RETALIATION UNDER THE EQUALITY ACT AND CONTEMPT OF COURT IN THE UK

Michael Connolly
University of Portsmouth, UK
Retaliation under the Equality Act and Contempt of Court in the UK

I. Introduction

The UK’s superior courts have found certain cases of retaliation difficult to resolve. The cause is an inadequacy in the statutory definition, which the courts have not acknowledged.\(^1\) In resolving these cases, the courts have employed unconvincing methods of statutory interpretation, while their language and reasoning suggest that, instead of equality law, they are in fact resorting to the law of (criminal) contempt of court. A second issue flows from this. Some of the more serious cases of retaliation could be analyzed as contempt, and it is surprising that this has never been raised in any of the judgments.

II. Contempt of Court in the UK

There are many varieties of contempt of court. The analogous one for this purpose is the offence of conduct interfering with the administration of justice, and given that this is, loosely at least, the goal of the retaliation provisions, some insight into the judges’ approach to retaliation may be gleaned from their approach to contempt.

Contempt is a creature of the common law, although nowadays, it can be an offence under a number of statutory provisions.\(^2\) It is also governed by the European Convention on Human Rights, most notably by Art. 6 (right to a fair trial) and in cases of publications, the usually countervailing Art. 10 (Freedom of Expression).

The law of contempt is notoriously difficult to pin down with any precision. This is because it is based on the broad principle ‘that the courts cannot and will not permit interference with the due administration of justice’.\(^3\) It is universal in application, and thus encompasses an

---

1. This drafting issue is not unique to the UK. See the contrasting approaches to the same problem: \textit{US v. New York City Transit Authority} 97 F 3d 672 (2nd Cir. 1996) and \textit{EEOC v. Board of Governors} 957 F 2d 424 (7th Cir. 1992).
2. See Law Commission, \textit{Contempt of Court} (Consultation Paper No 209, 2012) Appendix F, p 6, listing 27 statutory offences, and over 50 examples of statutory provisions stating that particular conduct should be treated as if it were a contempt of court.
enormous range of scenarios in variety and gravity. This means, among other things, the law can be applied to new and novel situations without apparently widening its scope.4

Being so fluid, contempt can be categorized in numerous ways. For the purpose of this paper, it can be sub-divided into ‘public’ and ‘private’ pressure.

A. Public pressure

This is ‘improper’ conduct, which can be unfair, unreasonable, or immoderate pressure, persuasion, or influence,5 ‘likely to’6 to deter witnesses, or otherwise interfere with the administration of justice. For litigants, ‘fair and temperate criticism is legitimate’, but not:

[C]onduct which was calculated so to abuse or pillory a party to litigation or to subject him to such obloquy as to shame or dissuade him from obtaining the adjudication of a court to which he was entitled.7

The best known case in recent times is Attorney General v. Hislop.8 Here, a satirical magazine, Private Eye, published defamatory articles about Sonia Sutcliffe (wife of a notorious murderer, The Yorkshire Ripper) suggesting that she knew her husband was a murderer and gave the police false alibis. She sued Private Eye for libel. Before the trial, Private Eye repeated the allegations pointing out that Ms Sutcliffe would be cross-examined on them. The Court of Appeal held that the articles were designed to pressurize Ms Sutcliffe to abandon her claim and as such they amounted to contempt.

4 Ibid.
6 See e.g. the ‘Scandalizing the Court’ case, Dhooharika v. DPP [2014] UPC 11, [42]. In this context, the word “calculated” often is used interchangeably with “likely”. In this context both mean “objectively likely”. See also, Hunt v. Clarke sub nom Re O’Malley, Hunt v. Clarke (1889) 58 LJQB 490 (CA), 492 (Cotton LJ); Bell v. Stewart (1920) 28 CLR 419 (High Ct of Australia) 430-431. See also R v. Payne [1896] 1 QB 577 (HL) 581-582, where Wright J, uses the words ‘calculated’ and ‘likely’ interchangeably.
McCowan LJ stated that there was:

all the difference in the world between a private discussion between lawyers aimed at bringing to Mrs Sutcliffe’s attention that she might be cross-examined about certain matters and holding her up to public obloquy in terms neither fair nor temperate but of abuse, which is what I conclude without hesitation occurred in this case.⁹

Nicholls LJ, observed: ‘There is an enormous difference between bringing home to an opponent the strength of one’s own position and the weakness of his, and vilifying him in public.’¹⁰

B. Private Pressure

In Attorney General v. Times Newspapers,¹¹ Lord Simon warned that private pressure on a litigant might sometimes be justifiable, although not if it were ‘violence or bribery or public execration’.¹² He suggested that such pressure might be justified in a ‘common interest that fair, reasonable and moderate personal representations would be appropriate.’¹³

III. Retaliation in the UK

Structurally, the retaliation (‘victimization’) provisions are set out in much the same way as the Civil Rights Act 1964. The legislation outlaws detrimental treatment ‘because’ a person has done a ‘protected act’, such as complain about discrimination, bring discrimination proceedings, or support another’s proceedings:

Equality Act 2010

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

⁹ Ibid, 535.
¹⁰ Ibid, 530.
¹² Ibid, 318-319.
¹³ Ibid.
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

A. Retaliation cases using the language of contempt

1. Chief Constable of West Yorkshire v. Khan

Some cases are marked by conduct which would be applied to all litigants, whether or not the principal claim was one of discrimination. This has invoked some sympathy from the courts. In Chief Constable of West Yorkshire v. Khan\(^{14}\) a job reference (or recommendation) was refused, pending the outcome of the claimant’s discrimination claim. The House of Lords stated that ‘Employers, acting reasonably and honestly, ought to be able to take steps to preserve their position in pending proceedings,’\(^{15}\) and that the refusal was ‘a reasonable response to the need to protect the employer’s interests as a party to litigation.’\(^{16}\)

What is interesting here is that this language, focusing on the seriousness of the conduct, rather than its cause (because). This is patently out of place for liability under the equality legislation, but familiar to the law of contempt, which permits a certain amount of ‘reasonable’ pressure or ‘fair and temperate’ criticisms between litigants.

