
LIABILITY OF COMPANY DIRECTORS FOR DISCRIMINATION

By Kathleen Donnelly

*On 27 September 2011 the Employment Appeal Tribunal (EAT) handed down its decision in *Bungay and Paul v Chandel and others* (UKEAT/0331/10) holding that two company directors were jointly and severally liable for damages related to the discriminatory dismissal of two employees.*

SUMMARY

The case concerned serious allegations of race discrimination. The two directors named in the litigation, Mr Bungay and Mr Paul, had been the “*prime movers*” in a campaign of discriminatory action, which, in the employee Mr Chandel’s case, had been designed to ensure that he was removed from his post. The discriminatory activity continued after Mr Chandel’s dismissal, when the directors made unfounded and malicious complaints to the police.

The Employment Tribunal (ET) held that the dismissal was discriminatory. However by the date of the remedies hearing, the company itself had gone into liquidation. It was argued on behalf of the dismissed employees that the named directors should be held jointly and severally liable for damages relating to the discrimination. The ET agreed, and ordered awards of damages, including aggravated damages, against the two directors on a joint and several basis.

The directors appealed to the EAT on 3 grounds: that the directors were not “*agents*” of the company and could not be personally liable, that it was wrong to award damages jointly and severally, and that aggravated damages could not relate to any acts occurring after the employment relationship had ended.

In a considered judgment, Mr Justice Silber in the EAT dismissed the appeal, and gave guidance as to the correct approach to each legal issue.

THE DIRECTORS AS AGENTS

This issue concerned the statutory interpretation of Regulations 22 and 23 of the Employment Equality (Religion or Belief) Regulations 2003. Regulation 22(2) confers liability on principals for the discriminatory acts of persons acting as agents. Regulation 23(2) deems an agent for whose act the principal is liable to aid the doing of the act by the principal.

The issue on the appeal was whether the directors were “agents” within the meaning of Regulation 23(2). The appellants argued not, on the basis that they were at all times acting in their capacity as directors and liability for their acts necessarily was that of the company alone. This was, however at odds with the statutory regime which deems such a person to aid the doing of the act (Regulation 32(2), above).

“ *the Appellants were managing the Centre as part of their authority as its directors and so the Tribunal was entitled to conclude that the Appellants were acting as its agents even though they performed their duties in a discriminatory manner* ”

Mr Justice Silber applied common law agency principles, and the line of authority starting with *Lana v Positive Action Training Housing (London)* [2001] IRLR 501: the test of authority is whether when doing a discriminatory act the discriminator was exercising authority conferred by the principal, and not whether the principal had in fact authorised the agents to discriminate. Agency was clearly established: under the Articles of Association, the directors had the power to manage the business of the company, and the campaign to remove Mr Chandel was carried out in the course of that business. Indeed, as argued on behalf of Mr Chandel, any other conclusion would be inconsistent with the requirement to give a purposive construction to anti-discrimination legislation.

JOINT AND SEVERAL LIABILITY

The appellants argued that in any event, it was wrong to order joint and several liability for damages, as any award should be pro rata apportioned between all responsible persons (including the other directors not named as defendants). Reliance was placed on *Way v Crouch* [2005] IRLR 603, in which it was said that it is not appropriate in almost any case to make a joint and several award which is 100% against each respondent.

“ *the correct approach to the measure of compensation for loss caused by unlawful discrimination should be to follow the ordinary principles to the law of tort which was the approach adopted in the Gilbank case* ”

The EAT however adopted the Court of Appeal’s reasoning in *Gilbank v Miles* [2006] IRLR 538, in which joint and several liability was ordered against a hairdressing salon manager who had “*consciously fostered and encouraged a discriminatory culture*”, and upheld the order in this case.

Way was not followed, Mr Justice Silber going so far as to say that “the time might well have come when *Way* should no longer be relied on or even cited as accurately representing the law”.

AGGRAVATED DAMAGES FOR POST TERMINATION EVENTS

The third issue before the EAT concerned the aggravated damages awards, which had been ordered by reference to the conduct of the directors both before and after the termination of the employees’ employment.

The appellants argued that an award in respect of post termination acts was wrong in law, as the relevant employment relationship had ended, and any remedy lay by way of separate litigation.

“ *there is no rule of law which restricts the circumstances in which aggravated damages may be awarded* ”

Mr Justice Silber however accepted on behalf of Mr Chandel that (following *Zaiwalla & Co v Walia* [2002] IRLR 697 and *The Governing Body of St Andrew’s Primary School v Blundell* [UKEAT/0330/09]) there is no rule of law which restricts the circumstances in which aggravated damages may be awarded, and there is no justification for refusing to award damages where a campaign of discrimination is continued after the employment has ceased. Indeed, it is preferable that these matters should be dealt with within the ambit of the proceedings rather than being pursued in further, separate, litigation.

COMMENT

The case illustrates the potentially wide liability of directors in discrimination claims, and the potential availability of a secondary route to recovery in cases where the actual employer might not have the financial means to meet an award for damages.

It also provides helpful guidance as to the proper approach to awards on a joint and several basis, as well as the circumstances in which aggravated damages may be awarded.

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