

Stigmatize me: the exception or the rule?

There has been much speculation in the media about whether former employees of the News of the World intend to pursue claims for stigma damages in light of the highly publicised circumstances surrounding their dismissals. Claire Darwin and Andrew Smith explore the different type of stigma damages claims available and some of the difficulties inherent in pursuing them

Chagger claims

So-called stigma damages are awarded to compensate employees for two different types of stigma and consequent handicap on the labour market. The first type is the stigma resulting from the fact that an employee has brought legal proceedings against his or her employer. This is in recognition of the fact that, exceptionally, those who have brought proceedings against their employer become virtually unemployable in their chosen field or their career will be adversely affected. We shall refer to these sorts of claims as 'Chagger claims', referring, of course, to *Chagger v Abbey National plc*.

In *Chagger* claims the question of stigma damages arises at the remedy stage when the employment tribunal or court has to decide for what period the employee is likely to suffer ongoing financial losses as a result of his or her treatment by the employer. Handicap on the labour market as a result of stigmatization is one of the factors that the court or tribunal can take into account. Stigma damages in the *Chagger* sense are only relevant when the employee has suffered a loss of earnings or has an ongoing loss, and therefore are most likely to be claimed by employees who have been dismissed. Such damages can be awarded by the ordinary courts or a tribunal, depending on the specific facts of the claim.

Malik claims

The second type of stigma is that which results from an association with an employer or organisation that has run its business in a dishonest and corrupt manner. In *Malik v Bank of Credit and Commerce International SA*, the House of Lords confirmed that employees who have had their future employment prospects damaged by their former employer could pursue contractual claims for breach of the implied term of trust and confidence. We shall refer to these as 'Malik claims'. With regard to former employees of the News of the World, it seems likely that their claims for stigma damages will be *Malik* rather than *Chagger* claims.

A *Malik* claim is a common law claim for breach of contract. The alleged stigmatization, flowing from the employer's breach of contract, constitutes the cause of action in itself. Accordingly, most *Malik* claims will be pursued in the ordinary



Claire Darwin and Andrew Smith: Matrix Chambers

courts, thereby avoiding the statutory cap in the employment tribunal. In fact, a *Malik* claim can be brought by an employee in the ordinary courts long after his or her employment has actually ended, because the trust-destroying conduct may only have adverse financial consequences for the employee at a later date, or the employee may only have learned of the employer's conduct after leaving their employment.

Causation and breach

In both *Chagger* and *Malik* claims it is third-party employers that are the immediate cause of the loss, because it is those prospective employers which cause the employees loss by stigmatizing them and then not recruiting them. However, in both sorts of claim it is well established that the original wrongdoer, the former employer, should be liable for the losses that flow from its own unlawful conduct. In *Malik* claims this is subject to a reasonable foreseeability test.

In *Malik* claims the issue of stigma is relevant to both liability and remedy. It is for employees to establish on the balance of probabilities that they have been stigmatized by reason of their previous employment by the employer, and that they have suffered loss and damage as a consequence. The question for a court or tribunal is whether the stigma has had a real or substantial effect on the employee obtaining alternative employment and, if so, how great that effect was.

In *Chagger* claims the employee is *prima facie* entitled to a remedy as a consequence of his or her treatment by the employer, and a court or tribunal will consider stigma damages at the remedy stage only.

Assessment of compensation

In any successful claim for stigma damages (whether a *Malik* or *Chagger* claim), it will be open to the court or tribunal to conclude that the employee will be unable to obtain comparable employment – ie a job with the same earning

In Malik claims, as with Chagger claims, courts and tribunals are likely to take a pragmatic approach to the difficulties inherent in proving stigma

capacity – for the remainder of their career as a consequence of the stigmatization. In such cases of ‘career length loss’, tribunals and courts may be assisted by the Ogden tables (sixth edition), which provide an actuarial basis for such computations. These should, however, be used as a starting point and not applied slavishly (see *Chagger* in the EAT, *per Underhill P* at paras 114-116).

Employment tribunals are, of course, well versed in assessing compensation on a speculative basis (see *Andrews v Software 2000 Ltd* and *Wardle v Credit Agricole Corporate and Investment Bank*). Indeed, as the Court of Appeal in *Chagger* observed, many courts and tribunals may already take stigma (in the *Chagger* sense) into account as one of the features of the job market when they determine how long it will take the employee to secure comparable alternative employment.

In cases pursued in the tribunal, the assessment of stigma damages in *Chagger* claims may vary slightly depending on whether the claim is for discrimination or ordinary unfair dismissal. In discrimination claims, the court or tribunal’s job is to put the employee back in the position that he or she would have been in had the unlawful discrimination not occurred. In such cases, the employee would not have been compelled to issue legal proceedings and therefore the stigma would never have arisen.

In ordinary unfair dismissal complaints, the level of the compensatory award is the amount that the tribunal considers to be just and equitable in all the circumstances, having regard to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer (s.123(1) of the Employment Rights Act 1996).

Proof of stigmatization

In practice, it will be very difficult for either party to prove the precise reason(s) why a third-party employer has not offered the employee employment. Potential employers are unlikely to be willing to give evidence on this issue, because they themselves may be at risk of victimisation claims being pursued against them.

In *Chagger* the Court of Appeal commented that it would be wrong for a court or tribunal to infer that an employee will in future suffer from widespread stigma simply because the employee makes this assertion, and that tribunals should adopt a ‘sensible and robust approach’ to the question of compensation. The Court of Appeal noted that if an employee is ‘unwilling to make good his suspicions by taking proceedings against the alleged wrongdoing [prospective]

employers – notwithstanding that it may be understandable why he is reluctant to do so – he cannot expect the tribunal to put much weight on what is little more than conjecture’ (para 97). However, on the particular facts of *Chagger* there was extensive evidence of attempted mitigation by the claimant – more than 111 job applications had failed to result in a new job – and in those circumstances the employment tribunal was entitled to conclude that he was unlikely to obtain future employment in his chosen industry because of the stigma associated with his racial discrimination claim.

