The implications of *Peninsula Business Service Ltd v Baker* UKEAT/0241/16/RN on employer liability for acts of victimisation

By Katherine Anderson

Can an employer escape "scot-free" from liability for an act of victimisation if it is 'astute enough' to instruct an innocent third party – or employee - to carry it out?

In the recent case of Peninsula Business Service Limited v Baker UKEAT/0241/16/RN the EAT made inter alia a number of findings relevant to the law on the liability of employers and principals under the Equality Act 2010, raising interesting questions in relation to liability for acts done by employees, agents and third parties under the 2010 Act.

In this case, the claimant, a lawyer, relied on a number of protected acts for the purposes of a victimisation claim against his employer ("PBS Ltd"). These were that he had asserted that he was disabled and requested reasonable adjustments. The detriments he alleged and relied upon were that his employer had decided to subject him to covert surveillance, and the surveillance itself, which was carried out by a third party, Brownsword Group ("BG"). The ET had quoted extensively from a letter the claimant had sent to his line manager in which he had said that knowing that he had been the subject of surveillance was having a profound effect on his general wellbeing.

Section 109 of the 2010 Act addresses liability of employers and principals. Sub section (1) states that anything done by a person (A) in the course of A's employment must be treated as also done by the employer, whilst s 109(2) states that anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. The Explanatory Notes to the Act state that this section makes employers and principals liable for acts of discrimination, harassment and victimisation carried out by their employees in the course of employment or by their agents acting under their authority. It does not matter whether or not the employer or principal knows about or approves of those acts. However, employers who can show that they took all reasonable steps to prevent their employees from acting unlawfully will not be held liable.

PBS Ltd argued that it could not be fixed with liability for the surveillance itself: BG had carried it out. In order to fix PBS Ltd with liability for victimisation in relation to the surveillance itself, the claimant had to show that BG had victimised him, and that the employer was liable for that conduct. However BG had not victimised the claimant. It had carried out the surveillance simply because it was asked to. It had no knowledge of the protected acts; its act was an innocent one. PBS Ltd argued that motivation on the part of the employer could not be combined with BG's action in order to make the employer liable for the surveillance itself. It submitted that such a "composite" approach was inconsistent with CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.

Readers will recall that Reynolds encompassed a direct age discrimination claim. The claimant, aged 73, worked for CLFIS (UK) Ltd ("Canada Life") under a consultancy agreement which was terminated by the General Manager in the UK, "G". His decision to do so was informed by a presentation by the Managing Director of the Division, "M", which drew attention to various perceived problems with the claimant's performance. Some of the input for the presentation came from the Director of Claims Management Services, "N". The Tribunal focused entirely on the motivation of G, as the responsible decision-maker, and found that the decision to terminate the agreement was because of his genuine belief that the claimant was not providing the service in the manner that Canada Life required; it was not in any sense related to her age. The claimant appealed to the EAT on the basis, inter alia, that the Tribunal had erred by disregarding the involvement of M and N who provided information to G that might have been "tainted" by discrimination. The EAT agreed, but that decision was overturned by the Court of Appeal. It was common ground that it would be unjust if an employee ("C") had no remedy against her employer in a case in which a manager ('X') decided to dismiss her on the basis of an adverse report about her from another employee ('Y') who was motivated by her age, but the parties differed as to the legal basis on which a remedy should be available. The Court of Appeal rejected the "composite approach" which involved bringing together X's act with Y's discriminatory motivation. It held that the correct approach was the "separate acts approach", i.e. to treat Y's report as a discrete discriminatory act, for which the employer would be liable provided it was done in the course of Y's employment, and subject to the "reasonable steps" defence, with C being able to recover for the losses caused by her dismissal as a consequence of that act, rather than because the dismissal itself was unlawful.

PBS Ltd argued further that the application of the 'composite approach' in its case would have the unfair consequence that BG would also be liable for victimisation by virtue of s 110(1) EqA 2010. Section 110 addresses liability of employees and agents. Subsection (1)

states that a person (A) contravenes that section if (a) A is an employee or agent, (b) A does something which, by virtue of s 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and (c) the doing of that thing by A amounts to a contravention of the 2010 Act by the employer or principal (as the case may be). The Explanatory Notes to the Act explain that this section makes an employee personally liable for unlawful acts committed in the course of employment where, because of section 109, the employer is also liable - or would be but for the defence of having taken all reasonable steps to prevent the employee from doing the relevant thing. An agent would be personally liable under this section for any unlawful acts committed under a principal's authority. However, an employee or agent will not be liable if he or she has been told by the employer or principal that the act is lawful and he or she reasonably believes this to be true.

The claimant, Mr Baker, objected that the effect of PBS Ltd's argument would be to enable an employer to escape scot-free from liability for an act of victimisation if it is astute enough to instruct an innocent third party to carry it out. However the EAT agreed with PBS Ltd's submissions. Section 109 makes a principal liable for anything his agent does within the scope of his agency but only if what the agent does is, itself, a breach of the 2010 Act, and, correspondingly, section 110 makes an agent liable for something for which the principal is liable, only if that act is a contravention of the 2010 Act by the principal. The employer does not necessarily get off scot-free, because it is liable for any act of victimisation which it carries out itself.

Applying the "separate acts approach" from Reynolds, a claimant in such a case as PBS Ltd v Baker might rely upon, as the relevant detriment, the employer's decision to subject him to covert surveillance, and seek to recover for the losses caused by the surveillance itself (for example injury to feelings, or even psychiatric harm) as a consequence of the employer's act.

The EAT judgment in PBS Ltd v Baker indicates that claimants in such cases must take particular care in their pleadings. The judgment has implications not only in cases in which an employer instructs an 'innocent' third party to do its 'dirty work', but where it instructs another, 'innocent' employee to do so. If s 109(2) makes a principal liable for anything his agent does within the scope of his agency only if what the agent does is, itself, a breach of the 2010 Act, then, in a similar fashion, s 109(1) will make an employer liable for anything done by an employee (A) in the course of A's employment only if what the employee does is, itself, a breach of the 2010 Act. This could have implications in any employment case in

which a claimant suffers a detriment at the hands of an “innocent” employee who is carrying out a management instruction that is “tainted” by discrimination.

The EAT commented that the appeal raised an interesting question about the construction of sections 109-111 of the 2010 Act but in the event the discussion in the case did not address the provisions of s 111 of the 2010 Act, “Instructing, causing or inducing contraventions”.

It seems, then, that an employer may not escape “scot-free” from liability for an act of victimisation by instructing an innocent third party – or an employee – to carry it out if the claimant pleads his or her case in accordance with the “separate acts approach” in Reynolds. This will require particular care on the part of claimants and their representatives.

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