SUMMARY

2016/10 Associative victimisation claim allowed to proceed (UK)

<p>The Employment Appeal Tribunal ('EAT') has allowed a claim of 'associative victimisation' to proceed, reversing an Employment Tribunal ('ET') judge's decision to strike it out. Victimisation occurs where someone is subjected to a detriment because of a 'protected act' (such as alleging discrimination). In this case, the claimant claimed he had been subjected to a detriment because someone else associated with him had alleged discrimination. The second ET judge to hear the case held that there was not a close enough connection between the claimant and those who made the allegation of discrimination, and struck out the claim. The EAT held that the judge was wrong to find that Mr Thompson was required to show some particular relationship to the person whose protected act was relied upon, and in fact the association could be entirely in the mind of the employer. Association will be a question of fact in each case.<lb/>This was the first case in the UK to find that it is possible to bring a claim of victimisation by association, and could represent a significant development in UK discrimination law.</p>

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Background

The EU Racial Discrimination Directive 2000/43/EC has been implemented in the UK by the Equality Act 2010. Section 39(4)(d) of the Equality Act makes it unlawful for an employer to victimise an employee by subjecting them to any detriment. Section 27(1) sets out that a person (A) victimises another person (B) by subjecting them to a detriment because B has done or A believes B has done or may do a 'protected act'. 'Protec|ted act' is defined in section 27(2) and includes bringing proceedings under the Equality Act, giving evidence or information in connection with such proceedings, doing any other thing for the purposes of or in connection with the Equality Act and making an allegation that another person has contravened the Equality Act. Under the Equality Act, therefore, the individual claiming victimisation has to do (or be believed to have done) the protected act.The 2008 CJEU case of Coleman – v – Attridge Law, a reference from the UK ET, held that a person could be directly discriminated against on the grounds of disability because of their association with a disabled person, i.e. the claimant need not hold the relevant protected characteristic. Coleman, who was not disabled, brought a successful claim that she had been discriminated against on the basis of her son's disability when her flexible working request was rejected. Discrimination against an individual due to their association with a person who holds a protected characteristic is commonly referred to as 'associative discrimination'. Following this case, the EAT gave effect to the ECJ decision by reading words into the Disability Discrimination Act 1995 (a precursor of the Equality Act) to prohibit direct discrimination by association. Wording prohibiting associative discrimination was subsequently included in the Equality Act in connection with direct discrimination and harassment but not in connection with victimisation.Rule 37(1)(a) of the Employment Tribunal Regulations 2013 states that a claim may be struck out on the grounds that it has "no reasonable prospect of success".

Facts

Mr Thompson was employed as a bus driver by London Central Bus Company Ltd ('LCBC').

He was dismissed following an incident in which he gave away his high-visibility jacket without authorisation. He successfully appealed against this decision to dismiss him and returned to work. Whilst his appeal was on-going, he had issued an ET claim against LCBC, including a claim of associative victimisation, which he continued after his reinstatement. It was based on the following facts.Mr Thompson had overheard a conversation between other employees of LCBC, in which they claimed that LCBC had boasted about exiting employees who opposed racism. Mr Thompson belonged to the same trade union as these other employees, a small union which is not recognised by LCBC. Mr Thompson had then shared the details of what he had heard with his manager. It was his contention that LCBC had dismissed him (to his detriment) as a result of the protected act (stating that LCBC had breached the Equality Act 2010 by dismissing employees who opposed racism) of the other employees. He claimed that he was associated with the other employees, at least in the mind of his employer, due to their shared trade union membership. In effect, Mr Thompson reasoned: I was dismissed because I am a member of the same trade union as people who made a protected disclosure.In a Preliminary Hearing on 8 April 2014, the ET judge held that a claim of associative victimisation could in theory be brought, even though it was not permitted on the face of section 27(1) of the Equality Act. The ET held that victimisation by association was not permitted under the Race Directive and that in order to comply with the EU position on associative discrimination, section 27(1)(a) must be read as making unlawful any detriment applied "because of a protected act", rather than because the claimant did a protected act. This was not challenged by LCBC.At a second ET Preliminary Hearing on 17 June 2014, however, a second judge struck out the claim on the basis that the link between Mr Thompson and the other employees was "tenuous" and could not "give rise to the form of association necessary" for a successful claim of associative victimisation, even if such a claim could theoretically be brought. The judge therefore felt the claim had "no reasonable prospect of success". Mr Thompson appealed this decision.

