
Memery Bank

Where Dismissal Is the End of a Career

Merrill April assesses two recent cases affecting the rights of employees dismissed by their employers.

Chagger v Abbey National plc

Facts

Abbey National plc (“Abbey”) made Mr Chagger compulsorily redundant as a risk analyst. The tribunal found that his dismissal had been unfair and discriminatory on grounds of race. The facts were that Abbey created a pool of 2 and applied an ostensibly objective matrix to the individuals in the pool, as a result of which the retained individual scored full marks and Mr Chagger scored 2 marks less and therefore was selected for redundancy.

Award in excess of £2million!

When the matter came before the tribunal, Mr Chagger adduced evidence that he had applied for 111 jobs in the finance industry in a period of approximately 16 months, including some of lower status and outside the market risk control area, which was his speciality. He also gave evidence that he had offered to work as a volunteer for Abbey who had refused and that he had used 26 recruitment agents to assist him in his search. He had ultimately been forced to give up and had started to retrain as a maths teacher by the time the judgment was given, following a remedies hearing.

In assessing his loss, the tribunal agreed with his submission that the evidence showed that part of the reason that he couldn’t get a job in the finance industry was because he had brought proceedings against Abbey. They therefore decided it was correct to take into account, as part of his ongoing future losses, the fact that future employers might be put off employing him, because he was stigmatised by the fact that he had brought tribunal claims. They therefore planned to compensate him to retirement age for losses incurred because he could not work in equivalent or better paid employment and made a total award of £2.8million, the majority of which was for future loss, on the basis that he would never again be able to obtain employment in the financial services industry.

The matter went before the EAT, who allowed Abbey’s appeal against the size of the award on a number of bases. As a result, the case went before the Court of Appeal, who ruled on a number of issues.



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The stigma of bringing proceedings

On the issue of stigma caused by bringing proceedings, Abbey argued that they could not be liable, since it was not their fault, but the fault of the third party employers who were causing this additional loss by refusing to employ Mr Chagger. The Court of Appeal disagreed. They said that in their view it was the original employer who remains liable for stigma loss, so in principle it is recoverable in these circumstances. Furthermore, their view was that the only evidence needed of such stigma loss is evidence of the steps taken to mitigate loss. The court said they were not concerned about this leading to unrealistically high awards. *“It is far from common experience that those taking proceedings against their employer thereafter become virtually unemployable in their chosen field.”* However, no doubt this will be a much more common experience in the financial sector following the recession. Mr Chagger’s dismissal took place 18 months before the recession really hit the City, as he was made redundant in April 2006.

The Court of Appeal made it clear that the mere assertion of stigma losses was not enough, neither was a simple suspicion that the individual was being stigmatised. However, it was not necessary for the individual employee to bring victimisation claims against the third party employers (to prove he had failed to gain employment because of the stigma of bringing proceedings against his former employer), provided the individual had *“very extensive evidence of attempted mitigation.”* The job of the tribunal is to work out how far a claimant’s difficulties are as a result of the general market for jobs and how far they can be attributed to the stigma of having brought proceedings. The Court of Appeal suggested “a modest lump sum” was appropriate where only stigma loss was identified. However, they agreed that it was undesirable and unnecessary for the tribunal to reach a concluded view on the particular contribution the stigma factor has played: *“It was sufficient for it to conclude that he was unlikely to obtain employment in the finance industry.”*

The significance of this can be seen in the fact that initially Mr Chagger had suggested in his claim that the consequence of a discriminatory dismissal was 2 years’ future earnings (the general rule of thumb for assessing future loss). He subsequently amended his claim (given that he had lost the ability to pursue his career) and claimed £4million of which £2.8million was awarded. It is also noteworthy that there were only 4 companies he was able to identify as having refused him employment, at least in part, because he had sued Abbey. In the light of the Court of Appeal’s observation that very extensive evidence of attempted mitigation is needed, note that his job search was *“the most extensive and best documented search”* which the employment tribunal had ever seen.

Possible reduction?

