

Lord President

Lord Hardie

Lord Nimmo Smith

Pursuer and Reclaimer: Allardice; Thompsons, Solicitors

Defenders and Respondents: Duncan; Solicitor for City of Edinburgh Council

18 May 2011

Introduction

[1] The reclaimer is employed by the respondents as a Community Service Assistant to supervise groups of offenders who have been sentenced to community service. Although he is still in the employment of the respondents he alleges that he has been unable to attend at his place of work since 24 or 25 September 2005 because he is suffering from a depressive disorder conform to DSM-IV 296.22 with features of anxiety. The reclaimer attributes his illness and the consequent loss, injury and damage to a course of conduct on the part of two of his superiors, James Hewitt and Frank Kane, in contravention of section 8 of the Protection from Harassment Act 1997 ("the 1997 Act").

[2] In support of his allegation that Hewitt and Kane pursued a course of conduct amounting to harassment of the reclaimer, the reclaimer avers a number of specific incidents in 2004 and 2005 involving either Hewitt or Kane or both of them. In paragraph (vii) of article 4 of condescendence the following averment is made:

"Through 2005 on an almost daily basis the pursuer was subject to verbal abuse and criticism by the said Hewitt and Kane. It became a matter of routine for the pursuer to be called into the office by said Hewitt and he and said Kane would pick fault in [*sic*] the way in which the pursuer was supervising his group. Said behaviour amounted to bullying and harassment."

The reclaimer further avers in paragraph (ix) of the said article of condescendence that in October 2005 he lodged a grievance with the respondents about his treatment by Hewitt and Kane. The said grievance was investigated and partly upheld, although the reclaimer had not been provided with a copy of the respondents' findings, despite his requests for such information. At paragraph (x) of the said article of condescendence the reclaimer avers that an incident occurred on 18 March 2007. The averments are in the following terms:

"On or about the 18th of March 2007 the pursuer was walking along Crewe Road North, Edinburgh. As he did so he became aware of a transit white mini-bus heading towards him. The said mini-bus veered towards him. The pursuer then noticed that the said Hewitt was driving the said van. He sounded the horn. The said Hewitt gesticulated to him with a clenched fist."

[3] At a hearing on the procedure roll, counsel for the respondents challenged the relevance of the reclaimer's averments. While it was accepted that the averments relating to the conduct of Hewitt and Kane prior to September 2005 were sufficient to allow an inquiry, it was submitted that the incident on 18 March 2007 was anodyne and could not be said to be part of the course of conduct alleged to amount to harassment. If that incident were excluded from probation the action was time-barred by virtue of section 18B of the Prescription and Limitation (Scotland) Act 1973.

[4] Although the Lord Ordinary rejected the submission that the alleged incident on 18 March 2007 lacked the necessary quality to form part of a course of conduct amounting to harassment, he concluded that the difference in time, place and circumstances between that incident and the previous incidents was such that it could not form part of any course of conduct that might be established by reason of the previous incidents. Accordingly he determined that the averments relating to the 2007 incident were irrelevant and should be deleted, as a result of which the action based upon the earlier incidents was time-barred. The Lord Ordinary therefore dismissed the action. The reclaimer has reclaimed against that decision and the respondents have taken advantage of the reclaiming motion by cross-appealing on the ground that the Lord Ordinary erred in concluding that the averments in support of the 2007 incident were sufficient to amount to harassment.

The 1997 Act

[5] The 1997 Act makes provision for protecting persons from harassment. Sections 1 to 7 inclusive extend only to England and Wales and sections 8 to 11 inclusive extend only to Scotland. The relevant provisions in this case are as follows:

"8 Harassment

(1) Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and -

(a) is intended to amount to harassment of that person; or

(b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.

(2) An actual or apprehended breach of subsection (1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question; and any such claim shall be known as an action of harassment.

(3) For the purposes of this section -

'conduct' includes speech;

'harassment' of a person includes causing the person alarm or distress; and

a course of conduct must involve conduct on at least two occasions.

...

(5) In an action of harassment the court may, without prejudice to any other remedies which it may grant -

(a) award damages;

(b) grant -

(i) interdict or interim interdict;

...

(6) The damages which may be awarded in an action of harassment include damages for any anxiety caused by the harassment and any financial loss resulting from it.

...

