



EMPLOYMENT TRIBUNALS

Claimant: Mr Sundeep Dhiraj

Respondent: Cambridgeshire & Peterborough NHS Foundation Trust

Heard at: Cambridge by CVP

On: 7 June 2023, and 5 & 6 October 2023

Before: Employment Judge Liz Ord
Panel Member Eleanor Deem
Panel Member Lizzie Davies

Representation:

Claimant: Ms A Fadipe (Counsel)
Respondent: Mr M Islam-Choudhury (Counsel)

Our **original judgment** was given orally on 5 October 2023 and was reconsidered at the hearing with respect to the second complaint following application by the respondent. We varied it on 6 October 2023 and a record of the **reconsidered judgment** was sent to the parties that day. Both original and reconsidered judgments were unanimous.

Subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

The Complaints and Issues

1. There were two complaints of racial harassment under section 26 of the Equality Act 2010.
2. The first, concerning the use of the words "P.....Paul", was conceded by the respondent in so far as it had the "effect" of harassing the claimant, but not so far as it had the "purpose" of harassing the claimant

3. The second, concerned the calling of the claimant “Fred”, rather than his given name.
4. The issues for the tribunal were:
 - 4.1. Did the respondent do the following things?
 - 4.1.1. Lisa Hargreaves on 20 May 2022 referring to a shop owner as “P... Paul”
 - 4.1.2. Lisa Hargreaves referring to the claimant as “Fred” as opposed to his actual name on various dates between 4 April 2022 and 24 May 2022.
5. If so, was that unwanted conduct?
6. Was it related to race?
7. Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
8. If not, did it have that effect?
9. Was it reasonable for the conduct to have had that effect taking account of the claimant’s perception and the other circumstances of the case?

Evidence

10. The tribunal had before it the following documentary evidence:
 - 10.1. A documentary bundle of 103 electronic pages;
 - 10.2. A witness statement bundle of 16 electronic pages;
 - 10.3. The claimant’s skeleton arguments of 3 October 2023;
 - 10.4. The respondent’s skeleton submissions of 7 June 2023;
11. It heard evidence on oath from:
 - 11.1. For the claimant:
 - 11.1.1. Sundeep Dhiraj (the claimant).
 - 11.2. For the respondent:
 - 11.2.1. Sara Hart (claimant’s line manager);
 - 11.2.2. Lisa Hargreaves (administrator);
 - 11.2.3. Caroline Nightingale (grievance decision maker)

The Law

12. Section 26 Equality Act 2010 – Harassment

- (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.
- (2) ...
- (3) ...
- (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.

13. Under section **136** of the **Equality Act**, it is for the claimant to prove a prima facie case of harassment before the **burden of proof** shifts to the respondent to provide a non-discriminatory reason for the treatment.

14. In **Madarassy v Nomura International plc**, 2007 ICR 867, CA, the Court of Appeal held that the claimant had to show “something more” than just poor treatment and a protected characteristic.

15. In **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, the EAT set out the approach to be taken to harassment claims, which focuses on three elements, namely:

- 15.1. Unwanted conduct;
- 15.2. Having the purpose or effect of either: violating the claimant’s dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant;
- 15.3. Related to a protected characteristic.

16. In **UNITE the Union v Nailard** [2016] IRLR 906 the EAT provided guidance on how to determine “related to” when considering a protected characteristic, which in that case was sex. It held that context alone was not sufficient; regard had to be given to the conduct of those against whom the complaint was made, not the conduct of others simply because it formed part of the background. The test requires:

- 16.1. A focus upon the conduct of the individual or individuals concerned and for the Tribunal to ask whether their conduct is associated with the protected characteristic;
- 16.2. The employment tribunal has then to apply an objective test in determining whether it was “related to” the protected characteristic in issue; the intention of the individuals concerned might form part of the relevant circumstances but will not be determinative of the question the tribunal has to answer.

Findings of Fact

17. The claimant was employed by the respondent as a Support, Time and Recovery Worker from 4 April 2022 to 10 October 2022. He is of Asian ethnicity.

