EWHC 2687 (QB)).

THE STATUTORY TORT

One must also have regard to the Protection from Harassment Act 1997, which provides for civil as well as criminal remedies for victims. Harassment is unwanted behaviour towards the victim, which causes harm or distress. In the civil sphere, much assistance can be gleaned from the judgment of Simon J in *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB) where he summarises the constituents of the tort at paragraph 142:

- The conduct complained of must occur on at least two occasions;
- It must be targeted at the victim;
- It must have been calculated in an

objective sense to cause alarm or distress;
- It must be objectively judged to be oppressive and unacceptable.
- Whether the conduct is oppressive and unacceptable may depend on the social or working context in which the conduct occurs;
- A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: "torment" of the victim, of "an order which would sustain criminal liability."

This would certainly cover bullying and sexual, racial or other discriminatory harassment in the workplace, where it occurred at least twice. Note that unlike common law torts, which result in pure psychiatric injury, one does not need to show a recognised psychiatric injury, but rather (as in the employment law sphere) 'injury to feelings' will suffice.

VICARIOUS LIABILITY

An employer can be held vicariously liable for the actions of its employee found to have harassed another under the statutory tort (*Marjowski v Guys and St Thomas's NHS Trust* [2005] EWCA Civ 251). If one is relying on the common law tort of trespass, or Wilkinson v Downton, then again it is more likely that vicarious liability will apply if the employee is acting in a way closely connected to his employment. This has been given wide application recently by the Supreme Court in the case of *Mohamud v Morrisons Supermarkets PLC* [2016] UKSC 11. If vicarious liability attaches, the employer is likely to have the assets to meet a judgment or even insurance to cover the liability, so this is an important consideration.

However, where vicarious liability cannot be made out, the action will lie against the individual perpetrator. Early consideration of his/ her assets will be required – there is little point in pursuing an action where the prospects of recovery are slim. In my firm, at risk assessment stage, we look for assets of at least £250,000 within this jurisdiction when considering it worthwhile suing an individual without insurance.

LIMITATION

Under the Protection from Harassment Act, limitation is six years from the date of the harassment. If you can prove a 'course of conduct' under the act, then six years from the date of the final element of the conduct may be sufficient, but cases are, of course, fact-specific.

Rely on the common law torts, and your limitation period is three years from the date of the trespass or wrongful act, and section 33 of the Limitation Act 1980 may apply for the court to exercise its discretion to allow a case to proceed out of time. Clearly there is much more lee-way here time-wise than in a tribunal claim.

DAMAGES

Bear in mind that aggravated damages may be claimed in addition to those for pain, suffering, loss of amenity, and special damages for financial loss. Aggravated damages are compensatory, not punitive, but are designed to acknowledge any particularly egregious factors which resulted from the deliberate and malicious commission of the tort – so for example to compensate for the victim's humiliation, anguish, injury to feelings, loss of confidence and self esteem.

Exemplary damages are punitive in nature and if the facts fit, they should be claimed too. They can apply to cases of oppressive, arbitrary or unconstitutional conduct by anyone carrying out governmental functions, and as such they should always be considered where you are acting for a state employee. Distinctly, they may also be relevant where through committing the tort, a defendant has profited financially in some way.

SETTLEMENT AGREEMENTS

Of course, some clients will come to you where their complaints have already been dealt with away from the court's gaze, by way of a settlement agreement. These must be interpreted by application of contract law. Was a settlement agreed in full and final settlement of all claims? Was the client coerced into signing the agreement? Where the client received independent legal advice at the time of signing, coercion is unlikely to be made out. There may be a confidentiality or non-disclosure clause too, which the client risks being sued on should they divulge the contents of the agreement.

Note that the SRA's guidance from March 2018 shines a light on these non-disclosure agreements, and while they are often legitimate to protect both parties' interests, they should not be used to prevent the reporting of a criminal act or professional misconduct, which of course could include sexual, racial or other discriminatory harassment, as well as assaults and acts of bullying. SJ

> Increasing publicity and empowerment of victims has led to more claims for compensation from those affected