Gender Based Discrimination Litigation

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This compilation of gender based-discrimination lawsuits from around the world is based on a collaborative research project between the Business & Human Rights Resource Centre, A4ID and Sidley & Austin LLP.

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Executive Summary

This research focusses on 6 high profile gender discrimination cases which have been decided within the last 5 years or less. These cases were selected for our report because they all illustrated at least one of the key criteria that we benchmarked our choices against; these were (1) novel legal findings (2) an innovative approach to litigation (3) the impact of the case in the jurisdiction and/or (4) whether the case highlights an area of contention in the current application of the law.

The cases are also geographically diverse as we wanted to try and take a "snapshot" of how discrimination cases are being litigated across different jurisdictions. As the cases show, the development of this area of the law differs greatly across the globe.

It is of course impossible for draw definitive conclusions from such a small set of cases, but perhaps there are some tentative findings to be made:

- The Juren Academy case in China illustrates how the existence of discrimination legislation in a legal system is not enough. The law has to be used and implemented to make an impact. This case was the first gender discrimination case to be brought in an employment context . Despite this, evidence that would have been more than clear enough to produce a finding of discrimination in other jurisdictions, was not enough to result in such a finding here.

- Several of the cases (LATAM, Associated Motors and Presteve) show that Plaintiffs have chosen not to use traditional employment law to bring their claims. Instead they have used a variety of different mechanisms (tortious or quasi tortious actions or human rights legislation) to pursue their claims. This suggests that employment law in these jurisdictions is not well recognized or enforced in these jurisdictions and/or that the remedies available are not sufficient.

- The intervention of third party bodies (trade unions, business groups, civil rights movements or simple protests) have made a significant difference in many of the cases.

- At least 2 of the cases suggest that being able to demonstrate the evolving relationship between good behaviour in the discrimination arena and corporate reputation. The Associated Motors case in South Africa is a clear illustration of this principle, which we are currently seeing being applied in the US and UK. We can expect this relationship to continue to increase in importance.

- Finally the Ribeiro case shows clearly the controversial impact of mandatory arbitration clauses in an employment context. These clauses have already been outlawed in other jurisdictions (the UK being one of them) and there is an ongoing debate in the US as to the impact of these clauses on access to justice for employees. An issue to be watched.

1. Canada: Presteve Foods Ltd.

Abstract
OPT and MPT were temporary foreign workers from Mexico who came to Ontario to work for Presteve's fish processing plant. The plaintiffs alleged that the defendant, Pratas, made repeated sexual advances, all unwanted and unwelcomed, throughout their time at the plant.

The Vice-Chair Mark Hart hearing the case in the Human Rights Tribunal of Ontario (the "**Tribunal**") made numerous factual findings against the personal respondent and concluded that he engaged in a persistent pattern of sexual harassment in the workplace towards OPT and that his "pattern of persistent and unwanted sexual solicitations and advances and sexual harassment towards O.P.T. created a sexually poisoned work environment for her in violation of s. 5(1) of the [Ontario Human Rights] Code."

Table of Key Facts

Case name	O.P.T. v Presteve Foods Ltd. 2015 HRTO 675 (CanLII) O.P.T. and M.P.T. (with Justicia for Migrant Workers as intervenor) v Presteve Foods Ltd. and Jose Pratas. Canada: Human Rights Tribunal of Ontario awards record general damages against food company Presteve over sexual harassment of migrant workers	
Date	May 2015	
Jurisdiction	Canada	
Plaintiffs Temporary foreign workers at the company, OPT and MPT (two sisters). Their Counsel was Niki Lundquist. Justicia for Migrant Workers featured as legal Intervenor; their Counsel was Grace Vaccarelli and Zahra Binbrek.		**Defendants** A North American fish company, Presteve Foods Ltd. Their Counsel was Gino Morga, with Dominic Dadalt as Student-at-Law. Then-owner and -principal of the company, Jose Pratas, was the other Respondent. His Counsel was Laura Joy, with Greg McGivern as Student-at-Law.
Decision	Judgement delivered on 22 May 2015 by Vice-Chair Mark Hart: The judge found that the personal respondent *did* engage in sexual harassment towards OPT and MPT, created a poisoned work environment and discriminated against them in respect of employment because of sex, in violation of both OPT and MPT's rights derived from the Human Rights Code. Further, Presteve Foods Ltd. was also found liable for these violations; the judge ordered both respondents to pay OPT $150 000 in damages, and similarly to pay MPT $50 000 in damages. This amount, serving as 'compensation for injury to dignity, feelings and self-respect', was based on two broad criteria – first, the seriousness of the respondent's conduct, and second, the effect (e.g. emotional difficulties) experienced by the discriminated applicant. The judge mentioned several past cases as supporting references; among these were *Arunachalam v. Best Buy Canada, 2010 HRTO 1880 (CanLII)*, *Seguin v. Great Blue Heron Charity Casino*, *2009 HRTO 940 (CanLII),* and *Sanford v. Koop, 2005 HRTO 53 (CanLII)*.	

	Finally, the judge ordered a change of Presteve Foods Ltd's training practices, asking that they provide temporary foreign worker hires with human rights information and training in their native language, for the next 3 years (i.e. 2015-8).
Prior procedures	The matter has a long and complex procedural history (reviewed in detail in Interim Decision, 2013 HRTO 20 (CanLII)). The original application was made in 2009 by the CAW-Canada union on behalf of 39 individuals, all temporary foreign workers employed by the respondent company. OPT and MPT joined as applicants in 2010. The other applicants had their claims settled through the 2011 criminal proceedings against the personal respondent; only OPT and MPT's sexual harassment claims remained outstanding.
Subsequent procedures	Damages were awarded (as outlined in the 'Decision' box), along with pre-judgement interest. The case was heard over multiple days across 2013 and 2014, with final submissions made in October 2014.

Background Information

OPT and MPT were two sisters from Mexico hired by Presteve Foods to work as temporary foreign workers ("**TFWs**") in a fish processing plant. Under the terms of their work visa, the complainants were prohibited from working for any company apart from Presteve. Over the course of the nine months that the sisters were employed, the owner of the company exploited their status as TFWs to engage in ongoing sexual harassment and assaults. The owner's actions ranged from dinner solicitations, to unwanted comments and touching, to forced sexual acts. Specific examples of the behaviour include:

- OPT, the eldest sister, alleged that on multiple occasions Mr. Pratas would force her to go to dinner with him under threat that he would send her back to Mexico if she refused.

- When OPT was in the car alone with Mr. Pratas, he would move his hand along both of her legs up to the top of her leg and touch her vagina over her clothes. OPT would resist, but Mr. Pratas would continue. On one occasion Mr. Pratas asked OPT to take her pants down and became angry when she refused; she complied and he touched her bare legs with his hand and touched her vagina over her underwear, smiling. On another occasion in the car Mr. Pratas pulled down the zipper of his pants and forced OPT to touch his erect penis.

- On several occasions in his office, Mr. Pratas would put his hand inside OPT's work coat and squeeze her breasts over the top of her clothes; on one occasion Mr. Pratas hugged and kissed OPT on the mouth without her consent.

- On three occasions, when Mr. Pratas was alone with OPT in the house where she stayed, Mr. Pratas forced OPT to perform fellatio, threatening to send her back to Mexico if she refused. On three separate occasions he asked her to pull her pants down and then climbed on top of her and penetrated her with his penis. In all of these instances OPT resisted and asked him to stop, but he continued.

- MPT alleged that on her first day of work, Mr. Pratas slapped her on the buttock and on two other occasions he touched her breast over her clothes while she was alone in his office. On two other occasions, while taking her to see a doctor, Mr. Pratas persistently asked MPT to have sex with him and touched her leg without her consent. MPT resisted in all of these instances, but he continued.

After a particularly violent exchange, one of the complainants pressed criminal charges and eventually filed a human rights complaint. In its findings, the Human Rights Tribunal of Ontario

noted that the owner and principal of Presteve Foods engaged in “a persistent and ongoing pattern of sexual solicitations and advances” and that he “knew or ought reasonably to have known that these sexual solicitations and advances were unwelcome, particularly in light of the fact the O.P.T. expressly resisted and rejected his advances on many occasions.”

Timeline of Key Events

Date	Key Event
August 2007	OPT and MPT arrive in Canada from Mexico as TFWs. First instance of harassment by Mr. Pratas to MPT on MPT’s first day of work
September 2007	First instance of harassment by Mr. Pratas to OPT
30 April 2009	Application filed by CAW-Canada on behalf of 39 TFWs employed by the Respondent company
18 December 2008	OPT gives statement to the Canadian police being the first time she disclosed allegations of sexual assault by Mr. Pratas
12 April 2010	OPT and MPT added as additional applicants to filing in April 2009
22 May 2015	Decision by Adjudicator Mark Hart

Impact

The damages awarded by the judge are noteworthy; up until that point, the Ontario Human Rights Tribunal typically awarded compensation in the region of $500 to $15 000. The damages awarded to OPT and MPT significantly exceeded that amount. The award was accompanied by company training recommendations.

The media coverage of this trial is broadly sympathetic to the women/plaintiffs. The Human Rights Legal Support Centre, an independent agency funded by the Government of Ontario to provide legal services to individuals who have experienced discrimination, hailed the case as a ‘landmark ruling’, insofar as it shed light on the abuse experienced by migrant workers in Canada. One of the plaintiffs encouraged other women in a similar situation to ‘speak up’. The plaintiffs’ lawyer, Niki Lundquist, was interviewed by The Star, where she got to voice her concern that while the ruling provided ‘vindication’ in this instance, it also reflected a larger ‘systemic problem’.

Presteve was brought under new ownership from 2010. The new owners publicly emphasized their detachment from the previous owners, and assured their commitment to respecting human rights and dignity in the workplace.

Strategic Elements

The case involved an intervention by ‘Justicia for Migrant Workers’, which is a Canadian non-profit group engaged in social justice struggles, such as promoting the rights of migrant farmworkers.

The intervenor called Dr Kerry Preibisch as an expert witness to depict migrant workers’ vulnerabilities and the nature of temporary foreign worker programs in Canada; Dr Preibisch’s status as expert witness was not challenged by the respondents, in light of the Tribunal’s previous use of her expertise in *Peart v. Ontario, 2014 HRTO 611 (CanLII)*. The judge found that Dr Preibisch was qualified to testify, despite her lack of direct involvement in the allegations, as set out in *R. v. Mohan, 1994 CanLII 80 (SCC), [1994] 2 SCR 9.* Her testimony bore out the ability of

Canadian employers, such as Pratas, to wield the threat of repatriation over their migrant workers. Pratas had the power to, for any or no reason, and without the chance for appeal or review, send MPT and OPT back to Mexico.

In assessing the allegations' credibility, the judge was guided by *Faryna v. Chorny, 1951 Can LII 252 (BC CA), [1952] 2 DLR 354 (BCCA),* quoting that among other factors, the 'ability to describe clearly what [was] seen and heard' helps to establish credibility. It is on this metric that the judge found the plaintiffs' evidence to be consistent, explicit, and delivered with 'commensurate' emotion – in short, credible.

The personal respondent chose not to testify.

