Appeal No. UKEAT/0176/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 December 2017
Judgment handed down on 10 May 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MR M BAKKALI — APPELLANT

GREATER MANCHESTER BUSES (SOUTH) LIMITED
t/a STAGE COACH MANCHESTER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHARLES CIUMEI (One of Her Majesty's Counsel) and MR FELIX WARDLE (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR STEFAN BROCHWICZ-LEWINSKI (of Counsel) Instructed by: Thomas Mansfield Solicitors Ltd 35 Artillery Lane London E1 7LP

SUMMARY

HARASSMENT - Purpose

RELIGION OR BELIEF DISCRIMINATION

Where the same facts are relied upon for a claim of direct discrimination on grounds of religious belief or race and a claim of harassment for conduct related to those protected characteristics, an Employment Tribunal does not err in determining the harassment claim if they rely on their findings of fact on the direct discrimination claim provided they apply the correct "related to" test required by **Equality Act 2010** section 26. No evidence from the alleged perpetrator as to why he uttered offending words is required although an adverse inference may be drawn from his not giving evidence. Findings of fact on the context in which the words were spoken is relevant. **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 considered. The Employment Tribunal did not err in the test for harassment which they applied. Although a different Employment Tribunal may have come to a different conclusion, they did not err in law. Appeal dismissed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Mr Mounir Bakkali ("the Claimant") appeals from the dismissal in a Judgment sent to the parties on 8 December 2016 by an Employment Tribunal, Employment Judge Slater and members ("the ET") of his claim of harassment related to religious belief or race. The ET also dismissed his claims of unlawful deductions from wages, direct race and religious discrimination and unfair dismissal. The Full Hearing was concerned only with the appeal from the dismissal of the claims of harassment under the **Equality Act 2010** ("EqA"). The principal issue in the appeal is whether the ET failed to recognise and apply the different test for harassment - erroneously applying that for direct discrimination. Mr Ciumei QC with Felix Wardle appeared under the auspices of the Bar Pro Bono Unit for the Claimant. Mr Brochwicz-Lewinski appeared for Greater Manchester Buses (South) Limited ("the Respondent").

Outline facts relevant to the claim of unlawful harassment

2. The Claimant was employed by the Respondent from 14 July 2008 until his dismissal on 28 October 2015. At the relevant time he worked as a bus driver. The Claimant identifies himself as being of Moroccan origin and Muslim.

3. In early October 2015 the Claimant had a conversation with a colleague, Mr Cotter. The Claimant told Mr Cotter about a report made by a German journalist who went to Syria and spoke to Islamic State ("IS") fighters. In paragraph 5 of the Particulars of Claim it is said the Claimant quoted some of the comments and findings made by the journalist to Mr Cotter. These included the opinion of the journalist that:

> **"… Mosul … was a "Totalitarian State", and that they (IS), are trying to enforce law and order upon its subjects, and that they are confident and proficient fighters, …"**

4. On 19 October 2015 the Claimant and Mr Cotter were in the seating area of the works canteen. It was not in dispute and the ET found at paragraph 20 that Mr Cotter said to the Claimant "Are you still promoting IS/Daesh".

5. The ET recorded at paragraph 21:

> **"21. … The claimant was, on his own account, upset by the conversation with Mr Cotter and the allegation that he was promoting or supporting ISIS. …"**

6. The Claimant and Mr Cotter went into the corridor connecting the seating area of the canteen with the servery. There was an incident in the servery between the Claimant and Shane Tomkinson, another driver. This occurred in front of Marie Green, a canteen worker. She was concerned about the Claimant's behaviour which she considered to be aggressive.

7. On 20 October Marie Green told Mr Grimshaw, Assistant Operations Manager at the Hyde Road depot, about the incident. Mr Grimshaw asked Marie Green, Mr Tomkinson and Mr Cotter to make statements about the incident. Mr Cotter left his statement in the office of Mr Ambrose, Depot Operations Manager, who asked Mr Grimshaw to investigate the incident.

8. The ET recorded at paragraph 24:

> **"24. Mr Tomkinson wrote in his statement that he heard a dispute between two drivers about Mr Bakkali supporting the ISIS religion. …"**

He then gave his account of the altercation between him and the Claimant.

9. The ET recorded at paragraph 25:

> **"25. Marie Green wrote that, after an argument between Mr Bakkali and Russ Cotter about Mr Bakkali telling other drivers that he supported that he supported ISIS, Mr Bakkali asked for tea then turned to Mr Tomkinson and said sorry. Mr Tomkinson replied "No worries, go ahead" then Mr Bakkali started shouting loudly saying "Why are you saying that to me; why would I be worried?" …"**

Marie Green wrote that on that occasion she found the Claimant frightening, aggressive and very intimidating. She would prefer him not to use her services.

