Neutral Citation Number: [2023] EAT 70

Case No: EA-2021-000733-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 May 2023

Before :

JASON COPPEL KC
(sitting as a Deputy Judge of the High Court)

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Between :

JAGBIR SIDHU	**Appellant**
- and -	
OUR PLACE SCHOOLS LIMITED	**Respondent**

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Sophie Belgrove for the **Appellant**
Ian Wheaton for the Respondent

Hearing date: 26 January 2023

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JUDGMENT

SUMMARY

RACE DISCRIMINATION

The employment tribunal did not err in rejecting the Appellant's claims of harassment on racial grounds. The Appellant's arguments that the tribunal had failed, in certain respects, to ask itself the right questions when applying the statutory definition in s. 26 of the Equality Act 2010 were unfounded and in any event could not succeed in circumstances where there was ample other foundation for the tribunal to have rejected the claims, and no challenge on grounds of perversity had been mounted.

Jason Coppel KC, Deputy Judge of the High Court

The appeal

1. The appellant appeals from the judgment of the Employment Tribunal sitting in Birmingham dated 5 May 2020 rejecting his claims against the respondent of discrimination on grounds of race and/or religion or belief. Permission to appeal was granted by Judge Keith on 9 March 2022 on terms which permitted the appellant to pursue challenges to the findings of the Tribunal on two allegations of harassment on racial and/or religious grounds, contrary to s. 26 of the Equality Act 2010 ("EA10") which he had made before it, labelled allegations 1 and 5.

2. The appellant had appeared before the Tribunal with the assistance of a McKenzie friend; he was admirably represented on the appeal before me by Ms Sophie Belgrove, acting pro bono. The respondent was represented, as it had been before the Tribunal, by Mr Ian Wheaton.

The tribunal's findings

3. The tribunal found that there had been "*stark conflicts of evidence in this case about events that are alleged to have taken place*" (paragraph 11). In general, it preferred the evidence of the respondent to that of the appellant and indeed found his evidence not to be credible (paragraph 12):

"We found each of the respondent's witnesses gave clear and credible evidence. We found the claimant was from time to time reluctant to answer questions inconsistent vague and inclined to make assertions of fabrication and wide-ranging conspiratorial conduct which require but were completely unsupported by any cogent evidence. He was not a credible witness."

Allegation 1

4. Allegation 1 was set out in the appellant's claim form as follows:

"9th August. After my induction training had been completed, the trainer Mr. Merlin [Beedie], made reference to Sikhs and used hand gestures to depict the sawing of Sikhs. This I found highly offensive, derogatory and humiliating".

5. The sawing gesture of which the appellant complained was alleged to have taken place during a conversation with Mr Beedie which included mention of the persecution of Sikhs, and that some individuals had been executed through being sawn in half.

6. The relevant findings of the Tribunal were as follows:

"15.11 There was no evidence before us (other than his assertion that this was the case) that Sikhs find sawing gestures generally or a specific sawing gesture (whether or not accompanied by discussion about the past history of execution of Sikhs by Muslims using saws) offensive or highly offensive.

15.16 We find that Mr Beedie made either a chopping or sawing gesture with his hand during the post training discussion with the claimant on 9 August 2017. However, the claimant has failed to prove on the balance of probabilities that the gesture Mr Beedie made was the very specific gesture which he alleges is offensive to Sikhs.

33 This was an allegation of harassment related to race or religion. We have found above that the claimant has not proved that the hand gesture which he alleged was made by Mr Beedie was made by him on 9 August 2017.However, if we are wrong about that ,we conclude that talking about and illustrating by a hand gesture a barbaric historic method of execution perpetrated upon members of a religion or race could provoke strong negative feelings of revulsion or distress in the listener if of that same religion or race as the events in question are thereby

brought vividly to mind and are therefore capable of amounting to unwanted conduct. However, in this case we conclude that Mr Beedie's conduct did not have the purpose of either violating the claimant's dignity or of creating an intimidating hostile degrading humiliating or offensive environment for him. Mr Beedie was engaging in a conversation with the claimant in which he shared with the claimant his knowledge that Sikhs had suffered historical atrocities perpetrated by Muslims. He did not know (and we have not found) that a particular sawing gesture is or sawing gestures generally are offensive to Sikhs. This particular topic emerged as part of a conversation initiated by the claimant. There was nothing done or said by Mr Beedie to indicate animus of any sort towards the claimant. We also conclude that the conduct in question did not have that effect. We do not find that the claimant perceived sawing gestures specifically or generally as offensive to Sikhs. In our judgment the distress displayed by the claimant in tribunal was occasioned by the contemplation of the visual image in the bundle of documents. He did not evince any indication of discomfiture or complain about it at the time of the conversation and did not do so until his grievance some four and a half months later. We conclude he was not at the time nor was he subsequently 'highly' offended as he has alleged. Further having regard to the circumstances of the case (that it was said in the context of an amicable discussion with a colleague not targeted towards the claimant and there was no repetition and such a gesture is not (or, if it is, it is not known to be) offensive to Sikhs) it was not reasonable for the conduct to have that effect."