In *Malik* claims, as with *Chagger* claims, courts and tribunals are likely to take a pragmatic approach to the difficulties inherent in proving stigma. In *Bank of Credit and Commerce International SA v Ali (No.3)*, the Court of Appeal held that courts and tribunals are entitled to take a ‘broad view’ on a number of imponderables. Further, the Court of Appeal held that provided causation was proved, an employee’s losses could be assessed (if relevant) on a loss of a chance basis.

Again, the best available evidence of stigma is likely to be found in the whole history of an employee’s search for fresh employment. In *Ali (No.3)*, the Court of Appeal held that it is not necessary as a matter of law for an employee to call evidence from prospective employers about the effect of stigma on particular job applications as such a requirement would put a large and in many cases insuperable obstacle in the way of stigma claims. It is, however, open to an employer to subject the employee’s claims to a ‘job-specific’ exercise; in other words, undertaking a close scrutiny of each and every unsuccessful job application with the intention of proving that reasons other than stigma were the effective cause of the unsuccessful applications.

In *Ali (No.3)*, the Court of Appeal emphasised that when considering evidence specific to particular jobs, the trial judge must not lose sight of the overall picture and should reach a conclusion about loss on the basis of the evidence of the job search as a whole. For example, Robert Walker LJ observed that if the court or tribunal was satisfied that a job search, which was successful after say 12 months would, but for the job seeker’s stigma, have been successful after six months, then damages would be recoverable for the six months’ loss of employment, even if it was impossible to identify which particular job application would, but for stigma, have been successful.

Stigma damages as only head of future loss

The Court of Appeal in *Chagger* held that in exceptional cases where stigma damages are the only head of future loss – for

Employees bringing Malik claims, particularly in the tribunal, may be faced with arguments of contributory fault, on the basis that they participated in the alleged wrongdoing, or failed to challenge inappropriate practices

example, because the employee would have been lawfully dismissed in any event, had no discrimination taken place – it could be necessary for a tribunal to award compensation specifically by reference to the impact of stigma on future job prospects. This will of course be difficult due to the practical difficulties inherent in assessing causation as outlined above. The Court of Appeal held that if there is ‘sufficiently strong evidence’ of stigma difficulties, a court or tribunal could make an award of future loss of earnings for a specific period, much like in normal *Chagger* claims.

However, if the evidence is not ‘sufficiently strong’, then the Court of Appeal held that a court or tribunal is still entitled to award an employee stigma damages, provided that there is ‘some evidence’ from which a court or tribunal could infer that stigma is likely to be playing a part in the difficulties facing the employee who is seeking fresh employment. The threshold for ‘some evidence’ is unlikely to be very high. The compensation is for the stigma element of the employee’s employment difficulties, and therefore is likely to represent only a proportion of the employee’s full loss of earnings.

The Court of Appeal in *Chagger* suggested that such compensation could be in the form of a modest lump sum akin to the awards made in personal injury cases and referred to the commonly cited case of *Smith v Manchester Corporation*. However, the purpose of a *Smith v Manchester* award is to compensate an injured claimant for the potential future disadvantage that he or she may experience on the open labour market (as a result of their post-accident condition), in the event that they become unemployed at a later date.

Although the Court of Appeal in *Chagger* did not refer to ‘Blamire awards’ (from *Blamire v South Cumbria Health Authority*), in our view these may be more appropriate in circumstances where an employee has been unable to return to comparable employment as a result of stigmatization, but there exists considerable doubt over (for example) how that employee’s career would have developed but for the unlawful conduct. *Blamire* awards are appropriate in circumstances where an employee is able to prove a continuing loss of earnings, but there are too many uncertainties regarding

future losses to adopt a conventional multiplier or multiplicand approach to quantification. As with *Smith v Manchester* awards, the court may award a lump-sum payment in order to compensate the claimant for the harm done to his future career prospects, as a result of the unlawful conduct and consequent stigmatization.

Contributory fault?

Finally, employees bringing *Malik* claims, particularly in the tribunal, may be faced with arguments of contributory fault, on the basis that they participated in the alleged wrongdoing, or failed to challenge inappropriate practices. The extent to which such arguments can credibly be pursued will, of course, vary from case to case.

Conclusion

Tribunals are well accustomed to taking stigma (in the *Chagger* sense) into account when assessing compensation for future loss of earnings. However, *Malik* claims for stigma damages are rare, possibly due to a lack of awareness among the general public of the availability of such claims. If the former News of the World employees do encounter considerable difficulties on the labour market and elect to pursue such claims, it is hoped that this will result in further consideration of the different types of stigma damages claims by the appellate courts, and perhaps a more unified approach to such claims and awards.

Claire Darwin and Andrew Smith, Matrix Chambers

Cases referred to:

<i>Chagger v Abbey National plc</i> [2010] IRLR 47
<i>Malik v Bank of Credit and Commerce International SA</i> [1998] AC 20
<i>Andrews v Software 2000 Ltd</i> [2007] IRLR 568
<i>Wardle v Credit Agricole Corporate and Investment Bank</i> [2011] IRLR 604
<i>Bank of Credit and Commerce International SA v Ali (No.3)</i> [2002] IRLR 460
<i>Smith v Manchester Corporation</i> [1974] 1 KIR 1
<i>Blamire v South Cumbria Health Authority</i> [1993] PIQR Q1