2021/37

Employer loses discrimination claim after trying to reduce gender pay gap (UK)

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Summary

An Employment Tribunal (ET) decision involving an advertising agency has highlighted the dangers for employers of taking an overly aggressive approach to reducing gender pay gaps. It also provides a reminder that all discrimination is unlawful, even where the victims are from a historically privileged group.

Facts

In 2018, the advertising agency Wunderman Thompson calculated and published its gender pay gap (as required by UK legislation on gender pay gap reporting introduced in 2017). It had a mean gender pay gap of 38.8% and a median gender pay gap of 44.7%. Both these figures were notably high, revealing that men were on average paid significantly more than women within the organisation.

Shortly after this, the agency's executive creative director gave a presentation at a conference also attended by the agency's CEO, which included a statement that the agency wanted to "obliterate" its reputation for being full of "straight white men". This was accompanied by a slide referring to "white, British, privileged, straight, men", with the text crossed out. The commentary on the slide said that "one thing we all agree on is that the reputation [of being full of white British men] has to be obliterated".

While the slide specifically referenced the reputation as being what Wunderman Thompson wanted to obliterate, not white males themselves, the content proved controversial and caused significant consternation in the agency's creative team. Complaints were raised with HR that the presentation had shown a bias against straight white men, and this was followed by 'push back' against that view. Misunderstandings apparently continued, with the employer accepting that "tensions were running high".

Shortly afterwards, Wunderman Thompson decided to make two creative directors redundant. It selected two straight white British men for redundancy, both of whom had been among those who had complained about the 'obliteration' presentation. They brought various unfair dismissal and sex discrimination claims to an ET (among other claims).

Employment Tribunal's decision

The ET accepted that the desire to present a positive vision of diversity in practice and to reduce the gender pay gap was a 'perfectly legitimate response' to high gender pay gap figures. Nonetheless, it decided the reason for the claimants' dismissals was their sex.

The ET found that the agency had viewed the senior creative team as male-dominated and believed that this was a significant reason for its gender pay gap figures being so poor, particularly in the creative department. A significant factor in the employer's mind at the time was the gender pay gap issue, and a reason for dismissing the claimants was that it would have an impact on that – in terms of both the figures and the prospect of opening senior positions that could be filled by women.

The ET considered whether hypothetical senior female comparators would have been treated in the same way and decided they would have not. While there may have been a push back against their views, the reaction would not have been so furious, nor would there have been immediate consideration of disciplinary action or a decision within two or three days to pre-select them for redundancy. On the contrary, such senior female individuals would have been regarded as exactly the type of employees who would improve the gender pay gap figures.

In support of its conclusion, the ET noted that in the days before the claimants' selection for redundancy the executive creative director had saved a senior female creative from redundancy, one reason for this being that she was a woman.

The ET upheld the claims of unfair dismissal, sex discrimination and victimisation, while rejecting those of race, age and sexual orientation discrimination, and dis-

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doi: 10.5553/EELC/187791072021006004003

missal for being a whistleblower. A comment by Wunderman Thompson on Twitter suggested it would be appealing the decision.

Commentary

A standard line in many gender pay gap reports is that 'there is no quick and easy way to reduce a gender pay gap'. This case shows why. Men cannot be sacked because they are men, and women cannot be hired because they are women (apart from in rare situations where positive action is permissible).
The case also illustrates the dangers for employers of adopting an overly aggressive attitude to addressing their pay gap. Strategies to deal with gender pay gaps should always be best thought of in terms of positive steps. How, as an employer, can we attract and retain more diverse talent? How can we address some of the recruitment gaps that have stopped diverse candidates succeeding? How can we build a diverse workforce? Had the employer in this case thought in this more positive manner, its 'obliteration' presentation may never have been created and it would not have seen a redundancy exercise as a way of engineering a better outcome.
The most effective, lawful way of reducing gender pay gaps is not by arranging for one person to succeed at the expense of another, demonising a group of people, or trying to engineer a particular demographic within the workforce. Rather, it is about taking more subtle steps to level the playing field by ensuring opportunities are genuinely available to all. With barriers removed and proper support in place, diversity and a reduced gender pay gap is much more likely to be achieved.

Comments from other jurisdictions

Croatia (Dina Vlahov Buhin, Schoenherr): From the Croatian law perspective this case, as well as the court's ruling, is rather interesting because, on one hand, gender pay gap is still rather widespread in Croatia and on the other, we found no similar cases in Croatian practice. Although there are quite a lot of discrimination cases that have been brought before the Croatian courts, the majority of them are rejected by the courts because the plaintiffs in these proceedings fail to prove the likelihood of discrimination (after which the burden of proof shifts to the defendant) or there is a lack of understanding on the side of plaintiff(s) regarding the legal conditions for the establishment of discrimination (i.e. plaintiffs tend to consider discrimination to be any behaviour they perceive as unfavourable or unfair no matter whether there is a discriminatory basis or a person in a comparable situation). The 'discrimination' cases in Croatia are generally initiated for mobbing and harassment at the workplace and alternatively for discrimination on the grounds of gender, sexual orientation or family status. To this day, according to our knowledge, no discrimination proceedings have been initiated due to the gender pay gap.
In our opinion the Croatian courts would have to reach the same conclusion as the Employment Tribunal of the UK, although, having two male plaintiffs claiming discrimination on the basis of gender would likely arouse doubt in respect of the correctness of such court's decision; this mainly because of the widespread public knowledge about the existing gender pay gap in Croatia,, and overall, more often discrimination cases of women in employment matters.
Generally, to reduce the gender pay gaps, the businesses should take account and track pays across gender, race, parental status and other demographic characteristics. Efforts to close pay gaps should at least include an annual pay audit and mechanisms to ensure company-wide transparency around negotiation, pay, reward processes and salary ranges, more flexible parental and remote working policies, etc.