A second issue (which must now be decided by the original employment tribunal) was whether, absent unlawful discrimination, Mr Chagger would have been dismissed in any event and, if so, at what stage. If he would have been so dismissed, then the Court of Appeal have made it clear that, as in cases of ordinary unfair dismissal, if there were a chance that dismissal would have occurred in any event, then that must be factored in to

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reduce the future loss award. If no definite date can be identified, but the evidence is clear that he was likely to have been dismissed fairly and in a non-discriminatory way at a particular point in time, then compensation is likely to be reduced based on this principle by the proportion reflecting that chance of dismissal in any event at a future date.

Significance

Given the findings of the Court of Appeal in relation to stigma loss caused by bringing such discrimination proceedings, this case is significant. Prior to the *Abbey* case, stigma loss was understood to mean (following *Malik v BCCI* 1997) that where an employee is stigmatised because he worked for dishonest employers, as a result of which his standing as an employee in the job market is damaged, he could claim (in appropriate circumstances) losses attributed to him as a result. The *Abbey* case means that wherever an employee can show that he is unable to work again in his chosen field as a result of the fact that he has successfully sued his employer, his chances of recovery of a very large award against that employer are greatly increased. Given that many people in the City would take the view that they would be so stigmatised and unable to pursue their career if they were to bring proceedings, it is doubtful whether the Court of Appeal's comment that it is "far from common experience that those taking proceedings against their employer thereafter become virtually unemployable in their chosen field", actually reflects the reality of the situation, at least in the City of London.

Can I Have a Lawyer, Please?

R (on the application of G) v X School and others

Facts

The Claimant was a teaching assistant employed at X School (a voluntary aided school). It was alleged that he had kissed and had sexual contact with a 15 year old boy who was not a pupil but had been at the school for a short period of work experience. If true, this would have been a criminal offence and could have resulted in criminal prosecution.

By 1st February 2008 the governors knew that no criminal prosecution would be made. Following an internal investigation, a disciplinary hearing was held on 21st February 2008 following which, on 27th February, the governors decided to dismiss the Claimant for abuse of trust. In the dismissal letter the governors stated that the panel was so concerned about the individual's suitability for work with children that they were going to report his dismissal to the appropriate agencies (under 2003 regulations in force at the time), which they did. The assistant appealed against his dismissal and brought the judicial review proceedings which are the subject of this note.

Breach of human rights?

The school, in keeping with many employers, had a policy of no legal representation at disciplinary or appeal hearings. The Claimant alleged that

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this was a breach of his Article 6 rights under the European Convention of Human Rights, which include the right to a fair and public hearing in determination of civil rights, within a reasonable time, before an independent tribunal.

Court of Appeal identifies the issue

The matter came before the Court of Appeal in January 2010, when the court stated that the critical issue was to what extent had an adverse finding at a disciplinary hearing exposed him to statutory procedures which would prevent him working with children ever again (here to the effect that the governors were satisfied that the assistant's actions had "*harmed a child or placed a child at risk of harm*").

The law

Under the 2003 law, the Secretary of State, once informed of an issue, had the right to make a direction that a person was unsuitable for work with children. Once such a direction was made, it became a criminal offence to employ such a person to work with children. The direction could however be appealed to a tribunal, then known as the Care Standards Tribunal, where lawyers would normally be present. That tribunal could order the Secretary of State to revoke or vary the direction, but it could only look at the material that was originally before the Secretary of State and not at any new material.

Following a change in the law and a transitional phase, the powers of the Secretary of State were passed to an independent body known as the "*Independent Safeguarding Authority*" (the "ISA") and "*List 99*" was replaced by the "*Children's Barred List*."

High Court finding

Having considered the statutory provisions, the judge in the High Court concluded that the disciplinary process of the governors at the school and the referral by the governors to the Secretary of State under the 2003 procedure in force at the time, was a single procedure. It was "*one and the same process for the purposes of Article 6.*" Although these were not proceedings in respect of a criminal charge so as to bring into play some parts of Article 6, nevertheless the Claimant was entitled to the procedural protection of legal representation before the Disciplinary Committee and the Appeal Committee because the findings of those bodies led to the referral and a referral could lead to a "direction" which was then the end of the person's career with children, even though the direction would not be made without the Secretary of State hearing representations.

