Appeal No. UKEAT/0105/14/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 July 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR D J JENKINS OBE

MR M WORTHINGTON

QUALITY SOLICITORS CMHT — APPELLANT

MRS B TUNSTALL — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR SEAN O'BRIEN (of Counsel) Instructed by: QualitySolicitors 41 Anchor Road Aldridge Walsall WS9 8PT
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

HARASSMENT - Conduct

Single instance race harassment claim – one overheard remark, “She is Polish and very nice” or “She is Polish but very nice”. The Employment Tribunal erred in law in (1) failing to address the question whether the remark alleged had the effect of violating the Claimant’s dignity or creating a proscribed environment for her – **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, **Grant v HM Land Registry** [2011] IRLR 748 and **Weeks v Newham College of Further Education** [2012] UKEAT/0630/11/ZT applied; and (2) failing to address and give reasons in respect of section 26(2), especially why it was reasonable for the single remark to have the effect in question. If the Employment Tribunal had applied the law correctly only one result was reasonably possible – namely a finding that the single remark did not have the effect in question. Appeal allowed.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal against one finding in a Judgment of the Employment Tribunal sitting in Birmingham (Employment Judge Batten presiding) dated 25 October 2013. The Employment Tribunal heard proceedings commenced by Mrs Bozena Tunstall ("the Claimant") against Quality Solicitors CMHT ("the Respondent"). For the most part it dismissed those proceedings. However in one respect it found that the Claimant had suffered unlawful harassment related to race. The Respondent appeals against that finding.

The Background Facts

2. The Claimant is Polish. She studied Law in Poland before she came to this country more than 20 years ago. She obtained a law degree in this country and worked as a Lecturer and, on a voluntary basis, as CAB Advisor. She circulated a CV seeking work in various roles including paralegal and legal secretary. Her CV mentioned, among many other points, that she had provided information to the public as a CAB Advisor in the area of housing.

3. The Respondent is a firm of solicitors whose work included housing law. It saw her CV and thought she might be of use to the firm as a paralegal. She was interviewed. Those who interviewed her were impressed with her performance, though concerned about what the Employment Tribunal described as her "heavily accented spoken English". She was offered work as a paralegal assistant. Her appointment was subject to satisfactory performance over a two-month probationary period and her contract was for six months.

4. The appointment was not successful. The Claimant commenced work on 23 April 2012. Her contract was terminated on 29 May. There were what the Employment Tribunal described

as "numerous and serious performance issues". The Employment Tribunal, which looked at examples of her work, found that those concerns were legitimate. It is only fair to the Claimant, however, to say that the Employment Tribunal considered the Respondent to be at fault in failing to ascertain at interview in the very beginning that the Claimant was unlikely to have the skills for the paralegal job. The Employment Tribunal was also critical of the Respondent's handling of her employment and support for her. The Claimant was, the Employment Tribunal said, "a sensitive woman who took things to heart".

The Employment Tribunal Proceedings

5. The Claimant brought proceedings in the Employment Tribunal, making wide-ranging allegations of unlawful discrimination on the grounds of race and religion. She was ordered to provide details. Under the heading "harassment", she mentioned the allegation which is the subject matter of this appeal. She said that about one week before her employment ended she

> **"...overheard being spoken about by HS to the client 'She is Polish but very nice'. The word "but" implicated "Polish" is not very nice usually." In her witness statement the Claimant said "I have overheard HS speaking about me to the client I never met. 'My paralegal assistant, Ros, will look after this from now on. She is Polish but very nice."**

6. The person against whom this allegation was made was Mr Shelley. In the answer to details provided the Respondent had said he had no recollection in which he said "She is Polish but very nice". By the Employment Tribunal hearing he accepted that he said to a client "She is Polish and very nice", but maintained he did not say "Polish but very nice".

7. The Employment Tribunal heard the case over three days between 11-13 September 2013. Judgment with Written Reasons was given on 30 October 2013. The allegation with which we are concerned was only one small allegation within the overall proceedings.

