Mahmood v Standard Chartered Bank – A landmark decision in discrimination and victimisation but what does it mean for discrimination claims in the DIFC?

Background

The Dubai International Financial Centre (the "**DIFC**") is one of a growing number of independent, financial free zones located within Dubai in the United Arab Emirates.

Officially launched in 2004, the DIFC was conceived as part of Dubai's strategic vision to diversify its economy. Since its inception, the DIFC has become one of the major global hubs for financial services, including banking, asset management, insurance, and capital markets, attracting many of the world's leading financial services institutions.

The DIFC has its own independent financial regulator (the Dubai Financial Services Authority) and independent court system. Its judiciary is made up of a mix of Emirati judges and judges from other common law jurisdictions (including the United Kingdom and Australia).

For employment lawyers in England and Wales, the DIFC is a jurisdiction that is of particular interest because it operates under a legal system which is distinct from the rest of the UAE. It also has its own codified laws on a range of matters (including corporate, commercial, employment, trusts, to name but a few) which are influenced by or directly adapted from the laws of England and Wales. Moreover, the common law jurisprudence of England and Wales can be persuasive in the DIFC Courts. This means the DIFC legal framework is, in many places, familiar to lawyers qualified to practise in England and Wales, as well as to international businesses and investors. However, there are some key and important differences as we explain in this article.

Shiraz Mahmood v Standard Chartered Bank

The seminal and historic case of Shiraz Mahmood against Standard Chartered Bank was heard last year in the Court of First Instance in the DIFC and was the first ever case to tackle the issues of discrimination (on the ground of race) and victimisation under Part 9 of the Employment Law DIFC Law No2 of 2019 (the **"Statute"**). Practitioners based in the UK considering the discrimination aspects of the Statute would be forgiven for assuming that the main aspects of the Equality Act (the **"Act"**) were cut and pasted into the Statute. Whilst all doppelgängers bear strong resemblance to their comparator they also have subtle differences. This is also true of the Statute when compared with the Act.

The case was heard by Chief Justice Wayne Martin, an Australian Judge with a strong commercial law background. His voluminous and detailed 188 page Judgment provides invaluable guidance on the judicial approach in the DIFC to some of the key discrimination concepts, in particular, the burden of proof, the drawing of inferences and causation.

It is axiomatic that in nearly all cases of discrimination in the modern workplace it is rare to find concrete overt evidence of less favourable treatment when considering the effect of direct discrimination. In the UK employment tribunals, employment judges are skilled in (and used to) probing under the skin of the facts and evidence as presented. It is well-established law in the UK that where the facts point to less favourable treatment without good explanation, the burden of proof shifts from the Claimant to the Respondent to show that discrimination was not

at large. Case law in the UK tells us that motivation in discrimination can be conscious and subconscious with prejudices applying and informing behaviours. On causation, *Nagarajan v London Regional Transport* and *Igen v Wong* are the benchmark cases and a discriminatory reason does not need to be a sole exclusive factor in causation or even the dominant one. It could be one of a number of factors and provided its effect on the treatment was significant and more than trivial, a claimant should still succeed in their case, notwithstanding the existence of concurrent and competing factors.

Alleged discriminatory treatment of Mr Mahmood

In Mr Mahmood's case there was a litany of poor treatment that he relied on and asserted as less favourable. This included:

- Being regularly shouted at by his seniors in the Islamic banking team;
- Negative focus on Mr Mahmood's nationality and mockery of his British accent;
- Mr Mahmood suffering a downgrading on his annual performance rating;
- Attempts to manage out Mr Mahmood under a settlement agreement;
- Initiation of a disciplinary procedure against Mr Mahmood after he described himself as *"disappointed"* with senior management at the Bank;
- Being ostracised in having his desk moved off the floor in which his business line was located;
- The imposition of a written warning and a short-shrift dismissal of Mr Mahmood's appeal of this sanction;
- Removal of Mr Mahmood's variable compensation; and
- Mr Mahmood finding his way on to a redundancy list and being dismissed by the Bank.

In addition, and unusually for discrimination cases, there was contemporaneous circumstantial written evidence of discrimination in documents which referenced Mr Mahmood as a "*cop of the colonial era"* and an *"English scholar"* in anonymous complaints raised against Mr Mahmood during his employment and at the relevant time.

Discrimination cases are often won and lost on the credibility of the witnesses. In this case, Martin CJ, plainly took a dislike to Mr Mahmood's evidence preferring the evidence given by witnesses for the Bank. The case appears to have hinged on these judicial evaluations as the Judge was unprepared to draw adverse inferences that the treatment complained of was due to Mr Mahmood's race or nationality and instead put this down to Mr Mahmood's behaviour and communication style.

Key differences of law between the Act and the Statute.

- Burden of proof - In discrimination cases in the UK, the burden of proving the case starts with the Claimant but often shifts to the Respondent employer if they are unable to advance a credible alternative (non-discriminatory) reason for the treatment

complained of. In Article 61(1)(a) of the Statute the burden, stubbornly, remains with the Claimant throughout. This is somewhat sclerotic and will make it harder for claimants to make out their cases in the DIFC.

- Drawing of inferences - Inferences of discrimination in the UK employment tribunals are often drawn where there are primary findings of less favourable treatment on the facts, which are inadequately explained by the Respondent. Martin CJ held in his Judgment that "*the failure of the employer to provide an explanation may support the drawing of an inference*". Taken together with the burden of proof, the position under the Statute seems to be the same position as applicable in the UK before the law changed to permit the shifting of the burden. In seems likely, therefore, that the same alacrity to draw inferences in UK cases will not be available in the DIFC Court. This is another potential hurdle for claimants to jump.

- Causation - Martin CJ, held that the UK authorities on causation were good law and seemingly adopted these in the Judgment (see paragraphs 44-52). He did, however, noting the danger of introducing another paraphrase for the test, hold that if the prohibited ground made a "*material contribution*" to the alleged detriment then causation would be established. It therefore seems that the DIFC Court has adopted and developed a slightly evolved test for causation. Whether this makes it harder to establish causation may be a matter of semantics only, although instinctively this feels like a higher bar than an influence which is "more than trivial".

There are a host of other notable differences between discrimination law in the UK and the DIFC, including:

- A more generous time limit of 6 months from the act complained of in the DIFC (cf. 3 months in the UK);

- More restricted protected characteristics in the Statute (for example, not including sexual orientation and gender re-assignment);

- No room for associative or perceptive discrimination in the Statute; and

- A capped compensation of a year's annual wage in the DIFC (with the possibility of multiplying this to the power of 3 where there is egregious or offensive conduct[i]).

Perhaps the main difference is that, in the DIFC Court, costs will generally follow the event with the loser expected to meet the successful party's costs (or at least most of them). This risk in costs to claimants will, in many cases on its own, act as a brake on them being prepared to exercise their rights and challenge alleged discrimination.

Conclusion

The impact of the *Mahmood* judgment on the appetite of prospective claimants to launch proceedings based on allegations of discrimination will be interesting to observe. Contrary to

[i] Article 40(2) of the Law of Damages and Remedies DIFC Law No.7 of 2005

some of the commentary on the case we have heard predicting an increase in claims, we would expect the decision in *Mahmood* to have a chilling effect. Only those would-be claimants equipped with strong hearts, deep pockets and possessed of strong inculpatory evidence of discrimination are likely to be prepared to exercise the rights conferred on them by the Statute. Whether this effectively deters litigants and becomes a barrier to justice remains to be seen.

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(CRS were the lawyers representing Mr Shiraz Mahmood in the above case).