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This is an author produced version of a paper published in

International Journal of Discrimination and the Law (ISSN 1358-2291,
eISSN 2047-9468)

This version may not include final proof corrections and does not include
published layout or pagination.

Citation Details

Citation for the version of the work held in 'OpenAIR@RGU':

MIDDLEMISS, S., 2014. Is a claim for post-employment
victimisation currently permissible under the Equality Act 2010?
Available from *OpenAIR@RGU*. [online]. Available from:
<http://openair.rgu.ac.uk>

Citation for the publisher's version:

MIDDLEMISS, S., 2014. Is a claim for post-employment
victimisation currently permissible under the Equality Act 2010?
International Journal of Discrimination and the Law, 14 (2), pp.
117-125.

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Is a claim for post-employment victimisation currently permissible under the Equality Act 2010?

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Abstract

This article provides an overview of the current legal rules dealing with post employment victimisation and an analysis of the nature and scope of the law on this issue in the United Kingdom. The main focus of the article is to consider the conflicting legal decisions in this area and the impact they have had. Particularly, the detrimental effect the uncertainty arising from these cases has had and will continue to have on solicitors involved in claims and employees that have experienced this kind of victimisation. Finally the need for reform of the law in this area will be considered.

Key Words: Victimisation, post-employment, case law, conflict

Introduction

The law on post-employment victimisation is covered by the Equality Act 2010. However, the provisions dealing with post-employment victimisation are less favourable under the Act than under previous law and do not comply with the legal standards of the European Union. With respect to victimisation itself there are two sections of the Equality Act 2010 that apply. Section 27, has been brought over from previous legislation and defines an action for victimisation. However, section 108 is a new section that implements the decisions in previous cases which allowed post-employment actions for discrimination, harassment and victimisation.¹ However, this latter section was badly drafted and excludes protection for post-employment victimisation. For people experiencing post-employment victimisation in the workplace the denial of legal protection for this type of behaviour can be a problem.

¹ Coote v Granada Hospitality Ltd (No. 2) (1999) IRLR 452

The very recent decision in the case of *Onu v Akwiku*² was an attempt by the EAT to address the inadequacies of the legislation in this respect. Unfortunately it contradicts the earlier decision of a differently constituted EAT on the same point which is likely to cause confusion. Before analysing these developments in detail it is important to set out the relevant law and how it has been interpreted.

Victimisation

The ordinary, day to day, non-legal meaning of the term victimisation in employment which it has been given over time is where an employer has treated or treats a person or persons in his employment in an unfair or harsh manner. However, it has a more specific meaning in employment law which is different to this. Victimisation arises where an employee is involved in (e.g. by acting as a witness) or brings a discrimination claim against his employer during his employment and his employer responds by treating him in a discriminatory manner. The origins of the victimisation rules are uncertain but, historically US legislation had a strong influence of the content of the original Acts dealing with discrimination in the UK.³ So it seems likely that US law was the original source.⁴ However, European law has also been influential in the development of the law in this area. Article 7 of the Equal Treatment Directive⁵ called on member states to take the necessary steps to protect employees against dismissal by employers taken as responses to complaints within

² UKEAT/0022/12/RN

³ Sex Discrimination Act 1975, Race Discrimination Act 1976 E.g. Indirect Discrimination rules and role of EOC in the UK derived from the US.

⁴ It is referred to as a claim for retaliation in the United States and it is by far the most common type of discrimination claim.

⁵ 76/207/EEC

their undertaking or to any legal proceedings brought against them and aimed at enforcing their compliance with the principle of equal treatment.⁶

Under section 27 of the Equality Act 2010,⁷ victimisation occurs when: (1) A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.⁸

Section 27 (2) states that each of the following is a protected act (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act.⁹ In this context it means treating someone less favourably than others (those that have not undertaken a protected act) because that person has exercised, or intends to exercise, his/her rights under specific legislation. In *Bruce v Addleshaw Booth & Co*¹⁰ the Employment Appeal Tribunal confirmed that complaints of victimisation can only be brought if the claimant can show that he has been subjected to discrimination of a type that is unlawful under the relevant legislation. The claimant would need to show that he has been subjected to a detriment representing victimisation during his employment or after.