The Tribunal commented on the inherent vulnerability of migrant workers in Canada and their susceptibility to exploitation and abuse.

Given the severity of the contraventions of the Human Rights Code, the Tribunal awarded the complainants damages for injury to dignity, feelings and self-respect in an amount totalling $200,000 which was an unprecedented sum. The value placed on such injury turned on the facts of the case itself and the sustained duration of abuse suffered by the applicants. Much of the commentary surrounding the case following the award suggests that large awards in human rights cases are a trend that will continue into the future. In light of this, employers in Canada need to be mindful of:

- human rights legislation applies to all employees working in Canada, including foreign nationals employed on temporary work permits;
- human rights tribunals are easy to access and unlike a court, there are no cost-consequences for an unsuccessful complaint;
- rising awards in relation to claims - more than ever it appears imperative to ensure that decisions to discipline and terminate do not involve any form of discrimination;
- the need to understand that the consequences of failing to provide a discrimination free workplace can be significant and the behaviour of particular problematic individuals cannot be used as a scapegoat for corporate liability.

Further Information

- https://www.canlii.org/en/on/onhrt/doc/2015/2015hrto675/2015hrto675.html
- https://www.lexology.com/library/detail.aspx?g=e08aeacf-ec36-4165-9a25-7bf4c8cdbc39
- https://www.business-humanrights.org/en/canada-human-rights-tribunal-of-ontario-awards-record-general-damages-against-food-company-presteve-over-sexual-harassment-of-migrant-workers
- https://canliiconnects.org/fr/commentaries/44642
- https://www.hrlsc.on.ca/en/human-rights-stories/Cases-decided-at-hearing
- https://www.thestar.com/news/investigations/2015/05/27/migrant-workers-awarded-record-220000-in-sex-harassment-case.html
- https://canliiconnects.org/fr/r%C3%A9sum%C3%A9/39654
- https://www.cbc.ca/news/canada/windsor/foreign-worker-in-sex-harassment-case-tells-others-to-speak-up-1.3092129

- https://www.utoronto.ca/news/migrant-farm-workers-vulnerable-sexual-violence-u-t-expert
- https://www.labourandemploymentlaw.com/2015/06/new-high-water-mark-for-human-rights-damages-opt-v-presteve-foods-ltd-2015-hrto-675/
- https://www.theglobeandmail.com/news/national/tfw-program-workers-win-large-awards-over-sexual-harassment/article24650487/
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2. China: Cao Ju v Juren Academy

Abstract
On 11 July 2012, a female job applicant filed a civil lawsuit in China against the Juren Academy, a tutoring school. Her lawsuit alleged gender discrimination by Juren Academy, which limited its recruitment to men. This case is believed to be the first employment gender discrimination lawsuit in China. During the trial, the principal of Juren admitted that the academy had made a mistake in attempting to recruit only a male candidate for the administration assistant role. The case was subsequently settled between the parties for 30,000 yuan[1], which was contributed to a "special fund to support female equal employment opportunities and anti-gender discrimination."

Table of Key Facts

Case name	Cao Ju v. Juren Academy	
Date	December 18 2013 (date of settlement)	
Jurisdiction	China	
Plaintiffs Cao Ju (pseudonym)		**Defendant** Juren Academy (tutoring school)
Facts	Female job applicant filed a civil lawsuit against the Juren Academy, a tutoring school, alleging gender discrimination, as it limited its recruitment to men.	
Type of case	Employment gender discrimination Civil, Haidian District Court	
Decision	Juren Academy agreed to settle the case by paying 30,000 yuan, and also offered Cao a formal apology.	
Prior procedures	Plaintiff submitted multiple complaints to 7 different tribunals, all of which were dismissed or the tribunal had failed to respond within the requisite time period.	

[1] **Note:** This is approximately equivalent to USD 4279.78, applying the CNY/USD exchange rate on 5 November 2019.

	The Haidian District court had initially affirmed the dismissal as well, but upon receipt of the public petitions, it decided to accept and hear the civil case.
Subsequent procedures	None

Background Information

The female applicant, more widely known by her pseudonym Cao Ju, is the applicant in what is believed to be the first employment gender discrimination lawsuit in China.

Cao was then a Beijing college graduate who submitted an application online for an administrative assistant position in Juren Academy, a private tutoring school, on 11 June 2012. On 25 June 2012, having not received a reply to her application, she revisited the recruitment website online only to discover then that the job description had been updated to include a "men only" requirement.

Cao called Juren, who confirmed over the phone that the position was reserved for male applicants only[2], and it would not consider Cao as a candidate despite her meeting all other criteria for the job description.[3]

On 11 July 2012, Cao filed a civil lawsuit at the Haidian District Court against Juren with the help of her lawyer and Yirenping, an anti-discrimination organization. Cao alleged gender discrimination and infringement of her equal employment right, and sought 50,000 yuan in compensation as well as a formal apology.[4] On the same day, Cao also submitted a complaint against Juren to the Haidian District Branch of the Beijing Municipal Human Resources and Society Bureau.[5] However, the Haidian District Court did not respond to Cao's civil suit within the prescribed time limit of 7 days under Article 123 of the Civil Procedure Law of the People's Republic of China.[6]

On 25 July 2012, several students staged a demonstration outside of Juren Academy to protest against gender discrimination.[7] Between August and September 2012, Cao then also attempted to submit complaint letters to five other bodies and authorities regarding the Haidian District Court's failure to respond (including the president of the Haidian District Court, the Supervision Section of the Haidian District Court, the Beijing No. 1 Intermediate People's Court, the Beijing Municipal People's Procuratorate Branch No. 1 and the Labour Inspectorate).[8] She ultimately only received a response from the Labour Inspectorate, which subsequently dismissed her case on 30 November 2012, citing that Juren had rectified the recruitment notice by then and hence there was no longer a discrimination case to answer.[9]

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[2] Plaintiff obtains 30,000 yuan in China's first gender discrimination lawsuit, China Labour Bulletin https://clb.org.hk/en/content/plaintiff-obtains-30000-yuan-china%C3%A2%E2%82%AC%E2%84%A2s-first-gender-discrimination-lawsuit

[3] 就业性别歧视第一案和解结, 中国妇女报http://www.women.org.cn/art/2013/12/23/art_9_135113.html

4 Ibid, http://www.women.org.cn/art/2013/12/23/art_9_135113.html; and首例就业机会性别歧视按引发的反思, 刘明辉

[5] 首例就业机会性别歧视按引发的反思, 刘明辉

[6] Plaintiff obtains 30,000 yuan in China's first gender discrimination lawsuit, China Labour Bulletin https://clb.org.hk/en/content/plaintiff-obtains-30000-yuan-china%C3%A2%E2%82%AC%E2%84%A2s-first-gender-discrimination-lawsuit

[7] Ibid.

[8] 女子应聘遭性别歧视状告企业 历时1年终获立案, 法治周末http://news.sina.com.cn/s/2013-09-18/004128241690.shtml

[9] Plaintiff obtains 30,000 yuan in China's first gender discrimination lawsuit, China Labour Bulletin https://clb.org.hk/en/content/plaintiff-obtains-30000-yuan-china%C3%A2%E2%82%AC%E2%84%A2s-first-gender-discrimination-lawsuit; and 就业性别歧视第一案和解结, 中国妇女报 http://www.women.org.cn/art/2013/12/23/art_9_135113.html

Thereon, Cao applied for an administrative review of the Labour Inspectorate's decision with the Beijing Human Resources and Social Security Bureau on 29 January 2013, but the Beijing Human Resources and Social Security Bureau upheld the Labour Inspectorate's decision and this administrative review application was too dismissed on 28 March 2013.[10] Unsatisfied with the outcome of the administrative review, Cao filed another administrative lawsuit at the Haidian District Court on 12 April 2013, alleging that the Beijing Human Resources and Social Security Bureau had failed to fulfil its statutory duty.

In support of Cao's case, more than 110 female university students from across China signed a letter to the Committee of Internal Affairs, the Judicial Committee of the Beijing People's Congress and the Haidian District People's Congress on 26 May 2013, petitioning for the authorities to ensure that Cao's lawsuit would be accepted by the Haidian District Court.[11]

On 10 September 2013, her case was finally accepted by the Haidian District Court after multiple complaints and administrative reviews.[12] For Cao, what should have been a 7 day process ended up turning into a 14 months wait.

The hearing took place on 18 December 2013. At trial, the principal of Juren, Yin Xiong, admitted that they had made a mistake when it attempted to only recruit male candidates for the administrative assistant position, but denied that the approach was driven by discriminatory intent. Yin Xiong explained that 2102 out of 2700 Juren Academy's employees were females (approximately 78%), and that Juren was therefore in urgent need of male employees to carry out the more heavy works and physically intensive tasks at the office.
In the end, Juren settled with Cao for 30,000 yuan as a "special fund to support female equal employment opportunities and anti-gender discrimination", and issued Cao a formal apology.[13]

Timeline of Key Events

Date	Key Event
11 June 2012	Cao Ju applied for an administrative assistant position at Juren Academy via its online recruitment portal.
25 June 2012	Cao Ju re-visited the online recruitment portal after not receiving a response to her application, where she discovered that the job advertisement had been revised to include a "men only" requirement. Juren told Cao Ju that it would only consider male candidates.
11 July 2012	Cao Ju filed a civil lawsuit in the Haidian District Court in Beijing China against the Juren Academy with the help of anti-discrimination organization Yirenping, alleging gender discrimination and seeking a compensation of 50,000 yuan. The Haidian District Court did not respond to the filing of the civil suit within the prescribed time limit of 7 days. Cao Ju also submitted a complaint to the Haidian district branch of the Beijing Human Resources and Social Security Bureau.
25 July 2012	Several students staged a demonstration outside the Juren Academy to protest against the alleged gender discrimination.

[10] Ibid.

[11] 女子应聘遭性别歧视状告企业 历时1年终获立案, 法治周末http://news.sina.com.cn/s/2013-09-18/004128241690.shtml

[12] Ibid.

[13]2013年十大劳动维权案例点评, 中工网《劳动午报》
http://right.workercn.cn/147/201401/02/140102073756062_2.shtml

Between August and September 2012	Cao Ju subsequently submitted complaints regarding the Haidian District Court's failure to respond with five other bodies.
30 November 2012	The Labour Inspectorate dismissed the case. Since the academy had subsequently changed the recruitment notice after Cao Ju's complaint, there was no longer any discrimination case to answer.
29 January 2013	Cao Ju filed an application for administrative review of the Labour Inspectorate's decision with the Beijing Human Resources and Social Security Bureau.
28 March 2013	The Beijing Human Resources and Security Bureau upheld the Labour Inspectorate's decision.
12 April 2013	Cao Ju launched an administrative lawsuit at the Haidian District Court, alleging that the Beijing Human Resources and Social Security Bureau had failed to fulfill its statutory duty.
May 2013	The Haidian District Court accepted the administrative lawsuit, but dismissed the lawsuit two months later in July.
26 May 2013	More than 110 female university students from across China signed a letter to the Committee for Internal Affairs, the Judicial Committee of the Beijing People's Congress and the Haidian District People's Congress demanding that they ensure that the courts in Beijing performed their duty and accepted Cao's case.
10 September 2013	The Haidian District Court accepted Cao Ju's civil case against Juren Academy.
18 December 2013	On the day of the court hearing, Juren Academy settled the case with Cao Ju for a payment of 30,000 yuan and had agreed to issue a formal apology to Cao Ju.