10 Limitation

(1) After section 18A of the Prescription and Limitation (Scotland) Act 1973 there is inserted the following section -

'18B - Actions of harassment

(1) This section applies to actions of harassment (within the meaning of section 8 of the Protection from Harassment Act 1997) which include a claim for damages.

(2) Subject to subsection (3) below and to section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of three years after -

(a) the date on which the alleged harassment ceased; or

(b) the date, (if later than the date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to have become, aware, that the defender was a person responsible for the alleged harassment or the employer or principal of such person.

(3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who is alleged to have suffered the harassment was under legal disability by reason of nonage or unsoundness of mind.'

(2) In subsection (1) of section 19A of that Act (power of court to override time-limits), for 'section 17 or section 18 and section 18A' there is substituted 'sections 17, 18, 18A or 18B'."

Submissions on behalf of the reclaimer

[6] Counsel for the reclaimer relied upon the various incidents in 2004 and 2005 which are alleged to have occurred prior to the reclaimer's becoming unfit for work for medical reasons. Each of these incidents formed part of a course of conduct by his superiors, Hewitt and Kane, acting in the course of their employment with the respondents. In October 2005, following his absence due to illness, the reclaimer lodged a grievance with the respondents concerning the conduct of his said superiors. Although the reclaimer had not seen the details of the decision by the respondents, he had been advised that the grievance had been partly upheld. The course of conduct prior to the reclaimer's absence from work had been undertaken by employees of the respondents who were in a position of authority over the reclaimer. The location of these incidents had been at the office where these employees worked, in public places and in private places. Some of them were isolated or opportunistic incidents. The final incident on 18 March 2007 occurred in a public place, was opportunistic and followed the success of the reclaimer's grievance procedure involving Hewitt and Kane. It resulted from a chance encounter with the reclaimer at a time when the reclaimer was absent from work due to illness. The intervals between September 2005 and March 2007 should be considered in the context of the reclaimer's absence from work. The final incident was indicative of Hewitt taking every opportunity available to him to harass the reclaimer.

Submissions on behalf of the respondents

[7] Counsel for the respondents submitted that the question for this court was whether the Lord Ordinary had been correct to conclude that there was no necessity to enquire into the factual background to determine whether the final act in March 2007 was part of a course of conduct amounting to harassment. Although such an issue is fact dependent, the Lord Ordinary was entitled to reach the conclusion which he did. The Lord Ordinary was correct when he concluded that the difference in time, place and circumstances between the 2007 incident and the previous incidents was such "that on no view could it form part of a course of conduct when taken along with the previous incidents" (para [31]). Alternatively, or in any event, counsel submitted that the Lord Ordinary had erred in paragraph [28] of his Opinion when he rejected the submission for the respondents that the 2007 incident lacked the necessary quality to form part of a course of conduct amounting to harassment. The alleged incident in 2007 involved an act of a different type and gravity and could not amount to harassment, even in the context of what had allegedly occurred in the past.

Discussion

[8] The relevant provision of the 1997 Act is section 8. This section is intended to provide similar protection against harassment in Scotland as that provided by section 1 for England and Wales. Although the language in section 8 is not identical to the language in section 1, the effect of the provisions is the same. For ease of reference we have quoted the terms of section 8 from which it is clear that an actual breach of section 8(1) may be the subject of a claim for damages in an action of harassment. Section 8(1) recognises the right of an individual to be free from harassment and to that end Parliament has prohibited the pursuit of a course of conduct which amounts to harassment and which satisfies the criteria specified in section 8(1)(a) or (b). Thus in order to satisfy the test of relevancy, averments in an action of harassment must be such as to provoke a positive response to each of three questions, namely, are they capable of supporting the conclusion that there was a course of conduct being pursued; if so, did that course of conduct amount to harassment of the pursuer; and, if so, was the conduct intended to amount to harassment of the pursuer or did it occur in circumstances in which a reasonable person would consider it to be harassment of the pursuer? The action will necessarily fail if any of these questions can be answered in the negative without enquiry into the facts.