The “P” word

18. On 20 May 2022 he attended a staff away day. He was in conversation with three white colleagues, when one of them, Lisa Hargreaves, made a comment using the words “Paki Paul”, hereinafter referred to as the “P” word. The other two colleagues laughed. The claimant had previously been subjected to racial abuse as a child, and the “P” word had been used against him at school. Consequently, the comment was a trigger that caused him to feel uncomfortable and upset.
19. There is conflicting evidence over the context in which the “P” word was used on the day. Ms Hargreaves said that she was simply relating a story from when she was a child in the 1980s, about a shop that used to be called “P... Pauls”. The claimant however said Ms Hargreaves spoke about calling the shopkeeper “P... Paul”. Ms Hargreaves was consistent in her evidence and we accept that she was referring to the shop. However, the shop name itself appeared to refer to the shopkeeper, and so we accept that this is how the claimant understood it.
20. After mulling over the incident at the weekend, on the following Monday, being 23 May 2022, the claimant spoke with his line manager, Sara Hart, about the comment. He said he knew the comment was not aimed at him, but he nonetheless found it offensive. He did not want to get anyone into trouble. He was new to the job and did not want to rock the boat.
21. Ms Hart spoke with Ms Hargreaves on 25 May and explained that, whilst the claimant was not making a formal complaint, he was upset at the comment.
22. Ms Hargreaves apologised to the claimant that day and was upset that she had offended him. She confirmed that the comment was not aimed at him and she had no intention of being racist or malicious, or of offending him. She thought she was just stating what the situation had been at the time of her childhood. The claimant commented that he never said she was a racist.
23. Ms Hargreaves and the claimant did not speak to each other again after this meeting as the claimant went off sick with stress and resigned with notice on 12 September 2022.

Fred

24. Ms Hargreaves found it difficult remembering names and she sometimes called other staff members (including white people) “thingy” or “Fred” (which was her “go-to” name), rather than their given names. This is not disputed. She found it hard remembering the claimant’s name “Sundeeep” and would often call him “thingy”, “Fred” or “Sanjeev”.
25. The claimant said that Ms Hargreaves called him Fred constantly and refused to call him by his actual name, as she would just forget his real name.

Ms Hargreaves said in cross examination that she sometimes called him Sundeep and did not call him Fred any more than she did with other staff. She said she was just terrible with names.

26. We find that Ms Hargreaves had a bad memory when it came to names and she treated the claimant no differently than others in this respect. When she could remember his name, she would say it. Otherwise, she would often go to her “go-to” name of Fred or “thingy”.
27. The claimant initially had no problem with Ms Hargreaves calling him “Fred” or “thingy”. He treated it as banter, and called her “Barry” in return. It was only after the incident with the “P” word on 20 May that he started to believe the reason she didn’t want to call him by his real name was because it was Asian. He then began to feel offended.
28. He raised the matter with Ms Hart when discussing the “P” word incident on 23 May and thought that she would speak to M Hargreaves about it. However, as the focus of the conversation was on the “P” word incident, Ms Hart took the “Fred” matter no further and did not raise it with Ms Hargreaves. Consequently, Ms Hargreaves was unaware she had caused the claimant upset in this regard.

Grievance

29. The claimant raised a grievance on 2 August 2022 about the “P” incident and the way it was handled. He also mentioned the “Fred” matter but withdrew this part of the grievance, saying he did not want to make a formal complaint about it but just wanted to bring it to his manager’s attention.
30. On 28 September 2022, Caroline Nightingale, who heard the grievance, wrote to the claimant upholding his complaint about the use of the “P” word.

Discussion and Conclusions

“P... Paul” comment

31. The inference, even if referring to a shop, is that “P.. Paul” relates to a person. The “P” word is derogatory and inappropriate and this was recognised by the respondent when upholding the claimant’s grievance. Consequently, the respondent concedes that the “P” word had a harassing effect on the claimant. We therefore conclude that saying the “P” word was unwanted conduct relating to race, which had a harassing effect on the claimant.
32. We have, however, considered the matter further, as the respondent requested a determination on whether the “P” word had the purpose of harassing the claimant. This element is not conceded.
33. The claimant, when giving evidence, did not put a positive case that Ms Hargreaves was deliberately trying to offend. He also told her that he never said she was a racist.
34. When he raised the issue with his line manager there was no mention of Ms Hargreaves purposely trying to offend. If he had thought the comment was

intended to offend, we would have expected him to say so at the time. In fact he said he knew the comment was not aimed at him.

