Appeal No. UKEATPA/0128/18/LA
UKEATPA/0129/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 August 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR D P EVANS — APPELLANT

XACTLY CORPORATION LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MR DAVID EVANS (The Appellant in Person)

SUMMARY

HARASSMENT

DISABILITY DISCRIMINATION - Disability related discrimination

VICTIMISATION DISCRIMINATION - Protected disclosure

The Employment Tribunal were best placed to make findings of fact about the context and office culture which it did, and which was necessary in order to understand the Claimant's allegations of harassment and victimisation as well as direct discrimination and section 15 disability discrimination. Having done so, the Tribunal was fully entitled to conclude that the comments complained of did not amount to harassment as defined in section 26 **Equality Act 2010**. In other contexts and circumstances they might have done, but harassment claims are highly fact sensitive and context specific. The other complaints also failed on the facts which were for the Tribunal to make and decide.

HER HONOUR JUDGE STACEY

1. This case comes before the Employment Appeal Tribunal on two proposed appeals brought by Mr David Evans (the Claimant below) against Xactly Corporation Limited (the Respondent before the Tribunal). I shall continue to refer to the parties as they were before the Tribunal.

2. The first proposed appeal is from the Judgment of the Employment Tribunal held at London (Central) ("the ET") before Employment Judge Wade and Members (Ms M Taylor and Ms M Jaffe), following a hearing which took place in November and December 2017. In a Judgment with Reasons sent to the parties on 5 January 2018, all claims brought by Mr Evans were dismissed ("the Judgment").

3. The second proposed appeal concerns the Judgment of Employment Judge Wade sitting alone on a consideration of the papers, which refused the Claimant's application for a reconsideration, which was sent to the parties on 13 February 2018 ("the Reconsideration Judgment").

4. The Claimant was employed by the Respondent as a Sales Representative from 4 January 2016 until his dismissal on 16 December 2016. Following his dismissal, the Claimant brought proceedings for a number of breaches of the **Equality Act 2010** ("EqA 2010"), by reference to the protected characteristics of race and also disability. The issues were very clearly and precisely set out by Employment Judge Hodgson at a Preliminary Hearing and faithfully represented and reproduced in the Judgment, at paragraphs 2 to 7. They were: direct discrimination by reference to the characteristic of disability and/or race, the alleged detriment being his dismissal and

precursor disciplinary proceedings; four alleged incidents of harassment related to disability and and/or race; victimisation, relying on two protected acts with the same detriment as in the direct discrimination complaint; and, finally, section 15 discrimination arising from disability relying on the same incidents of harassment when he said he was called "*fat*", which he said arose from his disability. The Claimant had relied on two impairments in support of his contention that he was disabled within the meaning of section 6 **EqA 2010**. The Respondent had accepted that the Claimant was disabled by reason of his type 1 diabetes but in the absence of any medical evidence did not concede that he had an under-active thyroid or the effect on him of such a condition, if he did have it. The Respondent also did not accept that there was any link between the Claimant's weight and his health.

5. In accordance with its duty, the ET made comprehensive findings of fact relevant to the issues based on the evidence before it, explaining as it did so, why it had preferred the evidence of one witness over that of another where there was a conflict of evidence. It also explained the inferences it had drawn from the primary facts it had found, and why it had made them. Where it was invited to infer a fact but had been unable to do so, it also explained its reasons.

6. The Tribunal found that his colleagues knew from early on in his employment that he had type 1 diabetes as he would regularly inject himself at work and nobody had an issue with that. The Claimant did not allege any specific negative comments about his disability itself.

7. The race discrimination complaint was founded on the Claimant's association with the travelling community. It was common ground that the Claimant's close friend and colleague at work, Noel Paton, knew that the Claimant had close links with the traveller community, but the other Respondent witnesses said that they were not aware of it and when the Claimant's line

manager, Tom Castley, supported the Claimant when he needed time off to go to the funeral of a close friend, he did not remember being told or knowing that the Claimant's friend was a traveller.