Impact

At the time of this case, Cao's lawsuit was the first gender discrimination related employment lawsuit, and was considered a major victory and milestone for women's employment and anti-discrimination rights in China. Cao's case proved it possible for women facing acts of gender discrimination to initiate legal proceedings against companies or prospective employers, raising social awareness about the issues of gender discrimination and paving the way for other gender discrimination lawsuits based on similar facts across different provinces.[14]

Yin, the Principal of Juren, commented that this case "has drawn public attention to the need to improve human resources". [15] In actuality, although Juren's case is a cautionary tale to hiring companies, it might not be a sufficient deterrent to bring about genuine shifts in corporation values or practical anti-discrimination measures in corporations. Companies in China may seek to instead circumvent possible gender discrimination proceedings by not explicitly specifying gender requirements in recruitment notices, utilising guises under the recruitment process such as resume

[14] "Only Men Need Apply" Gender Discrimination in Job Advertisements in China, Human Rights Watch, https://www.hrw.org/sites/default/files/report_pdf/china0418_web.pdf
[15] China's First Workplace Gender Discrimination Lawsuit Closes, Yulanda Wang, All-China Women's Federation, http://www.womenofchina.cn/html/womenofchina/report/168270-1.htm

screening, written assessments, interviews, where female applicants are rejected under the pretense of unsuitability, poor written test results, or other reasons.[16]

In terms of judicial impact, Cao's case might not hold significant value for future discrimination cases as China is not a precedent-based legal system. This case was also an out-of-court settlement rather than a court decision, although it might act as a reference point for future cases. The critical question of whether Juren was liable for gender discrimination against Cao under applicable Chinese anti-discrimination laws remained unanswered. It is worth noting that the 30,000 yuan paid by Juren to Cao was not compensation awarded to Cao personally, but was instead supposed to be a payment to "fund for female equal employment opportunities administered by Cao".[17] The penalties and redress available to victims of gender discrimination under the law thus remain unclear.The difficulties Cao faced before her lawsuit also highlight the ambiguities of gender-related employment discrimination laws.

Nevertheless, despite the minimal judicial impact of the case, the social impact of the case was important. The prevalence and success of the lobbying efforts of civil society in "ensuring that the court did eventually accept the case" [18] reflects a changing social climate where citizens are increasingly willing to publicly air their opinions about gender equality. Geoff Crothall from China Labour Bulletin, an NGO that promotes the rights of workers in China, described the case as an "important breakthrough", and he expected "more women to actively challenge discrimination moving forward".[19] Following her experience, Cao, together with three other female employee plaintiffs who had filed their own ground-breaking anti-discrimination lawsuits in China, wrote an open letter to the State Council recommending that China enact a dedicated employment discrimination law, in response to the State Council's 26 November 2013 open call for legislative initiatives.[20] This would have helped raise the profile of these gender discrimination lawsuits in the public eye.

Strategic Elements

Use of Civil Society Organizations and community engagements

The petitioning efforts of civil society played a crucial role in the success of this case. More than 100 female university students from across China signed a letter to the Judicial Committee of the Beijing People's Congress and Haidian District People's Congress to ensure that Cao's lawsuit was accepted by the Haidian District Court. Students also staged a demonstration outside the Juren Academy to protest against its alleged discrimination while the trial was ongoing. The involvement of lawyers and the grassroots anti-discrimination organization, Yirenping, were also essential to Cao in navigating through China's complex legal landscape and administrative procedures.

Multiple avenues of redress

Another reason for Cao's success was her persistence in pursuing multiple avenues of redress. This was an approach available to her as the slightly fragmented nature of the Chinese legal system also meant that there are multiple avenues of redress. For example, between August and September 2012, Cao submitted complaint letters to five different authorities regarding the Haidian District Court's initial failure to respond to her complaint within the requisite time period (the five

[16] 就业性别歧视第一案：个案胜利捅不破女性就业天花板, 中国青年报
https://www.ncss.cn/zx/zcfg/qg/281166.shtml

[17] "Only Men Need Apply" Gender Discrimination in Job Advertisements in China, Human Rights Watch, https://www.hrw.org/sites/default/files/report_pdf/china0418_web.pdf; and China's First Workplace Gender Discrimination Lawsuit Closes, Yulanda Wang, All-China Women's Federation, http://www.womenofchina.cn/html/womenofchina/report/168270-1.htm

[18] Plaintiff obtains 30,000 yuan in China's first gender discrimination lawsuit, China Labour Bulletin https://clb.org.hk/en/content/plaintiff-obtains-30000-yuan-china%C3%A2%E2%82%AC%E2%84%A2s-first-gender-discrimination-lawsuit

[19] Women Still Face Great Wall of Discrimination in China, CNN (March 8, 2014) https://www.cnn.com/2014/03/08/world/asia/china-gender-discrimination/index.html

[20] The urgent need for a new Employment Discrimination Law in China, China Labour Bulletin, https://clb.org.hk/en/content/urgent-need-new-employment-discrimination-law-china

authorities being the president of the Haidian District Court, the Supervision Section of the Haidian District Court, the Beijing No. 1 Intermediate People's Court, the Beijing Municipal People's Procuratorate Branch No. 1 and the Labour Inspectorate).

Further Information

- "China: woman settles in first gender discrimination lawsuit" the Guardian, 28 Jan 2014
- "Plaintiff obtains 30,000 yuan in China's first gender discrimination lawsuit", China Labour Bulletin, 9 January 2014
- https://clb.org.hk/en/content/urgent-need-new-employment-discrimination-law-china
- "Only Men Need Apply" Gender Discrimination in Job Advertisements in China, Human Rights Watch, https://www.hrw.org/sites/default/files/report_pdf/china0418_web.pdf;
- China's First Workplace Gender Discrimination Lawsuit Closes, Yulanda Wang, All-China Women's Federation, http://www.womenofchina.cn/html/womenofchina/report/168270-1.htm

3. Columbia: LATAM Airlines

Abstract

The case concerns gender discrimination in the workplace and the unfair dismissal of a female copilot. This was a civil case which was ultimately heard by the Colombian Constitutional Court.

Ana Margarita Mc Brown Vázquez ("Mc Brown") started working for LATAM Airlines Colombia S.A. ("LATAM") in 2007 through an open-ended contract. After nine years of working for the airline, her contract of employment was unilaterally terminated in 2016. She brought a Fundamental Rights Claim ("*acción de tutela*") (the "Claim") against LATAM alleging, among other things, that she had been a victim of workplace harassment and gender discrimination. After being struck out at first and second instances in the courts of Bogota, the claim eventually reached the Constitutional Court ("*La Corte Constitucional de Colombia*") (the "Court") after the intervention of the Ombudsman's Office of Colombia ("*La Defensoría del Pueblo*"), who requested the Court's protection of Mc Brown's fundamental rights due to the fact it concerned a matter of constitutional relevance with regards to the recognition and guaranteed protection of women's rights. After legal proceedings of more than a year, the Court determined that although there had been no discrimination, the termination of her employment had been carried out without due process and LATAM was therefore ordered to reintegrate her into the same role.

Table of Key Facts

Case name	Corte Constitucional ordena el reintegro de mujer copiloto de LATAM Airlines despedida (Sentencia T-293/17)
Date	8 May 2017
Jurisdiction	Colombia
Plaintiffs	**Defendants** LATAM Airlines Colombia S.A.

Ana Margarita Mc Brown Vázquez, former employee	
Decision	After an entire year of legal proceedings, the Court declared the unilateral termination of the contract by LATAM ineffective. Although the Court decided that the termination of Mc Brown's employment contract had not been based on discrimination, the Court nevertheless questioned the fact that the airline had not respected the due process right of the claimant. LATAM was ordered to reintegrate the claimant to the same position she had been in before being dismissed within 48 hours. The Court also ordered LATAM to begin an awareness raising program for its employees regarding the topics of equality and gender discrimination in the world of commercial aviation.
Prior procedures	The claimant's claim was rejected at first and second instance by courts in Bogota.
Subsequent procedures	As regards the plaintiff's economic claims for lost salaries, social benefits and para-fiscal contributions, the Court referred the matter to the Ordinary Labor Court.

Background Information

Mc Brown worked for LATAM from 2007 until the airline unilaterally terminated her contract in 2016. Mc Brown based her Claim on the fact that the termination of her employment contract infringed her fundamental right to life, health, and equality, to work in dignified and fair conditions, to due process, to the liberty of unionization, to collective negotiation and to the special protection of women. She alleged, among other things, that her termination was based on her affiliation with the union of the Colombian Association of Civil Aviators, that it disregarded the collective agreement that benefitted her, ignored her mental health at the moment of notifying her of the termination of her contract and was carried out as a gender discrimination act.

LATAM, however, denied that the termination had been based on gender discrimination and alleged that there had been a just cause for termination, namely the objectively poor results obtained by Mc Brown in her promotion course. This Court was receptive to this view, deciding that the termination was not based on gender discrimination. However, they found that LATAM had not observed her right to due process in carrying out the termination of her employment and therefore ordered the airline to reintegrate her into the same role as the one she occupied when she was dismissed.

Timeline of Key Events

Date	Key Event
November 2007	Mc Brown joins LATAM under an indefinite employment contract.
November 2015	Mc Brown is notified by LATAM about the possibility of starting a promotion process to become commander of the A320 fleet, a candidature that Vázquez accepted. In her opinion, this causes tension with male superiors due to her status as a woman in a male working environment.

December 2015	Mc Brown begins a ground course and a flight simulator course, with satisfactory results.
February 2016	While finishing phase 3 of the promotion process, captain Álvaro Vélez recommends that she "continues with phase 3 a bit more" to "consolidate" her knowledge. In accordance with the aforementioned, she is told to sign a "substandard performance" form. In spite of the restriction this will entail, Vázquez continues being programmed as copilot for A320 fleet flights. In this respect, captain Diego Ospina informs her that, regardless of this restriction, she can consolidate her knowledge by carrying out A320 fleet flights during this instruction period and at the end there will be an evaluation of phase 3.
March 2016	Mc Brown takes on the role of copilot B767, with a minimum monthly salary of $7,429,000 COP; a monthly average of $727,761 COP for travel expenses and overtime; a food allowance of $579,500 COP; and a seniority bonus of $1,880,000 COP.
22 March 2016	Mc Brown becomes affiliated with the Colombian Association of Civil Aviators.
23 March 2016	Mc Brown's affiliation with the union is notified to the company and sometime later the company unilaterally terminated her contract.
11 April 2016	The Claim is submitted.
22 April 2016	The Claim is struck out at first instance in Bogota.
2 June 2016	The Claim is struck out at second instance in Bogota.
8 May 2017	The Claim is heard at the Court in Bogota and a judgement in favor of Mc Brown is made.