[9] The first question for our consideration is whether the claimant's averments are a sufficient basis upon which it might be affirmed that the respondents' named employees were pursuing a course of conduct in respect of the claimant. The only guidance within the legislation concerning what amounts to a course of conduct is contained in section 8(3), which provides that a course of conduct must involve conduct on at least two occasions. The averments undoubtedly meet that criterion because they include allegations of incidents in 2004 and 2005 of abusive conduct towards the claimant by Hewitt and Kane. There is an averment that throughout 2005, on an almost daily basis, the claimant was subjected to verbal abuse and criticism amounting to bullying and harassment as a matter of routine. Indeed it appeared to be accepted on behalf of the respondents that, if established, these averments would entitle the court to conclude that the respondents' employees had been pursuing a course of conduct towards the claimant.

[10] The narrow issue in this case is whether the alleged incident on 18 March 2007 forms part of that course of conduct or whether it was an isolated, unrelated incident. In seeking an answer to this question the Lord Ordinary recorded that the submissions for both parties accepted that, in determining what amounted to a course of conduct, the court could rely upon the authorities relating to the application of the *Moorov* doctrine (see *Moorov v HM Advocate* 1930 JC 68). The Lord Ordinary adopted the approach advocated by counsel for both parties and stated:

"I therefore turn to apply the law in *Moorov* to the alleged course of conduct in this case. It seems to me that the question is whether the 2007 incident has the necessary *nexus* in time, place and circumstances with at least one of the previous incidents. I am also of the view that, having regard to the very nature of harassment, the permissible time interval between separate incidents is probably in general less than is permitted in the case of other types of conduct. It was accepted that the pursuer stopped working on 25 September 2005. The shortest interval between the last incident at work and the 2007 incident is therefore in the order of 17 months. The place at which the 2007 incident occurred was a public street, whereas all previous incidents

occurred in the pursuer's workplace, wherever that might have been at a particular time. Moreover, the circumstances of the 2007 incident are quite different: the pursuer was not at work at the time (and had not been for about 17 months), whereas in the previous incidents he was at work when the conduct complained of occurred. The 2007 incident was an opportunistic and isolated one." (para [30])

We consider that the foregoing passage in the Lord Ordinary's Opinion discloses an error in his approach to the issue for his determination. The application of the *Moorov* doctrine in criminal cases is used where there are a series of offences which are so interrelated with each other that the evidence of a single witness to one offence can afford corroboration for the evidence of another single witness testifying to a second offence, assuming both witnesses are found to be credible and reliable. In civil actions of harassment the requirement for corroboration does not arise but, even if it did, the reclaimer's evidence about one incident could not corroborate his evidence about a second incident. The application of the *Moorov* doctrine in such civil cases is of limited, if any, value. However even if we were to apply the principles derived from the authorities based upon that doctrine, an interval in the order of seventeen months would not appear to us to exclude a connection in time between the two events. The distinction drawn by the Lord Ordinary between the place at which the 2007 incident occurred, namely a public street and the location of the previous incidents, namely the reclaimer's workplace, is of little significance when one considers that his workplace was frequently a public place where offenders performing community service, under the supervision of the reclaimer, were working. Some of the alleged incidents of harassment are averred to have occurred in such public places. Finally, the distinction drawn by the Lord Ordinary between the 2007 incident and the previous incidents based upon the fact that in 2007 the reclaimer was not at work at the time of the incident, whereas in the previous incidents he was at work when the conduct complained of occurred, is of less significance than it might have been when one bears in mind that the reclaimer was still employed by the defenders, albeit he was absent from work due to illness. Moreover, in answer 5, the defenders aver that they have suggested that the reclaimer be transferred to a different department, but the reclaimer has declined that offer as he was unfit for work. Thus it would appear that, although absent from work due to illness, the reclaimer is still employed in the same department under the supervision of Hewitt. We consider that, even if the *Moorov* doctrine were to be applied to the averments in this case, it is not evident that the reclaimer would be bound to fail to establish a course of conduct which included the 2007 incident as part of that course of conduct. Another reason for not applying the *Moorov* doctrine, at least at this stage of the proceedings, is that before being able to take an informed decision as to the applicability of that doctrine, the court is normally aware of the nature and extent of the available evidence to enable it to decide whether there is the necessary interrelationship in time, place and circumstances between different events. One can envisage an extreme case where there were only two incidents of alleged harassment separated by a period of several years. It might then be possible for the court to conclude, without the necessity of a proof, that a course of conduct could not be established on any view of the alleged incidents. However, we are not in that extreme situation in the present case. The reclaimer has averred several incidents between 2004 and 2005 culminating in allegations of routine bullying and almost daily harassment, followed by the incident in 2007. The circumstances of that incident might be such as to entitle the court to conclude that it was part of the same course of conduct, but the answer to that question will depend upon an assessment by the court of the evidence led in support of the reclaimer's averments. We are of the view that the proper approach to the determination of any question of whether the reclaimer has established a course of conduct is to consider the evidence in the round and to determine whether the incident in 2007 is part and parcel of the conduct in 2004 and 2005, which the defenders concede could amount to a course of conduct. In all the circumstances we are unable to conclude at this stage that the reclaimer is bound to fail in establishing that the 2007 incident was part of the course of conduct which commenced in 2004. Accordingly, unless any of the two remaining questions can be answered in the negative at this stage, a proof before answer should be allowed.