10. On about 22 October 2015 Mr Cotter apologised to the Claimant for upsetting him.

11. On 23 October 2015 the Claimant was suspended. He prepared a written statement on that day.

12. On 27 October 2015 Mr Grimshaw held an investigatory meeting with the Claimant. The Claimant recorded on his mobile phone that meeting and his subsequent disciplinary and appeal meetings. The Claimant told Mr Grimshaw that two weeks ago he had a "strong debate" with a driver, Mr Cotter, about Syria. He said that he had informed Mr Cotter what a German journalist had said about ISIS. The Claimant told Mr Grimshaw that on 19 October 2015 the driver accused him of promoting ISIS and he got angry.

13. Mr Grimshaw gave Mr Ambrose the statements he had obtained and the notes of the investigation meeting. Mr Ambrose decided to proceed to a disciplinary hearing.

14. Mr Ambrose held a disciplinary meeting with the Claimant on 28 October 2015. The ET recorded at paragraph 38 that the Claimant gave his account of the incident on 19 October. He said that he was polite and that Mr Tomkinson was aggressive. The ET recorded at paragraph 38:

> **"38. … The claimant accepted that he was annoyed at the conversation with Mr Cotter. He explained that they had had a previous conversation about Syria and the claimant had told Mr Cotter about what the German journalist had said. He said "He thought I was promoting what the German said". The claimant said he had told Mr Cotter that the journalist had said that "Those guys are very good fighters. They're not worried and they've actually managed to run the country in time." The claimant said he was annoyed on 19 October about this because he had been accused. Mr Cotter had told him he was promoting IS. He said Mr Cotter said to him, "Are you still promoting IS**

> **Daesh?" Ms Keppie [from HR] suggested it may have been a joke. The claimant said he did not take it as a joke. He took it seriously and Mr Cotter made him angry."**

15. Mr Ambrose decided that the behaviour of the Claimant on 19 October 2015 was threatening and abusive and therefore his decision was to summarily dismiss him for gross misconduct.

16. A Stage 1 appeal was held on 4 November 2015. The decision to dismiss was upheld. The Claimant had the right to lodge a further appeal which he did.

17. On 11 November 2015 a Stage 2 appeal meeting was held. On that day the Claimant was told the appeal was dismissed. This was confirmed by letter of 13 November 2015.

The Judgment of the ET

18. The allegation of harassment related to race and/or religious belief which is the subject of the appeal is:

> **"On the evening of 19 October 2015 Rusk Cotter approached the claimant in the canteen and unexpectedly said "Are you still promoting IS/Daesh". …"**

19. In deciding whether this admitted remark constituted unlawful harassment the ET relied upon their conclusion at paragraph 20 of their Judgment that it did not constitute direct discrimination.

Equality Act 2010

Section 4:

> **"The following characteristics are protected characteristics -**
>
> **…**
>
> **race;**

religion or belief;

…"

Section 13:

"(1) 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."

Section 26:

"(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."

20. For the purposes of the issues in this appeal four paragraphs in the Judgment of the ET are material:

"20. Relevant events began in October 2015. Early in that month, the claimant had a conversation with another driver, Mr Cotter. The claimant reported to Mr Cotter comments by a German journalist about ISIS which could reasonably be understood as being of a positive nature. The claimant told Mr Cotter that the journalist had said that ISIS were very good fighters and they had managed to run the country in time. On 19 October 2015 the claimant had a heated discussion with Mr Cotter in the area of the canteen. The conversation resulted from the earlier comments from the claimant about what he had heard the German journalist say. We find that Mr Cotter said to the claimant "Are you still promoting IS/Daesh". The claimant's evidence on this point is supported by the statement made by Mr Cotter shortly after the relevant events. We find that Mr Cotter made the remark because of the previous conversation. There is no evidence that Mr Cotter made the remark because of the claimant's race or religion.