EAT Judgment

The EAT agreed with Mr Thompson that the claim should not have been struck out. It reiterated that a case can only be struck out in the most exceptional circumstances and that the ET was wrong to conduct "an impromptu trial of the facts".The EAT held that the second ET judge appeared to have had the wrong test in mind when he considered the 'form of association' between Mr Thompson and the other employees whose conversation he had overheard. He emphasised that it is not the tribunal's role to decide whether something is in principle likely to constitute association; this should in each case be decided on the facts. It was conceivable that LCBC may have been moved to treat Mr Thompson differently due to his association with the Trade Union, and as such the judge's decision that this link was

necessarily too tenuous constituted an error of law. The appeal was therefore allowed.The case has subsequently been remitted for hearing at the ET.

Commentary

This case is significant for two reasons. It is the first case in which the concept of associative victimisation has been tried at a tribunal. Until 2015, the only successful claims of associative discrimination were direct discrimination and harassment claims. The pivotal case in the area of associative discrimination, Coleman, first held that the Directive against discrimination "applies not to a particular category of person but by reference to [discriminatory grounds]", i.e. not only to those who themselves hold the protected characteristic. While Coleman concerned a case of direct associative discrimination on grounds of disability, the judgment has since been held to apply to all protected characteristics, and the Equality Act accordingly provides for this by making any direct discrimination 'because of' a protected characteristic unlawful rather than requiring a claimant to hold that protected characteristic.However, the wording relating to victimisation is not as wide. The decision in this case to interpret the wording of the Equality Act widely to reflect the intention of the Directive is a new development. It comes in the same year as the ECJ decision of Chez Razpredelenie Bulgaria (C-83/14), which held that indirect discrimination can be by association. The judgment in Chez concerned a shopkeeper in a district of a Romanian town that was inhabited largely by people of Roma origin. The local electricity company had treated the inhabitants of this district less favourably than those of other districts by fixing their electricity meters at a greater height – allegedly to avoid tampering, although there was no evidence of more meter tampering in that district. This constituted indirect discrimination on the basis of ethnic origin. The shopkeeper could not read her meter, however, the shopkeeper herself was not of Roma origin, so the issue was whether she could claim to have suffered indirect discrimination. The ECJ replied affirmatively. Being an inhabitant of the district in question, she was discriminated against indirectly because of ethnic origin, albeit not her own ethnic origin. This was an example of indirect associative discrimination and marks a shift towards a broader interpretation of associative discrimination.The second point of interest is the ET judge's error in looking at whether there had been "the form of association necessary" between Mr Thompson and the employees he overheard to found a complaint of associative victimisation. When Coleman returned to the EAT following the ECJ judgment, the EAT's judgment explicitly stated that while the word 'associative' makes a useful shorthand, association is not at the heart of the matter. Instead, what matters is that the adverse treatment has been suffered because of a prescribed ground. The judgment even states that tribunals should not "become bogged down in…what does or does not amount to an 'association'". The strength of the association between Mr Thompson and the other employees, then, is

immaterial provided that Mr Thompson suffered a detriment because of the protected acts of others. Indeed, the EAT's judgment even stated that the association could be entirely in the mind of the employer.It is worth noting that Mr Thompson's association with the individuals who made the protected disclosure does appear to be particularly weak; Mr Thompson simply belonged to the same trade union as the individuals in question and overheard their conversation. As the first ET judge stated, "there is a rather loose association which might render the causal connection hard to establish... the Claimant will have an uphill struggle". Even in such a case, the EAT held that to strike the claim out on the basis of a weak association was the incorrect decision. Practitioners should therefore be aware that, even where association of any kind seems unlikely, this may not be sufficient to conclude a matter before all the facts have been established at a full tribunal hearing. The EAT reiterated that a claim can only be struck out in the most exceptional circumstances so perhaps, given the breadth of interpretation applied to associative discrimination, such a case is unlikely to fall into this category.

Subject: associative victimisation

Parties: Mr G Thompson v London Central Bus Company Ltd

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