8. In its Written Reasons the Employment Tribunal first set out the issues. It then made findings of fact in a section running from paragraphs 11-13.29. In this section, however, it made no findings concerning the particular issue with which we are concerned.

9. The Employment Tribunal then set out the applicable law. It referred to the definition of harassment in section 26 of the **Equality Act 2010**. It referred to the analysis of the requirements of harassment set out in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336. The Employment Tribunal summarised the submissions of the parties. Its summary does not record any submissions on the particular issue with which we are concerned, although we are told that the Tribunal was referred to **Richmond** and also to **Grant v HM Land Registry and EHRC** [2011] IRLR 748 and **Weeks v Newham College of Further Education** UKEAT/0630/11 (4 May 2012).

10. The Employment Tribunal went through the various issues which it had to decide. The first place where it addressed the issue with which we are concerned is paragraph 33. We will quote in full:

> **"33. Allegation 8** *Harassment because of race by comments about the claimant's ethnicity to potential clients.* **Mr Shelley confirmed that he had on one occasion told a client that the claimant was 'Polish and very nice'. The claimant contended that he had said she was 'Polish but very nice'. There is a complete conflict of evidence on whether the word but or and was used. Mr Shelley said that he did not mean anything derogatory. The Tribunal were not provided with details of the client, the nature of the legal work involved or the precise context of the remark. The Tribunal considered that whether the word 'but' or 'and' was used did not matter. It was unnecessary to refer to the claimant as Polish to a third party, by way of introduction. The fact of the claimant's race should have been irrelevant to the introduction and its inclusion suggested that it was used to patronise the claimant and to allude to some shortcoming perceived by Mr Shelley in light of the respondent's concerns about the claimant's performance which staff was reporting on regularly. It was clear to the Tribunal that the comment had the effect that the claimant felt humiliated and degraded – the comment was directly about her and made within her hearing. Whilst this was an isolated incident, the Tribunal considered that it amounted to an act of unlawful harassment of the claimant because of her race."**

11. The Employment Tribunal went on to deal with other issues. At the very end there were two further paragraphs of conclusion. In one paragraph the Employment Tribunal summarised

the reasons why it rejected all the other claims of discrimination and harassment. Then in paragraph 40 it said the following:

> **"40. In relation to allegation 8, where Mr Shelley told a client that the claimant was Polish and that she as nice, the Tribunal found this to be a reference to her race which was unnecessary and was, albeit unconsciously, motivated by concerns about the claimant's accent, communication issues and performance which staff were raising regularly. It was clear to the Tribunal that this comment, heard by the claimant, was unwanted conduct which had the effect that she reasonably felt humiliated; as such it constituted unlawful harassment of the claimant because of her race."**

Statutory Provisions

12. It is unlawful for an employer to harass an employee (see section 40(1)) of the **Equality Act 2010**. The definition of harassment is contained in section 26 of the Act. So far as relevant, section 26 provides as follows:

> **"(1) A person (A) harasses another (B) if—**
>
> **(a)A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b)the conduct has the purpose or effect of—**
>
> **(i)violating B's dignity, or**
>
> **(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **....**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a)the perception of B;**
>
> **(b)the other circumstances of the case;**
>
> **(c)whether it is reasonable for the conduct to have that effect."**

Race is a relevant protected characteristic. See section 26(5).

The Appeal

13. On behalf of the Respondent Mr Sean O'Brien submits that the Employment Tribunal erred in law in the following ways. Firstly, it made no express finding that the comment in question had the purpose or effect of violating the Respondent's dignity or creating an

intimidating, hostile, degrading, humiliating or offensive environment for her. He took us to passages in **Richmond**, **Grant** and **Weeks** in support of a submission that these words were an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

14. Secondly, the Employment Tribunal did not sufficiently deal with section 26(4), which required it to take into account whether it was reasonable for the conduct to have the effect in question and the other circumstances of the case. In the end, thirdly, he submitted that the Employment Tribunal's conclusion was perverse. The remark, whether it was in the form suggested by the Claimant or the form suggested by the Respondent, was not capable of satisfying the harassment test and the appeal should therefore be allowed.

