Botched disciplinary process breached duty of care owed to an employee accused of sexual harassment

The recent case of *Woodhead v WTTV Limited and anor* reminds employers of the importance of handling disciplinary processes with sensitivity, especially when mental health issues are involved. Employers must act transparently, avoid unnecessary urgency, and adapt their approach once informed of an employee's psychiatric vulnerabilities.

What happened in this case?

The Claimant was employed by the Respondent television company as its Managing Director. In November 2019, he was selected for redundancy and his employment was due to terminate in May 2020. On 28 November 2019, the Claimant was asked, without notice, to attend a "fact finding" meeting with the Director of Fair Employment Practices and the Director of Human Resources of NBC Universal International Ltd (**NBC**), being the Respondent's majority shareholder.

At the meeting, the Claimant was informed that a freelance colleague, known as "NPQ", had made complaints of sexual harassment against him. He was not shown NPQ's written complaint during the lengthy meeting. Instead, the complaints were explained to him, and he was asked for his responses. After the meeting, the Claimant was suspended pending further investigation.

At the time of suspension, the Claimant suffered from long-standing psychiatric conditions. He was a recovering alcoholic since 1991 and had been in therapy since 1992. He suffered from compulsive sexual behaviour disorder, anxiety and depression and he had a history of self-harm. After the meeting, the Claimant's mental health rapidly declined. He was signed off work with depression and anxiety from 3 December 2019 and diagnosed with "adjustment disorder" on 11 December 2019. He was admitted to hospital for in-patient treatment on 13 December 2019. He was discharged in January 2020 but treated for a further seven weeks as an out-patient and remained signed off sick until 8 May 2020, when his employment terminated by reason of redundancy. The disciplinary decision was sent to him in September 2020.

The Claimant brought a personal injury claim (alongside other claims) in the High Court, arguing that the Respondent's conduct of the investigatory and disciplinary process between 28 November 2019 and the end of September 2020 breached their duty of care not to expose him to a risk of psychiatric injury.

What was decided?

To succeed, the Claimant needed to show that:

- it was reasonably foreseeable that he could suffer an injury to his health attributable to the conduct of the investigatory and disciplinary process;
- the Respondent breached its duty of care to him by failing to take reasonable care to reduce or prevent the

harm; and

- that breach of duty caused or materially contributed to the harm suffered.

Was the risk of an injury reasonably foreseeable?

The Judge determined that, as of 4 December 2019, it was reasonably foreseeable that the Claimant could suffer harm to his health from stress due to the process. It was on this date that the Respondent received a letter from the Claimant's psychologist stating that the Claimant was a recovering alcoholic and that this traumatic episode had destabilised him, causing a relapse of depression. The letter said it was essential that treatment was effective and ongoing before the Claimant was subjected to further stress. The Judge concluded that upon receipt of this letter, the Respondent was on notice that the Claimant suffered from long-term and serious mental illness and that there was a risk to his health by continuing with the disciplinary process.

If yes, did the Respondent breach its duty of care to the Claimant?

The Judge identified four significant failings in the Respondent's conduct of the process, three of which were found to amount to breaches of the duty of care.

Failing 1 – The conduct of the investigatory meeting

First, the fact-finding meeting of 28 November 2019 was handled badly. The Claimant was called into a lengthy meeting without notice. He was not given a written copy or summary of the complaints. He was not suspended pending an investigatory meeting (which would have been in line with NBC's Disciplinary Policy). Instead, the meeting was conducted as an investigatory meeting. The Claimant clearly found it intensely distressing – he later said he experienced a *"disassociative episode"* in the meeting and was left *"reeling".*

The Judge observed that there was no reason why matters had to be dealt with in this way. There was nothing that required urgency or a response on that day rather than a few days later. It was not the approach of an employer acting reasonably and it had a particularly severe impact on the Claimant's mental health. However, this could not amount to a breach of the duty of care because it took place *before* the date on which the risk of harm became reasonably foreseeable (i.e. 4 December 2019).

Failing 2 – The conduct immediately following the meeting until 11 December 2019, when the process was suspended

On 29 November 2019, the Claimant's solicitor wrote to the Respondent to ask for all communications to go to him and for the investigatory meeting to be rescheduled, this time with written notice of the questions. He also said that the Claimant was suffering from stress, taking medical advice and may be disabled. On 2 December 2019, the Respondent refused to reschedule the investigatory meeting but gave the Claimant until 4 December 2019 to comment on the investigatory report (a copy of which was sent to him later that day). When the investigatory report was sent to the Claimant,the "findings" column was left blank – suggesting that all complaints against him were still live. In fact, by the time the report was sent to the Claimant, the Respondent already knew that some of the complaints would *not* be taken forward. It later emerged that this was not an inadvertent error. Rather, the column showing the findings (including the findings favourable to the Claimant) had been deliberately removed.

