SUMMARY

2011/6: Loss caused by ex-employer’s victimisation not too remote (UK)

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Facts

Ms Bullimore, a solicitor, brought claims of unfair dismissal and sex discrimination following the termination of her employment with a law firm (WW). These proceedings were eventually settled. A few years later, she was offered employment with another firm, Sebastians. She gave her former firm WW as one of the referees. Accordingly, Sebastians asked WW to send them a reference letter. WW complied and sent Sebastians a written reference. In answer to a question about how her employment had ended, the reference referred gratuitously to the fact that Ms Bullimore had brought tribunal proceedings and also said that "she could on occasion be inflexible as to her opinions". As a result, Sebastians changed its offer of employment to make it conditional on a satisfactory probationary period. Ms Bullimore thought that this was an unjustifiable attempt to alter the terms of the offer and she refused to proceed. Sebastians refused to drop its requirement for a probationary period and the offer lapsed, effectively having been withdrawn. Ms Bullimore then brought a claim of victimisation against both her

former employer WW (now called PWW) and her prospective employer Sebastians. The Employment Tribunal upheld her claim. It found that (i) the terms of the reference by WW and (ii) the withdrawal of the job offer by Sebastians were both acts of unlawful discrimination by way of victimisation, contrary to the Sex Discrimination Act 1975 ("SDA"). The reference was unlawful because its unnecessarily negative content was influenced by the fact that Ms Bullimore had brought a sex discrimination claim. The withdrawal of the offer of employment was unlawful because Sebastians were not simply responding to a negative reference, but were influenced in their decision to withdraw their offer by the fact that Ms Bullimore had brought sex discrimination proceedings against her former employer. In both instances, the relevant statutory provision was s4 of the SDA. This section provided protection for (former) employees against less favourable treatment by reason of having done certain socalled "protected acts" – for example, bringing proceedings under the SDA or alleging that someone had contravened the SDA. (Note: With effect from October 2010, this provision was repealed and replaced by a similar anti-victimisation rule set out in s27 of the Equality Act, which applies to sex and the various other protected characteristics covered by that Act, such as race, age and disability.) The Tribunal's decision was subsequently affirmed by the Employment Appeal Tribunal ("EAT") ([2010] IRLR 572). In the UK, cases such as this usually go through two stages. The first is to determine whether the respondent is liable. The second stage consists of a "remedies hearing", the purpose of which is to determine the amount of the liability. In this case, where Ms Bullimore had sued both PWW and Sebastians, the remedies hearing would normally have included both respondents. However, Ms Bullimore agreed a settlement with Sebastians, which paid her £ 42,500. The result was that the sole purpose of the remedies hearing was now to determine how much compensation PWW should pay. On this question, the Tribunal found that the reason Ms Bullimore had lost the job was the withdrawal of the offer, which was an unlawful act of Sebastians. Being a law firm, it must have been aware that it was doing wrong. The withdrawal constituted a new act which "broke the chain of causation" so as to make Ms Bullimore's loss of earnings too remote to justify compensation from PWW. Accordingly, the Employment Tribunal concluded that PWW could not be found liable for the loss of earnings flowing from the withdrawal of the job offer by Sebastians. It limited the award of compensation from PWW to £ 7,500 for injury to feelings. Ms Bullimore appealed to the EAT on the question of remedies.

The Employment Appeal Tribunal's decision

Upholding the appeal, the EAT held that the withdrawal of the job offer and the consequent loss of earnings were far from being too remote to justify compensation from the previous employer. Ms Bullimore had suffered loss as a result of the combination of two unlawful acts and the withdrawal of the job offer was a direct, natural and foreseeable consequence of the

supply of the reference. There was no rule that a subsequent unlawful act by a different party automatically "broke the chain of causation". The EAT also pointed out that giving damaging references is not an uncommon form of victimisation and it would be very unsatisfactory if a claimant who lost a job as a result of such a reference was unable to recover damages from the person who gave it. This was particularly so because a remedy against the prospective employer would not always be available – if, for example, the prospective employer had no idea that the claimant had brought discrimination proceedings, but withdrew its offer simply on the basis of a bad reference. Accordingly, the EAT ruled that the previous employer should be liable for the loss of earnings and the case was remitted to the Employment Tribunal for consideration of the amount.

Commentary

It is important to note that, in this type of case, both the prospective employer and the former employers can be held liable for loss of earnings, as well as injury to feelings, flowing from their unlawful acts of sex discrimination by victimisation. The former employer can be liable for the former employee's loss of earnings, even if the conduct by the prospective employer is also considered to be unlawful victimisation. However, the prospective employer will only be liable if its decision to withdraw the job offer was motivated by a reference that directly referred to a "protected act". The EAT set out its provisional views about how liability for damages should be divided between the employers in this type of situation. In this particular case, the parties had proceeded on the basis that the liability for loss of earnings would be apportioned between the two respondents, i.e. that each would only be liable for a part, and the EAT decided not to interfere with that agreement. However, the EAT did comment that apportionment was probably inappropriate, because the loss of earnings appeared to be an "indivisible injury". On that basis, each party should be jointly and severally liable for the full amount. What are employers to take from the case? The EAT acknowledged that 'the Tribunal's conclusion might, without reference to the detailed facts, seem rather harsh: the position of employers who are asked for references for employees with whom they have fallen out is a delicate one'. One practical lesson from this case for employers is never to refer to a former employee's discrimination claim in a reference. As for prospective employers, they should be very careful if they are provided with such a reference and, if the job offer is withdrawn, must be able to prove that the decision was not motivated by the information about the claim. Finally, although this case was brought under the old SDA victimization provisions that have now been superseded, the EAT's conclusions will continue to be relevant to victimisation claims of this nature under the Equality Act 2010.

Comments from other Jurisdictions

The Netherlands (Peter Vas Nunes): Employer 1 provides prospective Employer 2 with a negative reference that qualifies as sex discrimination. As a result, prospective Employer 2 withdraws its offer of employment. Both employers act in breach of the anti-discrimination law. Is each of them singly liable for the loss resulting from its own behaviour, or are both employers jointly liable? It probably makes no difference, but let us suppose that both employers are jointly liable for the (former respectively prospective) employee's loss of earnings and for the injury to her feelings. In this case, Ms Bullimore had already received £ 42,500. A Dutch court would most likely deduct this amount from the award.

Subject: Gender discrimination

Parties: Bullimore – v – (1) Pothecary Witham Weld Solicitors and another (No. 2)

Court: Employment Appeal Tribunal (England & Wales)

Date: 21 September 2010

Case number: UKEAT/0189/10

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