Impact

The Court stated that, although the objective of this Claim was not to evaluate women's access route to commercial aviation (which should be based on their capabilities and not their gender), the statistics cited during the Claim drew its attention to the necessity of adopting measures to guarantee the employment stability of women as best as possible. One such measure is the observance of compliance with the right to due process, a right which, if infringed, may give rise to the type of claim brought by Mc Brown. This is found in Article 42 of Decree 2591 of 1991[21]. Related claims are normally brought against institutions or the authorities. However, in exceptional circumstances these can be brought against a private entity by an individual within an employment context. This applies where there is an individual in a state of subordination and powerlessness with respect to a defendant employer. Here, Mc Brown brought this type of claim against LATAM airlines, which provides guidance for future cases brought before the Court.

Indeed, this Case presents a way of achieving "access to protection of fundamental rights such as those of due process and equality" in an employment case, which remains a challenge for individuals bringing this type of claim through the normal court proceedings. Moreover, it has highlighted not only the need for employers to ensure there are mechanisms in place for the

[21] Artículo 42. Procedencia. La acción de tutela procederá contra acciones u omisiones de particulares http://www.corteconstitucional.gov.co/lacorte/DECRETO%202591.php

adoption of measures to eliminate the historical barriers of access for women to traditionally male spheres of work, but also the responsibility of the state when intervening (in this case the Constitutional judge) to guarantee as best as possible that similar claimants can remain within the roles occupied at the moment of termination.

The Court questioned the restricted access women have in Colombia to reach copilot and/or pilot roles within the industry, as this is still a male dominated market. Within the judgement, the Court pointed out that this was due to the perpetuity of stereotypes in the social spectrum, through which erroneous ideas are sustained as to the supposed incapacity of women to develop technical tasks and those which involve particular skill and dexterity, such as piloting a plane[22]. The decision in this case drew attention to the unequal treatment faced by women seeking to work as pilots. In its judgement, the Court ordered LATAM to begin an awareness-raising process among its employees regarding topics of gender equality and gender discrimination in the world of commercial aviation. This would be based on a plan that should contemplate, at the very least, the awareness of all the employees of the company regarding the judgement passed in this action and to remind them that the use of sexist language based on gender stereotypes is prohibited by the Constitution. The substantial media coverage of the decision by various national newspapers brought to light insufficient training and awareness in traditionally male sectors and had the effect of increasing the public's awareness of the problem.

Strategic Elements

This Claim, which had been rejected at first and second instance by the courts of Bogota, finally arrived at the Court due to the intervention of the Ombudsman's Office of Colombia. This was due to its constitutional significance with regard to the protection of women's rights.

The plaintiff argued that:

- Her dismissal was based on her affiliation to the Colombian Association of Civil Aviators, and failed to take into account the fact that this affiliation allowed her to benefit from the arbitration award in force between the Colombian Association of Civil Aviators and LATAM;
- She received the notification of her dismissal at a time when she was in poor health; and
- She was discriminated against at work by her colleagues who, she alleged, were bothered by the prospect of a woman being promoted in a work environment of men and purposely made sure she failed the tests she needed to pass in order to be promoted.

The defendants, on the other hand, argued that:

- There was a just cause for the unilateral termination of the contract;
- There had been no discrimination at all; the plaintiff was not dismissed because she was a woman but because she performed unsatisfactorily in the tests she took, and this was a just cause of dismissal.
- *But crucially those tests were tests for promotion, and instead of merely not promoting her, the plaintiffs fired her instead.*
- They were unaware of the plaintiff's membership of the Colombian Association of Civil Aviators; and
- The plaintiff was not in a state of manifest weakness at the time of dismissal

This type of Claim in Colombia is similar to a civil human rights claim in other jurisdictions. In Article 42 of Decree 2591 of 1991 the "*acción de tutela*" can be raised, exceptionally, against actions or omissions of private parties when: "the application is to protect someone who is in a position of subordination or powerlessness with respect to the private party against whom they started the claim" [23]. Therefore, there is procedural legitimacy in bringing this type of claim against private

[22] Constitutional Court: "Unequal treatment of women looking to work as pilots" https://canal1.com.co/noticias/nacional/existe-trato-desigual-para-mujeres-que-buscan-trabajar-en-aerolineas-como-pilotos-corte-constitucional/

[23] Artículo 42. Procedencia. La acción de tutela procederá contra acciones u omisiones de particulares http://www.corteconstitucional.gov.co/lacorte/DECRETO%202591.php

parties such as an employer due to the implicit subordination found in every employment relationship. This claim may be brought against the employer in order to protect the employee's right to equality. Interestingly, the Court considered that this type of claim is the appropriate claim in gender discrimination cases such as this one as it offers a rapid and timely intervention in preventing the infringement of the right to equality of the claimant, for whom the normal judicial mechanisms are inefficient. In the case of the right to equality, the necessity of urgent protection is especially obvious, which is why the Court stated in its judgement that it is only through this type of claim that the claimant would be able to adequately re-establish her rights, should her right to equality have been infringed. LATAM's argument that the Claim should be resolved within an employment law jurisdiction due to the fact that the unilateral termination of the contract was in compliance with the just cause established in numeral 6 of section A of Article 62 of the Employment Code[24] therefore failed.

However, the Constitutional Court considered that the arguments relating to the plaintiff's membership of the Colombian Association of Civil Aviators were not appropriate for a Fundamental Right Claim *("acción de tutela"*) and that the usual employment tribunal would be the correct place to resolve this.

A further guidance point for future cases is that the Court has established that it is possible to reverse the burden of proof with regard to claims concerning the protection of rights where there is a weaker and more powerful party. The principle that applies here is that the privileged and strong party to the relationship should assume the burden of proof due to their easy access to the evidential elements (where discrimination is concerned, it is likely that the motivating factor for the more powerful party needs to be established, something the weaker party is likely to be unable to prove). The defendant is in a privileged position with regard to the victim, and is therefore in a better place to prove the correctness of its actions in order to invalidate the accusation.

Crucially, the Court held that the right to equality had not been infringed; the unilateral termination of the contract was not found to be a gender discriminatory act. However, Mc Brown's fundamental right to due process, which constitutional jurisprudence has broadened to include relationships between private entities, was deemed infringed. The guarantee of due process is found in employer-employee relationships due to the fact that the former has the possibility of applying sanctions and punishments and is therefore obliged to observe the rules of due process.

To conclude, when the employer intends to unilaterally terminate an employment contract for a just cause, they must guarantee the employee's right to defence. This case has extended this due process guarantee to an employment context, which means that an employer intending to dismiss an employee on a just cause basis should guarantee to the employee that: (i) the misconduct is identified; (ii) an explanation is given regarding the concrete reasons for the unilateral termination of the employment; and (iii) the chance to talk and to be heard will be given. In future gender discrimination cases within an employment context, a claim before the Court is preferred to bringing a case through the ordinary labor tribunals.

Further Information

- Constitutional Court: "Unequal treatment of women looking to work as pilots" https://canal1.com.co/noticias/nacional/existe-trato-desigual-para-mujeres-que-buscan-trabajar-en-aerolineas-como-pilotos-corte-constitucional/
- In Commercial Aviation a Small Percentage of Women are Pilots http://www.hoydiariodelmagdalena.com.co/archivos/28243
- Constitutional Court Orders Latam to Reintegrate Unionised Female Pilot

[24] Artículo 62. Terminacion del contrato por justa causa: https://leyes.co/codigo_sustantivo_del_trabajo/62.htmhttps://leyes.co/codigo_sustantivo_del_trabajo/62.htm

https://www.eltiempo.com/justicia/cortes/ordenan-reintegrar-a-mujer-piloto-de-acdac-a-latam-142148

- http://www.corteconstitucional.gov.co/relatoria/2017/t-293-17.htm
- https://www.eltiempo.com/justicia/cortes/reintegran-a-mujer-piloto-a-latam-por-orden-de-la-corte-constitucional-142070
- https://www.diarioconstitucional.cl/noticias/actualidad-internacional/2017/10/20/cc-de-colombia-acogio-tutela-y-ordena-a-latam-airlines-reintegrar-a-mujer-copilota-despedida-y-discriminada-en-razon-de-su-genero/
- https://www.pulzo.com/nacion/reintegro-piloto-latam-situacion-laboral-mujeres-aviacion-colombia-PP369999
- http://www.defensoria.gov.co/es/nube/noticias/6719/Con-intervenci%C3%B3n-de-la-Defensor%C3%ADa-Corte-Constitucional-protege-derecho-al-debido-proceso-de-trabajadora-de-aerol%C3%ADnea-Defensor%C3%ADa-del-Pueblo-LATAM-Airlines-tutela-acoso-laboral-Corte-Constitucional.htm

4. South Africa: Associated Motor Holdings (PTY) Ltd.

Abstract

The Claimant brought a case against: (1) her former employer (Associated Motor Holdings); (2) the parent company of her former employer (Imperial); and (3) the CEO of Imperial (Mark Lamberti). Against (1) – (3), she alleged that she suffered economic loss as a result of the wrongful acts of her employer. These purportedly contravened s.3 of the Protected Disclosures Act, 26 of 2000 (the "**PDA**") by subjecting her to "*occupational detriments*", a result of her having made "*protected disclosures*", as defined by the Act ("**Claim A**"). Against (2) and (3), she additionally alleged that her reputation and dignity were damaged by inappropriate remarks of racist and sexist nature ("**Claim B**").

The judge held that:

Claim A: Associated Motor Holdings is liable for damages for the economic loss suffered by the Claimant after she was unlawfully suspended following her complaints about gender-based and race-based discrimination.

Claim B: Imperial and Lamberti are jointly and severally liable for damages resulting from the impairment of the Claimant's dignity following remarks of a sexist and racist nature made by Lamberti.

Table 1: Key Facts

Case name	Adila Chowan v Associated Motor Holdings (PTY) Ltd, Imperial Holdings Limited and Mark Lamberti (22142/16) [2018] ZAGPJHC 40
Date	23 March 2018

Jurisdiction	South Africa	
Plaintiffs Adila Chowan, former employee of the first Defendant.		**Defendants** (1) Associated Motor Holdings (PTY Ltd); (2) Imperial Holdings Limited; (3) Mark Lamberti
Decision	As to Claim A, the judge held that the suspension, disciplinary proceeding and dismissal of Chowan fell within the ambit of "*occupational detriments*" under the PDA while the Claimant's lodged complaints were also "*protected disclosures*" for the purposes of the PDA. Thus, (1) was found to liable to Chowan for damages, for an amount to be determined. However, Defendants (2) and (3) were not held liable for these damages, as they were not the Claimant's employer (a prerequisite for such liability under the PDA). As to Claim B, the judge found that (2) and (3) did not defame Chowan, because her reputation was not damaged. However, there was a finding of an infringement of her dignity. Thus, Defendants (2) and (3) were found jointly and severally liable for damages resulting from the impairment of the Claimant's dignity. This was despite the fact that the Court considered that it was the narrower Common Law version (as opposed to the Constitutional Law version) of dignity which had been used by Chowan. The insulting language used by the Defendants under this claim and its effect on Chowan satisfied the requirements for impairment of dignity.	
Prior procedures	N/A	
Subsequent procedures	The Claimant in this case did not bring her claim under specialist South African Employment Law legislation, but under the common law of delictual (tortious) liability. It is notable then that future Claimants can pursue their claims in a similar manner as well, unconstrained by legislative provisions. No appeal is pending and damages are yet to be quantified.	

