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Cut your losses

13 April 2010

By **Charis Damiano**

A ruling on stigma losses may not lead to higher damages awards, but employers could face more claims from employees who have been unable to find alternative work and from those with expectations of large payouts, says Charis Damiano

No doubt employers took a deep breath when they heard about the Court of Appeal's judgment in *Chagger v Abbey National Plc* [2009] EWCA Civ 1202. Despite Abbey National's strong legal arguments about public interest, the principle of stigma losses was extended to discrimination cases. But how much real impact will the case have?

The Employment Tribunal found that Mr Chagger had been unfairly dismissed and discriminated against when he was selected for redundancy in 2006. He was awarded over £2.7m in compensation. Part of this amount related to stigma damages, which arose as a result of his not being able to find alternative work because he had previously brought a discrimination claim.

The case came before the Court of Appeal on two key issues:

- whether the tribunal should have reduced the award which Mr Chagger received to take into account a 'percentage chance' that he may have been dismissed in any event, should no discrimination have taken place; and
- whether stigma losses are in fact recoverable and, if they are, the circumstances in which such a claim can be made.

The Court of Appeal made a clear determination that, as Mr Chagger may have been dismissed in any event (effectively the Polkey argument, applied to discrimination cases) this should have been taken into account when assessing the compensation awarded. The case was remitted back to the tribunal to consider the amount of award in light of this ruling. This provides useful guidance for assessing likely compensation awards; there would need to be an appropriate reduction, calculated by reference to the percentage likelihood (in Mr Chagger's case, he was in a pool of only two people).

The stigma principle

The principle of stigma losses stems from the earlier case of *Malik v BCCI* [1997] ICR 606 (HL) where future employability was affected by the unlawful practices of a previous employer. The Court of Appeal has now extended this principle to discrimination cases: losses flowing from a third party's unwillingness to employ someone who has previously brought a discrimination claim remain the liability of the employer who committed the original unlawful act. A third party's involvement does not break the chain of causation.

Clearly this has consequences for employers and, during the case, Abbey National made strong representations that this was against public policy. It is, therefore, important to be clear in what circumstances this principle will be applied. The Court of Appeal stated that it did not believe that this decision would open the floodgates to high damages awards. Given that most Employment Tribunals already consider the issue of unemployability under the general heading of future loss, this may prove the case; the impact of any stigma will be another factor to consider when determining the level of compensation to be awarded, but the Court of Appeal stated that a figure for stigma damages need not be specifically allocated. The case would be most relevant when someone becomes unemployable for the rest of their working life (as with Mr Chagger) and has extensive evidence to support this claim – such cases are likely to be exceptional.

Similarly, it will be a rare case where the only head of loss is stigma damages and the tribunal has to determine an exact amount of compensation in this regard.

In any event, when asserting a stigma damages claim, claimants will still need to provide evidence of the damage they have suffered and how it flows from any stigma to which they have been subjected. The onus will be on them to establish and prove the loss; mere conjecture will not be sufficient. They will also have to show the steps that they have taken to mitigate their losses and provide examples of new employers being unwilling to recruit them.

Despite these hurdles for the claimant, the case may still have repercussions. Employers will likely face more potential claims from employees who have failed to secure alternative work (particularly given the current economic climate). Settlement out of court may prove more difficult as claimants will have expectations for bigger awards. Similarly, it will be interesting to see if tribunals award higher compensation amounts in future cases.

Clearly, avoiding litigation in the first place is the goal for employers. Some best practice guidance includes:

- Using objective criteria and rationale when making decisions.
- Maintaining a clear paper trail to back up all decisions.
- Implementing and utilising effective policies, including those relating to equal opportunities and diversity.
- Training managers fully in all key policies and encouraging them to be proactive in identifying any potential problems.
- Resolving issues informally where possible, before the matter escalates.

It will be interesting to see how this case is interpreted in tribunal decisions over the next few months. Despite the Court of Appeal's assertions that this will not lead to a disproportionate number of future claims or high awards, the true impact remains to be seen.

Postscript:

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