⁶ In the Coote case supra 1 the ECJ ruled that article 6 of the Equal Treatment Directive included the right of a worker to make a post-termination claim.

⁷ This statutory provision provides a right in respect of sex, race, disability, sexual orientation, religious and age discrimination outlawing victimisation of employees in specific circumstances.

⁸ In *Bouabdillah v Commerzbank* ET/2203106/12 a London banker, fired for failing to disclose a sexual discrimination lawsuit against her former employer Deutsche Bank, won an employment tribunal for victimisation against Germany's Commerzbank.

⁹ Employees (and, in some instances, workers) have the legal right not to be victimised, harassed or subjected to any other detriment for exercising (or proposing to exercise) certain of their statutory employment rights. They have the right not to be victimised etc. on grounds of sex, gender reassignment, pregnancy and maternity, race, disability, religion or belief, sexual orientation, age married or civil partner status.

¹⁰ (2004) All ER (D) 218 (May) EAT

The statutory concept of victimisation was usefully explained by Lord Nicholls in the case of *Shamoon v Chief Constable of the RUC*¹¹ as follows:

"Persons who exercise their statutory rights are not to be penalised for doing so. Employers and others who retaliate in this way are guilty of discrimination. The victimisation provisions adopt substantially the same structure as the direct discrimination provisions, save only that the proscribed ground is different. In cases of direct discrimination, the proscribed ground is sex, or whatever. In cases of victimisation the proscribed ground is that the claimant committed one of the 'protected acts'; for instance, that the claimant had brought proceedings under the Act..."

Comparators

As a claim for victimisation is based on a claimant experiencing inequality of treatment the correct approach in a victimisation case is to establish an appropriate comparator. The claimant must identify another employee who has not carried out a protected act under section 27 as the following quote suggests: ...“ The definition of victimisation calls for a similar ‘less favourable treatment’ comparison. In the case of direct sex discrimination the comparison is between the treatment afforded to the claimant woman and that afforded to a man. In the case of victimisation the comparison is between the treatment afforded to the claimant and the treatment afforded to a person who has not committed a protected act.”¹² One of the most difficult aspects of a victimisation claim is determining the characteristics of the correct comparator. That is a single employee or group of employees with whom the victimised employee compares himself to demonstrate he has suffered less favourable

¹¹ (2003) ICR 337 at paragraph 5

¹² Ibid

treatment. In *TNT Express Worldwide (UK) Ltd v Brown*¹³ the Court of Appeal considered the relevant case law and¹⁴ confirmed that the correct choice of a comparator was one of the central issues for determination in a victimisation claim. The Court set down three general rules for determining the validity of a victimisation claim. First, the employer by subjecting the employee to a detriment must have treated him less favourably than the employer would have treated other employees in the same circumstances. Secondly, the comparison must not include employees who have also undertaken a 'protected act' e.g. those that have also complained of an act of discrimination. Thirdly, the employer must have subjected the employee to less favourable treatment because he had undertaken a protected act.

Causation

In terms of the Act the question to be addressed is whether it has been established that the less favourable treatment that the claimant had suffered was 'by reason that' he had committed one or other of the protected acts. In deciding that question it will need to be established that the protected act had a 'significant influence on the outcome', irrespective of whether the respondents were consciously or unconsciously motivated by the fact that the claimant had undertaken a protected act as the following quote highlights. "The legislature is attempting to provide for the situations where the motivation is, at the least, difficult to prove and, indeed, may not even be consciously acknowledged by the actor."¹⁵ It was decided by a majority of judges in the House of Lords in *Nagarajan v London Regional Transport*¹⁶ that this type of causation needs

¹³ (2001) ICR 182

¹⁴ Particularly the case of *Chief Constable of West Yorkshire Police V Khan* (2001) IRLR 830 (HL) considered below

¹⁵ Rideout, R Dyson, *J Rideout's Principles of Labour Law* (1983) 4th ed. Sweet and Maxwell p 321