15. The Claimant resists the appeal. She informed the Employment Appeal Tribunal in advance that she did not intend to attend the hearing and she has not done so. We have her answer and a Skeleton Argument which she has lodged. Her answer did not address the criticisms made in the Notice of Appeal. Rather it raised its own criticisms of the Employment Tribunal – so much so that she was asked to confirm whether she wished to cross-appeal. She informed the Employment Appeal Tribunal that she did not.

16. The Claimant's Skeleton Argument submits that the use of the word "Polish" was intended by Mr Shelley to dominate, belittle and cause a cultural gap between himself and the client, on the one hand, and the Respondent on the other. The Claimant submits that the Employment Tribunal was entitled to find that the word "and" rather than the word "but" did not change the meaning of what Mr Shelley said. She said that the phrase used by Mr Shelley would have "some effect on her dedication to her duties".

Discussion and Conclusions

17. The role of the Employment Appeal Tribunal is a limited one. It is confined to addressing questions of law (see section 21(1) of the **Employment Tribunals Act 1996**. It does not re-examine factual conclusions for itself. The question is whether there was an error of law in the reasons of the Employment Tribunal or whether, applying the narrow test set out in **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93, there was an overwhelming case that the Employment Tribunal reached a conclusion which no properly directed Employment Tribunal could reach.

18. The Employment Tribunal had two tasks to perform in order to decide the harassment claim. Firstly, it had to make primary findings of fact. Secondly, it had to apply its findings in order to reach conclusions on the different aspects of the definition of harassment, principally applying the words of the statutory definition but also taking into account guidance from higher courts.

19. It is not a ground of appeal before us, but we remark that it would have been best if the Employment Tribunal had decided between the two competing versions of what was said. Firstly, it was part of the Claimant's case that the words used were "She is Polish but she is very nice" and she drew from this a suggestion that there was an implication that Polish people were not usually nice. Secondly, the Employment Tribunal seems to have found the remark objectionable, not because of that implication but rather because it thought the remark was patronising which is a very different approach. It is usually best if Employment Tribunals make findings of primary fact before they come to apply a statutory definition. As we say, however, this is not a ground of appeal.

20. We turn, then, to the way the Employment Tribunal handled the statutory definition. The first question for it to address was whether the remark was unwanted. In paragraph 33 the Employment Tribunal did not expressly say so, but it is implicit in its findings. In paragraph 40 there was an express finding that the remark was unwanted.

21. The next question for the Employment Tribunal to address was said with the purpose of violating the Claimant's dignity or creating the proscribed environment for her. We read the Employment Tribunal's conclusions as rejecting that suggestion. Paragraph 41 finds that the use of the remark was for unconscious or subconscious reasons and treats the matter as an "effect" case rather than a "purpose" case. Nevertheless it would have been better if the Employment Tribunal had directly reached a conclusion on the matter.

22. The next question for the Employment Tribunal to address was whether the remark had the effect of violating the Claimant's dignity or creating the proscribed environment for her. The Employment Tribunal found that it did. But in paragraph 33 it did not use the precise words and it did not address directly the question whether it was reasonable for the remark to have this effect. In paragraph 40 it stated no more than a conclusion that it was "reasonable for her to feel humiliated" with no underlying reasoning.

23. To our mind, there are two linked errors of law in the Employment Tribunal's reasoning at this point. Firstly, the Employment Tribunal did not directly address the question whether the remark truly violated the Claimant's dignity or truly created an intimidating, hostile, degrading, humiliating or offensive environment for her.