Given the inadequacy of the simplistic statutory definition of retaliation and absence of any defense to deal with such subtleties as the seriousness, context, or nature of the conduct, it is no surprise that a court may look beyond the statutory language for a solution.

2. St Helens Borough Council v. Derbyshire

In St Helens Borough Council v. Derbyshire,\(^{17}\) the employer wrote directly to all 510 members of staff (bypassing their trade union and the claimants’ solicitor) stating that should an

\(^{14}\) [2001] ICR 1065 (HL).
\(^{15}\) [2001] ICR 1065 (HL), [31] (Lord Nicholls).
\(^{16}\) Ibid, [59] (Lord Hoffman).
\(^{17}\) [2007] ICR 84 (HL).
equal pay claim, pursued by just 39 employees, succeed, the resulting cost was likely to cause redundancies. The letter was found to be, ‘effectively a threat’, ‘intimidating,’ and ‘directed against people who were in no position to debate the accuracy of the ... pessimistic prognostications’. The tribunal considered that reasonable reactions could include ‘surrender induced by fear, fear of public odium or the reproaches of colleagues.’

As a consequence, the 39 claimants brought a separate claim of retaliation, succeeding in the House of Lords. (After all this, as it happens, there were no redundancies.) The House of Lords struggled to distinguish Khan technically, but did so, in effect, on the gravity of the case. Lord Bingham held that they were entitled to distinguish Khan because: ‘The contrast with the present case is striking and obvious, for the object of sending the letters was to put pressure on the appellants to drop their claims.’ Lord Hope said that the employer’s conduct ‘while no doubt honest, could not be said to have been reasonable.’ Lord Neuberger added, in line with Lord Hope’s reasoning, that the tribunal had found the employer’s conduct did not satisfy the ‘honest and reasonable’ test. Lord Carswell agreed with Lord Neuberger.

Once again, the concern was over the gravity, rather than the cause, of the retaliation, and the language used to resolve the case was that of the law of contempt.

**B. Could some retaliation defendants be guilty of Contempt?**

To date, no contempt proceedings have been brought in relation to a discrimination complaint, although this could be because of a (misplaced) belief that all forms of victimization are provided for by the Equality Act 2010.

Many retaliation cases involve conduct so reprehensible, they amounted to *criminal* contempt of court, which can attract imprisonment as well as a fine. Two examples are given below.

---

18 Para 4(d) of the ET Reasons, cited, [2007] ICR 84 (HL), [38].
19 See [2004] IRLR 851 (EAT), [16].
20 [2007] ICR 84, [9].
21 Ibid, [17] and [28].
22 Ibid, [74].
1. *St Helens Borough Council v. Derbyshire*

In many ways the circumstances in *Derbyshire* and *Hislop*\(^23\) were alike. There was private pressure to abandon the proceedings. There was also public pressure (*a fortiori* on a daily basis, in person, from work colleagues), as well as public ‘odium’ or ‘obloquy’. In *Hislop*, the Court of Appeal held that as the articles were intended to dissuade Ms Sutcliffe from pursuing her claim, they could not have been made in good faith. The same logic applies here. The sole reason for the sending out the letters was to pressurize the claimants into abandoning their equal pay claim.

Any conduct coming close to one of the most flagrant and notorious contempts of modern times must risk being in contempt of court. The employer’s conduct in *Derbyshire* did that. The employer should consider itself fortunate that this went unnoticed by the courts and the Attorney General.

2. *Commissioner of Police for the Metropolis v. Maxwell*

In *Commissioner of Police for the Metropolis v. Maxwell*\(^24\), the claimant was a Detective Constable within Specialist Operations Counter Terrorism Command Special Branch of the Metropolitan Police. He is of mixed race and is gay. He had issued proceedings for some 120 incidents of discrimination by his employer and colleagues. In response, one colleague leaked details of ‘their side of the story’, ridiculing the claim, to a tabloid newspaper (Rupert Murdoch’s *Sun*), who in turn informed the claimant’s solicitor of its intention to publish. In the event it did not publish (perhaps fearing contempt proceedings).

This act may have been laced with motives of punishment, revenge, and indignation. But it was most obviously an attempt to hold the claimant out to public obloquy, and thus dissuade him from persisting with the claim. It was not surprising that the employer was found liable for retaliation. Publicly ridiculing the victim’s claim would also seem to exceed the ‘fair and temperate’ thresholds required for contempt, especially given the circumstances: the employer knew the claimant was mentally fragile (he was off sick with stress at the time); he had

---


\(^{24}\) EAT, 14 May 2013, UKEAT/0232/12/MC.
already suffered several incidents of retaliation before he had issued the proceedings; and the employer was the police, lending exceptional credibility to its side of the story while correspondingly undermining his. Again, no suggestion was made that the employer’s action amounted to contempt.

**Conclusion**

The principles used to resolve ‘difficult’ cases of retaliation are from the law of contempt. This is apparent not only by the decisions, but the language used in reaching them. It is also curious, if not alarming, that when presiding over conduct that amounts to contempt, judges (and counsel!) in these cases have never appeared to consider referring the defendant for contempt proceedings.