¹⁶ (2000) 1 AC 501

to be established in victimisation cases. In *Onu v Akwiku*¹⁷ the EAT in dealing with the question of causation in a case involving a threat made by an employer to an employee following a protected act confirmed that: “the statutory question is whether the victimisation¹⁸ occurred because she had done so. A realistic approach must be taken to any situation in which it is said a protected act has occurred... If the claim includes reference to allegations under the Equality Act then we do not see it as a precondition for the threat to be actionable that in the course of making it the perpetrator should expressly refer to that fact. In context, here, Mr Akwiku plainly knew of an action having been brought. Although it covered more than a breach of the Equality Act, it covered that too. The fact he did not single out the action under the Equality Act for specific mention when making a threat does not mean that his action was not taken, at least in part, in response to the bringing of proceedings under that Act...any detriment suffered from an act in response to the bringing of the claim is to be attributed to the bringing of the protected act.”¹⁹ The EAT took a purposive approach to the case and readily attributed the threats made to the claimant (some time after she had left her employment) by her employer as being in response to a race discrimination claim taken against him previously by her (without specific mention of it by him) and hence it was victimisation.

Post employment discrimination

The decision in *Adekeye v The Post Office (No2)*²⁰ remained good law until recently in respect of complaints of victimisation brought under previous legislation the Sex

¹⁷ Appeal No. UKEAT/0283/12/RN & UKEAT/0022/12/RN

¹⁸ Here, uttering a threat to the sister of the claimant about what he would do to her sister and her.

¹⁹ *Supra* 21 Para. 110

²⁰ (1997) IRLR 105

Discrimination Act 1975²¹ and the Race Relations Act 1976. The EAT considered first whether the expression "a person employed" in section 4(2) of the Race Relations Act 1976 could properly be construed so as to include a former employee. They concluded that the expression meant "a person who is employed under a contract of employment and this meant that there was no protection for those persons no longer employed by him.

In *Rhys-Harper v Relaxion Group PLC*²² the Employment Appeal Tribunal needed to clarify whether sex discrimination by an employer of a former employee that took place after the employment had terminated would be protected by the Sex Discrimination Act 1975.²³ The law was already clear that in respect of post employment victimisation this was within the scope of the Sex Discrimination Act 1975.²⁴ However, the issue was could a claimant make a claim for direct and indirect discrimination where they were an ex-employee or former job applicant. The EAT held that these forms of discrimination were not within the field of employment and therefore fell outside the SDA. The Court of Appeal upheld the decision of the EAT. However, this decision was overturned by the House of Lords in *Relaxion Group v Rhys-Harper, D'Souza v London Borough of Lambeth, Jones v 3M Healthcare* and three other actions.²⁵ They decided that an employment tribunal did have jurisdiction to consider a complaint of discrimination that relates only to acts that are alleged to have taken place after the complainant's employment has come to an end.

²¹ Section 6(2)

²² (2001) IRLR 460 CA

²³ Interpreted in line with the Equal Treatment Directive

²⁴ *Supra* 1 Coote

²⁵ (2003) IRLR 484 HL

Under section 108 of the Equality Act post-employment discrimination and harassment are covered.²⁶ This section states that: (1) A person (A) must not discriminate against another (B) if (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act. Section 108 (2) states 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.

Post-employment victimisation

This article is about the legal position of a person who has been involved in, or brought, proceedings under equality law against his employer during his employment but, has been victimised because of it after he has left his employment. What type of behaviour on the part of the employer is this likely to be? The action could be refusing an employee a reference as in the *Jesemy* or *Coote* case²⁷ or denying him some term or condition of his contract which he is entitled to e.g. outstanding wage or bonus. In *Oku* below it was a threat made by an employer to his employee via her sister and in *Taiwo* it was an employer informing on an ex-employee to the immigration authorities.

²⁶ Unlike victimisation which is excluded.

²⁷ Middlemiss, S Employers Liability for Employee References and Victimisation, *Statute Law Review* (OUP) (2012) Vol. 33 Part 4