24. Three recent decisions make it plain that these words are an important control on the concept of harassment. In **Dhaliwal**, at paragraph 22, the Employment Appeal Tribunal (Underhill P) said:

> **"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award. But we are satisfied that the Tribunal, which clearly considered the case most conscientiously, was entitled to hold that what it found Dr Lorch to have said did indeed fall on the wrong side of the line. We can see no error of law in its decision and this appeal must be dismissed."**

25. In **Grant v HM Land Registry & EHRC** [2011] IRLR 748 Elias LJ said, paragraph 47:

> **"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**

26. In **Weeks v Newham College of Further Education** Langstaff P said:

> **"17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.**
>
> **...**
>
> **20. The fact that terms that are plainly related to gender, such as 'girlie chat', 'power-dressed women' and 'harem', are used only once in the course of a fairly lengthy period of time, again, would not prevent in an appropriate case, and with appropriate surrounding circumstances, those comments being seen to create the environment spoken of.**
>
> **21. However, it must be remembered that the word is 'environment. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant. For example, if the conclusion of the Tribunal here had been that the words were used all the time, in effect, in regular conversation, one would have expected the ultimate conclusion to be very different and to have required the Respondent as employer of the other staff concerned to have given some explanation as to its action or inaction about it. It seems therefore that none of the factors that the Tribunal says it took into account amongst others could be said to be a factor it should not have taken into account. In our view, therefore, the Tribunal cannot be said to have been in error by taking account of irrelevant factors. Their weight is another matter: but, short of a perverse conclusion, is a matter for the Tribunal and not for us to judge."**

27. To our mind, it was essential for the Employment Tribunal to directly and carefully address whether the single remark relied on in this case could truly be said to have violated the Claimant's dignity or created the proscribed environment for her and if so why.

28. Secondly, the Employment Tribunal did not address section 26(4) to any significant extent, and did not provide any reasoning at all on the question whether it was reasonable for the remark to have the effect in question. It is impossible to see what other circumstances of the case it took into account.

29. The Employment Tribunal's own finding, that the Claimant was a sensitive woman who took things to heart, a finding amply borne out by some of the other claims of discrimination and harassment she made which the Employment Tribunal rejected, put into relief the importance of making findings under section 26(4), in particular whether it was objectively reasonable for the remark to have had the proscribed effect. The Employment Tribunal did not do so. It might be thought, for example, that it would be reasonable for an employer, introducing an employee who had a strong accent to mention the employee's nationality or race. The Employment Tribunal said only that it was not "necessary" for the employer to have done so. The Employment Tribunal did not answer the question whether it was reasonable for the remark to have the effect which the Claimant suggested.

30. For these reasons, essentially accepting submissions to us made by Mr O'Brien, we are satisfied that the Employment Tribunal erred in law and that its decision cannot stand.

31. The question then arises whether the appeal should be allowed to the extent of dismissing the claim or whether the claim must be remitted to be reconsidered. We are conscious of the

limited remit of the Employment Appeal Tribunal, which is empowered only to deal with questions of law (see, in particular, **Jafri v Lincoln College** [2014] EWCA Civ 449 at paragraphs 19-23 and 44-47). We have, however, reached the conclusion that, if the Employment Tribunal had applied the correct legal test, only one answer was reasonably possible. The single remark, whether it was in the terms suggested by the Claimant or those suggested by the Respondent, was not such as to violate her dignity or create the proscribed environment for her. On any view, it was an introductory made to a client for the purpose of encouraging the client to be given the services of a paralegal assistant. The Claimant's submission in her Skeleton Argument that the remark was made to drive a wedge between herself and either Mr Shelley or the client is, to our mind, entirely fanciful. We have reached the conclusion that this single remark was not capable of satisfying the definition of harassment. It follows also that we accept Mr O'Brien's submission that the decision of the Employment Tribunal was, in the true legal sense, perverse - but this was, we think, because it did not direct its mind to the statutory definition.

32. So the appeal will be allowed. The finding of harassment will be set aside and, of course, with it the remedy will fall.