SUMMARY

2016/38 Mistreatment of an employee because of their immigration status does not amount to direct or indirect discrimination in the UK (UK)

<p>The UK Supreme Court has held that the mistreatment of two Nigerian employees based on their vulnerable immigration status, did not amount to direct or indirect discrimination. The question for the Court was whether the employees had been discriminated against on the basis of their nationality. The Court accepted that immigration status is a function of nationality, but that it is not the same thing.</p>

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Background

Under the Equality Act 2010, discrimination may be considered to be direct or indirect, depending on the behaviour of the employer. The Equality Act lists nine different characteristics which are protected from discrimination, including race. 'Race' includes colour, nationality, national or ethnic origins, and potentially caste.

Direct race discrimination occurs where, because of an employee's race, an employer treats

them less favourably than it treats or would treat others. An employee claiming direct discrimination must show that they have been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different.

Indirect race discrimination occurs where an employer applies a provision, criterion or practice (PCP) which puts, or would put persons of the employee's race at a particular disadvantage when compared to other persons. This PCP then puts that employee at a disadvantage, which cannot be justified by the employer as a proportionate means of achieving a legitimate aim.

Since the definition of race includes nationality, the question for the Court was whether an employee's immigration status could be equated with nationality, and therefore the employee could claim protection under the legislation.

Facts

The Court heard a joint appeal relating to claims by two Nigerian women that they had been discriminated against because of their status as migrant domestic workers. Both had been subjected to poor working conditions, physical and verbal abuse, and were not paid the national minimum wage over the course of a number of years. Further, their passports were taken away, leaving both in a particularly vulnerable situation.

Ms Taiwo resigned and alleged that her treatment amounted to direct or indirect discrimination. An employment tribunal rejected her claims holding that neither direct nor indirect discrimination could be made out. In relation to the direct discrimination claim, the tribunal held that the treatment she had suffered was not because she was Nigerian, but because of her status as a vulnerable migrant worker. In addition, there was little evidence that Nigerian employees in the UK were more likely to be employed on a migrant domestic worker visa compared with individuals who were not Nigerian. A claim for indirect discrimination was therefore rejected. On appeal to the Employment Appeal Tribunal, both claims were also dismissed. She was however successful in her claim for unlawful deduction of wages.

Ms Onu also resigned and brought similar claims to Ms Taiwo. However, an employment tribunal held that Ms Onu had been treated less favourably because of her status as a vulnerable migrant worker. They reasoned that her treatment was clearly linked to her race, and she had therefore been subject to direct race discrimination. As a result, her indirect discrimination claim was not considered at this stage. However, the Employment Appeal Tribunal did not agree, and overturned the decision, holding that the treatment was linked to her particular vulnerability and subordinate position to her employer, and not because of her nationality.

Ms Taiwo and Ms Onu appealed to the Court of Appeal. Following a similar line of reasoning as the tribunals below it, the Court held that claims of direct and indirect discrimination could not be made out, stating that the reason for Ms Taiwo's and Ms Onu's treatment was because of their particular immigration status and not because they were Nigerian nationals. It held that immigration status was not to be equated with nationality for the purposes of the Equality Act.

Both the appealed to the Supreme Court for a definitive ruling on the question of whether immigration status should be afforded protection under the UK's equality legislation.

Judgment

The Supreme Court dismissed both appeals. It held that neither Ms Taiwo or Ms Onu had suffered race discrimination (direct or indirect) because the reason for their treatment was not because they were Nigerian, but because of their vulnerability as a particular kind of migrant worker. The Court emphasised that under UK legislation immigration status was not defined as a protected characteristic and that the dividing line between characteristics which are protected and those that are not was crucial.

Whilst immigration status is a function of nationality, the Court held that it is not the same as nationality. Migrant workers are not defined by their nationality, but by their type of visa; the same type of visa may apply to individuals of different nationalities. Both employees were dependent upon their employers for their continued right to live and work in the UK – something which was exacerbated by the fact that their passports were taken away and that they had very limited knowledge of English. The mistreatment that they had suffered was because of this particular set of facts and not because they were Nigerian nationals. It could not be said that their immigration status was so closely associated with their nationality as to be indissociable from it.

The Court explored the reasons why domestic migrant workers are particularly vulnerable; the fact that such workers are often employed in private homes in unregulated settings; the long hours, unfamiliar culture and language; and because many do not have the opportunity to know their legal rights. As such, the Court held that there are many non-British nationals who live and work in the UK that do not share this vulnerability. Therefore, the claims for direct discrimination were unfounded.