Post - Termination Victimisation

The liability of employers for victimisation arising after a contract of employment has ended was first established in the case of *Coote v Granada Hospitality Ltd. (no 2)*.²⁸ Ms Coote argued that after her dismissal by her former employer he had victimised her by failing to provide her with a reference relating her employment. She had pursued a claim against her employer for sex discrimination alleging that his action in dismissing her had been motivated by her pregnancy and the claim was settled out of court. Ms Coote then brought a claim against her employer for victimisation by failing to provide her with a reference. This claim was unsuccessful at the Employment Tribunal stage as it was held that she was not in employment at the time of the act of victimisation and accordingly the tribunal had no jurisdiction to hear the complaint. On appeal to the Employment Appeal Tribunal they referred the matter to the European Court of Justice for guidance on the applicability of the Equal Treatment Directive²⁹ to victimisation which occurred after the employment relationship had ended. The ECJ held that the Directive applied to this type of behaviour and required member states to introduce measures to protect workers from this type of post employment discrimination. Following the ECJ decision the EAT upheld Ms Coote's claim for victimisation under the Sex Discrimination Act 1975. The UK Government's response to the *Coote* decision was to introduce legal rules that protected against post-employment discrimination which are now contained in section 108 of the Equality Act 2010. This makes discrimination, which arises out of an employment relationship which has ended, unlawful. However, section 108(7) specifically excludes victimisation. This exclusion is acknowledged by the current

²⁸ (1998) IRLR 656

²⁹ 1976/207 EEC

Government as a drafting mistake however, it does exclude the possibility of the type of claim in the *Cooté* case being brought under this section.

Section 108 of the Equality Act

This section of the Act gives the right to a claimant to bring an action against her employer after the contract has ended. In respect of discrimination it states that: (1) A person (A) must not discriminate against another (B) if (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them ...³⁰ However, post-employment victimisation is excluded under section 108 (7) which states that conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A. This provision denies the right to post-employment protection that was provided to employees by the ECJ in the *Cooté* case and could be subject to challenge. The Government have admitted that this is a drafting error which will be sorted out but, in the meantime pointed out that there is still a remedy under the Act which can be provided in line with section 27 of the Equality Act 2010, previous UK statute law, the Equal Treatment Directive³¹ and relevant case law. The case law below illustrates the difficulties caused by this error and the need for the section to be amended as a matter of urgency. In the meantime claimants will need to overcome various hurdles to establish the legitimacy of their claim.

³⁰ Also regarding harassment it states the following at s 108 (2): 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.

³¹ 1976/207 EEC or Supra 10 General Framework Directive for Equal Treatment in Employment and Occupation

Relevant Case Law

Following the *Coote* decision the tribunals extended the right to employees to make a post-employment claim. Similarly in *Shoebridge v Metropolitan Police Services*³² the Employment Appeal Tribunal upheld an employment tribunal finding that it had jurisdiction to hear a complaint of victimisation relating to events 14 months after the employment had ended. Also in (1) *Walker* (2) *Premier Model Management Ltd v (1) BHS Ltd (2) Hough*³³ the EAT held that discriminatory acts that took place after the termination of the employee's employment were deemed to have sufficient proximity to the employment relationship so as to give rise to a continuing act of sex discrimination for the purposes of a claim under the Sex Discrimination Act 1975.

The situation changed with the decision of *Rowstock Limited v Jessemy*³⁴ where it was held that victimisation of an employee after his employment had ended did not give him a right to complain to an employment tribunal. The Equality Act 2010 did not cover victimisation against a worker after he had left his job.

The facts in *Rowstock* were that Mr Jessemy issued a claim against his former employer *Rowstock Ltd* for unfair dismissal and age discrimination having been dismissed on the ground of retirement before his 66th birthday and those claims were successful. Also his employer had provided an unfavourable reference and Jessemy added a complaint of post-employment victimisation to his other complaints, arguing that the reason for the poor reference was his complaint of age discrimination. The tribunal conceded that Mr Jessemy's ex-employer had provided a poor reference

³² (2004) All ER (D) 87 (Jul) EAT

³³ EAT/0001/05

³⁴ UKEAT/0112/12; (2013) EMPLR 023

about him which limited his ability to obtain alternative employment. However, they rejected his victimisation claim on the basis that under section 108 (7) of the Act³⁵ they had no jurisdiction to hear it. Mr Jessemy appealed against the tribunal decision arguing that Parliament could not have intended to remove this protection and that the Tribunal did have jurisdiction to hear his claim. The EAT dismissed his appeal on the basis that the wording of section 108(7) is clear and tribunals are required to observe the letter of the law.³⁶ In its judgment, the EAT said that, “the literal words of section 108(7)...produce a lacuna in the statutory scheme of protection from discrimination, harassment and victimisation which the UK is required by EU legislation to enact.” Although it recognised that it was unlikely that post-employment victimisation had been intentionally excluded under this section, it said the real question is whether the EAT had the power “to plug the gap or eliminate the lacuna”. The EAT concluded that its judicial role does not extend as far as amending primary statutes. However, it did grant permission to Mr Jessemy to appeal on this point to the Court of Appeal and the outcome of this appeal is eagerly awaited. The general consensus among practitioners is that post-employment victimisation is important and needs protection.

