Chagger v Abbey National plc & anor

Claimants can recover 'stigma damages' following a discriminatory dismissal though the Court of Appeal doubted whether the practical implications of the decision would be significant. Christopher Stone focuses upon the opportunities that the Court of Appeal's decision in *Chagger v Abbey National & anor* presents for claimants

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The tribunal's findings

The facts on liability may be briefly stated as the Court of Appeal was concerned solely with the quantification of loss. Mr Chagger was of Indian origin and was selected for redundancy from his job as a trading risk controller.

The tribunal upheld his complaints of unfair dismissal, racial discrimination and breach of contract (relating to a failure to pay a bonus) and awarded him compensation of £2.8 million. The award included an uplift of 2 per cent for failure to follow statutory procedures because the tribunal decided that the level of compensation was itself an exceptional circumstance within the meaning of s.31(4) of the Employment Act 2002.

The claimant's efforts to mitigate his loss were quite staggering – the tribunal found that he had applied for 111 roles, used 26 employment agencies and had offered to work voluntarily for Abbey National. He had subsequently retrained as a teacher.

Clearly impressed by the difficulties that the claimant had in finding equivalent work, the tribunal awarded him a continuing loss of earnings for the rest of his career, using a multiplier/multiplicand approach more commonly seen in personal injury cases, taking into account his earnings as a teacher.

The tribunal found that part of the reason for Mr Chagger's difficulty in finding a job was that he had brought these proceedings against Abbey and was suffering the stigma of doing so. Interestingly, given the excitement that this case has generated about stigma damages, the tribunal did not need to determine the extent to which any stigma had contributed to his difficulty in finding work. Herein lies a clue as to why the practical implications of the Court of Appeal's decision may be limited in practice.

The EAT decision

The EAT (Underhill P) upheld Abbey's appeal against the tribunal's finding that it should not consider whether the claimant would have been dismissed in any event. The EAT held that a *Polkey*-type deduction could be made in discrimination cases. It also overruled the tribunal regarding stigma damages and held that the claimant's damages should be limited to his loss of earnings from Abbey, rather than taking into account the unlawful victimisation of future employers.

The Court of Appeal's decision

Mr Chagger appealed against the findings of the EAT as well as the correctness of the 2 per cent uplift. The Court of Appeal (Smith, Rimer and Elias LJJ) upheld the EAT on the following grounds:

- the tribunal should take into account the chance that the claimant would have been dismissed in any event; this did not offend the UK's obligations under EU law
- the level of compensation could be an exceptional circumstance.

The Court of Appeal overturned the EAT on the following grounds:

- the tribunal was correct not to limit loss to the period of time during which Mr Chagger would have been employed by Abbey
- the tribunal could take into account losses that flowed from the stigma of bringing proceedings after a discriminatory dismissal.

Recoverability of stigma damages

It is clear from *Malik v BCCI* that a claimant may recover from his ex-employer damages that flow directly from its unlawful act where the claimant is stigmatised through association with a dishonest business. However, the respondent sought to distinguish that from the case of loss flowing, it claimed, not directly from dismissal by the ex-employer but rather from the unlawful decision of prospective employers that victimised a candidate because he had brought proceedings.

It was argued that this loss was too remote because it broke the chain of causation and, for policy reasons, the ex-employer should not be liable for that loss. This was because the candidate would have recourse against the prospective employer and there was no mechanism for the ex-employer to bring those prospective employers to give evidence in the tribunal or seek a contribution. The respondent was further concerned about floodgates opening and employers indemnifying employees for career losses.

In the majority of cases, given the difficulties of proving victimisation by a prospective employer, stigma damages of the sought claimed in Chagger are unlikely to make a marked difference to the period of future loss awarded by a tribunal

The Court of Appeal rejected these arguments, largely on policy grounds. It will usually be very difficult for a claimant to prove a victimisation case against a prospective employer and to make stigma loss unrecoverable would weaken the protection offered to victims of discrimination. There was also no good reason for an ex-employee to be able to recover his loss if he was 'lawfully stigmatised' as a trouble-maker for bringing a claim of unfair dismissal or through association with a dishonest business (*Malik*), but not if he was 'unlawfully stigmatised' for bringing a claim of discrimination.

Practical implications: will the floodgates open?

The Court of Appeal thought that the decision would not open the floodgates:

> *'Once it is accepted that stigma loss is in principle recoverable, in most cases it need not be considered as a separate head of loss at all.'*

The reason for the limited practical impact of this decision is that, as in this case, tribunals will not usually have to determine whether there has been stigma loss and what percentage of loss is attributable to stigmatisation. Stigmatisation will instead form one of a number of factors that may lead to difficulties in finding a job, alongside such nebulous factors as the state of the job market.

In many respects stigmatisation is therefore akin to the prejudice against employing older workers; while such prejudice is now unlawful it is common for tribunals to recognise that it nevertheless remains harder for older workers to find employment, so awarding longer periods of future loss. They do not identify what portion of the loss is attributed to this factor.

Rather than looking to identify each act of victimisation, in practice the focus for tribunals will therefore remain the reasonableness of the claimant's efforts to mitigate his loss and it will be for the respondent to show that he has acted unreasonably. If those efforts have been reasonable but the claimant can nevertheless not find work, he will be able to recover the full extent of his loss whether the failure to find work stems from stigma suffered or some other reason. Nothing therefore alters the requirement on a claimant to keep a detailed diary of efforts to find new work, particularly as it will be very difficult for a claimant to prove stigma damages in isolation.

The Court of Appeal called for a 'sensible and robust' approach to determining the stigma loss. It will not be sufficient for a claimant merely to assert stigmatisation, especially as in most jobs markets, with a large number of employers, there will be no reason for a prospective employer to be aware that a candidate has brought proceedings. The claimant will have to show that her case is the exception.

These cases are likely to be in small or specialised industries or involve a claimant with a particularly high profile, such as a senior City worker. Although a stigma claim of some £16 million was recently rejected by an arbitral panel in ex-manager Kevin Keegan's claim against Newcastle United, because of a contractual clause limiting liability, that is precisely the type of industry in which this decision may have an impact.

In those cases claimants may well use *Chagger v Abbey* to justify extended periods of future loss, but they will still need extensive evidence of mitigation, especially given the unlikelihood that they will take proceedings against prospective employers in order to strengthen their claims.

However, in the majority of cases, given the difficulties of proving victimisation by a prospective employer, stigma damages of the sought claimed in *Chagger* are unlikely to make a marked difference to the period of future loss awarded by a tribunal.

The Court of Appeal considered *obiter,* and without the benefit of argument, the unusual situation where a claim for stigma damages might be the only head of loss for a claimant. Where a claimant would have been dismissed in any event, thereby subject to a 100 per cent *Polkey*-type reduction, he or she may recover stigma damages because although he would have been on the job market at the same time, he has been disadvantaged in the labour market as a result of the stigma caused by the unlawful dismissal. However, the burden of proving this, which will be difficult, will be on the claimant. Quantifying the loss attributed to the stigma will be harder still and the Court of Appeal suggested that that problem may be overcome by making a 'modest' award analogous to a *Smith v Manchester* award.

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Cases referred to:
Chagger v Abbey National plc & anor [2010] IRLR 47
Malik v BCCI SA (in liq) [1997] IRLR 462 HL
Smith v Manchester Corporation (1974) 17 KIR