Background Information

At the beginning of 2012, the Claimant was recruited for the position of group financial manager at Associated Motor Holdings (PTY Ltd) (**AMH**) by Mr Adler, the then CFO of AMH. The Claimant is academically qualified, has extensive experience as a chartered accountant in the corporate world, has held the position of CFO in the past and has also acted as CEO on one occasion. Before accepting the position, the Claimant received assurances from Mr Adler that there would be an opportunity for career progression within the Imperial Group. It was on the strength of these assurances that the Claimant accepted the appointment.

Mr Adler was subsequently replaced as CFO by Mr Hibbit. The Claimant was advised that Mr Hibbit would only be in the post for two years and that "*he was also there to groom [her] into the CFO*

position". Mr Hibbit did not complete a full two years as CFO at AMH, and the Claimant became aware that the position of CFO had been advertised and that a recruitment firm had been appointed by Lamberti to appoint a "*top flight CFO*". The Claimant was interviewed by the recruitment firm, and a meeting was later held between the Claimant and Lamberti, during which Lamberti interviewed her for the position of CFO. At the end of the meeting Lamberti informed the Claimant that she would not be appointed as CFO. Lamberti subsequently sent the Claimant an email in which he confirmed that they would appoint a CFO whom she could learn from.

Mr Janse van Rensburg was appointed as CFO of AMH, with effect from January 2015. After the decision to appoint the new CFO was made, the Claimant resigned. She withdrew her resignation, however, after a meeting was held between her and members of the Imperial Group management, including Lamberti, on 20 June 2014, during which the Claimant was assured that she would be appointed to the position of CFO within the Imperial Group within a year. Janse van Rensburg had no experience of the motor industry and the Claimant was required to assist him in the fulfilment of his duties. The Claimant did not consider Janse van Rensburg to be at the level of a "*top flight CFO*", as Mr Lamberti has promised.

During a conversation with Janse van Rensburg, the Claimant complained to him about the colour of the company vehicle which had been allocated to her. In response to this, Janse van Rensburg stated "*the colour of your car suits your skin*". When the Claimant objected, Janse van Rensburg replied that he had a light or white car that suited his skin colour.

In March 2015, Janse van Rensburg told the Claimant, on instruction from Lamberti, that she would never be a CFO within the Imperial Group. A meeting was held between the Claimant, Lamberti, Janse van Rensburg, the CEO of AMH and the CFO of Imperial. During this meeting, Lamberti referred to the Claimant as *"a female, employment equity, technically competent, they would like to keep her but is she wants to go she must go, others have left this management and done better outside the company, and that she required three to four years to develop her leadership skills"* (referred to by the Court as "**the utterance**").

The Claimant lodged a grievance against Lamberti and subsequently lodged a further grievance against Janse van Rensburg. A firm of attorneys was appointed to conduct an investigation into the grievance and the Claimant was summarily suspended, in order to allow the investigator to have "*a clear field in which to operate".* The report submitted by the independent investigator neither made findings nor recommendations, and Imperial's board of non-executive directors resolved that the Claimant's allegations were "*without foundation and substance*". The Claimant was informed that her actions constituted misconduct, on the grounds that she had abused the grievance procedure. A disciplinary hearing was held and the Claimant was subsequently summarily dismissed, on the recommendation of the independent chairperson of the hearing. It is patent on the facts that both Lamberti and Janse van Rensburg were involved in the process that led to the Claimant being suspended, and ultimately dismissed.

The Claimant brought her first claim against AMH, Imperial and Lamberti for the economic loss she suffered as a result of the unlawful acts of her employer. She claimed these acts contravened s.3 of the Protected Disclosures Act, 26 of 2000 (the "**PDA**") by subjecting her to "*occupational detriments*"as a result of her having made "*protected disclosures*", as defined by the PDA. ("**Claim A**"). Additionally, the Claimant brought a second claim against Imperial and Lamberti for the damage caused to her reputation and dignity by the utterance ("**Claim B**").

Claim A: the Court found that AMH is liable for damages for the economic loss suffered by the Claimant, as the unlawful acts of AMH contravened s. 3 of the PDA.

Claim B: the Court found that Imperial and Lamberti are jointly and severally liable for damages resulting from the impairment of the Claimant's dignity.

Timeline of Key Events

Date	Key Event
16 March 2012	The Claimant's employment at AMH commenced.
June 2012	Mr Hibbit was appointed to the position of CFO.
May- June 2014	The Claimant became aware that the position of CFO at AMH had been advertised.
2 June 2014	The Claimant was interviewed by a recruitment firm for the position of CFO.
20 June 2014	The Claimant was interviewed for the position of CFO by Mr Lamberti. Mr Lamberti informed the Claimant that her application was unsuccessful.
25 June 2014	The Claimant resigned on learning about the appointment of Mr Janse van Rensburg.
3 July 2014	The Claimant withdrew her resignation after a meeting held between her and members of the Imperial Group management.
5 January 2015	Mr Janse van Rensburg commenced his employment as CFO at AMH.
March 2015	The Claimant complained about the colour of her company car to Mr Janse van Rensburg. Mr Janse van Rensburg made a comment that the Claimant's car suited the colour of her skin.
March 2015	Mr Janse van Rensburg told the Claimant, on instruction from Mr Lamberti, that she would never be a CFO within the Imperial Group.
15 April 2015	A meeting was held between members of the Imperial Group management. Mr Lamberti made the "utterance".
8 June 2015	The Claimant lodged a grievance against Mr Lamberti.
18 June 2015	The Claimant was informed that an investigation into her claims would take place.
18 June 2015	The Claimant lodged a further grievance against Mr Janse van Rensburg.

18 June 2015	The Claimant was suspended from her normal duties.
20 July 2015	The Claimant was advised that the investigation had found her allegations to be "*completely without foundation in fact, and are devoid of substance*". The Claimant was informed that disciplinary action would be taken against her.
30 July 2015	Disciplinary charges were served on the Claimant.
26-27 August 2015	The disciplinary hearings were held.
4 September 2015	A representative from the appointed firm of attorneys recommended that the Claimant be dismissed with immediate effect.
September 2015	AMH confirmed the Claimant's dismissal.
7, 8, 10 and 11 August 2017 and 18 September 2017	Dates of hearing in the South Gauteng High Court, Johannesburg.
23 March 2018	Date of judgment in the South Gauteng High Court, Johannesburg.

Impact

One significant impact of this case stems from the basis of the Claimant's claim. The Claimant brought her claim under the common law of delictual liability, rather than under specialist South African employment legislation. The possibility of employees in South Africa pursuing delictual claims in the event of their dismissal or where they allege their rights have been infringed is particularly significant when applied to senior employees. This is due to the greater reputational damage and the greater financial risk for employers, as senior employees typically receive higher remuneration.[25]

Additionally, the overlap of two forms of discrimination (gender-based *and* race-based) is another notable element of the case. The judgment emphasises how there is a great public interest in ensuring that the existence of systemic discrimination and inequalities in respect of race and gender is eradicated.[26] Judge Meyer stated, for example, "*as blatant and patent as discrimination was in the days of apartheid, so subtle and latent does it also manifest itself today*".[27] Further to this, commentary suggests similar conduct is happening to vary degrees in many South African

[25] Miles Chennells, "Damages for referring to an employee as a female employment equity candidate" available at https://www.masconsulting.co.za/wp-content/uploads/2018/05/Chowan-v-AMH-May-2018-Full-article.pdf.
[26] Henry Ngcobo and Nicole Deokiram, "Discrimination: the unfortunate tale of an "affirmative action candidate" available at http://www.derebus.org.za/discrimination-the-unfortunate-tale-of-an-affirmative-action-candidate/.
[27] *Adila Chowan v Associated Motor Holdings (PTY) Ltd, Imperial Holdings Limited and Mark Lamberti* (22142/16) [2018] ZAHPJHC 40 [60].

organisations[28] i.e. the biases which prevented the Claimant from becoming CFO, and ultimately caused the loss of her employment, are prevalent in South African business.[29]

The public interest generated by the case was largely because of the standing of Lamberti in South African business, and the large amount of damages that could potentially be paid. Whilst damages have not yet been quantified, the Claimant is seeking the equivalent of roughly £1,224,000 in damages. Commentary describes Lamberti as a "household name in South African business", and following the judgment Lamberti resigned from his position as CEO of Imperial and from his position on the board of South Africa's state power utility Eskom.

Another noteworthy feature of the case is the nature of "the utterance", and Lamberti's reference to the Claimant as a *"female employment equity"* candidate. The "employment equity" label references the Claimant as belonging to a group that has been historically discriminated against which, in employment law, is entitled to preference. By making such a statement, Lamberti implied the Claimant held her position because of her race and gender, failing to recognise her status as a professional qualified chartered accountant with extensive experience. This element of the case has raised interesting commentary. One assessment of the utterance is that it highlights the problematic attitudes that cause some to see others as "employment equities" and how Lamberti's comments reveal structural, deep-rooted assumptions "*that white men are competent while black people and women must prove they are"*[30]*.* In this context, it is significant that only the Claimant was subjected to disciplinary action, suspended from her employment and eventually dismissed. Lamberti and Janse van Rensburg were not subjected to suspension or disciplinary action.[31]

Strategic Elements

<u>The Key Legislation and the Decision</u>

<u>Claim A:</u> s. 3 of the PDA provides that "*no employee may be subjected to any occupational detriments by his or her employer on account, or partly on account, of having made a protected disclosure".* The court found that the suspension imposed on the Claimant, the disciplinary hearing which was held regarding her conduct and her subsequent dismissal constituted "*occupational detriments"* in terms of the PDA, and the grievances which she had lodged constituted protected disclosures to her employer in terms of s. 6 of the PDA. AMH are liable for the damages resulting from their breach of s.3 of the PDA, however, Imperial and Lamberti are not liable as they are not the Claimant's employer, which is a prerequisite for such liability under the PDA.

The definition of a protected disclosure must satisfy the requirement set out in s. 1 of the PDA that the employee has "*reason to believe that the information concerned shows or tends to show"* unfair discrimination. The Court found that the Claimant's inferences of gender-based and race-based discrimination against her were justified by the following:

i. "The utterance" stated by Lamberti.

ii. At the time when the Claimant directed her grievance to her employer, the senior management of her employer was white male dominated and, with one exception, the last fourteen appointments were all white males. The Claimant has extensive experience in the motor industry, has held the position of CFO in the past and Lamberti promised her that she would be appointed to the position of CFO within the Imperial Group within one year

[28] Cynthia Schoeman, "Unconscious bias, latent discrimination and real consequences" available at http://www.ethicsmonitor.co.za/articles/TCR-Vol-8-Iss-3.pdf.
[29] Steven Friedman, "South African business must tackle its deeply rooted prejudice" available at https://mg.co.za/article/2018-04-11-south-african-business-must-tackle-its-deeply-rooted-prejudice.
[30] Steven Friedman, "South African business must tackle its deeply rooted prejudice" available at https://mg.co.za/article/2018-04-11-south-african-business-must-tackle-its-deeply-rooted-prejudice.
[31] Henry Ngcobo and Nicole Deokiram, "Discrimination: the unfortunate tale of an "affirmative action candidate" available at http://www.derebus.org.za/discrimination-the-unfortunate-tale-of-an-affirmative-action-candidate/.

from the date of the promise. Subsequently, another white male was appointed to the position of CFO of the claimant's employer, who had little understanding of the motor industry and the Imperial Group's accounting, instead of the Claimant.

