



EMPLOYMENT TRIBUNALS

Claimant: Mr A. McLean

Respondent: Yvette Mooney, Terence Yeomans and Jason Stevenson

Heard at: Birmingham

On: 12 & 13 March 2018

Before: Employment Judge Butler

Members: Ms. S. Campbell and Mr C.J. Ledbury

Representation

Claimant:

Respondent:

JUDGMENT

The unanimous Judgment of the Tribunal is that the claim of harassment on the grounds of the Claimant's race is not well-founded and is dismissed.

REASONS

1. By a claim form submitted to the Tribunal on 26 May 2017, the Claimant brought claims of direct discrimination and harassment on the grounds of his race against Contract Fire Systems Limited and the above named Respondents and a claim of victimisation against Contract Fire Systems Limited. His claim against Contract Fire Systems Limited was settled through ACAS and the Claimant elected to continue his claim for racial harassment against the above three Respondents.
2. The basis of the Claimant's claim is that on 01 March 2017, as he was about to enter a storeroom on his employers premises, he heard comments and laughter from the above named Respondents. He alleges that Miss Mooney had indicated she wished to go to Barbados on holiday to which Mr Yeomans said words to the effect that she would be alright there since the Negros had donkey dicks at which all three Respondents laughed. The Claimant alleged that this amounted to harassment on the grounds of his race by the Respondents.

The Issues

3. The issues in this case are, firstly, whether Mr Yeomans actually made the comments attributed to him by the Claimant causing the other two Respondents to laugh at what he said and, secondly, whether those comments or any other comments made by Mr Yeomans amounted to harassment for the purposes of Section 26 of the Equality Act 2010.
4. Section 26 of the Equality Act 2010 provides:-
 - (i) A person (A) harasses another (B) if –
 - (ii) (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)
5. The protected characteristic relied on by the Claimant is race, in that he is of mixed race, one of his parents being African Caribbean.

The Evidence

6. We did not have a bundle of documents, although Witness Statements were produced by the Witnesses and all named parties gave evidence. Certain documents were handed to us which we considered in our deliberations.
7. In their oral evidence, the Claimant and the Respondents made reference to certain inconsistencies in each other's evidence. These largely consisted of where the Respondents were standing when the Claimant heard comments made by Mr Yeomans, where he went to deliver a box of goods to the storeroom after he heard the comments, when Miss Mooney left the storeroom and where the Claimant was standing when she spoke to him later. We considered these matters to be of no relevance to the issues in this case.
8. The Respondents essentially denied that Mr Yeomans made the comments attributed to him by the Claimant. Their version of events was that when Miss Mooney indicated she would like to go to Barbados on holiday, Mr Yeomans said words to the effect that the men there were "well hung" to which Mr Stevenson then said to Miss Mooney words to the effect that would suit her because of the size of her "bucket" (a reference to her private parts) and Mr Stevenson then cupped his hands to simulate an echo in a bucket. They allege that it was this exchange at which the Respondents were laughing.

The Facts

9. There were a number of matters which we considered in making our Findings of Fact. Those which we considered to be relevant to the issues in this case were:
 - i. The Claimant was outside the storeroom in which the three Respondents were talking when he said he heard

the comment he attributes to Mr Yeomans. Whilst saying he heard these comments clearly when he was outside the double doors leading to the store, he claims not to have heard any further comments made by the Respondents because he was in a state of shock.

- ii. The Respondents all gave a consistent account of what was said between them, namely, Mr Yeomans referring to Barbadian men as being “well hung” and then the comments regarding the “bucket”
 - iii. Despite alleging he was shocked and upset by what he heard, the Claimant apparently remained at work for the remainder of the working day to complete his normal duties. He sent an email to a colleague alleging that Mr Yeomans had made certain comments and saying he could no longer work for the company. Since he shared an email facility with Mr Stevenson, upon seeing this exchange of emails, Mr Stevenson asked the Claimant whether he could support him in anyway in referring the matter to the Employer’s HR Department. The Claimant refused to accept this offer of assistance.
 - iv. The Claimant knew his probationary period had been extended, his employment having commenced on 14 November 2016, and knew he would have had a further review imminently which could have led to his dismissal.
 - v. Before leaving work on 01 March 2017, when the relevant incident occurred, the Claimant deleted the email chain with his colleague which had been seen by Mr Stevenson.
10. The principal issue in this matter is what was said. Bearing in mind those matters referred to above and the general demeanour of the parties as they gave their evidence, we were able to make Findings of Fact. We were impressed with the evidence of Miss Mooney and of Mr Stevenson. We found the Claimant’s evidence to be somewhat inconsistent at times. By way of example, although not strictly relevant to the issues, he changed his mind several times when giving evidence as to when Miss Mooney actually left the storeroom. We mention this at this point because of the Claimant’s tendency to rely on detail which was not actually relevant to the issues.
11. For the above reasons, we preferred the evidence of the Respondents in relation to what Mr Yeomans said and the comments which were made after that by Mr Stevenson. We do not accept that the Claimant would have clearly heard what was said inside the storeroom when he was outside it, yet was then unable to recall what was said when he was inside the storeroom and much closer to the three Respondents. We conclude that the Claimant fabricated his account of the comments made by Mr Yeomans and we accept the evidence of the Respondents as to what they actually said.

