Employment

Justice denied?

Chris Bryden & **Michael Salter** explain why successful tribunal claimants are often short-changed

IN BRIEF

- One in 10 claimants who succeed in their claims find the employer fails to pay up.
- Schedule 8 para 43 of the Tribunals, Courts and Enforcement Act 2007 is coupled with moves to aid claimants in recovering funds.
- Could the Protection form Harassment Act 1997 be used to claim damages against a respondent that refuses to pay an award?

Ministry of Justice (MoJ) statistics show that only 53% of successful tribunal claimants questioned recently had received the full amount of compensation awarded by the employment tribunal by the end of the 42-day period allowed before interest starts to accumulate. The research, published in May, also found that of the little over 1,000 successful claimants who responded to the questionnaire sent out for the purpose of the paper, 39% had not been paid any compensation, while 40% of unpaid claimants did not know they could enforce the order (see *Research into Enforcement of Employment Tribunal Awards in England and Wales)*.

The results of this survey echo the findings of earlier studies. For example, in its 2008 Evidence Briefing, *Justice Denied*, Citizens Advice noted that one in 10 claimants who succeed in their claims is faced with a hollow victory when the employer fails to pay up.

Creatures of statute

It is well known that tribunals cannot enforce their own judgments, as they are creatures of statute and lack the jurisdiction to do so (save in the limited exceptions of additional compensation, for example where there has been a failure to re-employ the claimant as ordered: Employment Rights Act 1996 s 117(3)-(5)). Section 15(1) of the Employment Tribunals Act 1996 provides that "any sum payable in pursuance of a decision of an employment tribunal in England and Wales which has been registered in accordance with employment tribunal procedure regulations shall, if the county court so orders, be recoverable by execution issued from the county court or otherwise as if it were payable under an order of that court".

Therefore the express statutory method of enforcing awards made in employment tribunals is to bring separate execution proceedings in the county or High Court.

A new regime

Since 1 April 2009 the requirement for registration of decisions has been removed due to the coming into force of s 27 and Sch 8 para 43 of the Tribunals, Courts and Enforcement Act 2007. This reform is coupled with moves to assist claimants in recovering awards made to them. On 19 May 2009 it was announced that the government has begun discussions with the High Court Enforcement Officers Association to develop a service whereby creditors can seek enforcement of an award or settlement as soon as the due date for payment has passed and the respondent has failed to pay. Costs of seeking the enforcement will also be payable by the respondent.

The regime governing enforcement of tribunal awards deserves proper scrutiny, particularly in light of the welcome reforms being considered in order to make it easier for successful claimants to take steps in a cost-effective and efficient manner to recover awards lawfully due to them. However, to do so falls outside the scope of this article. Instead we wish to highlight other rights employees may have arising from non-payment of any award made in light of recent case law and to speculate as to whether non-payment, in certain circumstances, can sound in further damages.

Mr Coutinho

On 20 May 2009 the Court of Appeal handed down its decision in the case of *Rank Nemo (DMS) Ltd and Others v Coutinho* [2009] EWCA Civ 454.

Mr Coutinho won his tribunal claim for unfair dismissal and race discrimination and was awarded in excess of £72,000. He was employed from January 1997 until March 2004. Liability passed to Rank Nemo by virtue of the operation of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). Rank Nemo refused to pay the award even after Mr Coutinho obtained an order from Slough County Court.

On 30 April 2008 Mr Coutinho issued fresh tribunal proceedings alleging victimisation. The tribunal held that it had no jurisdiction to consider the claim, finding that the subject matter of the complaint was in fact a matter of enforcement. On 16 September 2008 the Employment Appeal Tribunal (EAT) (HHJ McMullen QC) allowed Mr Coutinho's appeal against this decision and in doing so took a significant step towards imposing penalties on recalcitrant respondents in specific (or as the Court of Appeal described them, "novel") circumstances.

The claimant in effect argued that the non-payment of the award was not itself the wrong from which he sought to obtain relief. Rather, the specific action of the respondents in not paying that award, he contended, amounted to fresh statutory

torts. These acts included disposing of assets without having regard to the due debt; misrepresenting the financial situation of the company and offering the claimant a "take it or leave it" sum of £20,000. These acts, and others, it was contended, resulted in the claimant being treated differently from other ex-employee creditors. In upholding this line of logic Judge McMullen noted: "There is an expectation, not just that people will obey the Orders of the Court or a Tribunal but that a person engaged in litigation against his employer in which he is vindicated can expect that Orders will be observed."