8. In order properly to understand the harassment complaints, the Tribunal quite rightly analysed the office culture and the context of the allegations, and the nature of the relationships between the Claimant and the makers of the comments and behaviour relied on as acts of harassment. The Tribunal noted that the context in which behaviour occurs can be crucial to understanding its meaning. They found as follows:

> **"17. The office culture was of jibing and teasing; a way of operating which appears not to be unusual for competitive sales people working under stress to achieve their targets. Mr Castley called it "banter" in that, as he explained, no one was seeking to offend and the receiver was not offended. The Claimant says that these conversations were derogatory.**
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> **18. Some of the phrases which the Claimant says were used cannot be said to amount to potential race or disability harassment. These included terms such as "secondhand car salesman" and "jellied eel salesman". Mr Castley cannot recall saying these things. The Claimant and Mr Paton often said "c***" and the Claimant called Mr Paton "fat paddy" on a regular basis. Thus, it can be seen that the conversation was indiscriminatingly inappropriate and that nobody was either respecting or focussing on protected characteristics.**
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> **19. The Claimant says that Mr Paton was "lovely" and not malicious in that nothing he said ever seemed derogatory and this indicates the subjective nature of the issue. The word c*** is ugly and offensive to many women but the Claimant thought nothing of it. Also, Amanda Fennell [a Senior Director at the material time], who was not part of the team but sat near it, did not personally like the style of conversation but did not perceive it as unacceptable in context and never noticed the Claimant being upset. She referred to the behaviour as "an extension of the friendship" between colleagues which was an interesting way of putting it, meaning that this was all treated as normal friendly behaviour at work.**
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> **20. Mr Castley said that he would at times pull someone aside if he felt that their language had gone too far. He gave specific examples involving an individual called James and another called Solomon. The former was eventually dismissed when he failed to improve his behaviour. There were limits but as far as he was concerned the claimant's colleagues did not exceed them in relation to him.**
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> **21. Mr Castley's third example was of having to talk to the Claimant about his behaviour towards a colleague called Sarah. She had complained to her boss, Amanda Fennell, who had raised it with Mr Castley. She did not like the Claimant trying to hug and cuddle her and call her "pudding". She was upset that he was commenting on her size and said that she had asked him to stop but he had not done so. The managers discussed the issue and did not escalate it to HR because they did not think it [amounted to] a sexual assault; instead they took Mr Evans [the Claimant] aside and explained to him that this behaviour was not appropriate. The Claimant's response was that Sarah "could be rather spikey", in other words not taking any responsibility. He denied that his managers ever even got involved but their evidence was detailed and they corroborated one another and we have no doubt that they did."**

The Tribunal therefore found that the Claimant was an active participant in inappropriate comments and behaviour in the workplace and seemingly comfortable with the office culture and environment.

9. Next, the ET turned to the specific incidents relied on by the Claimant as acts of harassment. They found that on one occasion only he was referred to as a "*fat ginger pikey*" by a colleague, Kevin Henderson, with whom he was on very friendly terms and socialised with outside work, both before and after the comment was made. Very few colleagues heard the comment and those that did, did not find it out of the ordinary. The Claimant did not react or complain at the time and the evidence, which the Tribunal accepted, was that the Claimant would have done so had he been offended. The ET found that only Mr Paton knew of the Claimant's connections with the traveller community and so those that had heard it considered it as a random comment, the Tribunal found.

10. The Tribunal also accepted that on a few occasions phrases such as "*salad dodger*", "*fat yoda*" and "*gimli*" (a reference to a Lord of the Rings character) were bandied about although none of the Respondent witnesses thought that the Claimant was actually fat, and the comments were made by the Claimant's friends in the workplace. The Tribunal found that it:

> **"28. … struggled to see how [the comments] could have been particularly offensive."**

11. In the Spring of 2016 the team came under pressure concerning sales, given an overall poor sales performance. Unfortunately, the Claimant was one of those not achieving what had been thought to be his potential. He had not concluded any deals at that stage. Whilst it was expected, and acknowledged, that it would take time for him to build up a pipeline of deals on which commission could be generated, his sales performance was considered extremely poor,

even after making allowances for him as a new starter. During the period of the Claimant's employment, three colleagues were either dismissed or resigned on account of their poor sales figures and everyone was under pressure concerning sales.

