Browne Jacobson

Tribunal entitled to assess discrimination compensation on basis of career-long loss

In Secretary of State for Justice v Plaistow UKEAT/0016/20 and UKEAT/0085/20, the Employment Appeal Tribunal ('EAT') upheld an employment tribunal's decision to calculate compensation for harassment and direct sexual orientation discrimination based on career-long loss

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In *Secretary of State for Justice v Plaistow UKEAT/0016/20 and UKEAT/0085/20*, the Employment Appeal Tribunal ('EAT') upheld an employment tribunal's decision to calculate compensation for harassment and direct sexual orientation discrimination based on career-long loss. Here, the EAT considered the Claimant's conditions of PTSD, depression, symptoms of paranoia, as well as other functional impairments as conditions which were likely to be life-long. This case is a useful reminder to employers that under section 124 of the Equality Act 2010 (EqA 2010) the calculation of compensation for discrimination is based on the loss the claimant has suffered and there is no upper limit of compensation. If a Tribunal views that an employee has been treated so badly that the injury was likely to be permanent, compensation may be justified up to retirement. As was the case here, the assessment of compensation encompasses some grade of speculation, as the tribunal must decide what would have happened in the absence of the discriminatory acts, so that the Claimant could be put in that financial situation. In carrying out that assessment, the weight to be given to the material available will be for the employment tribunal to decide and is inevitably case-specific. The EAT noted that Tribunals should ensure that they maintain a sense of proportion in terms of the overall award made.

Background:

The Claimant in 2003 commenced his employment with the HMP Feltham. In 2014, the Claimant's request to transfer to HMP Woodhill was accepted. Unfortunately, post transfer, the Claimant was subjected to harassment related to sexual orientation or perceived sexual orientation. Such acts continued throughout his employment. Due to the severity of conduct the Claimant was subjected to, in October 2014 he requested a transfer to a different prison. In October 2015 the Claimant raised a grievance, which was not investigated, despite further attempts to pursue these grievances. The Claimant suffered victimisation having complained about this treatment to his MP and was accordingly terminated due to purported gross misconduct in August 2016; aged 38.

The Claimant subsequently brought a number of claims, including direct sexual orientation discrimination, harassment and victimisation.

Employment Tribunal (ET) Decision:

The Claimant was awarded compensation under various heads of claim, including £41,000 for injury to feelings, £15,000 for aggravated damages and £8,000 for exemplary damages. Having regard to medical evidence, the ET concluded that the financial loss award should be career loss. This career loss award was based on the ET accepting the Claimant's evidence that he intended to remain employed by the prison service up to his retirement. The ET applied a 5% reflection to reflect the likelihood that the Claimant may be able to return to some form of future employment later in life and the possibility that the Claimant may have resigned shortly before retirement age. The Respondent's failure to follow the ACAS code in relation to the Claimant's dismissal further resulted in a 20% uplift in compensation.

The Respondent appealed against the ET's Remedy Judgment on the basis that it had been wrong/had reached a perverse decision in awarding compensation on a career-loss and the 20% uplift and the ET's failure to review the financial value of the award as a whole.

EAT: Career-long basis for award

As a result of the discriminatory treatment the Claimant had suffered, it was common ground that the Claimant suffered moderate PTSD, depression and symptoms of paranoia, presenting with various functional impairments as a result (which included finding it difficult to leave his house on some days, or to attend to his personal care, or interact with members of the public, as well as experiencing low mood and sleep disturbance).

On the basis of the Claimant's expert medical evidence, Lady HJ, sitting alone, had been entitled to find that the ET had permissibly found that the Claimant's condition was likely to be life-long. Adopting the approach laid down in *Wardle v Credit Agricole Corporate and Investment Bank [2011]* ICR 1290, the ET concluded that it was very unlikely that the Claimant would ever be able to return to any work; on the basis of the ET's findings, it was entitled to find that this was one of those rare cases where it would be appropriate to consider the Claimant's future losses on a career-long basis.

