EMPLOYMENT TRIBUNALS

Claimant | ***Respondent***

Mr B Kenbata **AND** **Westminster City Council**

Heard on the papers **On: 30 October 2017**

Before: **Employment Judge Gordon**
Mr P Secher
Mr J Carroll

Representation

For the Claimant: Nabila Mallick (counsel)

For the Respondent: Christopher Stone (counsel)

REASONS on REMISSION

1. We heard this claim in June 2015. We rejected all parts of the claim except for a claim of victimisation. The Claimant succeeded in that victimisation claim only because of a concession of fact made on behalf of the Respondent. The concession was that the Claimant's complaint of race discrimination was a protected act.[1] Because of the statutory definition of protected act, the concession meant that he had not acted in bad faith when he made that complaint. The victimisation claim succeeded because we found that the Respondent had acted detrimentally towards the Claimant because he had made that complaint.

2. If that concession had not been made, we would have found that the Claimant had acted in bad faith when he made that complaint and the victimisation claim would have failed. But we considered ourselves precluded from making this finding because the concession was one of fact and not law, and it would have been wrong for us to go behind it.

3. However, since the Claimant's success in the victimisation claim was purely technical we declined to make an order in his favour by way of remedy.

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[1] As defined in section 27 of the ***Equality Act*** 2010.

4. We dismissed all the Claimant's other outstanding claims which were before us.

5. On the question of costs, since the Claimant succeeded in only one of a number of claims, and that success was purely technical because of the concession, we refused to order reimbursement of the Tribunal fee paid by the Claimant. Instead we acceded to the Respondent's application for costs. We ordered the Claimant to pay £10,000 to the Respondent in respect of costs and we ordered that the Claimant forfeited the deposit of £1,000 that he had been ordered to pay in one of the claims which failed – the protected interest disclosure claim.

6. The Claimant appealed against our decision to the Employment Appeal Tribunal and was partially successful.[2] The EAT remitted the claim back to us with a direction that it should be dealt with on submissions only. To that end, we received written submissions from the parties. We now give our decision on the matters remitted to us.

7. We propose to recite the relevant facts for this remitted decision (the main facts were in our oral decision and reasons given on 24 June 2015 – transcribed and signed on 4 January 2016). We will then explain the result of the appeal and our revised approach to this matter.

8. The Claimant, who describes himself as a Black British African, worked in the Respondent's open plan office. In December 2013, his manager placed a pot plant on a desk near her place of work. On 2 April 2014, the Claimant sent an email to Mr Low, who was the head of department, saying:

> "Dear Martin
> Could you please consider the removal or relocation of the plant on Zinnie's desk in her absence. I find it difficult to communicate with colleagues in certain sections of the office with the plant blocking my view and suspect it could be a remote health and safety issue and a form of racial segregation which is an offence under the Equality Act 2012."

9. He attached a picture of the plant in his email. In subsequent emails the Claimant maintained his stance that the placing of the pot plant could be an act of race segregation and referred to section 13(5) of the Equality Act 2010.

10. On 3 April 2014, in the open plan office, Mr Low asked the Claimant about his complaint. We heard a recording of this discussion (the Claimant secretly recorded everything which happened in the office) and read a transcript (page 664 of the bundle). Whilst it is not as confrontational as the Claimant says, it was a questioning discussion between Mr Low and the Claimant. We heard on the recording the incredulity expressed by Mr Low to the Claimant about the Claimant's reaction to the plant.

[2] Appeal No. UKEAT/0063/16/JOJ.

11. The action of talking to the Claimant in this way in the open plan office was said to be an act of racial harassment, direct race discrimination and victimisation. Whether it was an act of racial harassment or direct race discrimination is before us in this remitted hearing. There was no appeal against our finding that it was an act of victimisation nor our decision on remedy in that claim.

The law

12. Section 13 of the Equality Act 2010 defines direct discrimination. A person A discriminates against another B if because of a protected characteristic A treats B less favourably than A treats or would treat others. This therefore leaves room for a hypothetical comparator if there is no direct comparator. Of significance in this case is section 13(5). If the protected characteristic is race, then less favourable treatment includes segregating B from others.

13. Harassment is defined in section 26 of the Act. A person A harasses another B, if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Section 26(4) states that in deciding where the conduct has the effect referred to, each of the following must be taken into account –
    (a) the perception of B;
    (b) the other circumstances of the case; and
    (c) whether it is reasonable for the conduct to have that effect.

14. Section 136 of the Act deals with the burden of proof. That says that if there are facts from which the tribunal could decide in the absence of any other explanation that the person A contravened the provision concerned, the tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision. This recognises that is difficult for Claimants to prove that there has been discrimination, and reflects the fact that discrimination is usually covert and that discrimination and harassment are often unconscious rather than conscious.

The appeal

15. The appeal was successful on two grounds:-
    (a) **Inconsistency**. The EAT found that we were wrong to limit the effect of the "no bad faith" concession to the victimisation claim. Instead, for the sake of consistency, we should have addressed the racial harassment claim on the basis that the Claimant had been acting in good faith throughout. And we were wrong to find that the Claimant had acted in bad faith because this was not something put to him in cross examination. We need to adjust our approach to the racial harassment claim accordingly.
    (b) **Reasons**. The EAT found that we should have dealt with the events of 3 April 2014 also as a direct race discrimination claim.

Considerations

16. As can be seen from the definition of harassment, it has two limbs. In our original findings when we considered the first limb, we found that when Mr Low spoke to the Claimant in the office on 3 April 2014 his purpose was not to violate the Claimant's dignity nor to create an intimidating, hostile, degrading, humiliating or offensive environment for him. That finding was upheld on appeal.