…

68. … ***On the evening of 19 October 2015 Rusk Cotter approached the claimant in the canteen and unexpectedly said "Are you still promoting IS/Daesh?"*** **…**

69. We have found that Mr Cotter did make the alleged comment. Had the comment been made in isolation, without the context about which we have heard from the claimant, we may have concluded that the claimant had proved facts from which we could have concluded that it was an act of religious discrimination, given the claimant is Muslim. If the comment had been made without the context, and the speaker knew the claimant was Muslim, it would have appeared that the speaker was linking the claimant's religion to the possibility of him promoting ISIS. However, the context in which Mr Cotter made this remark was that it followed a conversation where the claimant had informed Mr Cotter about positive sounding comments from a German journalist about ISIS. Mr Cotter had understood that, by making these comments, the claimant was promoting ISIS. Given the context, we conclude that the claimant has not proved facts from which we could conclude that the respondent treated him less

favourably because of his religious belief. Also, the claimant has not proved facts from which we could conclude that the remark was made because the claimant was of Moroccan national origin. The complaint of direct race and/or religious discrimination in relation to this particular allegation, therefore, fails.

…

82. We found that Mr Cotter did make this remark. However, for reasons we explained in relation to the complaint of direct discrimination, in the context it was not related to religious belief. There is no evidence it was related to race. We conclude that it was unwanted conduct. We are not satisfied it had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant but would have accepted that it had such an effect. However, given our conclusion that, in the context, the remark was not related to religious belief, this complaint fails. There is no evidence it was related to race so the complaint of harassment related to race also fails."

The Grounds of Appeal

21. The ground of appeal permitted to proceed to a Full Hearing was clearly summarised by Mrs Justice Simler, the President, as follows:

> **"The only basis for rejecting the Claimant's claim in the circumstances was the Tribunal's conclusion that the comment did not *relate to* race or religion. The proposed ground of appeal challenges this conclusion in circumstances where the Tribunal appears to have reached precisely the same conclusions in paragraphs 69 and 82 without any apparent recognition of the wider test in s.26 of the EA 2010 as compared with s.13. Section 26 involves no comparison and imposes a wider connection test than s.13. It is argued that the findings at paragraph 82 and the Tribunal's conclusion may reveal an error in its approach, and a failure to have regard to the wider context relevant to a decision under s.26."**

22. As formulated in the amended grounds of appeal it is said:

> **"3.1. The Employment Tribunal erred in law at paragraph 82 of the Decision in that they did not apply the correct legal test in relation to harassment contrary to s.26 Equality Act 2010.**
>
> > **3.1.1. The test for harassment under s.26 Equality Act 2010 is different to the test for direct discrimination under s.13. The s.13 test is a comparative exercise and requires an inquiry into the cause of the less favourable treatment: "*because of* *a protected characteristic*" (emphasis added).**
> >
> > **3.1.2. In contrast, the test at s.26 does not require a comparison and is a wider test: "*related to* *a relevant protected characteristic*" (emphasis added).**
> >
> > **3.1.3. The Employment Tribunal erred in law by relying on its earlier reasons on the complaint of direct discrimination (paragraph 69) in dismissing the complaints of harassment related to race and religion at paragraph 82.**
> >
> > **3.1.4. It therefore failed to have regard to or inquire more widely into the context of the unwanted conduct and its relation to either of the protected characteristics of race or religion as required by s.26 Equality Act 2010."**

A It is further said that the ET "failed, inter alia, to deal with" seven listed matters. These included at paragraph 3.1.5:

> **"a. The reason why Mr Cotter had the first conversation with the Appellant (i.e. the one that preceded that on 19 October 2015);**
>
> **b. The reason why Mr Cotter made the remark on 19 October 2015. His handwritten statements for the disciplinary proceedings do not explain that;**
>
> **c. The reason why there was no proper witness statement from Mr Cotter or why he was not called to give evidence to the Employment Tribunal (despite the fact that he was still working for the Respondent at the time of the Employment Tribunal hearing);**
>
> **…**
>
> **e. The fact that Mr Cotter apologised for his remark on 19 October 2015 (as set out or recorded in his handwritten statements). The Employment Tribunal does not appear to have looked into this or attached any significance to it. They do not appear to have investigated why Mr Cotter felt it appropriate to apologise. So far as the Appellant is aware, Mr Cotter was not subject to any sanction in relation to his conduct to the Appellant."**

23. By their Answer the Respondent contends that the decision of the ET to reject the claim of harassment should be upheld for the reasons set out in their Judgment and for additional grounds. These were that:

> **"5. The Employment Tribunal's conclusion that Mr Cotter's remark was neither related to religious belief nor race was plainly correct and/or a permissible finding …"**

for reasons which included:

> **"5.1. By his oral evidence before the Tribunal, the Appellant expressly confirmed that Mr Cotter's comment to him about IS [Islamic State or Daesh] resulted from the Appellant's previous comments to Mr Cotter about IS in their earlier conversation. Those comments, as found by the Tribunal, could reasonably have been viewed as being of a positive nature.**
>
> **5.2. The finding of the Tribunal at paragraph 20 of its Judgment that Mr Cotter made his remark because of his previous conversation with the Appellant is therefore unimpeachable.**
>
> **5.3. Other evidence relevant to the Tribunal's assessment of Mr Cotter's comment was:**
>
> > **…**
> >
> > **5.3.2. The fact that Mr Cotter had immediately sought to backtrack from his comment and explain himself when challenged by the Appellant, together with the fact that Mr Cotter apparently and readily apologised for his comment.**
> >
> > **…"**

24. It is to be noted that there is no ground of appeal asserting that the ET erred in failing to hold that pursuant to **EqA** section 136 the burden of proof passed to the Respondent to show

A that they had not contravened section 26 and that on the evidence they had not satisfied that requirement so that a finding of harassment should have been made.

B 25. There is no difference between counsel as to the legal principles applicable to the issues raised in this appeal. Both Mr Ciumei QC and Mr Brochwicz-Lewinski referred to the judgment of Underhill J (as he then was), President of the EAT, in **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 in which the EAT held that the three necessary elements of liability C for harassment were not difficult to break down. The EAT in **Dhaliwal** was concerned with the predecessor legislation of the **EqA**. The three elements are set out in paragraph 10 of **Dhaliwal**. There is a material difference between **EqA** section 26 and the predecessor D legislation. Importantly the predecessor legislation was concerned with conduct "on grounds" of a protected characteristic. Mr Ciumei QC referred to the **Equality Act 2010** Code of Practice which provides at paragraph 7.9:

> **"Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic."**

E

The **EqA** is concerned with whether the conduct is "related to" a protected characteristic.

F 26. The EAT in **Unite the Union v Nailard** [2017] ICR 121 held at paragraph 97: "We think there is no doubt that the words "related to" were intended to effect a change". At paragraph 100 the EAT held:

G

> **"100. In our judgment section 26 of the Equality Act 2010 requires the employment tribunal to focus upon the conduct of the individual or individuals concerned and ask whether their conduct is associated with the protected characteristic …"**

27. In my judgment the third element identified in **Dhaliwal** now needs to be modified to H reflect the different wording in **EqA** section 26. I suggest that the modified third element is:

> **"(3) Was the unwanted conduct related to a relevant protected characteristic?"**

However, the further observations of Underhill J in paragraph 11 of **Dhaliwal** are unaffected by the wording of the legislation and are of importance. The EAT held:

> **"11. The tribunal's eventual decision may often depend on what are, in practice, undifferentiated factual issues which cover more than one element in the analysis. Nevertheless, it will be a healthy discipline for a tribunal in any case brought under this section (or its equivalents in the other discrimination legislation) specifically to address in its reasons each of the elements which we have identified, in order to establish whether any issue arises in relation to it and to ensure that clear factual findings are made on each element in relation to which an issue arises."**

28. In this case the first two elements of harassment contrary to **EqA** section 26 were established. The conduct complained of: first Mr Cotter publicly asking whether the Claimant still supported ISIS was unwanted and, secondly, the conduct had the effect of humiliating him. The issue on this appeal is whether the ET erred in their analysis and application of the third element: whether the conduct complained of was related to the religious belief or race of the Claimant.

29. Mr Ciumei QC and Mr Brochwicz-Lewinski agreed that context is important to the decision as to whether the conduct complained of was related to the relevant protected characteristic. Although referring to the predecessor legislation, the observations of Langstaff J, then President, in **Mrs S Warby v Wunda Group Plc** UKEAT/0434/11/CEA referred to the observations of Elias LJ in **Grant v HM Land Registry and Another** [2011] ICR 1390. Langstaff J held:

> **"21. In *Grant* at 1401, paragraph 43, again, the importance of the particular circumstances were emphasised there by Elias LJ: "for example, it will generally be relevant to know to whom a remark is made, in what terms, and for what purpose". We therefore accept the Respondent's submission that context is everything. It is for a Tribunal who hears the witnesses, whose job it is to determine the facts, and who considers the submissions made to it in the light of having heard those witnesses and determined those facts, to decide what the context is and to contextualise what has taken place. We would add that it may be a mistake to focus upon a remark in isolation. A Tribunal is entitled to take the view, as we see it, that a remark, however unpleasant and however unacceptable, is a remark made in a particular context; it is not simply a remark standing on its own.**
>
> **…**
>
> **23. … we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the**

words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context; …"

30. An issue on which there was some difference between counsel was whether the question of whether the conduct complained of "is related to" the protected characteristic will require a consideration of the mental processed of the protective harasser. Relying on the observations of Underhill LJ in **Henderson v The General Municipal and Boilermakers Union** [2016] EWCA Civ 1049 at paragraph 7, Mr Ciumei QC contended that where, as in this case, there was no direct evidence of the mental processes of the alleged perpetrator, and the burden of proof was on the Respondent, an ET should find for the Claimant in a harassment claim. Mr Brochwicz-Lewinski disagreed.