12. In the victimisation complaint the Claimant relied on a conversation with Mr Castley on 16 June 2016 when he says he reported the "*fat ginger pikey*" comment and complained about being harassed in the workplace. Mr Castley did not remember the Claimant making a discernible complaint. After a careful analysis of all the evidence relating to the conversation - it was not minuted and the discussion had been outside a pub in Moorgate where they were having a drink after watching a football game at work together - the Tribunal found that the Claimant had elaborated the discussion beyond recognition. It had been a low-level discussion which Mr Castley had genuinely forgotten. It was possible that the Claimant had mentioned something about it and that Mr Castley had suggested that the Claimant speak to Mr Henderson about it if he was concerned. The ET went on to find that in any event:

> **"33. … there was absolutely no sign that he [Mr Castley] reacted against the Claimant after 16 June and there was no reason for him to do so."**

13. When the team sales figures continued to be poor, Mr Castley spoke frankly to the whole team about what he wanted them to do to improve sales. He mentioned both the Claimant's and Mr Henderson's poor sales record during a sales meeting in mid-October. The Claimant refused to accept the criticism and answered back at Mr Castley during the meeting. The ET found that the office was in a dark mood because of poor sales and Mr Castley was focussed on that as he too was under pressure from above for his team to perform better. The Tribunal found that there was no second protected act within the meaning of section 27 **EqA 2010** and there were no repercussions from the discussion on 16 June between the Claimant and Mr Castley. It was all about the Claimant's poor work performance.

14. The Claimant's poor performance and inability to take guidance or training or acknowledge room for improvement in his performance eventually led, the Tribunal concluded, to Mr Castley deciding he wanted the Claimant's employment to be terminated. On HR advice he decided to carry out a performance improvement plan first. The Claimant then brought a grievance, relying on having been called a "*pikey*" by Mr Henderson. In the course of the grievance investigation the Claimant sought to negotiate and achieve an exit package for himself.

15. The parties waived their privilege in relation to the without prejudice negotiations so that the information would be before the ET. The ET records that whilst the Respondent was willing to offer a total package of four months' pay and any commission (should it become due) which would have been in the region of £5,000, the Claimant was holding out for something in the region of £78,000. Unsurprisingly negotiations broke down.

16. The Tribunal found that the Claimant was dismissed because the relationship had broken down and in circumstances where he had sold nothing over the 11 and a half months, as they set out in paragraph 73.

> **"73. In conclusion, as already recorded, the Claimant's employment was terminated because the relationship had broken down in circumstances where he had sold nothing since he started his employment. The decision to discipline him was not unusual given his poor record and that is demonstrated by the way colleagues who also performed poorly were similarly treated. It is impossible to say that the Claimant was singled out for bad treatment, and this would have applied even if there had not been a performance improvement plan in place and Mr Castley had moved straight to dismissal. There is no statutory obligation to follow a fair dismissal procedure where an employee has not been employed for two years, what is important is that the process must not be discriminatory, and we have found that it was not."**

17. The Employment Judge and her colleagues therefore concluded that the effective cause or reason for the Claimant being disciplined or more accurately subject to the performance improvement plan (the terms were used interchangeably) and then dismissed, was his sales

performance and the decision was not in any way influenced by direct discrimination or victimisation as alleged by reference to either protected characteristic of race or disability.

18. That is an end to the matter in relation to both the direct and victimisation complaints, but for the sake of completeness, there were other difficulties with the victimisation complaint. The Tribunal concluded that the Claimant's conversation with Mr Castley did not contain a discernible complaint and did not amount to a protected act and there was therefore nothing on which to found a victimisation complaint. The Tribunal considered carefully the complaint by Mr Evans, which he has referred to again today at length in his oral submissions, that he had complained of harassment and that Mr Castley had not acted on it. He has sought to argue that that was an error by the Tribunal to have reached its finding of fact. The difficulty for Mr Evans in relation to this, and his other challenges to the facts found by the Tribunal, is that it considered extremely carefully the evidence of both Mr Evans and Mr Castley before reaching its conclusion which was impeccable.

19. But in any event, it accepted Mr Castley's evidence - again having carefully scrutinised it - that it simply did not register with him that the Claimant was alleging harassment and he quite genuinely had no recollection of it. It therefore follows as a matter of logic that he cannot have treated the Claimant less favourably because of something he was unaware of. It is analogous to a pregnancy dismissal case where a Respondent genuinely does not know that the employee is pregnant when she is dismissed. The claim was hopeless, as the ET found.