Denmark (Christian K. Clasen, Norrbom Vinding): I find the issues discussed in the British case very interesting, and believe they will be the subject of much discussion in the future. More and more companies seek new ways to improve diversity in relation to gender but also ethnic background and religious belief etc. To promote diversity in itself is a legitimate aim and an obligation in some contexts. However, in practice, it may give rise to issues. Firstly, as the British case illustrates, the desire to promote accessibility for one group should not come at the expense of another group. This was also the situation in a decision by the Danish Board of Equal Treatment where a woman was denied a job at a café because the employer wanted an equal gender distribution among its employees. The staff consisted of more than twice as many women as men. The employer argued that an equal gender distribution gave better dynamics and empirically worked better when dealing with dissatisfied customers who individually responded differently to men and women.
Even though that might be the case, the Board of Equal Treatment attached importance to the fact that the applicant was rejected solely because of her gender and, thus, found that the rejection constituted direct discrimination. Accordingly, she was awarded a compensation.
Secondly, in order to analyse a potential need for creating a more diverse workforce and to document any developments in the process, the employer will need to collect information about protected criteria in the workforce.
Typically, many of these types of information will be collected during the hiring process. However, as employers with a link to Denmark will know, this may prove a challenge as the Danish Anti-Discrimination Act prohibits employers from requesting, collecting, receiving or using information about the applicants' or employees' racial origin, ethnic origin, religion, belief, political views, sexual orientation, national origin or

doi: 10.5553/EELC/187791072021006004003

social origin at any point during the employment relationship.
The purpose of the prohibition is to ensure that the employer does not in any way include these criteria in the decision-making process. Even if the employer requests the information in order to make accommodation for the applicant or employee, it will constitute a violation of the Anti-Discrimination Act and may therefore result in compensation being awarded to the applicant or employee.
This was also the result in another case before the Board of Equal Treatment. During a job interview, the employer asked the applicant if he was Muslim. The employer argued that the question arose in a conversation where he was describing the diversity of the workplace and that this was e.g. reflected by the fact that the staff canteen did not serve pork. Nonetheless, the applicant was awarded a compensation because the employer had asked questions related to the applicant's religion.
The two cases show how well-intended actions to promote diversity and equality may, especially in Denmark, lead to discriminatory decisions.

Romania (Teodora Mănăilă and Andreea Suciu, Suciu | The employment law firm): The case is indeed a particular example of discrimination in the workplace, especially as the hidden motive based on which the employee was chosen for redundancy targeted the reduction of the gender pay gap – a situation that was by itself discriminatory. In other words, it appears that the company tried to eliminate a discrimination by way of another discrimination.
Nevertheless, a more in-depth question arises, namely how it was possible for such high gender pay gap to be reached, especially considering the fact that the principle of equal pay for work of equal value was included in the European Union legislative framework (e.g. Directive 2006/54/EC) as well as the Charter of Fundamental Rights of the EU (art. 23) a long time ago.
The Romanian Labour Code prescribes as a rule the principle of equal pay for equal work or work of equal value between men and women. Moreover, in relation to the establishment and payment of salary, the Labour Code expressly states that no discrimination based on gender, age, etc., is allowed. Thus, from a Romanian labour law perspective, salary gaps should be based on objective factors which can be proven by the employer.
From a statistical point of view, Romania has among the lowest pay gaps registered at EU level. Nevertheless, there have been plenty of cases where the Romanian courts awarded employees damages for the breach of such principle.
In practice, the issue of gender pay gap had been initially eliminated by law through salary coefficients applicable at national level. Nowadays the pay gap is eliminated either by way of collective bargaining agreements or unilaterally by the company (however, the practice is mostly common for big companies, small and medium-sized enterprises don't use such mechanisms).

As the European Comission has published this year a proposal for a directive aiming to close the gender pay gap through pay transparency and enforcement mechanisms, we expect more debates and even future amendments to the labour legislation to be initiated on this topic.

Subject: Gender Discrimination, Discrimination General
Parties: Bayfield and Jenner – v – Wunderman Thompson (UK) Ltd and others
Court: Employment Tribunal
Date: 5 July 2021
Case numbers: 2200540/20V; 2200546/20V
Internet publication: https://assets.publishing.service.gov.uk/media/60f7fe27d3bf7f568ffe880b/Mr_C_Bayfield__vs_J._Walter_Thompson_Group_Limited.pdf

doi: 10.5553/EELC/187791072021006004003