The Judge criticised the Respondent’s imposition of a short deadline for a response; there was no sufficient reason for it and no cause for urgency. Although the Respondent’s tactics were worthy of criticism, ultimately, the Judge held that it was not a breach of the duty of care to have continued with the process until 11 December 2019, after which the process was suspended in light of the Claimant’s hospitalisation. However, the decision not to tell the Claimant that some of the complaints against him had been dropped *was* a breach of duty. It gave a false impression of the extent of the matters that he had to respond to. It would have been reasonable and appropriate to make clear that only part of the complaints would be going forward.

Failing 3 – Attempting to revive the disciplinary process when the Claimant was still on sick leave in February 2020

The Claimant’s sick note at the relevant time stated he was suffering from PTSD, anxiety and acute depression with suicidal ideation and receiving ongoing therapies/psychiatric treatment. Nevertheless, the Respondent sought to revive the disciplinary process on 12 February 2020. The Claimant’s solicitor wrote on 13 February 2020 to remind the Respondent that the Claimant was still signed off and not able to engage in the process. The Respondent continued to chase a response.

The Judge found that the Respondent’s approach was neither necessary nor reasonable and *was* a breach of duty. It ought to have been clear that he was not fit to participate in the process and if there had been any doubt, the Respondent should have sought clarification from his doctor or referred him to Occupational Health. The Judge discounted the Respondent’s suggestion that it needed to resume the process due to NPQ’s ongoing distress. This was not borne out by evidence. Emails from the time showed her to be lucid and clear-headed and preoccupied with seeking financial compensation. There was no evidence of distress.

Failing 4 – Pursuing an Occupational Health referral between 16 April 2020 and 8 May 2020

During this period, the Claimant was certified as sick. Covid restrictions meant that any Occupational Health professional would not have been able to meet with the Claimant in person. At best, it would have been a video call, which the Judge said was *“highly unlikely”* to afford any information sufficient to assess the Claimant’s state of health. Yet the Respondent’s solicitor continued to pursue the point, even when asked to refer to the Claimant’s doctor instead. No consideration was given to the Claimant’s circumstances, the fact of the lockdown restrictions or the option of getting information from the doctors treating the Claimant.

The Judge remarked the Respondent’s solicitor was pursuing an *“entirely pointless”* referral and appeared to be more concerned with form over function. This was not a reasonable course of action and was another breach of duty.

If yes, did the breaches cause the Claimant’s injury?

Two of the three breaches were held not to have caused injury.

First, the attempts to revive the disciplinary process when the Claimant was still on sick leave in February 2020 did not materially add to the injury the Claimant suffered either by exacerbating or prolonging it. The issue had been dealt with by the Claimant’s solicitor and any distress that the Claimant experienced was not long lasting.

Second, the pursuit of an Occupational Health referral between 16 April 2020 and 8 May 2020 did not materially add to the Claimant’s injury. It had been dealt with by solicitors and the requests were not communicated to the Claimant at the time. He was only told when the issue had been dropped. There was no evidence that it had a significant impact on the Claimant.

However, the decision to mislead the Claimant about how much of the complaint against him remained live *did* cause injury. The initial shock and breakdown he suffered was worsened by the perception of not being heard or understood by the Respondent. This contributed to the existence and duration of the psychiatric condition. The failure to inform the Claimant that the scope of the disciplinary proceedings against him had been narrowed materially contributed to his psychiatric injury.

What does this mean for employers?

Although the Claimant’s victory was limited to one point, employers should pay close attention to the Judge’s scathing comments about the employer’s conduct. Importantly, this was a personal injury claim in the High Court, but the employer’s serious failings may have also provided a sufficient basis to claim constructive unfair dismissal and/or disability discrimination in the Employment Tribunal.

- **Remember your duty of care to employees accused of sexual harassment.** Employers often feel under pressure to investigate allegations of sexual harassment promptly and robustly, however, this case reminds us that employers continue to owe a duty of care to the accused as well as to the complainant. Investigatory and disciplinary processes should be approached with compassion, transparency, and fairness, particularly where an employee is known to be vulnerable.

- **Always follow a fair process.** Sudden and lengthy investigatory meetings without prior notice or disclosure of allegations can be highly distressing. Similar issues arose in the case of Weir v Citigroup Global Markets Ltd, which drew criticism from the Employment Tribunal. Employers must follow their owndisciplinary policies, ensuring procedures are fair, consistent, and not unnecessarily urgent or onerous.

- **Make adjustments to processes as needed.** Once on notice of an employee’s mental health condition, takereasonable steps to prevent further harm. Pursuing disciplinary processes despite clear medical advice that an employee is not fit to participate can constitute a breach of the duty of care.