Post-dismissal discrimination

Judge McMullen underlined the point that for post-dismissal discrimination one must look to see whether there is a close connection between the act complained of and the employment relationship. Indeed, this is the point alighted upon by Mummery LJ, with whom Rix and Moses LLJ agreed in upholding the judgment of the EAT. Mummery LJ stated: "[The claimant's] claim rests not so much on the fact of an unsatisfied judgment as on the reason why and the circumstances in which the judgment debt has not been paid."

This dictum highlights the basic point, missed by the tribunal below. The claimant's claim did relate to the actual award made by the earlier tribunal, but only insofar as it formed part of the factual background of the second claim. It was therefore the same as any victimisation claim. The claimant made a protected act (in this case bringing the first claim) and now he was being victimised because of it.

Compensation

Obviously when assessing compensation in such cases, a fine line needs to be drawn to ensure that the tribunal hearing the second claim does not award the claimant compensation that also covers the losses suffered in the first claim. To do so would be a clear error, thus awarding the claimant twice for one statutory tort being committed.

The facts of *Coutinho* are somewhat unusual, though the case does provide a useful further weapon for advisers to consider, particularly when dealing with a large employer that is attempting to "fob off" or wriggle out of paying duly awarded compensation. However, it must also be borne in mind that litigating to seek recompense for the failure of a respondent to pay compensation awarded in earlier litigation has a certain lack of utility about it, especially when all the claimant stands to recover is further compensation.

Alternative enforcement methods

It is always worth considering other methods of enforcing tribunal awards. Following the line of logic applied by the EAT and upheld by the Court of Appeal in *Coutinho,* does the Protection from Harassment Act 1997 (PHA 1997) offer an unsatisfied judgment creditor any extra avenues to seek to obtain what is rightfully theirs? PHA 1997 allows for the awarding of compensation and an injunction if the defendant is found to have committed a course of conduct that harasses alarms or distresses the claimant. The appellate courts have sought to limit the scope of such claims by requiring an actionable civil claim under PHA 1997 to involve conduct which would also give rise to liability under the criminal parts of PHA 1997 (see for example *Conn v Sunderland City Council* [2008] EWCA Civ 148, [2008] 3 All ER 548).

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Superficially PHA 1997 appears to have little to do with enforcement of awards, being an Act designed, originally, to prevent stalking. However, since its enactment it has been widely used in numerous areas outside of its intended scope. The authors therefore wonder whether, in a suitable case, PHA 1997 could be used to claim damages against a respondent that refuses to pay an award.

The starting point is that, in the majority of cases, no such claim could be considered. In most cases, where a respondent simply ignores the award and refuses to communicate at all, enforcement, if cost effective, is the only remedy. However, in certain circumstances there is, potentially, a case to make out that the behaviour of the respondent amounts to a course of conduct amounting to harassment.

Ferguson v British Gas

Recent case-law has applied PHA 1997 even more widely. In *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46 (10 February 2009), [2009] All ER (D) 80 (Feb) the court held that the actions of British Gas, which included threats to disconnect, threats of legal action and a general failure to respond to communications from Mrs Ferguson could amount to harassment. Notwithstanding the argument by British Gas that such conduct did not satisfy the test in *Conn*. Jacob LJ stated: "Having accepted Mr Porter's submission [counsel for the appellant] about the legal test requiring gravity, I apply it here. I am quite unable to conclude that the impugned conduct is incapable of satisfying the test. On the contrary I think, at the very least, that it is strongly arguable that it does. I ask myself whether a jury or bench of magistrates could reasonably conclude that the persistent and continued conduct here pleaded was on the wrong side of the line, as amounting to 'oppressive and unacceptable conduct'. I am bound to say that I think they could."

It may be, then, that persistent and continued conduct by a respondent in failing to pay an award, that conduct including could surmount the hurdle and amount to harassment as falling the wrong side of the "oppressive and unacceptable" line. This is, however, entirely speculation on the part of the authors; it is not clear that the court would wish to extend the scope of PHA 1997 still further as contended here.

In most cases advisers will simply wish to enforce awards against employers by bringing enforcement proceedings in the county or High Court, for the usual remedies. Consideration must obviously be given to the cost/benefit ratio: if the respondent is near insolvent or a shell company, such proceedings may simply rack up costs that prove to be irrecoverable. However, in some circumstances it will be worth considering bringing further proceedings for compensation arising out of the way in which the respondent refuses to pay. Depending on the nature and tone of an aggressive respondent's communication it is possible that a *Coutinho* situation may arise; it is also feasible that a claim under PHA 1997 might be able to be brought. In such circumstances the threat of such further litigation may act as an effective "stick" to elicit payment; alternatively, if the respondent is solvent, it may be a way of increasing damages that can later be enforced in the usual way. NLJ

Chris Bryden, 4 King's Bench Walk. Website: *www.4kbw.co.uk*. **Michael Salter,** Ely Place Chambers. Website: *www.elyplace.com*