

**Secretary of State for Work and Pensions (Jobcentre Plus) v McCarthy** IDS 908

Mr McCarthy, who is gay, worked at a Job Centre. His duties included dealing with benefit applications from young people aged 16 to 18. His manager, P, became aware of an allegation that a male claimant, H, had said that he believed that he may get beneficial treatment in his benefit claim due to his relationship with Mr McCarthy. The allegation progressed from P, to P's manager and then through HR to the HE Investigation Service via an e-mail from HR referring to Mr McCarthy as 'an openly gay male' and suggesting that he had made sexual overtones to the 17-year-old male, H, who, at the age of 17, was classed as vulnerable.

The allegation actually reported to P was not that Mr McCarthy had made advances and offered inducements to H, but was a more of a concern about a consensual relationship between Mr McCarthy and H. Mr McCarthy was suspended, pending investigation. On HR's advice, P interviewed Mr McCarthy first, whereas the usual practice would have been to approach H first to establish the basis of the allegation. Mr McCarthy denied any contact with H outside work and when H was interviewed he firmly denied having made any suggestions about a relationship with Mr McCarthy. Consequently, no further action was taken.

Mr McCarthy presented a claim to a tribunal that the way in which the whole investigation had been conducted had discriminated against him on the grounds of his sexual orientation.

The tribunal found that the failure to follow investigation procedure, based on a belief that Mr McCarthy had a relationship with H, together with the initial misinterpretation of the complaint, was sufficient to 'shift' the burden to the employer. DWP's reason for its actions, i.e. that it had interviewed Mr McCarthy before details of alleged misconduct had been established from H was because H was 'vulnerable', was rejected. The real reason was the DWP's knowledge of Mr McCarthy's sexual orientation and stereotypical assumptions as to his likely behaviour. The DWP would not have made the same assumption about a heterosexual man alleged to have had social contact or a relationship with an under-18 female client. The claim of unlawful discrimination was therefore upheld.

DWP appealed, alleging perversity, part of which was that the tribunal should have considered the comparator at the first stage of the burden of proof test where Mr McCarthy had to establish a prima facie case, and not the second where DWP had to respond. The EAT dismissed DWP's arguments as "too technical". The essential question was whether the DWP treated Mr McCarthy in the way complained of on prohibited grounds. The Tribunal plainly considered that there was sufficient evidence before them to cast the burden on to the DWP to establish that the reason for the treatment was a non-discriminatory. While EAT they may not have come to the same decision, it was not satisfied that the tribunal's decision was perverse.

**Keeping You One Step Ahead**



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### **Ravat v Halliburton Manufacturing and Services Ltd IDS 909**

Mr Ravat worked in Libya, on operations being carried out by a Halliburton company based in Germany. He reported to African managers, his salary was paid via Germany, and his travel was arranged by a company in Malta. He was made redundant and claimed unfair dismissal. An employment tribunal concluded that it had jurisdiction to hear the claim. The employer appealed.

The EAT upheld the appeal. If an employee does not ordinarily work in Great Britain, or cannot be regarded as doing so because he is an expatriate employee who has his base in Great Britain, then it is only in exceptional circumstances that there will be jurisdiction. The character of those circumstances must be that he is recruited in Britain by an employer who is British for the purposes of furthering, by working abroad, the British business of that employer, not the foreign business of that employer. Applying that to this case, the tribunal had erred. It applied a test of "substantial connection" with Great Britain which is not sufficient.

The Court of Session upheld Mr Ravat's appeal. The search has to be for some connection between the employment relationship and Great Britain, i.e. strong connections with Great Britain and British employment law. Applying this approach, the original tribunal's reasoning had been correct.

An employee may have a place of work in a foreign country, but carry it out in such a manner and in circumstances in which he cannot properly be described as "roving" or "expatriate". Integral to the concept of "expatriate" is the fact that the employee not only works abroad, but also lives there in some form of stable place of residence: one who is "being more faithful to the root; one who has forsaken his native land" [very Rudyard Kipling!]. The jurisdictional criterion must be a "strong connection" as opposed to a "substantial connection" and the employment judge was correct to conclude that many aspects of Mr Ravat's employment "cling to Britain and British law".

### **Rayment v Ministry of Defence [2010] IRLR 768**

There have been a number of recent cases where employees who allege harassment at work have resorted to the Protection from Harassment Act 1997, rather than present a claim to an employment tribunal.

To establish harassment under the Act, there must be conduct which (i) occurs on at least two occasions; (ii) is targeted at the claimant; (iii) is calculated in an objective sense to cause alarm or distress; and (iv) is objectively judged to be oppressive and unreasonable.

Donna Rayment, was employed by the Ministry of Defence as the staff car driver for the commanding officer of the Honourable Artillery Company. She brought proceedings under the Protection from Harassment Act 1997 which related to her administrative discharge, the unjust administering of a written warning and the failure to remove pornographic pictures from the military transport restroom. The High Court found in Ms Rayment's favour and awarded total damages in the sum of £6,560.

The view had clearly been formed that the claimant was a troublesome and challenging employee. The final written warning was unfair and unjust, given that her continued absence was due to correctly certified medical unfitness for normal duties, and her "apparent predilection to seek reprisal for any apparent wrongdoing" amounted to no more than two complaints, which she had a right to make. The discharge was also unfair and unjust, given that the claimant had been unable to return to her normal duties due to ill health she had provided appropriate medical certification. The warning and the discharge were unacceptable and oppressive and had one purpose: to get rid of the claimant.

The behaviour of the employer in failing to remove a number of pornographic pictures from the military transport restroom at the barracks was also oppressive and unacceptable. Given that the claimant was the only female full-time driver using the room, such actions could only be construed as being directed at her.