However, a differently constituted EAT in the recent case of *Onu v Akwiku*,³⁷ disagreed with the decision in *Rowstock* and argued it was wrongly decided. The Claimant was a domestic servant who had brought a claim against her previous employers for, amongst other things, victimisation after she had left her employment. The Employment Tribunal held that victimisation was not made out on the facts. The claimant appealed at which point the respondent introduced a new argument that post-

³⁵ Which excludes claims for post-employment victimisation

³⁶ The tribunal was not directed to the leading case on the earlier legislation, *Rhys-Harper v Relaxion Group*, and so it is possible that it would have come to a different result if it had been considered.

³⁷ UKEAT/0022/12/RN

employment victimisation claims were precluded by virtue of s. 108(7) of the Equality Act. The EAT held that construction of the Act was to be approached in two stages. Firstly, the meaning of the Act was to be ascertained as if it was a purely domestic statute. If the result of the interpretation of domestic law was it was contrary to the requirements of the Equal Treatment Directive, then the second stage was to consider whether the Act could be interpreted in accordance with the obligations on member states under the Directive. The EAT concluded that the domestic construction of the Equality Act 2010 permitted employees to bring claims for acts of victimisation that took place after their employment had ended. It thought that the contrary decision in the Rowstock case had been wrongly decided. In dealing with the question of statutory interpretation and why the Equality Act should be interpreted to include the right to bring an action the following was stated: “The central difficulty is that the Equality Act 2010 does not expressly provide that victimisation of a former employee by her erstwhile employer is compensatable, whereas it does provide specifically that both discrimination and harassment occurring after termination of the employment relationship are, and it would seem all too easy for Parliament to have added a similar provision in respect of victimisation post-dating the termination of an employment to give rise to a claim if that is what it had intended. Yet that is what European Directives would require it to do; it is what the House of Lords recognised was provided by the predecessor statutes (here the Race Relations Act) by its decision in *Rhys-Harper v Relaxion Group* [2003] IRLR 484 HL; it is what the Code of Guidance to the Equality Act asserts the effect of the Act is; and although the Act is not expressly a consolidating statute, there is no Parliamentary material which suggests

that the legislature considered for one moment that the effect of what is was doing might be to provide for such a dramatic shift in the law.”³⁸

Conclusion

The type of action taken by an employer in the workplace that can represent a form of victimisation is extensive as illustrated by the case law. Despite this the legislation still specifically excludes post employment victimisation claims. Where this rule has been applied strictly according to statute by a tribunal or court (E.g. *Jessemy*) it has been viewed by some commentators and judges as acting contrary to the intentions of the judiciary and Parliament. This was the view taken by the EAT in the case of *Onu v Akwiku* which disagreed with the decision in *Jessemy* case and concluded that post-employment victimisation is caught by the Equality Act 2010. As there are now two inconsistent EAT decisions, permission to appeal to the Court of Appeal has been granted (alongwith the linked appeal of *Taiwo v Olaigbe*³⁹). While the Court of Appeal may provide an interim conclusion on the correct construction of the legal rules what is needed is a statutory change. However, given the Government’s apparent resistance to this change may come through the Court of Appeal in their judgement on this issue. It may try to resolve the problem (in the absence of statutory change) and make further appeal unnecessary. However, what is more likely is that a challenge to the legislation will be presented to the Court of Justice on the basis that it is contrary to EU law.

³⁸ Justice Langstaff at paragraph 60

³⁹ [2013] UKEAT 0254_12_0503 *Taiwo* was employed as a live-in nanny/housekeeper working under a migrant worker visa. After leaving her employment she brought a race discrimination claim alleging ill treatment and abuse by her former employers. They in turn contacted the UK Border Agency requesting that they investigate T’s immigration status. As a result, T brought a second employment tribunal claim alleging race discrimination, harassment and victimisation, relating to these post employment acts.