Claim B: the Court found that Imperial and Lamberti are jointly and severally liable for damages resulting from the impairment of the Claimant's dignity. This was despite the fact that the Claimant used the narrower Common Law version of dignity (confined to the individual's feeling of self-worth), rather than the Constitutional version of dignity (protects an individual's right to a sense of self-worth *and* an individual's right to reputation). The Common Law requirements for a dignity claim to succeed comprises of two elements: a subjective element and an objective element.[32]

The Court found that:

i. The subjective element of the claim for the impairment of one's dignity, which requires that the individual must in fact feel insulted, was clearly established. This was based on the evidence that the Claimant had never been addressed in that manner before, and she was extremely, upset, humiliated, degraded and objectified in terms of being a female empowerment candidate "*without recognition for the fact that she was a professional qualified chartered accountant with extensive experience and achievements*".

ii. The objective element of the claim for the impairment of one's dignity was also satisfied. This is because it was established that the reasonable person would conclude that the Claimant suffered palpable and actionable injury to her feelings.

Basis of Claim

It is significant that the Claimant did not bring her claim under specialist South African employment legislation, but under the common law of delictual liability. The Claimant chose not to rely on the protection provided by the Labour Relations Act, 66 of 1995 (the "**LRA**") and the Employment Equity Act, 55 of 1998 (the "**EEA**"), but instead on the *actio legis Acquilia,* for pure economic loss, and the *actio iniuriarum*, for injuries to her reputation and dignity. Additionally, the Claimant could have referred her claim to a specialist dispute resolution body established by South African employment legislation for unfair dismissal or automatically unfair dismissal, however, she chose to pursue her claim in the High Court.

Most employees would have used specialist South African employment legislation in respect of Claim A and Claim B, which is why the Claimant's decision to pursue remedies under the common law is all the more interesting. Commentary suggests the Claimant may have avoided these remedies for automatically unfair dismissal because, (i) she did not want to be reinstated, and/or (ii) she considers the maximum amount of compensation in terms of a claim for automatically unfair dismissal (two years' salary) to be insufficient reparation for the economic loss and injuries to her dignity that she suffered.[33]

Involvement of Organisations

Following the judgment, various South African organisations made statements calling for the resignation of Lamberti. The South African Federation of Trade Unions (Saftu), trade union federation Cosatu, the Black Business Council, the Economic Freedom Fighters and the Black Management Forum all called for the resignation of Lamberti from his position as the CEO of Imperial.[34] If Lamberti did not so resign, the Black Business Council discussed possible consumer boycotts against the companies engaged in business with Lamberti and his associated

[32] *Le Roux and Others v Dey* (CCT 45/10) [2011] ZACC 4 [143].
[33] Miles Chennells, "Damages for referring to an employee as a female employment equity candidate" available at https://www.masconsulting.co.za/wp-content/uploads/2018/05/Chowan-v-AMH-May-2018-Full-article.pdf.
[34] Sarah Smit, "Saftu boasts a double victory over Lamberti's Imperial resignation" available at https://mg.co.za/article/2018-04-18-saftu-boasts-a-double-victory-over-lambertis-imperial-resignation.

companies.[35] The Economic Freedom Fighters also called for the resignation of Lamberti from the Eskom board, stating Lamberti is not fit to hold any board position in one of South Africa's state-owned entities. The Black Management Forum additionally called for legislation on the disqualification of directors to be amended to include disqualification for offences under certain discrimination legislation.[36]

Further Information

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[35] "Black Business Council takes aim at Lamberti" available at https://www.enca.com/south-africa/black-business-council-takes-aim-at-lamberti.
[36] "The Black Management Forum Welcomes the Court Judgment on Mark Lamberti" available at https://www.bmfonline.co.za/index.php/innerleft-center-right/press-statements/183-the-black-management-forum-welcomes-the-court-judgement-on-mark-lamberti.

5. United Kingdom (England and Wales): Asda Stores Ltd.

Abstract

This case involves multiple claimants, (mostly female) store workers, who brought equal pay claims based on comparisons with the pay of (mostly male) employees working at depots. The issue before the Court of Appeal (EWCA) was a preliminary question of whether the two sets of terms and conditions of the two sets of employees could be legitimately compared, in order for an assessment of whether the work done was of equal value for the purposes of s.79(4)(c) Equality Act 2010 or s.1(6) Equal Pay Act 1970 were breached (the claimants claimed). The issue before the EWCA was concerning whether the female store claimants were entitled to compare themselves with (mostly male) employees in the distribution operation, the issue was not at this stage whether the work that they did was of equal value with their comparators.

Table 1: Key Facts

Case name	Asda Stores Ltd v Brierley and others [2019] EWCA Civ 44	
Date	31 January 2019	
Jurisdiction	England and Wales (UK)	
Plaintiffs Brierley and others – around 30,000 female claimants in the class. Representative: Leigh Day Solicitors		**Defendants** Asda, a subsidiary of Walmart, with around 165,000 employees and revenue of around $27bn Representative: Gibson Dunn & Crutcher LLP
Decision	The Court of Appeal (EWCA) dismissed the employer's appeal against a finding of an employment tribunal, upheld by the Employment Appeal Tribunal, that employees working in its retail stores were entitled to compare themselves with employees working in its distribution operation for the purposes of equal pay claims under the Equality Act 2010 s. 79(4)(c) and the Equal Pay Act 1970 s. 1(6).	
Prior procedures	ET and EAT case leading to appeal to EWCA.	
Subsequent procedures	Permission has been granted for Asda to appeal to the Supreme Court. If the Supreme Court uphold the Court of Appeal's ruling, the next step will be for the courts to determine whether it can be said that the two groups of employees carry out work that is of 'equal value'.	

Background Information

Asda Stores Ltd, trading as Asda, is a British supermarket retailer, and is a wholly-owned subsidiary of the US company Wal-Mart Inc. Asda's main business is its retail operation ("Retail"). At the date of the Employment Tribunal hearing (13 October 2016), Asda had 630 stores, employing roughly 133,000 employees in Retail. In addition, Asda has its own Distribution Operation ("Distribution"), comprising of 24 Distribution centres. At the date of the Employment Tribunal hearing, roughly 11,600 individuals were employed in Asda's Distribution operation. Most

of Asda's Retail employees are female, whilst most of the employees employed in Distribution are male. None of the Distribution centres are located on the same sites as any of the Retail establishments. No retail employees worked in a Distribution establishment (i.e. a depot), and no Distribution employees worked in a Retail establishment (i.e. a store).

Subject to some immaterial variations, all employees in the Retail operation are broadly on the same package of terms, wherever they work. No trade union is recognised for collective bargaining purposes for the Retail operation. The setting of pay and terms and conditions of employment for Retail employees is conducted annually, and is imposed by Asda after compliance with a process of corporate approval, without negotiation with the employees. The setting of pay is conducted in conjunction with Wal-Mart approval.

Regarding distribution employees, until 2010 there was considerable variation between sites as to the terms and conditions applying. In May 2012 Asda concluded a recognition agreement with the GMB, a general trade union in the UK, covering all employees at all of its Distribution centres (subject to three immaterial exceptions). This agreement prescribes “model terms and conditions” for the employees covered (subject, again, to some immaterial exceptions) but pay rates are negotiated separately for each centre, and therefore vary from depot to depot. Whilst the contractual terms in Distribution and Retail were reached by separate processes, those processes were implemented and operated by the Asda Executive Board, which was itself subject to governance by Wal-Mart. All those responsible for the setting of contractual terms were answerable, directly or through other more senior personnel to the Board, and derived their authority to set the employee’s contractual terms from the Board.

At a preliminary hearing on 13 October 2016, the Employment Tribunal (“ET”) held that the Retail employees ***were*** entitled to compare themselves to the Distribution employees for the purposes of their equal pay claims. Asda argued that the claims should be struck out on the ground the Claimants (Retail employees) could not compare themselves with their chosen Comparators (Distribution employees). The Claimants argued that:

1) As a matter of domestic law, common terms of employment applied at the stores and the depots, so that they could rely on section 79(4)(c) of the EqA 2010 and section 1(6) of the EqPA 1970 (in respect of the periods before 1 October 2010). The essential issue is whether common terms do in fact apply at the stores and the distribution centres. This domestic law point is the point in issue in the EWCA judgment.

2) The Claimants rely on the direct effect of Article 157 TFEU to give them a directly enforceable right to equal pay. They contend that comparison is possible in any case where there is a “single source” for the terms of employment of the claimant and the comparator.

On the domestic law point, the ET held that there were common terms generally between the Claimants and the Comparators, and a significant broad correlation between the terms in Retail and Distribution. Broadly similar terms would apply if Distribution employees performed their jobs at Retail establishments. On the EU law point, the ET held that Article 157 TFEU had direct effect and a single source of terms and conditions existed. The decision of the ET was upheld by the Employment Appeal Tribunal (“EAT”).

The EWCA upheld the decisions of the ET and EAT that there were common terms between the Distribution employees and Retail employees. The ET had analysed the differences and similarities between the Claimants’ and Comparators’ terms in great detail. The EWCA, however, held this approach was incorrect. Rather, the issue is whether the terms for Distribution employees were broadly similar across the relevant Distribution establishments, and the terms for Retail employees were broadly similar across the relevant Retail establishments.

It was not necessary for the EWCA to consider EU law because the appeal succeeded on the analysis of the application of domestic legislation. The EWCA did, however, uphold the decisions

of the ET and the EAT that there was a "single source" of the terms of employment. In this case, Asda's Executive Board set the terms of employment and was capable of rectifying the inequality between the Retail employees and the Distribution employees. The EWCA noted that Article 157 TFEU affords employees a directly effective right to equal pay where their comparators are doing the same or similar work, or work rated as equivalent. The EU authorities do not, however, establish definitively whether the same was true where the claimant's work was different from the comparator's, had not been rated as equivalent, and the question of whether the jobs were of equal value remained in dispute. The EWCA recommended that if this question had been determinative the right course would have been to refer the question to the ECJ. However, as the Claimants succeeded on the domestic law point there was no need to rely on direct effect.