35. Ms Hargreaves was consistent and reliable in her evidence that she was simply relating a story from her childhood when there was a shop called "P....Pauls", and that she had no intention of offending anyone.
36. On the evidence before us, we find that Ms Hargreaves simply did not think about the effect her comment might have on others, and we accept that she had no intention to offend. We therefore conclude that the comment was not made with the purpose of harassing.

Fred - original judgment

37. Ms Hargreaves found it difficult remembering names and she often called members of staff "Fred", which was her go-to name or "thingy". She treated the claimant no differently when she could not remember his name and the claimant originally treated it as banter and was not offended. It was only after Mr Hargreaves used the "P" word that the claimant became retrospectively offended by being called "Fred". However, nobody raised the "Fred" issue with her and she did not know this.
38. There is no evidence that Ms Hargreaves intended to offend and we conclude that calling the claimant "Fred" did not have this purpose.
39. We turn next to the effect on the claimant.
40. Whether or not Ms Hargreaves constantly called the claimant Fred and whether or not she also called other people Fred, does not detract from the issue of whether it was reasonable for the claimant to feel offended.
41. The "P" word has racist connotations, and the claimant's name is Asian. In this context there was an associative connection and it was not unreasonable for the claimant to feel offended by being called Fred rather than his actual name.
42. Therefore, we conclude that it was unwanted conduct that had an harassing effect.

Re-considered judgment with respect to "effect" of "Fred" allegation

43. Upon the application of the respondent, we determined that there were reasonable prospects of our original decision being varied, and that it was necessary in the interests of justice to reconsider.
44. The application related only to the second complaint concerning "Fred" and our conclusions on the "effect" it had on the claimant. Our decision on the first complaint concerning "P...Paul" and the second complaint concerning "purpose", remain the same. Our findings of fact are unaltered.
45. First, we have considered the relevant caselaw.

46. In accordance with **Richmond Pharmacology v Dhaliwal**, we must determine all 3 elements of harassment, namely:
- 46.1. Unwanted conduct;
 - 46.2. Having the purpose or effect of either: violating the claimant's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant;
 - 46.3. Related to a protected characteristic.
47. We have only reconsidered the third part of the test, being whether Ms Hargreaves' conduct "related to" race, as our original judgment did not adequately deal with this aspect.
48. To succeed in a harassment claim, the perpetrator's conduct must be "related to" the relevant protected characteristic. In this case, we must consider whether Lisa Hargreaves' actions amounted to conduct related to race.
49. In **UNITE the Union v Nailard**, the EAT held that the focus must be on the perpetrator's actions, and the test of whether the perpetrator's conduct was "related to" the protected characteristic, is an objective one. Context alone is not sufficient and, whilst intention might form part of the relevant circumstances, it will not be determinative.
50. We must therefore, consider and focus on Ms Hargreaves' actions objectively.
51. She called many of her colleagues Fred, including those who were white. This was accepted by the claimant. The reason was, she had problems remembering names. She did not intend to offend anybody. She did not refuse to say the claimant's name because it was an Asian name or because the claimant was Asian. She did not know she had upset the claimant by calling him Fred. She simply could not remember his name. Considering her conduct objectively, there is nothing to suggest that calling the claimant Fred was related to race.
52. Therefore, whilst we accept that, after the "P" word incident, it was reasonable for the claimant to feel offended by being called Fred, it was nevertheless not related to race. Therefore, the claimant has not demonstrated a prima facie case and the burden of proof does not shift. Consequently, this part of the harassment test must fail and the claim does not succeed.
53. Our original judgment is accordingly varied and the claimant's second complaint is dismissed in its entirety.

Date 19 January 2024

JUDGMENT SENT TO THE PARTIES ON

....6 February 2024.....

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.