[11] The next question is whether the course of conduct alleged amounts to harassment of the reclaimer. At this stage of the proceedings the action should be dismissed only if we can reach the conclusion that on the averments the answer to this question is bound to be in the negative. In considering whether averments of harassment are relevant, the proper test is whether the course of conduct amounts to harassment rather than the individual incidents comprising that course of conduct. That is apparent from the language of section 8

which prohibits the pursuit of "a course of conduct which amounts to harassment of another". The language reflects the equivalent provision for England and Wales in section 1 of the 1997 Act. This matter was considered by the Court of Appeal in *Iqbal v Dean Manson, Solicitors* [2011] EWCA Civ 123. In that regard Rix LJ observed:

"In my judgment, the Act is concerned with courses of conduct which amount to harassment, rather than with individual instances of harassment. Of course, it is the individual instances which will make up the course of conduct, but it still remains the position that it is the course of conduct which has to have the quality of amounting to harassment, rather than individual instances of conduct. That is so both as a matter of the language of the statute, and as a matter of common sense. The Act is written in terms of a course of conduct: see sections 1(1), 1(2), 1(3), 2(1), 3(1), 7(3). That course of conduct has to amount to harassment, both objectively and in terms of the required mens rea (see section 1(1)(b)). In the case of a single person victim, there have to be 'at least two occasions in relation to that person' (section 7(3)(a)), but it is not said that those two occasions must individually, i.e. standing each by itself, amount to harassment. The reason why the statute is drafted in this way is not hard to understand. Take the typical case of stalking, or of malicious phone calls. When a defendant, D, walks past a claimant C's door, or calls C's telephone but puts the phone down without speaking, the single act by itself is neutral, or may be. But if that act is repeated on a number of occasions, the course of conduct may well amount to harassment. That conclusion can only be arrived at by looking at the individual acts complained of as a whole. The course of conduct cannot be reduced to or deconstructed into the individual acts, taken solely one by one." (para 45)

We respectfully agree with these observations which are equally applicable to section 8 of the Act. The acceptance by counsel for the respondents before the Lord Ordinary that the averments relating to the incidents prior to 2007 were sufficiently relevant to merit inquiry, when taken together with our conclusion that the incident in 2007 could not be excluded at this stage as part of the course of conduct pursued by the respondents' employees against the reclaimer, provides a sufficient answer to the second question. It is, therefore, unnecessary for us to consider whether the incident in 2007 could, of itself, amount to harassment. However, had it been necessary to do so, we would have supported the Lord Ordinary in his conclusion that the conduct alleged could "properly be said to be fairly severe or oppressive and unacceptable" causing the reclaimer alarm or distress and could therefore amount to harassment. In that regard the terms of section 8(3) may be relevant. Section 8(3) of the Act provides that for the purposes of section 8 "'harassment' of a person includes causing the person alarm or distress".

[12] The final question is whether the averments on behalf of the reclaimer are sufficient to enable the court to infer that the course of conduct was intended to amount to harassment of the reclaimer or occurred in circumstances where it would appear to a reasonable person that it would amount to harassment of the reclaimer. The answer to this question is clearly a matter of inference to be drawn from the evidence led in support of the alleged course of conduct. For obvious reasons, no issue was taken with this aspect of the reclaimer's pleadings.

[13] In all the circumstances we have concluded that it cannot be said that on the pleadings the reclaimer is bound to fail. Accordingly we shall recall the interlocutor of the Lord Ordinary dated 2 March 2010 and allow a proof before answer, leaving all pleas standing.