Timeline of Key Events

Date	Key Event
2008	The equal pay claims against Asda commenced, when around 300 "colleagues" brought cases in Manchester and Liverpool. The claims were initially brought by the GMB.
2013	An agreement was reached between the GMB and Asda. The GMB agreed not to pursue employment tribunal claims in return for a four year working party with Asda about equal pay. Following this, Leigh Day were alerted to the matter and subsequently took over the case.
October 2014	Additional claims were brought by Retail employees.
October 2014	With Leigh Day acting on behalf of the Claimants, directions were agreed with Asda that the additional equal pay claims brought in 2014 would join the equal pay claims against Asda which commenced in 2008. [37]
13 October 2016	The Employment Tribunal held that the Retail employees were entitled to compare themselves to the Distribution employees for the purposes of their equal pay claims.[38]
31 August 2017	The Employment Appeal Tribunal upholds the ruling of the Employment Tribunal.[39]
31 January 2019	The Court of Appeal dismissed Asda's appeal, holding that Retail employees ***are*** entitled to compare themselves for equal pay purpsoes with Distribution employees.[40]
To be confirmed	Asda have been granted permission to appeal to the Supreme Court. The date of this hearing has not yet been confirmed.

[37] Leigh Day, "Asda Equal Pay Claims" available at https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Equal%20pay/Asda-Equal-Pay-booklet.pdf?ext=.pdf.
[38] *Brierley and others v Asda Stores Ltd* [2016] 10 WLUK 281.
[39] *Asda Stores Ltd v Brierley and others* [2017] 8 WLUK 332.
[40] *Asda Stores Ltd v Brierley and others* [2019] EWCA Civ 44.

Impact

The Supreme Court is yet to decide on this case, and should the Supreme Court rule that the Retail employees are entitled to compare themselves to the Distribution employees, the Claimants will still need to demonstrate that the roles are of ***equal value*** to succeed in their claim for equal pay. Therefore, the case is still unresolved.[41]

If the Supreme Court upholds the EWCA ruling, the impact of this case will be significant. The Supreme Court's decision would confirm that the fact that Retail employees and Distribution employees work exclusively at different sites is no barrier to the tribunal ordering an equal value report to be prepared. It would also see a significant shift of the equal value cases. The GMB union, which represents some Asda workers, described the EWCA ruling as a "landmark judgment".[42] The EWCA ruling is particularly noteworthy given the fact that similar equal pay cases are pending against the remaining members of the "big five" British supermarkets (Sainsbury's, Tesco, Morrisons and the Co-Op). Leigh Day, the solicitors representing the Claimants, suggest that if all 500,000 eligible staff at the "big five" claim and win, the supermarkets could owe the Claimants a total of £8 billion in compensation.[43][44]

The judgment could have widespread repercussions in the retail industry if the decision eventually leads to retail employees being paid and valued the same as those working in distribution centres. Commentary suggests the decision is particularly interesting given the very different day-to-day tasks that the two groups of employees perform, and shows that the courts are prepared to cast the net quite widely when looking for a comparator in equal pay terms.[45] Consequently, this could have a domino effect, diffusing into other sectors, for example, in the financial services industry between those working in call centres and those working in branches.

Additionally, the case illustrates the trend of increasing numbers of equal pay claims being brought in the private sector. Equal pay claims have traditionally been seen as a greater issue for the public sector due to, (i) the fact that public sector pay structures are generally more transparent than in the private sector, and (ii) a strong public sector union presence to fund equal pay actions.[46] Commentary suggests that, with the introduction of gender pay gap reporting from 6 April 2017, the number of equal pay claims in the private sector will increase. Defending such claims could become a critical business issue for employers, particularly if a claim is brought by a large number of employees, as a successful claimant can claim for arrears of pay for up to six years.[47]

Commentary also suggests that the case is a "*demonstration of the extraordinary (and arguably unnecessary) complexity of British equal pay law*".[48] EU law by comparison is not concerned (on

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[41] Lauren Brown, "Asda shop workers win landmark equal pay battle" available at https://www.peoplemanagement.co.uk/news/articles/supermarket-workers-win-equal-pay-battle.
[42] "Equal pay: Asda loses appeal in court case" available at https://www.bbc.co.uk/news/business-47072013.
[43] Ashleigh Webber, "Asda equal pay case heads to the Supreme Court" available at https://www.personneltoday.com/hr/asda-equal-pay-case-heads-to-the-supreme-court/.
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[48] "Supermarket retail staff could compare their terms to distribution workers at offsite depots in equal pay case (Court of Appeal)" available at https://uk.practicallaw.thomsonreuters.com/Document/I6b32f3bb286511e9a5b3e3d9e23d7429/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa60000016e028161271c05199a%3FNav%3DKNOWHOW_UK%26fragmentIdentifier%3DI6b32f3bb286511e9a5b3e3d9e23d7429%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=27a08766110d4b4824f2e7b8798065ab&list=KNOWHOW_UK&rank=2&sessionScopeId=c80f531ffc1df3323cb541210abc962b9b61d00c0df42d74b12449537d589667&originationContext=Search+Res

this point) with whether the claimants and comparators work at different sites, merely whether there is a single body with the power to determine the pay. Whilst the decision resolves the confusion about with whom comparisons should be made, establishing that the roles are comparable is only the first step in the litigation. There is still a lot to be decided if the Supreme Court upholds the EWCA ruling and the case subsequently returns to the employment tribunal, for example, whether the roles are of equal value and, if so, whether any difference in pay is attributable to a material factor that is not sex discriminatory.[49]

Strategic Elements

The Key Legislation and the EWCA Decision

The Equality Act 2010 (EqA 2010) repealed and replaced the Equal Pay Act 1970 (EqPA 1970) on 1 October 2010. To bring an equal pay claim, a claimant (A) must identify a comparator of the opposite sex (B) performing equal work. There are three categories of equal work: "like work", "work rated as equivalent" and "work of equal value".

A and B must be working for the same employer or associated employers, and must be at the same establishment or at a different establishment to which common terms and conditions apply. Under the EqPA 1970, common terms had to be observed "*either generally or for employees of the relevant classes*" (section 1(6) EqPA 1970). In contrast, the EqA 2010 uses the phrase "*either generally or as between A and B*" (section 79(4)(c), EqA 2010). Prior to the EWCA ruling, it was unclear whether this change in wording was significant. The EWCA held that the drafting in the EqA 2010 did not change the law, and Parliament did not intend to change the statutory test. The test remains that common terms must apply for employees of A's class and employees of B's class at the two establishments. It is irrelevant whether A and B themselves have any similarity in their terms.

The EWCA held that the ET had erred by considering whether there were broadly similar terms between Retail employees at one site and Distribution employees at the other site. The issue is, in fact, whether the terms for Distribution employees were broadly similar across the relevant sites, and whether the terms for Retail employees were broadly similar across the relevant sites. The question is not whether there are "common terms generally", but rather whether there are common terms for the claimant's and comparator's classes of employee.

The EWCA also held that Asda applied common terms to Retail employees wherever they worked, and common terms to Distribution employees wherever they worked. Common terms can be established even if the employees do not and never would work in the same workplace. In such cases, the tribunal may consider whether the comparator would still have been employed on terms broadly similar to his existing terms if he were, hypothetically, asked to do his job at the claimant's location, no matter how unlikely that may be in practice. This type of comparison is known as the "*North*" hypothetical.[50] This can be contrasted with a situation where there are no common terms across the sites of the comparator, so that the terms enjoyed by a comparator would depend on where they worked.

Class Actions

This case highlights the increase in "class actions", where the employees bring their claim against the employer collectively, as an effective mechanism to bring equal pay claims. In the case, the Claimant's solicitors, Leigh Day, are bringing the claim on behalf of the Claimants on a "no win, no fee" basis. Those entitled to bring a claim are able to easily join the "class action" by filling in an

ult&transitionType=SearchItem&contextData=%28sc.Search%29&navId=C880487675F3AA9847860508ECB73795&comp=pluk.

[49] Amy Nevins, "Court of Appeal upholds EAT decision on Asda equal pay claims" available at https://www.internationallawoffice.com/Newsletters/Employment-Benefits/United-Kingdom/Lewis-Silkin/Court-of-Appeal-upholds-EAT-decision-on-Asda-equal-pay-claims.

[50] *North v Dumfries and Galloway Council* [2013] UKSC 45.

online form.[51] Leigh Day also draw attention to the possibility of male Retail employees bringing "piggy-back claims" if the female Retail employees are successful in their equal pay claim. If the female Retail employees bring a successful claim, the male Retail employees would be left in a worse financial situation than the female Retail employees, as well as the better paid Male distribution employees. In this regard, the male Retail employees could bring a "piggy-back claim" (i.e. an equal pay claim that "piggy-backs" on the successful women's claims) using the successful female Retail equal pay claimants as their comparators. Leigh Day are bringing similar equal pay "class actions" on behalf of employees against the other four members of the "big five" supermarkets.

Historically, "class actions" have generally only gained momentum with trade union support. The growth of law firms using the "no win, no fee" business model, however, has led to a proliferation of claims, such as the Asda case, brought on this basis. A "no win, no fee" model incentivises the claimant law firm to recruit hundreds or even thousands of claimants together in one action. This is because the higher the number of claimants a claimant law firm can recruit, the higher the claimant law firm's reward will be if the claim is ultimately successful.[52] Commentary suggests that the fear of a claimant law firm stepping in in this way may cause a trade union to bring a "class action" where it would otherwise not have done so. Thus, the increasing use of the "no win, no fee" model by claimant law firms may also increase the likelihood of trade unions bringing "class action" claims.

Further Information

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[51] Leigh Day, "Asda Equal Pay" available at https://www.equalpaynow.co.uk/asda-equal-pay/.
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6. United States of America: Ribeiro v. Sedgwick LLP

Abstract

Traci Ribeiro joined the Chicago office of Sedgwick LLP in 2011, and worked as a non-equity partner from January 2012. On becoming partner, Ribeiro was required to sign a partnership agreement which contained an arbitration clause stating that any disputes would be referred to arbitration and an additional delegation clause that the arbitrator would decide whether the dispute should be subject to the arbitration process. Ribeiro brought a putative class action in July 2016 by filing her claim in state court in San Francisco alleging employment discrimination and retaliation by the law firm. However, the case was removed to the Northern District of California court where, in August 2016, Sedgwick moved to enforce an arbitration clause included in the partnership agreement which would leave to the arbitrator the question of whether the case would remain there or proceed in federal court.

Table of Key Facts

Case name	Ribeiro *v.* Sedgwick LLP (3:16-cv-04507)
Date	2016 – 2017
Jurisdiction	District Court, Northern District of California
Plaintiffs Traci Ribeiro [individual] **Legal rep** – Sanford Heisler LLP and The Wood Law Office LLC	**Defendants** Sedgwick LLP [law firm]
Decision	The District Court compelled the court action to be stayed and removed the matter to be settled by arbitration, pursuant to an arbitration clause in Ms Ribeiro’s partnership agreement. The Court held (in November 2016) that Ms Ribeiro had the “requisite sophistication” to understand the relevant clause. The scope of the clause meant that all issues in relation to the partnership agreement she signed were subject to the arbitration clause.

