

Frustration, Victimization and Damage Limitation

By Craig Rothwell

The reluctance of people to act as witnesses at court has been one of the subjects attracting the attention of the media in recent years. This is particularly in the context of serious criminal trials and the reluctance of some to appear as prosecution witnesses for fear of retribution. In having a public justice system within a small community, there are inevitably limits to the reassurance and protection the law can offer to assist those witnesses faced with such an unenviable dilemma.

However, in the area of employment law where the stakes are not (usually) so high, the protection provided by the law is more likely to be of reassurance for both those employees who bring complaints and those who assist them in providing evidence on their behalf.

Both the Human Rights Act 1981 (for complaints of discrimination) and the Employment Act 2000 (for most other employment related complaints) provide protection for employees or their witnesses against what is known as 'victimisation' by an employer.

The Human Rights Act provides that any person shall not 'treat prejudicially' another so as to prevent them making a complaint or giving evidence. Nor can that person (i.e. the employer) penalize them for making the complaint or giving evidence afterwards. The Employment Act similarly states that the filing of a complaint or participation in any proceedings by an employee against an employer cannot be punished by the dismissal or disciplinary action of the employee.

If an employer does take such action against the employee, then the employee will have grounds for (another) complaint: this time for victimisation. A proliferation of complaints like this is not uncommon in situations in which the relationship between employer and employee has deteriorated but neither is prepared or financially able to bring an end to the mutual antagonism by dismissal or resignation.

To avoid this scenario, it is therefore imperative for an employer when confronted by a complaint from an employee to smile through gritted teeth and act more properly than ever before in their behaviour towards that employee. Otherwise the employer may not only have to defend the initial complaint, but also a follow-on claim for victimisation. Strange as it might seem, it is often the case that an employee may be unsuccessful with the initial complaint but does succeed in the victimisation complaint. It is worth noting that there is no requirement for the initial complaint to be successful in order for a subsequent complaint for victimisation to succeed.

Given human nature, this back-to-front outcome is not really as surprising as it sounds. Faced with a serious and genuine complaint, even the worst employer can sometimes take stock and recognise that steps to remedy the situation have to be taken. On the other hand, even the best employers can let their frustration at a meritless complaint run amok and go on to treat that employee unfairly when they had treated them more than fairly before the complaint.

There are also not necessarily any "brownie points" available for past good conduct either: if it was the victimisation which ultimately led to a resignation or dismissal, the compensation payable to the employee is likely to be higher than if just the initial complaint had succeeded. This is because the employee, if treated fairly after the initial complaint, may have continued working at the company. In this case, without any resignation or dismissal caused by subsequent victimisation, the employer will not be held liable by the Tribunal or Court for any resulting loss of wages, only a sum for injury to feelings to the employee.

Hence, whilst there can never be a guarantee that those who decide to march into hell for a heavenly (or sometimes not so heavenly) cause can be given a safe

trip out again, the victimisation provisions at least in theory attempt to make the stay before the Tribunal or Court and its aftermath as painless as possible. However, in practice, if an employer is not careful, the victimisation provisions can turn the stay into an extended visit of the most hellish kind as complaint encourages complaint and what was initially the problem is forgotten as an irrelevance.

This article contains information of a general nature and should not be relied upon as a substitute for professional legal advice given with respect to a particular factual situation.

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