20. In relation to the section 15 **Equality Act 2010** disability discrimination complaint of less favourable treatment, arising in consequence of something from the Claimant's disability, the Tribunal found no causal link between the Claimant's size and his disability. His allegation was

that when he was referred to as "*fat*" in the exchanges also relied on as harassment, his weight was caused by his various medical conditions, which he said provided the necessary link between his disability and references to bodyweight. Mr Evans refers to two matters. Firstly he refers to a GP letter that he produced during the hearing before the Tribunal in evidence discussed in paragraph 7.2 of the Judgment. The Tribunal correctly observes that in the letter the GP merely raises the possibility of a causal link between weight gain and diabetes and hypothyroidism. It does not establish it in relation to the facts of this case or this Claimant. The GP states:

> **"I confirm that he suffers with hypothyroidism (under-active thyroid) and Type 1 diabetes, both of which can cause weight gain, due to the nature of the conditions and their subsequent treatment."**

21. It is an important principle of the fact finding process of any Court or Tribunal, that it relies on the evidence before it and it does not speculate or make guesses, beyond making common sense conclusions, or drawing inferences, from the evidence before it which it has accepted. It may also take judicial note of undisputed matters of common knowledge. The Tribunal Panel Members are not qualified as medical doctors and are not qualified to give medical opinions whilst sitting as a Tribunal Panel[1]. It would be wrong for them to make guesses about particular conditions and symptoms if they do not have the medical evidence before them. It is the role of the parties in a case to present evidence to a Tribunal to enable it to make the findings of fact necessary to support, or defend, a claim. The ET was perfectly entitled to reach the conclusions it did concerning the Claimant's disability and his weight. A further difficulty for the Claimant was that he was not considered to be overweight by any of his colleagues and the term "*fat*" was used as a generic unflattering adjective without any specific reference to the weight of the person to whom the comment was addressed. But even if the Claimant could

[1] Occasionally a Lay Tribunal Member may also have a medical qualification, but s/he would have been appointed as a Lay Member of the ET not for her or his medical expertise but their experience in workplace and industrial relations issues.

overcome both those obstacles, as the Tribunal explained, the complaint did not sit easily as a section 15 complaint, and they had already dealt with it as a harassment complaint. For the reasons explained below, the complaint failed in any event.

22. The Claimant sought to refer me to a new document in his supplementary bundle (at page 149 of the supplementary bundle). It is a doctor's letter produced five months after the ET Judgment which fails to meet the **Ladd v Marshall** [1954] 1 WLR 1489 test for the admission of fresh evidence. But even if I had allowed it, it refers to the Claimant's weight gain and refers to a number of medical conditions, but does not in terms link any weight gain to the medical conditions, so it took matters no further that the GP letter before the Tribunal.

23. Mr Evans today has referred to the overriding objective of the Employment Tribunal to help ensure a level playing field between parties, and that does indeed include assisting an unrepresented litigant where it is fair and appropriate and in the interests of justice to both parties to do so. That does not extend to conducting medical legal research in support of one party or another. It involves enabling a party to do the best they can, whether as a litigant in person or as a represented party, and to provide an environment that assists them to give their best evidence. It does not extend to assisting them by searching for evidence themselves. That criticism is not one that can fairly be made of any Tribunal, and certainly not in this case where it is apparent from the Decision itself that the Tribunal was at pains to assist the Claimant and facilitate his self-representation:

> **"10. We explained our reasons for various case management decisions carefully as we went along and also our commitment to ensure that the Claimant was not legally disadvantaged because he was a litigant in person. We regularly visited the issues and explained the law when discussing the relevance of the evidence.**
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> **11. We also encouraged the Claimant to make sure that his health was protected during the hearing and to do what he needed to do to control his blood sugar. No problems occurred."**

24. Much of the case concerned the harassment allegations. There were four specific allegations of harassment. These were considered in great depth and detail by the ET in their proper context and they ultimately rejected them. They accepted the Claimant's evidence that he had, on one occasion, been referred to as a "*fat ginger pikey*" and that occasionally he was called a "*salad dodger*", "*fat yoda*" and "*gimli*".

25. The Tribunal accepted and entirely understood that on the face of it the "*fat ginger pikey*" comment is a derogatory, demeaning, unpleasant and a potentially discriminatory and harassing comment to make. It correctly referred itself to **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08 and set out the Judgment of Underhill P (as he was then) in paragraph 70 of the Tribunal's judgment that "*Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly where it should have been clear that any offence was unintended*".