17. On the second limb, we found that the discussion of 3 April 2014 did not have that effect. This was because we found that the Claimant did not really think that the plant was an act of race discrimination and had racially segregated him. We found that it was not a genuine complaint and was an act of mischief. So although Mr Low's reaction in the open office was probably "unwanted conduct", we did not think the Claimant was surprised by it, and we did not think that it did violate his dignity or created the environment defined.

18. As a result of the EAT's decision we need to adjust our findings here. We need to find that the Claimant acted in good faith in his complaint that the plant was (or could be, as he said in his emails) an act of race discrimination and racial segregation. On that basis, the discussion with the Claimant about it in the open plan office was racial harassment after all. That is because the complaint was not an act of mischief after all, and therefore the Claimant would reasonably have been surprised by Mr Low's reaction. It also means that the discussion was capable of violating his dignity or creating a humiliating environment for him.

19. We have already found that it would be reasonable for the discussion to have that effect because any complaint of race discrimination at least in the first instance should be dealt with confidentially and the head of a department in Mr Low's position ought not to talk to a worker who has made such a complaint in an open plan office as happened here. We also heard from listening to the recording that immediately before the discussion between Mr Low and the Claimant in the office, the Claimant had been talking to another member of staff. It is likely that that member of staff heard Mr Low talking to the Claimant in the way he did. It is also possible, but we are not sure, that other people could have overheard the discussion between Mr Low and the Claimant.

20. It does not really matter who actually overheard Mr Low talking in this way. The important thing for the purpose of the claim is whether a reasonable person in the Claimant's position having made this complaint of race discrimination would suspect that other people might be listening to Mr Low talking to him in that way. If so, then it is unwanted conduct. It related to race because the discussion happened because he had made a race complaint. And it would reasonably affect the worker's perception of the workplace environment for the purpose of the harassment definition.

21. As a direct race discrimination claim however we take a different view. We found in our original decision that there was nothing in the background material or in any other material which made us think that race was an issue

in the office. It was on that basis that we dismissed all the other complaints of direct race discrimination. Mr Low was genuinely incredulous about the race complaint made with respect to the plant (as we heard from the recording). We are sure that he would have treated a hypothetical comparator (that is to say, a person without the protected characteristic of race who had complained about racial segregation in the same circumstances as the Claimant) in exactly the same way as he treated the Claimant.

Remedy in the harassment claim

22. When assessing the correct remedy for the racial harassment we think that it is right to make an award of monetary compensation. Our award may include compensation for injured feelings.[3]

23. On the evidence we do not think that any upset to the Claimant arising from the discussion in the office on 3 April 2014 lasted very long. We say that because he was dealt with sensitively after that incident and on his departure from the office he wrote a letter to Mr Low which was complimentary and which did not mention the discussion.

24. Because of this, and because this was a one-off act of harassment we think it must come very close to the bottom of the lower band scale in ***Vento v Chief Constable of West Yorkshire Police (No 2)*** [2002] EWCA Civ 1871, as uplifted by the Court of Appeal's decision in ***Simmons v Castle*** [2012] EWCA Civ 1039 and recent Presidential Guidance. We think it is right therefore to award £1,000.

Revisiting the question of costs

25. At the hearing the Claimant sought repayment by the Respondent of the fees he paid to bring the claim to the Tribunal, that is £950 hearing fee on case number 2201711/14 and £250 on the issue of case number 2200382/15, a total of £1,200 for the claim that was consolidated and which we finally heard. We declined to order the Respondent to pay these fees to the Claimant bearing in mind his success in the claim was purely technical.[4] However, having regard to the EAT's decision we must approach this question not by regarding his success on the victimisation and racial harassment claim as purely technical because of the concession, but by regarding him throughout as genuinely believing that the plant could be an act of race discrimination. On that basis, he ought to recover back these fees. However, since the Supreme Court has declared that the tribunal fees were unlawful,[5] any order we make in this respect would be pointless since the Claimant will be receiving back these fees anyway or may already have done so. In those circumstances we have concluded it is appropriate not to change our original order.

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3 Section 119(4) of the ***Equality Act*** 2010.

4 Paragraph 156 of our reasons.

5 ***R (on the application of UNISON) v Lord Chancellor*** [2017] UKSC 51.

26. We also need to revisit our order that the Claimant pay £10,000 towards the Respondent's costs in the light of our new findings. Our reasons for making this order are set out in paragraphs 157 to 168 of our reasons. We decided that the Claimant had acted unreasonably with respect to the protected interest disclosure claim (which failed after a deposit order) and that apart from the claim about the incident of 3 April 2014, all his other claims had no reasonable prospect of success. Therefore he acted unreasonably with respect to those other claims, and we therefore had a discretion whether to make a costs order under Rule 76 of ***The Employment Tribunals Rules of Procedure 2013***.

27. Despite giving the Claimant an opportunity to tell us about his means there was no evidence about how easy or difficult it would be for him to pay a costs order. We were made aware of discussions to settle the claim but were unhappy with the Claimant's explanation why he did not respond to the offer or negotiate at that time. We took into account that the starting point is that the Employment Tribunal is a no costs regime, that it is difficult for litigants in person to assess the strength of their case, and that although the Claimant had access to legal advice it might have been more difficult than usual for him to get such advice.

28. We decided that it was unreasonable for the Claimant not to limit his claim to the discussion on 3 April 2014 because that was the only claim which had some chance of success. Had he done this, the matter would have been set down for one or more likely two days. On that basis we ordered him to pay £10,000 towards the Respondent's costs which appeared on its figures to be well over £60,000 including VAT.

29. Nothing in the above reasons for making the £10,000 order has changed as a result of the successful appeal and our decision on remission. Accordingly we do not amend that order.

Employment Judge Gordon

Dated: 30 October 2017