- **Transparency is critical.** Failing to communicate that certain complaints had been dropped was found to be misleading and harmful. Misleading an employee in this way is also likely to amount to a serious breach of the duty of trust and confidence, meaning an employee could constructively dismiss themselves.

- **Use Occupational Health appropriately.** Occupational Health referrals should be meaningful and appropriate to the context. If better information can be obtained from the employee's own doctors, this route should be pursued instead.

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Workers do not need to allege discrimination explicitly to acquire protection from victimisation

In *Kokomane v Boots Management Services Ltd* the EAT has underlined that workers may be protected from victimisation where they raise complaints which do not clearly refer to discriminatory treatment. The key question is what the employer would have reasonably understood the worker to mean, considering both what was said and the relevant background context.

What happened in this case?

The Claimant began working for the Respondent in January 2001. She was the only non-white member of staff employed on a full-time basis at the particular store where she worked.

In April 2020, she raised grievances about her treatment by a colleague, Ms Suteu. She alleged that Ms Suteu had bullied, harassed and victimised her and treated her differently to other workers. In particular, she referred to an incident where Ms Suteu had accused her of shouting and chastised her for doing so. However, the grievances did not state that the Claimant believed she was treated this way because of her race.

A grievance hearing was held in March 2021. When discussing the shouting incident, the Claimant appeared to suggest that she had been chastised by Ms Suteu because of a stereotype that Black women are loud. She said, *“I called out for CD and Corolla responded “Stop shouting, not allowed”….Black girl woman, we are known to be loud.”*

Two months later, the Claimant was made redundant. She brought claims alleging that her selection for redundancy and dismissal amounted to victimisation, because she had complained about race discrimination in her grievance (constituting a “protected act”). However, the Employment Tribunal dismissed the claim on the basis that there had been no specific complaint of race discrimination and so no protected act.

The Claimant appealed to the Employment Appeal Tribunal (the **EAT**).

What was decided?

The EAT considered previous case authorities, which had taken a more nuanced approach to the question of whether a protected act has occurred. For example, in Waters v Commissioner of Police of Metropolis (1997) it was stated that *“…the allegation relied on need not state explicitly that an act of discrimination has occurred… All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer.”* In the later cases of Durrani v London Borough of Ealing (2012) and Fullah v Medical Research Council (2012) it was accepted that the specific type of discrimination does not have to be expressly stated, but there must be something present to indicate that it is a complaint of discrimination.

Summing up the law, the EAT said that Tribunals must:

- take account of all of the factors that are provided in the information given by the employee to the employer; and
- consider that information on the basis of how it would have been reasonably understood by the employer in context, including general facts about the employee and the place of work.

Here, the Respondent knew that the Claimant was the only Black employee in the workplace, and she had complained about having been treated differently to others, including the accusation of shouting. It was also aware that she had drawn a link between that accusation and the stereotype that Black women are loud. It was not clear that the Tribunal has approached its decision with this wider contextual information in mind when determining whether or not a protected act had occurred. Instead, the Tribunal had focused on whether a specific complaint of race discrimination had been raised.

The EAT upheld the Claimant’s appeal and remitted the case back to the Employment Tribunal to be considered again.

What does this mean for employers?

This case underlines that protection from victimisation may be engaged even where a written complaint or grievance does not expressly refer to discrimination. What matters is what the employer would have reasonably understood the worker to mean, taking into account the surrounding context, which might include comments made in a grievance hearing, as was the case here. In other words, more complaints might amount to protected acts than initially thought. This is important because a failure to spot a protected act means the opportunity to safeguard against subsequent detrimental treatment is lost and risks an uncapped victimisation claim.

Line managers and HR will need to take care to decipher whether informal and formal complaints of apparently non-discriminatory treatment (e.g. unfairness or bullying) could, in fact, amount to complaints of discrimination when set against the background context. As this requires a good understanding not only of the relevant facts but of discrimination law, it is important that these stakeholders receive sufficient training on handling grievances and equality law. If you need help delivering such training programmes, please get in touch with us at BDBF.

Kokomane v Boots Management Services Ltd

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Discriminatory changes made by a parent company to a group-wide LTIP award: was the subsidiary employer liable?

A senior executive missed out on a valuable LTIP award after the rules were amended by his ex-employer’s parent company. He alleged the changes amounted to indirect age discrimination and argued that his ex-employer was liable for the discriminatory actions of its “agent” – the parent company. The Court of Appeal rejected the claim, finding no agency relationship between the two entities and concluding that, in any event, the amended LTIP rules were a proportionate means of pursuing the legitimate aim of retaining key staff during a turbulent time for the business.

What happened in this case?