26. The Tribunal rightly considered the context and the overall relationship and behaviour of the Claimant and the Respondent and the various employees, so that it could properly understand whether the behaviour that was found to have occurred amounted to harassment. The Tribunal explained clearly and carefully that context is key when it comes to complaints of harassment, and it was entitled to conclude that in all the circumstances the comments the Claimant had received did not constitute harassment. It is also apparent from the Tribunal's Decision that the Claimant's evidence was not believed in many respects.

27. The effect therefore from the ET's Judgment and its careful findings that by reference to the statutory wording of the harassment definition in section 26 **EqA 2010** that: (1) the comments were not unwanted since the Claimant was such an active participant of the culture of banter (for

A want of a better word for it); (2) they did not have the purpose of violating the Claimant's dignity or creating an intimidating etc environment for him; (3) nor did they have the effect of violating the Claimant's dignity or creating an intimidating etc environment for him, as he was not offended; (4) in any event it would not have been reasonable for him to have considered his dignity was violated or the environment was hostile etc given the particular circumstances and all the context and material facts relevant to the claim. Furthermore, insofar as the harassment was said to be by reference to his disability, the Claimant had not proved any relationship between his weight (which was unremarkable) and his disability, so the disability harassment complaint additionally failed on that ground.

D 28. The basis of the appeal today is no more than a challenge to the findings of fact made by the Tribunal as was identified by HHJ Richardson in his opinion of the appeal on the sift. I have been through the Tribunal's Decision with a fine-tooth comb bearing in mind the criticisms raised of it. There is nothing in the proposed grounds that give rise to circumstances when the findings of fact made by the Tribunal can be challenged. It is the task of the Employment Tribunal to make findings of fact. They have done so and have explained, and justified, their various findings and have not failed to take into account things that should have been taken into account nor have they taken into account matters that they should not. They were entitled to reach the conclusions that they did on the evidence that they heard in what appears to be a nuanced and balanced Judgment and no error of law is revealed.

G 29. Mr Evans today has repeated his concern about bias by the Tribunal. Bias is not apparent from the Decision and nor is it apparent from the allegations now made by the Claimant against the Tribunal. The term appears to have been used to describe Mr Evans' dislike of the Tribunal's findings. However, the allegation does not come anywhere near an allegation of bias in its true

sense and, as already noted, paragraphs 10 and 11 draw attention to the care with which the Tribunal sought to approach the case and to assist to an extent, providing a level playing field to the Claimant.

30. The Tribunal has also explained that the Claimant perhaps sometimes has difficulty in objectively assessing his own behaviour. One example is set out in the insistence with which the Claimant required the Tribunal to listen to his secretly recorded tape of the dismissal phone call. He asked the Tribunal not only to read the transcript of that conversation, but to also listen to the tape as he said it would support his case. On listening to the tape, the Tribunal explained (see paragraph 57) that it is the Claimant who comes across as aggressive and bullying in that telephone call. It is evident that the Claimant has difficulty accurately perceiving how he may come across to others. Quite fairly to the Claimant, the Tribunal did not, as some Tribunals might have done, brand him as a liar, but rather explained that he lacked insight into his behaviour of how he came across to others and that his memory of events was not always accurate. His own witness confirmed this to be the case and did not support the Claimant.

31. The second appeal concerns the refusal of the Tribunal to reconsider and review its Judgment, using its powers under Rules 70 to 73 of the **Employment Tribunals Rules of Procedure**. The Claimant in his reconsideration application, as he has done today, has merely sought to reopen the facts that he disputes and that is not the role of a reconsideration. The circumstances in which a Tribunal may reconsider an earlier Judgment are limited to where it is necessary in the interests of justice to do so. There is an important principle of finality of litigation. No arguable grounds for demonstrating an error of law have been put forward.

32. I accept that at first blush it may be surprising that calling a colleague what many people would consider an offensive term such as "*fat ginger pikey*" at work does not amount to harassment, especially where the individual has links with the traveller community, but the Tribunal considered the facts extremely carefully and it is easy to see why they concluded that the Claimant had not been harassed by this remark and it was unarguably a decision the Tribunal was entitled to come to.

33. I therefore order that no further action be taken in relation to this appeal, disappointing though I know it will be to Mr Evans. I have noted from the testimonials and documents that he placed before this Appeal Tribunal that many people speak highly of his qualities and of his hard work and I hope he will soon be able to find employment where he is more successful. The references are not, however an answer to the careful findings of the Tribunal about his performance and behaviour as an employee of the Respondent.