Allegation 5

7. Allegation 5 was set out in the Claimant's claim form as follows:

"Thurs 5th October. In the morning racist remarks were made towards me regarding the lack of coloured people in Herefordshire by Holly [Green]"

8. The relevant findings of the Tribunal were as follows:

"15.22 It is accepted that Holly Green (who comes from Herefordshire) used the term 'coloured people 'in a discussion with the claimant on 5 October 2017 about the numbers of people of colour in Herefordshire. The claimant alleged she would not have done so had he been white. We accept her evidence that she had been wholly unaware at the time she did so that the phrase had any derogatory connotations. We find she would have used that term in such a conversation with any person. The claimant raised no complaint with her about this remark at the time and evinced no sign of discomfort annoyance or distress. He provided no evidence about any effect of this remark on him in his witness statement other than to record that the remark had been made. He did not raise it until he mentioned in his grievance on 18 December 2017.The claimant under cross examination frankly stated that he admired Holly Green for her honesty about having made the remark and also accepted that this was the only occasion he had worked with her.

36 The allegation against Holly Green is of harassment related to race or religion. We do not consider that any connection between the claimant's religion and the conduct in question has been made out. As far as harassment related to race is concerned we conclude the use of such derogatory phrase in the presence of a person of colour is capable of amounting to unwanted conduct but it did not have the purpose of either violating the claimant's dignity or of creating an intimidating hostile degrading humiliating or offensive environment for him. Holly Green did not know that this was a derogatory remark. She did not direct or target her remark towards the claimant. We also conclude that the conduct in question did not have that effect. He evinced no indication of discomfiture nor did he complain about it at the time of the conversation and did not do so until his grievance some four and a half months later. There is no evidence on

which we could conclude that the claimant felt or perceived his or her dignity to have been violated or that an offensive environment had been created, nor having regard to the circumstances of the case (that this was the first and only time they had worked together, that it was said in the context of an amicable discussion with a colleague not targeted towards the claimant, there was no repetition) would it have been reasonable for it to have had that effect."

Relevant legal principles

9. Section 26 EA10 provides, so far as material:

"(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."

10. It was, therefore, incumbent upon the tribunal to consider whether there had been unwanted conduct related to race and whether that conduct had had the purpose or the effect of either violating the appellant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the appellant.

11. The tribunal directed itself, with reference to the EHRC Code of Practice on Employment, that "*a serious one-off incident .. can amount to harassment*" (paragraph 29). It also cited the following case-law on the limb of the test laid down by s. 26 EA10 as to the effect of relevant conduct (paragraph 30):

> "In **Richmond Pharmacology v Dhaliwal 2009 ICR 724** Mr Justice Underhill said "*not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by the things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended*.' The claimant must have actually felt or perceived his or her dignity to have been violated or an offensive environment to have been created. The fact that the claimant is slightly upset or mildly offended by the conduct in question may not be enough to bring about a violation of dignity or an offensive environment. In the case of **HM Land Registry v Grant** Lord Justice Elias said "*when assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable*."

12. There has been no criticism on the appeal of the tribunal's directions as to the law. The appellant's criticisms have been directed to how the tribunal proceeded to apply the law which it had identified.

Ground 1

13. The first ground of appeal challenges the tribunal's findings on allegation 1. The principal point

made by Ms Belgrove is that the tribunal was unduly focused upon the particular sawing gesture which it understood the appellant to have alleged of Mr Beedie and whether that gesture or sawing gestures generally were offensive to Sikhs. It is said that the tribunal thereby lost sight of the point that a gesture may be offensive when used to illustrate mistreatment of a particular group of people, even if the gesture in and of itself is not offensive to that group. An example was given of a choking gesture used to illustrate the deaths of Jewish people in gas chambers at the hands of the Nazis.

14. I would accept that argument in principle, but so did the tribunal. In paragraph 33, it stated that if Mr Beedie had made the gesture alleged of him, "*talking about and illustrating by a hand gesture a barbaric historic method of execution perpetrated upon members of a religion or race could provoke strong negative feelings of revulsion or distress in the listener if of that same religion or race as the events in question are thereby brought vividly to mind and are therefore capable of amounting to unwanted conduct*".

15. Having at least assumed (if not actually held) that there was "unwanted conduct" within s. 26(1) EA10, the tribunal proceeded in paragraph 33 to find that that conduct did not have the purpose of either violating the claimant's dignity or of creating an intimidating hostile degrading humiliating or offensive environment for him. That was a finding of fact based in part on Mr Beedie's oral evidence and – as Ms Belgrove fairly accepted - could only be attacked on grounds of perversity (which is not one of the two permitted grounds of appeal). The tribunal did note in the course of its analysis on "purpose" that Mr Beedie "*did not know (and we have not found) that a particular sawing gesture is or sawing gestures generally are offensive to Sikhs*" which is potentially vulnerable to the criticism noted in paragraph 11 above. This was not irrelevant to purpose, as Ms Belgrove submitted; at worst, it was an incomplete account of the significance of the use of gestures, and so an insufficient basis in and of itself for finding that the requisite

purpose had not been shown. But it was not the only basis for the tribunal's conclusion on purpose: there were a number of other aspects to the tribunal's reasoning on "purpose" which stand unchallenged. I do not accept that any under-estimate by the tribunal of the significance of Mr Beedie's use of a sawing gesture would serve to establish that its overall finding on "purpose" was perverse or otherwise in error of law.