The Claimant was employed by Reckitt Benckiser Health Ltd (**RB Health**), a wholly owned subsidiary of Reckitt Benckiser Group plc (**RB Group**). The Claimant was entitled to participate in a group-wide long-term incentive plan (**LTIP**), operated and administered by RB Group. The 2017 LTIP award was due to vest on 31 December 2019, conditional upon a certain level of growth of RB Group’s earnings per share.

The Claimant entered into a settlement agreement with RB Health, under which he would retire on 30 June 2019. However, it was agreed that he would be treated as a "good leaver" for the purposes of the 2017 LTIP award and his award would vest post-termination, provided the vesting conditions were met. The vesting conditions were not met; therefore, no awards were made. This was a problem for RB Health as the LTIP awards promoted staff retention. The absence of any award risked senior employees leaving the business.

On 18 September 2019, the Remuneration Committee of RB Group resolved to amend the vesting conditions of the 2017 LTIP award. The amendment provided that 50% of the award would vest regardless of the performance of RB Group's shares, although the vesting was delayed from 31 December 2019 to May 2020. However, receipt of an award was made contingent on being employed on both 18 September 2019 and on the May 2020 vesting date, rendering the Claimant ineligible to receive an award.

The Claimant claimed that being deprived of the 2017 LTIP award was indirect age discrimination, on the basis that older people were more likely to have left the business by the new vesting date. He brought the claim against his ex-employer, RB Health, and against RB Group, arguing that it was the "agent" of RB Health. If this was correct, RB Health could be liable for the discriminatory actions of RB Group and RB Group could also be liable as the agent.

What was decided?

Decisions of the Employment Tribunal and EAT

The Employment Tribunal agreed that RB Group had acted as an agent for RB Health. However, it went on to dismiss the age discrimination claim. Although it found that the requirement for LTIP participants to be employed on 18 September 2019 indirectly discriminated against those aged over 57 (including the Claimant), it was a proportionate means of achieving the legitimate aim of retaining staff.

The Claimant appealed the discrimination decision, while RB Health and RB Group cross-appealed the agency decision. The EAT upheld both appeals – meaning that the Claimant still lost. It found that the requirement to be employed on 18 September 2019 could not contribute to the retention of staff. It held that it was not a means of achieving that aim at all, let alone a proportionate means, because "good leaver" beneficiaries like the Claimant had already left employment and could not be retained. However, it ruled against the Claimant on the agency point, finding that RB Group was *not* acting as agent for RB Health since RB Health had no control over RB Group's actions or decisions regarding the LTIP and nor was there any basis to say that RB Health had authorisedRB Group to act on its behalf in relation to the LTIP.

Again, both parties appealed, this time the Claimant on the agency decision and RB Health and RB Group on the discrimination decision.

Decision of the Court of Appeal

On the agency point, the Court decided that RB Group was *not* an agent of RB Health. One of the reasons the Tribunal had concluded that RB Group was acting as an agent was because RB Health's employees would benefit from the LTIP – but that was not enough on its own. There was no basis to say that RB Health had authorised RB Group to act on its behalf in relation to the LTIP, nor any evidence of express or implied assent by RB Group to act as an agent. Further, there was no evidence that RB Health had any control over RB Group in making or amending the LTIP. Instead, RB Group's powers derived from the rules adopted by its shareholders and directors. In addition, they were separate legal entities, and the Courts have generally rejected the notion that agency relationships exist between different legal entities within the same group.

On the objective justification point, the Court agreed with the Tribunal, ruling that there was no age discrimination. The requirement that LTIP participants had to be employed on 18 September 2019 wasa proportionate means of achieving the legitimate aim of keeping staff in post between 18 September 2019 and May 2020. The EAT had also overlooked the wider context in which this requirement had operated, namely the desire to retain the top layer of senior employees during a period of turbulence for the business.

What does this mean for employers?

This ruling provides clarity for employers – especially those operating in group structures – on three key fronts:

- **Employers are not automatically responsible for the actions of a parent company.** HR teams in group structures should note that a parent company's decisions will not automatically make a subsidiary liable unless there is a clear agency relationship. Shared group policies or benefits alone are insufficient to establish liability.

- **Design and operate incentive plans with care**. When administering LTIPs or similar schemes across a group, it is crucial to be clear about which entity is making decisions and how those decisions impact different employee populations. This may help to defeat an argument that a parent (or another group company) is acting as an agent for the employer entity.

- **Post-termination exclusions may be justified.** Excluding "good leaver" former employees from incentive schemes may be contentious but it should not be discriminatory if it supports legitimate business aims, such as retaining key talent, and is applied consistently and proportionately. However, it should be remembered that a disgruntled ex-employee in this position may be able to pursue other legal avenues, such as a breach of contract claim, which underlines the need for careful application of any changes.

Fasano v Reckitt Benckiser Group plc and anor

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