Review by the Court of Appeal – 2 important questions

The Court of Appeal was called upon to review the decision of the High Court judge and in doing so reviewed a large amount of European Court of Human Rights case law. The Court said that the questions to be determined were: (1) which civil right was the disciplinary proceedings determining? Was it a) the Claimant's contractual right (so far as it went) to

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remain employed by the particular school; or was it b) the Claimant's civil right generally to practise as a teaching assistant? It is clear law (since a 1981 case in the predecessor to the European Court of Human Rights) that the right to practise your profession is an Article 6 civil right. If the answer to question 1 was (b), question 2 was, does Article 6 therefore require the right to legal representation at the disciplinary hearing proceedings?

Question 1: Which civil right is at stake?

The court said if they found that the disciplinary proceedings were determinative of the assistant's right to practise his profession, they must find a "*close nexus*" between the disciplinary process and the Barred List procedures. The High Court judge had found a "*close nexus*" because he found that they were part of "*one and the same process*" for the purposes of Article 6.

The Court of Appeal said however, that the judge had been too formalistic and that they were going to follow the lead of the Strasbourg Court, the decisions of which they described as "*pragmatic and fact sensitive*."

In looking at the questions set out above, they reviewed the ECHR case law. They found it was not necessary for the disciplinary proceedings in the present case to finally conclude all issues relating to the assistant's right to practise his profession, but need only have a "*substantial influence or effect on the later vindication or denial of the Claimant's Convention right*." This was what they meant by a "*close nexus*"; in other words a substantial connection between one phase or aspect of the case and another.

The court found that the outcome of the disciplinary proceedings would have a substantial effect on the outcome of the Barred List procedure. Since the Claimant's right to practise his profession was directly at stake in the Barred List procedure, then that procedure may, in the language of the *Ocalan* case, be "*irretrievably prejudiced*" by the disciplinary proceedings. For this reason the judges found that the disciplinary proceedings were determinant of the Claimant's right to practise his profession, and therefore Article 6 should apply because it is a civil right that is in issue, not the narrower question of whether or not he had the right to continue working at X School.

NHS Case – Kulkarni & Other barring cases

The Court of Appeal also reviewed the decision in *Kulkarni* (2009) which concerned whether or not a doctor was entitled to legal representation in disciplinary proceedings brought by his employer. In that case, the doctor's contract entitled him to representation but the Court of Appeal referred to the judgement of Lady Justice Smith. She said that if she had needed to make a decision on the issue, she would have held that Article 6 rights were relevant where an NHS doctor faces charges of such gravity that in the event they are proved he will effectively be barred from employment in the NHS. The court also referred to the Wright case (2009) which concerned a different barred list system, the "*POVA List*," which was there

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to protect vulnerable adults. In that case Baroness Hale decided that the effect of provisional listing was to deprive a care worker of her civil right to practise her profession because a suspected care worker was provisionally placed on the list at an early stage of a lengthy administrative process and before they had an opportunity of a judicial hearing. Provisional listing without the right to make representations was a denial *“of one of the fundamental elements of the right to a fair determination of a person’s civil rights, namely the right to be heard.”*

So what? Question 2 – The right to legal representation

The Court of Appeal said that the effect of this case law was that, where an individual was subject to two or more sets of proceedings or phases of a single proceeding and a civil right or obligation enjoyed by him will be determined in one of them, he may (although won’t necessarily) by force of Article 6, enjoy appropriate procedural rights (such as the right to be represented by a lawyer) in relation to any of the other phases of the process, if the outcome of the other will have a substantial influence or effect on the determination of the civil right or obligation. They indicated that this was not a hard and fast rule, although the influence or effect must be something more than minimal. It was a principles-based decision requiring a pragmatic and fact-sensitive approach. They also considered the case of *Ocalan v Turkey* which introduced the concept of ‘irretrievable prejudice’ when considering the rights of a criminal defendant.