Conclusions

12. The Respondents denied that making a reference to Barbadian men being well hung amounted to a racial stereotype which could have caused offence. We find that such a comment could have caused offence in the right context. We remind ourselves that it is not what is intended by the comment, but rather how it is perceived by the recipient
13. Having determined as a matter of fact what was actually said, we must apply the facts to the statutory requirement in Section 26 of the Equality Act 2010 and ask whether the comments constituted harassment on racial grounds.
14. In reaching our conclusions, we have had regard to the decisions in Richmond Pharmacology –v- Dhaliwal EAT/0458/08, Betsi Cadwaladr University Health Board –v- Hughes [2014] UK EAT/0179/13, Warby –v- Wunda Group PLC UK EAT 0434/11 and Weeks v The Newham College of Further Education UK EAT 0630/11.
15. The decisions in these cases give guidance as to whether conduct or comments may amount to harassment for the purposes of Section 26. Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. It is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that no offence was intended. We bear in mind that it is important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.
16. We must also bear in mind the context in which the comments made by Mr Yeomans in this case was made. It was meant to be a light-hearted comment but was made without any knowledge that the Claimant was in the vicinity and could overhear what was being said. In such circumstances, it is difficult to conclude that the comment could have been intended to cause offence.
17. We have also considered the evidence of all of the parties who agreed prior to 01 March 2017 they had enjoyed a good working relationship which was variously described as good humoured, helpful and even jovial. It is agreed that the comment made was a single remark in the context of a discussion between the three Respondents. It is of course possible that a single remark maybe so significant as to create the proscribed environment envisaged by Section 26. The comments made by Mr Yeomans must be seen in context and we find that this was a one-off comment, not intended to cause any offence. A material question is whether it should reasonably have been apparent whether the comment was intended to cause offence as, if it was, it might carry a very different weight in the general scheme of things.
18. We have considered carefully the words and expressions in Section 26 and bear in mind that trivial acts or comments causing minor upsets should not be considered to amount to harassment and, where no offence was intended, trivial comments should not be taken to violate a person's dignity.

19. In relation to the Claimant's alleged injury to his feelings, we paid particular attention to the fact that he remained at work after allegedly being so shocked and upset by Mr Yeomans's comments and the laughter of the other Respondents and he then, for whatever reason, deleted the email chain between himself and his colleague when he had recounted what he alleged Mr Yeomans had said. We also bear in mind that the only evidence of any anxiety or depression suffered by the Claimant was his own oral evidence and a prescription for a mild anti-depressive drug dated seven weeks after the comments made by the Respondents.
20. We have also taken into consideration our view of the Claimant's truthfulness in relation to his evidence that he did not know his extended probationary period was coming to an end and he was due to have a further review which could have resulted in his dismissal (and which did) two days after the incident in question. Given that we consider his evidence about what Mr Yeoman's said to be a fabrication and the lack of credibility of his evidence in relation to the security of his employment, we do not accept that he suffered the emotional distress he alleges or that he had an anxiety attack the day after the comments, particularly since he also said in evidence that he had suffered depression as a result of a family bereavement some five years earlier.
21. Accordingly, whilst we accept that Mr Yeomans made comments that Barbadian men were "well hung", neither his comments nor those of Mr Stevenson were said in an angry or hostile manner and we do not accept that they fulfil the statutory definition of harassment or that it would be reasonable for the comment to violate the Claimant's dignity and/or create the environment set out in Section 26.
22. For the above reasons, we dismiss the claim.
23. Whilst we have found in favour of the Respondents, the Tribunal felt it appropriate to make the point that, in different circumstances and in a different context, the comments of both Mr Yeomans and Mr Stevenson might have amounted to harassment and their employers Diversity and Equality Policies should be reviewed by them. This does not detract from the fact that we did not consider the Claimant's evidence to be credible.

Employment Judge Butler

19 March 2018

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.