This was not a case where it could properly be questioned whether the ET had applied the correct legal principles. Given the dispute lied on prognosis as opposed to diagnosis, the Tribunal was wholly correct in resolving this dispute by favouring the expert evidence adduced by the Claimant.

Application of 5% discount

Given its findings of fact, the ET had been entitled to apply only a 5% discount when assessing the likelihood of the Claimant choosing to leave his employment early or the possibility of his being able to return to some form of employment in the future. Nevertheless, the EAT accepted that the tribunal's reasoning failed to display a more general consideration of the uncertainties involved in its predicted loss of earnings. There was nothing to suggest that it had allowed for the "more general vicissitudes of life" (the possibility of working life being cut short by reason of early death, disability or other unforeseen circumstances). The tribunal had therefore erred in failing to take those uncertainties into account when settling on 5% as a discount. The prison service's appeal was allowed on this limited basis.

Application of 20% uplift for failing to comply with Acas Code

In determining whether an uplift of 20% should be awarded in respect of the Respondent's failure to comply with the Code, the ET had not demonstrated that it had considered the absolute value of the award it was thus making; that was an error of law (*Acetrip Ltd v Dogra*, *unreported, EAT UKEAT 0016/20/VP UKEAT 0085/20/VP (18 March 2019*), UKEAT/0238/18, and *Banerjee v Royal Bank of Canada [2021] ICR 359, EAT*, followed). The ET's reasoning needed to demonstrate that it had considered the totality of the award and that this was proportionate to the Respondent's breach of the Code and to any harm suffered by the Claimant as a result (such that it was just and equitable to make an award of an uplift in that sum). The EAT remitted the questions of discount and uplift to the tribunal.

Comment

In *Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604* and *Wardle v Credit Agricole Corporate and Investment Bank (No 2) [2011] IRLR 819*, the Court of Appeal held that it will only be appropriate to award career-long loss in rare cases where there is no real prospect of an employee ever obtaining an equivalent job. The Claimant's case here is a rare example of a Tribunal's award of a career-long basis for assessment of financial loss. The ET described the Claimant's treatment as a campaign of direct discrimination and harassment.

The aim of compensation for discrimination is to award a sum of money that will put the claimant in the position they would have been in had the wrong not taken place (*Livingstone v Rawyards Coal Co (1880) 5 App Cas 25; Ministry of Defence v Cannock and others [1994] ICR 918*). Given that there is no upper limit on compensation for discrimination, employment tribunals may sometimes be faced with the prospect of making an Acas Code adjustment that, in itself, amounts to a very large sum of money.

This case serves to remind employers that they should not forget the potentially significant implications of a failure to follow the Acas Code when an employee raises grievances complaining of discrimination, and when dismissing an employee in those circumstances.

The case also reminds tribunals that they should also maintain a sense of proportion in terms of the overall award made (*Ministry of Defence v Cannock and others [1994] ICR 918*) and clearly set out their considerations in their judgment.

Case list

- *Secretary of State for Justice v Plaistow UKEAT/0016/20 and UKEAT/0085/20*
- *Wardle v Credit Agricole Corporate and Investment Bank [2011] ICR 1290*
- *Acetrip Ltd v Dogra, unreported, EAT UKEAT 0016/20/VP UKEAT 0085/20/VP (18 March 2019), UKEAT/0238/18*
- *Banerjee v Royal Bank of Canada [2021] ICR 359, EAT*
- *Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604*
- *Wardle v Credit Agricole Corporate and Investment Bank (No 2) [2011] IRLR 819*
- *Livingstone v Rawyards Coal Co (1880) 5 App Cas 25*
- *Ministry of Defence v Cannock and others [1994] ICR 918*

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Contact

Raymond Silverstein

Partner

raymond.silverstein@brownejacobson.com

+44 (0)207 337 1021

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