	Ribeiro raised issue with the delegation of determining arbitrability to arbitration (a later addition amendment to the clause). However, the court determined that the issue of delegation did not affect the enforceability of the arbitration agreement itself, which would instead be determined by the arbitrator. Initially, Ms Ribeiro sought to turn this into a class action. However, the case was removed to arbitration before this was decided and it appears Ribeiro was unable to pursue this line of action due to confidentiality blocks by Sedgwick. The application for class action was then formally dismissed just prior to settlement after Ms Ribeiro agreed to drop her putative class action in California federal court after reaching a confidential settlement with the firm. This is another example of gender discrimination issues being resolved privately due to arbitration clauses in an employment/career context.
Prior procedures	No prior procedures.
Subsequent procedures	Once the matter was removed from the court, Ms Ribeiro and Sedgwick entered into mediation and a private settlement was reached in June 2017. The settlement amount is not known.

Background Information

Traci Ribeiro began working as a contract partner at the Chicago office of Sedgwick LLP in January 2011. In November 2011, she was promoted to the position of non-equity partner effective January 2012 and was asked to sign a partnership agreement which included an arbitration clause that applied to any disagreements in connection with any matters contained in the partnership agreement. The arbitration clause constituted the exclusive procedure for all disputes arising under the partnership agreement. In November 2012, the partnership agreement was amended to include a delegation clause which stated that the arbitrator would determine whether the dispute would be subject to an alternative dispute resolution process at a preliminary conference. Ribero signed this amended agreement in December 2012.

In January 2016, Ribero sent a letter to the Chair of Sedgwick claiming that decisions by the partnership had resulted in discrimination. Ribeiro alleged to be the victim of a pay gap and gender discrimination environment at the firm despite being one of the firm's top performers since joining in 2011. In February, she filed an administrative charge with the Equal Employment Opportunity Commission ("**EEOC**"). Sedgwick responded by filing a demand in April 2016 for Arbitration with the Judicial Arbitration and Mediation Services, Inc. ("**JAMS**") and sought a declaratory judgement that it had neither discriminated nor retaliated against Ribeiro in setting her compensation or determining whether to elect her as an equity partner. The arbitration proceedings were stayed by the parties pending settlement negotiations and attempts to alter the arbitration procedures. Negotiations were unsuccessful. At court, Sedgwick argued that the court should defer questions of arbitrability to the determination of the arbitrator or that, alternatively, the court should enforce the arbitration clause. The court's analysis was restricted to whether Sedgwick LLP's claim for arbitration was "wholly groundless" and it was decided that it was not. Indeed, Ribeiro was deemed to have "had the requisite sophistication to understand" the arbitration clause in her partnership agreement. The court ordered that the question of arbitrability was to be decided upon by the arbitrator.

Timeline of Key Events

Date	Key Event
January 2011	Traci Ribeiro begins work as a “contract partner” at the Chicago office of Sedgwick LLP.
November 2011	The partnership elects to promote Ribeiro to the position of “non-equity partner” effective January 2012.
February 2012	Ribeiro signs the partnership agreement which included an alternative dispute resolution clause that applied to “any disagreements in connection with any matters set forth in” the partnership agreement and constituted the “exclusive procedure for the resolution of all” such disputes.
November 2012	Sedgwick informs Ribeiro that the equity partners had amended and restated the partnership agreement. The only substantive change to the dispute resolution procedure in the agreement was to add that the arbitrator would “determine whether or not the Dispute should be subject to the ADR Process” at the preliminary conference.
December 2012	Ribeiro signs the amended and restated agreement.
January 2012	Ribeiro sends a letter to the Chair of Sedgwick claiming that decisions by the partnership had resulted in discrimination.
February 2016	Ribeiro files an administrative charge with the EEOC.
April 2016	Sedgwick files a demand for Arbitration with JAMS, seeking a declaratory judgement that it neither discriminated nor retaliated against Ribeiro in setting her compensation or determining whether to elect her as an equity partner.
2016	The parties stay the arbitration pending settlement negotiations and attempts to modify the arbitration procedures, though the negotiations were unsuccessful.
July 2016	An arbitrator is selected pursuant to the bilateral process specified in the partnership agreement.
July 2016	Ribeiro commences a putative class action in San Francisco Superior Court alleging employment discrimination and retaliation at a law firm.
August 2016	Sedgwick removes the action to federal court on the basis of federal question jurisdiction.
August 2016	Sedgwick moves to compel arbitration.
November 2016	Sedgwick’s move to compel arbitration is granted. The action is stayed pending completion of the arbitration.

Impact

While *Ribeiro* was not the first case where a female partner had sued its employer over allegedly discriminatory compensation practices, it nevertheless drew attention because of the alleged gender discriminatory behaviour that went on at the firm in particular because Traci Ribeiro was a top-performer at the firm (she was the third-highest revenue generator at the law firm) and yet had not received a promotion to equity partner. The gender pay gap and the discrimination at *Sedgwick LLP* drew the attention of the legal industry.

Ribeiro sheds light on the court's attitudes towards using arbitration as a tool to address (or avoid addressing) gender discrimination issues. *Ribeiro's* importance is heightened when we consider it in light of an increasing trend towards (i) the inclusion of arbitration clauses in employment agreements, and (ii) courts enforcing such arbitration clauses),[53] in order to respect the principle of contractual freedom. The case also helps to shed light on the courts' interpretation and application of the Federal Arbitration Act ("**FAA**"), which has been described as "reflect[ing] both 'a liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract,'"[54] in the context of employment agreements, and more specifically, gender discrimination.

In Ribeiro's case, the inclusion of (i) an arbitration clause within Ribeiro's employment agreement which incorporated the JAMS rules by reference, along with (ii) a delegation clause regarding the issue of arbitrability (which stipulated that the issue of arbitrability would be decided upon by the arbitrator, meant that this case was stayed and Sedgwick's move to compel arbitration was granted.

This case therefore presents an interesting case study regarding the common use of arbitration clauses in employment contracts within the US, which remains a challenge for employees seeking to bring a discrimination law (or any other) claim against an employer: "Arbitration agreements, like Sedgwick's, are too often used by companies to deter employees from seeking the justice they deserve,"[55] said Xinying Valerian, Senior Litigation Counsel at Sanford Heisler, LLP.

It is reasonably clear from the decision in *Ribeiro* that if an employee signs an employment agreement which contains an alternative dispute resolution clause, and which also delegates the decision of arbitrability to the arbitrator , then a court would most likely grant an order to compel the arbitration. *Ribeiro* is helpful in providing potential guidance for how subsequent cases can attempt to distinguish themselves from *Ribeiro,* e.g. by arguing that the employee was not a sophisticated party to the agreement (as Ribeiro clearly was) and did not understand the significance of the JAMS rules which delegate arbitrability to an arbitrator.

Strategic Elements

The inclusion of arbitration clauses within employment contracts is common in the US. Their enforceability in discrimination cases is therefore a key issue. In this case, the partnership agreement signed by Ribeiro on joining contained an alternative dispute resolution clause that applied to "any disagreements in connection with any matters set forth in" the partnership agreement and constituted the "exclusive procedure for the resolution of all" such disputes. Moreover, the amendment that Ribeiro signed in 2012 contained a specific agreement to arbitrate the issue of arbitrability. Indeed, both parties agreed that the FAA applied to the claim. Section 2 of the FAA provides that 'an agreement in writing to submit to arbitration an existing controversy

[53] This increasing trend of "forced" arbitration clauses in agreements, and courts enforcing them, can be seen in the consumer agreements context as well. ***See e.g.***Meyer v. Uber Techs., Inc., 868 F. 3d 66, 73, 81 92d Cir. 2017 (applying the FAA and state contract law to grant defendant Uber's motion to compel arbitration in putative class action where the arbitration provision was "reasonably conspicuous" to the plaintiff, and that he had "unambiguously manifested his assent" to be bound by the contract's terms of service).

[54] AT&T mobility v. Concepcion, 563 U.S. 333, 339 (2011)

[55] Sanford Heisler is New Lead Counsel in Female Partner Gender Discrimination Class Action Against The Sedgwick Law Firm https://www.prnewswire.com/news-releases/sanford-heisler-is-new-lead-counsel-in-female-partner-gender-discrimination-class-action-against-the-sedgwick-law-firm-300389366.html

arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract'.

The use of arbitration to resolve employment disputes can prove disadvantageous for employees in terms of both procedure and outcomes. The confidentiality obligations imposed is often particularly problematic in the context of discrimination cases.[56] The process has been criticised for its lack of transparency and critics argue that arbitration can enable employers to conceal cultures of discrimination. Additionally, because employees cannot bring a class action within an arbitration process this arguably weakens their leverage in cases where other employees would other wise be involved . Finally, because employees have no action to a jury trial in these circumstances, they will likely be awarded a lesser sum than a jury might award - and this obviously gives the employee less leverage in settlement negotiations.[57]

The decision on the enforceability, validity and applicability of an arbitration clause is usually reserved to a district judge, unless the parties "clearly and unmistakably provide[d] otherwise" such as by delegating the issue of arbitrability to arbitration (*AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986)*) as was the case with the inclusion of the amendment to the partnership agreement. Moreover, this delegation of arbitrability must be evaluated in isolation without considering whether the arbitration clause as a whole is enforceable (*Rend-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 71 – 74 (2010)*). If there is a "clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability" then the arbitrator, not the court, will be the one to determine the issue of arbitrability at least where the contracting parties are sophisticated (*Brennan v. Opus Bank, 796 F .3d 1125, 1130 (9th Cir. 2015)*). Here, the clear agreement to arbitrate along with the fact that Ribeiro was a sophisticated party in view of her partnership status at the law firm meant the court deferred the question of arbitrability to the arbitrator.

It is clear, therefore, that where there is a similar case, the following points may serve as distinguishing ones:

- no clear and unmistakable delegation of issue of arbitrability to arbitration;
- the employee party to the agreement did not have the requisite sophistication to understand that the incorporation of the relevant rules constituted the delegation of arbitrability; and / or
- the invalidation of an arbitration clause based on a "generally applicable contract defense, such as fraud, duress or unconscionability" with the standard to reach on unconscionability, established under *Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83, 114 (2000)*, requiring the proving of both procedural and substantive unconscionability.

Ribeiro v. Sedgwick LLP can serve as a guidance for future cases where the issue of the arbitrability of an arbitration clause, along with its eventual enforceability, needs to be established. This case demonstrates the importance of knowing the significance of arbitration clauses within an employment contract.

Further Information

- Sanford Heisler is New Lead Counsel in Female Partner Gender Discrimination Class Action Against the Sedgwick Law Firm https://www.prnewswire.com/news-releases/sanford-heisler-is-new-lead-counsel-in-female-partner-gender-discrimination-class-action-against-the-sedgwick-law-firm-300389366.html

[56] Peter Frost and Paul Golding QC, "Arbitration of employment disputes" available at file:///C:/Users/jedwar05/Downloads/Arbitration_of_employment_disputes.pdf.
[57] Moira Donegan, "Why can companies still silence us with mandatory arbitration" available at https://www.theguardian.com/commentisfree/2019/jan/08/forced-arbitration-sexual-harassment-metoo.

- Biglaw Partner Files Class Action Lawsuit Over 'Male-Dominated Culture' https://abovethelaw.com/2016/07/biglaw-partner-files-class-action-lawsuit-over-male-dominated-culture/?rf=1

- Sedgwick Partner Settles In Gender Discrimination Suit https://www.law360.com/articles/938092

- https://www.law360.com/articles/859144