16. A similar argument arises in relation to the tribunal's finding that Mr Beedie's conduct did not have the effect of violating the claimant's dignity or of creating an intimidating hostile degrading humiliating or offensive environment for him. The tribunal stated in this context that "[w]*e do not find that the claimant perceived sawing gestures specifically or generally as offensive to Sikhs*" which again, accepting the argument noted in paragraph 11 above, is not irrelevant to "effect" but could not be a complete answer to the claim on "effect" either (since it is in theory possible that the claimant was affected in the requisite sense by the gesture made by Mr Beedie in the context in which it was made). However, there was again more to the tribunal's findings. Having noted that the appellant was not a credible witness (paragraph 12), the tribunal rejected his claim that he had, at any stage, been highly offended by Mr Beedie's conduct. That finding is not undermined by any failure by the tribunal to appreciate the potential impact of that conduct. Further, the tribunal's finding that it would not be reasonable for Mr Beedie's conduct to have had the requisite effect was also based on factors in addition to the nature of the alleged sawing gesture and was based squarely on the case-law to which it had directed itself. There is no perversity challenge to that finding and no other basis on which it could be undermined.

17. Criticism was also made of the tribunal's finding in paragraph 9 of its reasons, when discussing its approach to resolving conflicts of evidence, that "an assertion is not evidence". An assertion may of course be evidence (although the appellant's assertions were of limited weight as evidence given the negative view which the tribunal had reached of his credibility). Read in

context, however, I understand the tribunal to have been discussing the need for the parties to adduce supporting evidence in respect of their contested allegations, and noting here, fairly, that a parties' assertions would not in themselves constitute supporting evidence. But even if there were something in this criticism, it seems to me that it does not bite upon the tribunal's conclusions on allegation 1, as they did not turn on a rejection of the appellant's factual case on the grounds that it consisted only of his own evidence. His evidence on certain points was rejected, but because it was considered not to be credible rather than for lack of supporting evidence.

Ground 2

18. Ground 2 challenges the tribunal's findings on allegation 5. The appellant argues that those findings are vitiated by the tribunal adopting an unduly narrow focus on Ms Green's use of the term "coloured people", rather than considered the whole of her comment as to there being few "coloured people" in Herefordshire.

19. Whilst its language is ambiguous in parts, that does appear to have been the tribunal's focus: see paragraph 15.22, set out in paragraph 8 above. However, I would not criticise it for that, as the appellant's pleaded complaint under allegation 5 was about the "language used by [Ms Green]", which more naturally referred to the use of the offending phrase rather than the overall comment that she made. Mr Wheaton, who had appeared before the tribunal, also drew my attention to various passages in the written arguments which demonstrated that the complaint to the tribunal had been about the phrase "coloured people" and had not been put on the wider basis pursued by Ms Belgrove on the appeal.

20. Further, this is, in my judgment, a tenuous and insufficient basis on which to criticise the

tribunal's reasoning on "purpose" and "effect" which, like its reasoning in relation to allegation 1, contained a number of different elements. On "purpose", the tribunal reasoned that Ms Green "*did not know that this was a derogatory remark"* and that "*[she] did not direct or target her remark towards the claimant".* Contrary to Ms Belgrove's submissions, these factors were not irrelevant to "purpose" and, that being the case, the tribunal's conclusion could only be criticised on grounds of perversity, which again is not a ground of appeal. I do not see how its reasoning would have been any different if the tribunal had had in mind the entirety of Ms Green's remark as opposed to the particular phrase "coloured people".

21. On "effect", the tribunal cited the lack of external evidence that the appellant had in fact been offended or otherwise discomfited by Ms Green's remark and then stated that "*[t]here is no evidence on which we could conclude that the claimant felt or perceived his or her dignity to have been violated or that an offensive environment had been created*". I do not accept that that finding proceeded on the erroneous basis that the appellant's "assertion" did not constitute evidence; rather, the tribunal simply did not believe the evidence that he had given as to the effect of Ms Green's remark upon him. There is the further finding that it would not have been reasonable for Ms Green's remark to have had the requisite effect on the appellant, based on the factors "*that this was the first and only time they had worked together, that it was said in the context of an amicable discussion with a colleague not targeted towards the claimant, there was no repetition".* Again, I do not accept the submissions of Ms Belgrove that these were irrelevant factors, having regard to the case-law to which the tribunal directed itself. That being the case, this was a finding which could again only be challenged on grounds of perversity, and no such challenge was pursued.

Conclusion

22. For the reasons given above, the appeal is dismissed.