31. In my judgment the change in the wording of the statutory prohibition of harassment from "unwanted conduct on grounds of race …" in the **Race Relations Act 1976** section 3A to "unwanted conduct related to a relevant protected characteristic" affects the test to be applied. Paragraph 7.9 of the Code of Practice on the **Equality Act 2010** encapsulates the change. Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant. It was said that without such evidence the ET should have found the complaint of

harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place.

32. The issue in this appeal is whether the ET failed to apply the statutory test for harassment in **EqA** section 26: whether the conduct complained of was "related to" the religious belief or race of the Claimant, instead wrongly applying the test for direct discrimination in section 13, whether the conduct was because of those protected characteristics.

33. The facts relevant to the claim of harassment were not in dispute. Mr Ciumei QC was right to observe that Mr Cotter, the author of the conduct complained of, could have given evidence. That he did not gave rise to comment. The absence of such evidence could form the basis for inference but not for speculation. The ET had to reach conclusions on the material before them.

34. The facts giving rise to the allegation of harassment were not disputed. Those facts included the offending words used by Mr Cotter on 19 October 2015. They also included the context in which they were spoken. It was not disputed that the Claimant had initiated a conversation with Mr Cotter earlier in October in which he had recounted the report of a German journalist which could be understood as being of a positive nature about ISIS. The Claimant relayed that the reporter had said that ISIS were very good fighters and had managed to run the country.

35. Based on the unchallenged facts the ET found at paragraph 20:

> **"20. … We find that Mr Cotter made the remark because of the previous conversation. There is no evidence that Mr Cotter made the remark because of the claimant's race or religion."**

The ET made a similar observation in relation to those unchallenged facts in paragraph 69:

> **"69. … If the comment had been made without the context, and the speaker knew the claimant was Muslim, it would have appeared that the speaker was linking the claimant's religion to the possibility of him promoting ISIS. However, the context in which Mr Cotter made this remark was that it followed a conversation where the claimant had informed Mr Cotter about positive sounding comments from a German journalist about ISIS. Mr Cotter had understood that, by making these comments, the claimant was promoting ISIS. Given the context, we conclude that the claimant has not proved facts from which we could conclude that the respondent treated him less favourably because of his religious belief. …"**

36. In dealing with the claim of direct discrimination the ET rightly considered whether the conduct of Mr Cotter on 19 October 2015 was *because* of his race and/or religious belief.

37. In addition to **EqA** section 13, direct discrimination, the ET set out **EqA** section 26, the definition of harassment, which contains the words "relevant to a protected characteristic".

38. The same facts were relied upon by the Claimant in support of his claim of harassment as that of direct discrimination. Findings of fact on the evidence before them were made in paragraphs 20, 68 and 69. Those included findings about the context in which the conduct complained of, the language used by Mr Cotter on 19 October 2015, took place.

39. As the complaint of harassment was based on the same facts as those relied upon for the complaint of direct discrimination the ET did not err in referring back in paragraph 82 to those findings. In deciding the complaint of harassment, in paragraph 82 the ET addressed the test applicable to harassment: whether the conduct complained of was or was not *related* to

religious belief. They concluded in respect of the offending words that there was "no evidence it was *related* to race". The ET held:

> **"82. … given our conclusion that, in the context, the remark was not related to religious belief, this complaint fails. There is no evidence it was related to race so the complaint of harassment related to race also fails."**

The ET were entitled to take into account the context in which the offending words were spoken. Whilst another ET may have reached a different conclusion, this ET applied the correct test for whether the conduct complained of constituted harassment within the meaning of **EqA** section 26.

40. There is no ground of appeal on failure to apply the burden of proof provision in **EqA** section 136(2) although it was referred to by Mr Ciumei QC in his helpful submissions. The ground upon which this appeal was permitted to proceed does not succeed.

41. The appeal is dismissed.