Chagger v Abbey National plc

Before Christmas, the Court of Appeal gave its decision in an important case which could significantly increase the size of damages payments in discrimination claims. Not only did the Court of Appeal widen the possible heads of damages to include "*stigma*" damages, its comments may make it easier for employees to bring claims in the future for the loss of their career. Although the Court was keen to play down the implications of its decision, employee lawyers will undoubtedly try to use this case against employers where possible.

The facts

Mr Chagger, who is of Indian origin, was made redundant by Abbey National Plc. Amongst other claims, Mr Chagger claimed that he had been discriminated against on the grounds of his race and was awarded compensation in excess of £2.7 million in the Employment Tribunal.

The case went to appeal in the Court of Appeal where the following questions were considered:

- Should the Tribunal have considered reducing Mr Chagger's compensation to reflect the chance that, even without discrimination, he would have been dismissed for redundancy?
- Should Abbey be liable for loss resulting from the stigma that Mr Chagger faced from potential future employers for bringing a claim against Abbey?

Non-discriminatory dismissal

On the first point, the Court of Appeal took the same view as the EAT that, when looking at the amount of compensation that should be awarded in a discriminatory dismissal, a tribunal should consider what would have occurred had there been no unlawful discrimination. If there is evidence that the employee would have been dismissed in any event, this must be factored into any compensation calculation. In this case, as Mr Chagger was only one of two candidates in the redundancy selection pool, there was a strong argument that he would have been made redundant even if the process followed had been non-discriminatory.

However, Abbey also argued that as there was a high turnover of employees in the market that Mr Chagger worked in, it was likely that he would have voluntarily chosen to leave Abbey in the near future. However, the Court of Appeal did not accept this argument as it felt that such circumstances could not be viewed in isolation of the discriminatory dismissal. If Mr Chagger had not been unlawfully dismissed, it was unlikely that he would have left Abbey without having another job on an equivalent salary lined up. As a result of the discrimination, Mr Chagger found himself looking for a new job at a time and in circumstances that he would not have chosen. Therefore, evidence relating to staff leaving employment voluntarily was not directly relevant.

'Stigma' damages

The Court of Appeal held that an employer responsible for a discriminatory dismissal should be held liable for financial loss suffered by the employee as a result of the stigma attached to bringing a claim for discrimination. However, compensation for such loss should only be awarded where compelling evidence has been produced by the employee. The Court noted that there may be exceptional cases where "stigma" loss is the only head of loss. However, this would only be the case where there was evidence that the employee would definitely have been dismissed even if there had been no discrimination. In such cases, any award for stigma damage should be limited to a "modest lump sum" only.

Impact

This case opens two new avenues for employees to claim increased compensation for discrimination.

First, the Court of Appeal has widened the circumstances in which stigma damages can be awarded. Previously, stigma damages could only be awarded where the stigma was the direct consequence of the unlawful act of the employer, not as a result of the employee bringing proceedings (as was the case here). In practice, it is likely that this will simply be another factor for a tribunal to consider in assessing how long it will take an employee to find a new job, a factor that many tribunals already consider in assessing future loss. Therefore, although employees may try to use "stigma" damages to obtain greater financial compensation, it is hoped that tribunals will take a "sensible and robust" approach as suggested by the Court of Appeal and not increase awards significantly on this basis only.

Secondly, employees will no doubt rely on the Court of Appeal's comments about voluntary resignation not only to argue that they should be compensated for longer periods of time, but also to highlight the difficulties of mitigating their loss when they are no longer in employment in these circumstances. It will be easier for employees to run "career-loss" arguments on the basis that they would have only left voluntarily if they had a new job on an equivalent salary. As a result of the discriminatory dismissal, their career path has changed and any compensation should be assessed in light of this.

Recommendations

The obvious point for employers is to make sure that the reason for any dismissal is clear (and fair) and has been evaluated internally, with evidence to support any decision made. HR have a key role to play in assessing the reason given by management and ensuring that a fair process is followed, particularly as there may be a higher price to pay if the employer gets it wrong.

Although this case makes it more difficult for employers to argue for reduced compensation on the basis that the employee would have resigned and left their role voluntarily, employers can still run the argument that the employee would have been dismissed in any event. When faced with a challenge on the grounds of discrimination, employers should gather evidence challenging the employee's steps to mitigate their loss and to show that an intervening event, such as redundancy, would have occurred thereby limiting any potential compensation.

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