Employment / Harassment

Contentious third parties

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revisit a familiar theme

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IN BRIEF

- Third party harassment and the Race Relations Act 1976.
- Comment on *Conteh v Parking Partners Limited*.

While the legal position under the Equality Act 2010 clarifies the law and puts third party harassment claims on a clearer footing, the judgment of the Employment Appeal Tribunal (EAT) in the case of *Conteh v Parking Partners Limited* UKEAT/0288/10/SM is an interesting consideration of the application of the Race Relations Act 1976 to such claims, and touches upon contentions previously raised by the authors (158 NLJ, 7342, p 1474.

Facts

Ms Conteh is a black African female, born in Sierra Leone. She was employed as a customer car park attendant for a company that provided car parking facilities in various developments. On 14 March 2009, a member of marketing staff employed by St George's, in the development served by the car parking facilities provided by Parking Partners, did not have a validated ticket to leave the car park. She was told by Conteh that she could not leave, though she in fact did so.

The next morning another member of the marketing staff attended and, the claimant stated, swore at her and called her a "stupid black African bitch" and other insults. Later that evening it appeared that both those members of the marketing staff deliberately blocked the exit barrier to traffic and argued with the claimant. The claimant reported this to her manager, who contacted the persons in question, who denied the claims.

The claimant's manager was reluctant to take matters to higher levels, but reviewed the CCTV footage. He concluded that he did not have enough evidence to prove the claimant's allegations, though he did not disbelieve her. He instead instigated a system whereby all marketing staff could be let out free of charge, whether or not the ticket was validated. However, the claimant was erroneously not informed of this.

The tribunal, when summarising the actions of the employer, also summarised what it did not do: "(1) speak to other members of its staff to explore whether there was any history of abuse or earlier instances of abusive conduct (2) speak to more senior managers at St George's or (3) speak to the claimant after the event to explain what had been done or was proposed to be done and how the new working practice would operate for her benefit." It was those failings that the claimant relied on as acts of discrimination and less favourable treatment on grounds of her race, and victimisation after her report of racial abuse. She further stated that an environment at work had been created that constituted harassment.

Burden

The tribunal found that the claimant had shifted the burden of proof in respect of direct race discrimination but that there was a reasonable explanation.

In respect of harassment, the tribunal then considered whether inaction—a lack of conduct—fell within the definition of "engaging in unwanted conduct", and concluded that it could. It held that although the creation of a hostile environment was by the action of third parties, arguably inaction by the employer could amount to its creation, if creation included continuation of such proscribed environment. However it concluded that such inaction in this case by the employer was not motivated by race.

On appeal the claimant contended that the tribunal should have concluded that the failure to act by the employer amounted to the creation of an environment where the claimant had been subjected to and continued to be vulnerable to racial abuse, and that in concluding that the actions of the employer were not motivated by race, had applied the wrong test. It was submitted on her behalf that some actions are inherently discriminatory, and in such circumstances there is no need to consider the reason why an alleged discriminator acted in that way. In the instant case it was contended that the nature of the abuse experienced by the claimant was such that it was inherently one of race discrimination; and to take no action about it was inherently to adopt or be part of that act; this was itself therefore necessarily racist (at 21). Thus, in relation to conduct which was discriminatory, there was no option to be inactive, because such inaction was itself inherently and self-evidently discriminatory, as this caused or created the hostile environment. The causative argument was based on the contention that it was foreseeable that inaction in the face of racist abuse created the environment about which the claimant complained.

Langstaff J rejected the logical premise of the argument. He noted that in section 3A(b) Parliament had used the word

"creating" rather than "causing". The EAT accepted that "creation" did not have to be "a matter of instant" (at 28) but what must be looked at is the (working) environment. Creation can take place over time and though third-party behaviour had partly created that environment, the actions of an employer could make it worse.

Inaction

The EAT also accepted that inaction could amount to creation. However, such cases will not be common and will not be readily found. Langstaff J then concluded that "creating" could include a case where all that could be said against an employer was that he had failed to remedy a situation brought about by the actions of others for whom he is not responsible.

Thus, the EAT concluded, unwanted conduct can include inaction; but that inaction must be on the grounds of race to create the hostile environment and therefore fall within s 3A. Inaction through, for example, inefficiency or absence by illness, has nothing to do with race. It was this logical leap of the claimant from inaction to inherent racism that ultimately led her appeal to be unsuccessful. The contention that a failure to deal with inherently racist third party conduct was itself inherently racist, and thus was itself on the grounds of race, was comprehensively rejected. The EAT noted that it would follow from the claimant's argument that if the claimant's manager had had a heart attack that hospitalised him immediately after her complaint and that had been the real reason for not dealing with her complaint, he would still be condemned as having acted in a racially discriminatory manner. That was a step too far. A failure to deal with racist conduct by third parties is distinct from the need to deal with it. It is the failure that must be the focus, and there was in the claimant's case, "nothing remotely racist" about the failure.

> **"Just as one door appears to close on third party harassment claims, another swings open"**

Comment

The authors have previously contended that circumstances similar to those in *Conteh*, such as, for example, an employer failing to implement an anti-harassment policy for customers in relation to front-facing staff (157 NLJ, 7280, p 960), could amount to harassment. Following *Conteh*, it is clear that unless there was some element of (for example) racism in the failure to introduce such a policy, a claim is unlikely to be successful. However it was also argued by the authors in the alternative that there was the potential prospect of a claim by an employee against an employer pursuant to the Protection from Harassment Act 1997. Parallels present themselves by the Equality Act 2010, s 40 which allows a claim where there has been harassment on at least two occasions and the employer has failed to take reasonably practicable steps to prevent that harassment. It may well be that just as one door appears to close on third party harassment claims, another swings open. NLJ

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