Turning to the claim for indirect discrimination, there was no PCP which was said to apply in the case of Ms Taiwo; the only PCP suggested was the exploitation of workers who were vulnerable because of their immigration status. That PCP would not have applied to employees who were not in that vulnerable position. There could be no doubt that Ms Taiwo

and Ms Onu were treated disgracefully. The Court accepted that it could not rule out the possibility in future cases that a claim of indirect discrimination may succeed if a relevant PCP could be identified.

Commentary

Throughout the judgment, the Supreme Court expressed some unease about the inadequacy of protection under the current legislative framework for these kinds of cases. Causes of action over which UK employment tribunals have jurisdiction only offer redress for some of the harm suffered. Awards were made for breaches of the National Minimum Wage Regulations and Working Times Regulations, but not for the distress and harm caused by exploiting vulnerable migrant workers.

The UK government has introduced legislation designed to combat human trafficking or slavery in a criminal context. The Modern Slavery Act 2015 does not however include offences under the jurisdiction of employment tribunals. The offences of slavery, servitude or forced labour attract criminal sanctions, and do not offer protection to those bringing employment claims for such abuse.

There is precedent to suggest that UK courts are thinking more extensively about the impact of such behaviour on vulnerable groups in society. Recently, an Employment Appeal Tribunal in the case of Chandhok & Anor – v – Tirkey (UKEAT/0190/14/KN) held that caste discrimination could come within the definition of race. However, the UK government has indicated its future intention to include caste discrimination in the provisions of the Equality Act 2010, which is not the case with immigration status.Despite this, the decision seems to be a correct interpretation of the scope of 'nationality' as currently defined under the provisions of the Equality Act 2010. In practical terms, this case clarifies the interpretation of race discrimination, although it does not offer much hope to those that suffer mistreatment in an employment context because of their particular immigration status. In the future, the UK government may wish to consider alternative ways of enabling employees to seek redress for the harm they have suffered as a result of a similar employee/employer relationship where migrant visas are at issue. Perhaps recent focus by the UK Prime Minister on the Modern Slavery Act is an encouraging sign.

Comments from other jurisdictions

The Netherlands (Ruben Houweling, Erasmus University Rotterdam): Domestic migrant workers are indeed a vulnerable group of employees. Although the population of this group is allegedly quite large, only a few (exploited) migrant workers seek a judicial remedy. As far as I know immigration status has, as of yet, never been used in a claim of unequal treatment.

Nationality on the other hand is – as a sub species of race – quite a common ground for judicial debate.

If a migrant worker takes action against his or her employer, this is usually in the context of underpayment. In 2013 the Dutch Court of Appeal ruled that a migrant worker from India was entitled to the minimum wage, pro rata, over the 80 hours a week she worked, even though the Minimum Wages Act only guarantees the minimum wage over a 40 hour working week.

Court of Appeal Den Haag 9 October 2012, ECLI:NL:GHDHA:2012:BX9769. Law reform of the Minimum Wages Act is announced to ensure minimum wages per hour.

In this UK case, both workers were women. That is not particularly surprising because migrant domestic workers are quite often female workers. It is however a significant fact from an equal treatment point of view. In future cases the migrant domestic worker could perhaps argue that she has been indirectly discriminated against because of their gender with more success.

In The Netherlands there is quite a strong debate about the extent to which certain exceptions to employment law protection for domestic workers are justified forms of indirect unequal treatment. These include a shorter period of sick pay; the fact that permission for dismissal is not required; and that there is no way of checking payment of the minimum wage, as there is no mandatory administration of this. That the different rules for domestic workers can result in indirect unequal gender discrimination is not in doubt.

L.W. Bijleveld & E.Cremers-Hartman, 'Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel'; Leiden: Vereniging voor Vrouw en Recht Clara Wichmann 2010'Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel';LeidenVereniging voor Vrouw en Recht Clara Wichmann2010W.BijleveldE.CremersHartman-, zie www.vrouwenrecht.nl.

Of course, resolving this would not solve the problems experienced by other exploited migrant workers. And, the real underlying issue is that most people in this vulnerable group of employees are not sufficiently empowered to take action against their employers. Therefore, the criminal law and the Labour Inspectorate will remain necessary, particularly as, in The Netherlands, adequate private law measures are lacking. Punitive damages are not available as a remedy when unequal treatment is established. Only actual loss is compensated and this – in a case of domestic migrant workers – is difficult to prove.

A. Zwanenburg, Remedies voor de gediscrimineerde sollicitant. Perfect fit for the job of 'heb nog even gekeken, is niks'? TAP 2015, 315.

Subject: Discrimination; nationality

Parties: Taiwo – v – Olaigbe & anor; Onu – v – Akwiwu & anor

Court: UK Supreme Court

Date: 22 June 2016

Case Number: [2016] UKSC 31

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