Substantial influence or effect

In applying a pragmatic and fact-sensitive approach, the Court of Appeal widened the situations in which the right to legal representation is likely to apply. They upheld the High Court judge’s decision but also stated that *“it is unnecessary to decide, as the judge did, whether or not the disciplinary process and the Barred List procedures formed “part of one and the same proceedings” for the purposes of Article 6. That is altogether too formalistic a process. The true question is whether there is a sufficiently “close nexus” between these processes. Such a nexus is in my judgment established if a test of substantial influence or effect as I have described it is met.”*

The Independent Safeguarding Authority

The judges concluded that the teaching assistant would be subjected to the ISA’s autonomous judgment as to whether or not he had engaged or may engage in conduct which endangers a child or is likely to endanger a child. In doing so he would be entitled to make representations to the ISA through a lawyer if desired but the ISA would review the disciplinary decision made by the School *“to establish on a balance of probability the facts.”*

There was every likelihood that the outcome of the disciplinary process, in a case where there had been a finding of abuse of trust by virtue of sexual misconduct, would have a profound influence on the decision-making procedures related to the Barred List. The governors would both be making findings of fact and judgement as to where the facts lay on the scale of

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severity in order to decide whether to refer the matter to the Secretary of State (or now the ISA). The ISA could bring an independent mind to bear on those facts and judgements but it did not operate a procedure for oral hearings with cross examination. The force of the disciplinary decision lay therefore, not only in the governors' views of the primary facts but also in their judgment as to how those facts should be viewed. The court concluded that without a new hearing and the possibility of oral evidence before the ISA *"at the very least the flavour and the emphasis of those conclusions will remain important and influential."*

Is a lawyer necessary?

The Court of Appeal found that *"within the proper confines of the evidence, the professional advocate might properly make a great deal of difference to the flavour and the emphasis; and if there were any contest as to the primary facts, to that also."* As a result of this finding they found that, since an advocate might possibly make such a difference to the *"flavour and emphasis"* to the governors, then the influence of the governors' conclusions on the ISA's decision-making might also have been different.

What's fair?

Article 6 provisions in relation to civil rights (as opposed to criminal proceedings) do not necessarily entail a right to representation but may do so. The level of procedural protection which Article 6 guarantees depends on what is at stake. It was important to give Article 6 a flexible interpretation because the distinction between civil and criminal proceedings is not so clearly made in the language of Article 6 as to be ignored for all purposes and is therefore *"something in the nature of a sliding scale, at the bottom of which are civil wrongs of a relatively trivial nature and at the top of which is serious crimes meriting substantial punishment."*

Conclusion

Therefore Article 6 requires that the Claimant should have been given the opportunity to arrange for legal representation in the disciplinary proceedings if he chose.

Accordingly it is clear that where a greater civil right is at stake in disciplinary proceedings, other than the right simply to remain in that particular job, it will be arguable that Article 6 rights (including the right to representation) are triggered. This is because of the possibility of irretrievable prejudice occurring at an early stage, even where it is not possible to say that the disciplinary proceedings will in any way determine the wider rights of that individual to operate in their chosen field or profession.

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Watch this space!

It has been reported that the Court of Appeal's decision is going to be appealed on a number of grounds. In particular, it will be argued that they misinterpreted some of the European case law on which they relied. It is also likely that the Supreme Court will be asked to rule more generally on the issues raised in this case.



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Merrill April is Head of Employment at Memery Crystal. She advises on contractual and other employment issues that arise throughout the employment relationship and on transactions, especially in relation to TUPE. She frequently works with owner managers setting up their employment and HR structures, drafting contracts and policies and working with HR and in-house lawyers in delivering the HR/employment law service to their business. She also represents clients in the High Court in relation to contractual disputes and restrictive covenant litigation.

Merrill has been ranked as a leading individual for employment law in the 2010 edition of Chambers UK. She is also listed in Who's Who in the City and is a member of the Employment Lawyers Association.

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