

Leeds Day Employment

Stigma damages: compensation flowing from pursuit of claim

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The Court of Appeal has held that an employer can be liable for stigma damages where an employee failed to obtain employment after bringing proceedings for a discriminatory dismissal.

Background

Compensation for discrimination is intended to put the claimant in the position he would have been in had the discrimination not taken place. While damages for injury to feelings are expressly provided for, "stigma" damages (that is, to reflect the claimant's inability to get another job due to the stigma of having commenced discrimination proceedings against the employer) are not.

Facts

C (of Indian origin) joined A as a trading risk controller. C was selected for redundancy from a pool of two and issued proceedings for race discrimination. The tribunal accepted that C had made extensive efforts to mitigate his loss, but would never work in the financial services industry again. It applied the following principles and awarded C compensation in excess of £2.7 million, holding that:

- Reducing compensation to reflect the chance that, in the absence of unfairness, a dismissal might still have taken place (a "Polkey" deduction (*Polkey v A E Dayton Services Ltd* [1988] AC 344)), was relevant only to unfair dismissals. It was not applicable to discriminatory dismissals.
- A was not liable for any stigma C had suffered in the job market as a consequence of taking legal proceedings, nor for the actions of third party employers.

A appealed and C cross-appealed to the Employment Appeal Tribunal). C appealed.

Decision

Upholding the appeal in part, the court held that:

- The tribunal should have considered making a Polkey deduction. Had there been no discrimination, as one of only two candidates, C might have been made redundant fairly.
- Assessment of C's future loss continued until the time the tribunal was satisfied that C could be

expected to get another job, with an equivalent salary. C's discriminatory dismissal not only shortened C's employment with A; it also altered the career path that C would otherwise have pursued.

- An employer responsible for a discriminatory dismissal was liable for financial loss suffered by the employee due to the stigma attached to bringing discrimination proceedings. The fact that potential employers were the immediate cause of loss did not free the original employer from liability (*Malik v Bank of Credit and Commerce International SA* [1997] ICR 606 (HL)). In reaching this decision, the court considered that:

- ♦ it can be difficult for an employee to show that he has been victimised for pursuing a claim against his previous employer;
- ♦ in most cases, stigma will not be a separate head of loss, but a factor relevant to assessing how long it will take the employee to find a new job;
- ♦ an employee will need compelling evidence of prejudice he has suffered in the job market as a result of bringing proceedings; and
- ♦ in exceptional cases, where stigma is the only head of loss, the tribunal must decide how far the employee's difficulties in obtaining new employment resulted from general market difficulties and how far from the stigma. If stigma was involved, a modest lump sum award analogous to those sometimes made in personal injury cases, applying the principles in *Smith v Manchester Corporation*, might be appropriate ([1974] 1 KIR 1).

Comment

This decision stands a good chance of being misunderstood. It does not establish that a claimant can claim stigma damages if he finds difficulties in



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finding another job because of the publicity caused by the legal proceedings. Rather, the decision indicates that where an employee can show stigma caused by the publicity of the tribunal proceedings, this may affect the period of future loss. Of course, there are real difficulties for a claimant to show that the reason why it has taken a longer time to get another job is caused, or will be caused, by the stigma caused by the tribunal proceedings (for example *BCCI v Ali* & others).

There may be many other reasons why an employee has failed to get another job. It is very unlikely that an employer will tell the employee that it is not offering employment to him because tribunal proceedings had been brought, but will rely on other factors (for example, interview performance). It is not sufficient for a claimant simply to assert that the stigma caused him not to be offered jobs or be invited to interviews. More is required.

Of course, it will be difficult for a claimant to argue that litigation stigma has prevented him getting a job until the case is heard or is publicised. Similarly, there seem to be some powerful arguments limiting the application of litigation stigma where the claimant has actually publicised the case in the trade or national press. It seems a bit incongruous for a claimant to create the litigation stigma and then be allowed to benefit from it by stating that it caused him not to get another job, thus claiming more damages.

Case: *Chagger v Abbey National Plc and another* [2009] EWCA Civ 1202.

Contacts

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