SUMMARY

2011/38 No power for tribunal to apportion liability for unlawful discrimination (UK)

<p>The Employment Appeal Tribunal (EAT) held that an Employment Tribunal had no power to apportion liability for damages between respondents where several respondents were found guilty of the same act of race discrimination. Where more than one party is found guilty of discrimination and the damage is ‘indivisible’, liability should be ‘joint and several’ as a matter of law - that is, the claimant is entitled to recover the entirety of his or her loss from any of the respondents.</p>

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Facts

In 1999, Ms Sivanandan (the 'claimant'), who was a race equality adviser, applied for two positions with a body called Hackney Action for Race Equality ('HARE'), which existed to promote good race relations within the London Borough of Hackney (the 'Council'). HARE was partly funded by the Council and had close links to it. It was managed by an executive

committee and had a full-time director, Ms Howell. The claimant had been a member of the executive committee of HARE in the past, but there had been a dispute and in the previous year she had started race discrimination claims against it (which she eventually won).

The claimant was interviewed separately for each of the two posts. The interview panels consisted of members of HARE's executive committee together with Ms White, a Council employee.

The claimant was not selected for either job. She brought proceedings in the Employment Tribunal, in which she claimed that her non-appointment was the result of sex and race discrimination and more particularly that she was being victimised because of her previous race claims. The respondents to the claims were:

Ms Howell, Ms White and the other members of each of the interview panels. These were referred to as the 'primary discriminators', on the basis that they had made the decision not to offer the claimant the roles.

The executive committee of HARE and HARE (the company) Ð these were put forward in the alternative as being the employer of the primary discriminators (other than Ms White) and therefore vicariously liable for their acts.

The Council - on the basis that it was Ms White's employer and therefore vicariously liable for her acts.

At an Employment Tribunal hearing in 2003, it was decided that the individual members of the interview panel had been influenced by the claimant's previous race discrimination claims when deciding not to offer her the jobs. The primary discriminators were therefore guilty of race discrimination by victimisation. HARE and the Council were held to be vicariously liable.

The Employment Tribunal's remedies decision

Following a number of appeals, cross-appeals and various delays, there was a remedies hearing in October 2007 by which time HARE had been disbanded. Ms White, the Council

employee, was the only respondent to attend. The Tribunal decided that liability should be apportioned between Ms White and all the other respondents. Furthermore, despite not having decided on the total award or the relative responsibilities of the various respondents, it held that the award against Ms White should be limited to £1,250 in respect of injury to the claimant's feelings. This was an unusual decision that could be criticised, but it was never appealed and was not considered by the Employment Appeal Tribunal (EAT) in the procedure described below.

A second remedies hearing was held in November 2008. The Employment Tribunal decided that all the remaining respondents were 'jointly and severally' liable to pay the claimant £421, 415. The Tribunal declined to apportion liability as between them. It considered that it would not be just and equitable to make such an apportionment in light of the fact that the Council had a very significant degree of influence over the decisions taken by the interviewing panel.

The Council appealed the ruling that the award should be joint and several, arguing that the factors relied upon by the Tribunal did not support its decision not to make any apportionment.

The Employment Appeal Tribunal's decision

The EAT upheld the decision not to apportion liability, but for different reasons. Whereas the Tribunal had proceeded on the basis that it had discretion to apportion liability and decided not to, the EAT held that there was no power to make such an apportionment as a matter of law.

The EAT summarised the relevant legal principles. It noted that unlawful discrimination was a statutory tort (civil offence), so it followed that compensation for loss caused by unlawful discrimination should follow ordinary tortious principles. In particular, the EAT set out the rules applicable in cases of concurrent tortfeasors (i.e. people guilty of committing the same tort or who separately contribute to the same damage):

If there is a rational basis for distinguishing the damage caused by tortfeasor A from that caused by tortfeasor B, the court will hold A and B liable to the claimant for that part only of the damage which is attributable to each of them ('apportionment'). Where this applies, the claimant will have to proceed against each respondent for the part of his loss caused by him or her.

On the other hand, where the same 'indivisible' damage is done to the claimant by concurrent tortfeasors, as in the current case, each is liable for the whole of that damage. (This is known as 'joint and several' liability.)

The EAT went on to acknowledge that it could be unfair that a single respondent may find himself responsible to the claimant for the entirety of damage for which others were also responsible. The Civil Liability (Contribution) Act 1978 (the '1978 Act') is designed to address this issue. It gives such a person the right to claim a 'contribution' from concurrent respondents to the extent the court decides is 'just and equitable having regard to that person's responsibility for the damage in question'.

The EAT clarified that this provision of the 1978 Act determines the liability of concurrent wrongdoers as between themselves, but it has no impact on the liability as between the respondents and the claimant. The claimant can recover in full against whichever respondent he or she chooses and it will then be up to that respondent to recover any contribution from the others.

The EAT considered that similar principles applied to discrimination claims. Where more than one person participated in the same act of discrimination or contributed to the same damage by different acts of discrimination (i.e. concurrent discriminators), liability should be joint and several. The EAT agreed with the rationale for joint and several liability set out in the House of Lords ruling in Barker – v – Corus (UK) plc [2006] UKHL 20: if someone causes harm, there is no reason why their liability should be reduced because someone else also caused the harm. On that basis, the EAT concluded that the respondents in this case should each be liable for the full amount of the claimant's loss.

The EAT acknowledged that it was departing from established authority and, up to now, employment tribunals had believed they were entitled to apportion liability between concurrent discriminators. This often occurs, for example, where tribunals are dealing with allegations of discrimination against both an employer and its employee, where the employer is vicariously liable. The tribunal tends to make the 'lion's share' of the award payable by the employer (on the basis that it has more money), with a smaller sum payable by the guilty employee. This practice has been endorsed by the EAT in previous rulings (Armitage and others – v – Johnson [1997] IRLR 162 and Way – v – Crouch [2005] IRLR 603).

The EAT in the current case commented in passing that employment tribunals engaging in this practice have proceeded on a misunderstanding of the law. However, the EAT fell short of

ruling definitively that the previous authorities had been wrongly decided. Instead, the EAT recommended that employment tribunals only make 'split awards' if such an order is positively sought by one of the parties and if there exists a clear legal basis - other than the 1978 Act - to do so.

Commentary

There clearly appears to have been a major misunderstanding of the law in this area in previous cases. Given this very clear, reasoned decision on the applicability of joint and several liability in discrimination cases where the claimant suffers 'indivisible' damage from different discriminators, it is unlikely that employment tribunals will be able to apportion liability between individual employee discriminators and the vicariously liable employer in future.

Where the employer is solvent, the claimant is likely to proceed against the employer to recover the damages. On the other hand, individuals may increasingly find themselves paying the entirety of damages where the employer has become insolvent.

In cases where the same advocate has defended the (discriminatory) employee and the employer, an apportionment is unlikely to be sought at the remedies hearing (as a conflict of interest would arise). However, in such cases, the employer could rely on the 1978 Act subsequently to seek to recover part of the award from the guilty employee.

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