No hard feelings

The EAT has provided further guidance as to what amounts to harassment, as Chris Bryden & Michael Salter observe

IN BRIEF

- Under the Employment Equality (Religion or Belief) Regulations 2003, harassment involved conduct that has the purpose or effect of violating the dignity of the claimant, or of creating an "adverse environment" for them.
- The conduct must have been "on grounds of" the claimant's protected characteristic.
- Under EqA 2010, the focus has shifted away from the reason behind the conduct to the form of the harassment.

With typical clarity, Underhill J (as was) has recently added to the growing volume of case law which imposes objective gloss onto the provisions of anti-discrimination legislation. In *Heafield v Times Newspapers Limited* [2013] UKEAT 1305_12_1701 the Employment Appeal Tribunal (EAT) has given further guidance as to what may or may not amount to harassment.

In 2010, one the respondent's editors shouted in the office: "Can anyone tell me what's happening to the f*****g Pope?" This was at a time when he was awaiting a story on the then Pope, allegedly having covered up for paedophile priests in the catholic church. It appears that deadlines were rapidly approaching and the editor wanted his story. Mr Heafield is a catholic and presented claims to the tribunal which included one of harassment arising from this statement. He lost, but appealed to the EAT. His appeal was sifted out, but came before Underhill J on a r 3(10) hearing.

The *Dhaliwal* test

The case was brought under the Employment Equality (Religion or Belief) Regulations 2003, being the legislative provisions in force at the time. Adopting the same formal analysis established in *Richmond Pharmaceuticals v Dhaliwal* [2009] ICR 724, the EAT identified the three stages necessary to prove any claim of harassment: "As a matter of formal analysis it is not difficult to break down the necessary elements of liability under s 3A. They can be expressed as three-fold: (1) The unwanted conduct: Did the respondent engage in unwanted conduct; (2) The purpose or effect of that conduct: Did the conduct in question either (a) have the purpose or, (b) have the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her. (We will refer to (i) and (ii) as "the proscribed consequences".) (3) The grounds for the conduct. Was that conduct on the grounds of the claimant's race (or ethnic or national origins)?"

The first, and most obvious, question that must be asked is, did the act occur? This clearly is a question of fact for each case. In *Heafield* it was accepted the editor used the language complained of.

Secondly, the EAT identified that the conduct must have the purpose or effect of violating the dignity of the claimant, or of creating an "adverse environment" for them. (The EAT used the terms "adverse environment" as short hand for the legislative requirement of an "intimidating, hostile, degrading, humiliating, or offensive environment" for the worker, and the test should be read as importing these words into the phrase). It is here that Mr Heafield failed in his claim. The tribunal that heard his claim found that the conduct of the editor neither had the purpose nor effect complained of; and was anyway not on the grounds of his religious belief.

> *"The steering of the appellate courts & tribunals on harassment cases is clear: undue sensitivity is not enough to amount to an actionable claim"*

Underhill J analysed both elements 2 and 3 of the *Dhaliwal* test and began by addressing what the "purpose" of the outburst was. The knowledge of the editor was relevant: the tribunal found as a fact that he did not know the claimant was a Catholic. The context of the statement's utterance was also of value: here there was no anti-Catholic content to the statement and the bad language used was because he was under pressure. It appears that this latter finding was not subject of the appeal, but Underhill J commented that it was a wholly unsurprising finding.

What conclusions can be drawn from the comment: was it ill-judged or worse? There appears to be little guidance from the case law or otherwise as to what amounts to a "purpose". However, in the context of intentional indirect discrimination, the EAT has found that at the time the acts were done the perpetrator wanted to bring about the state of affairs and knew that less favourable treatment would result: *Walker (JH) Ltd v Hussain* [1996] ICR 291. This clearly imports a sense of culpability and intentionality.

Effect of the comment

The EAT then turned its attention to the meat of the appeal: what was the "effect" of the comment. The tribunal had found that the claimant was upset by the comment; so, "arguably over generously" as Underhill J commented, he had suffered the proscribed circumstances prohibited by the legislation. The tribunal found, however, that this was not a reasonable reaction by the claimant and, as such, fell within the proviso contained within para 2 of reg 5. Factors the EAT identified as supporting this finding were the lack of ill-intention, the fact the comment was not directed at the Pope or Catholics and the fact the comment was not anti-Catholic—and, in fact, was *evidently* none of those things. A reasonable person would not have taken the comment as anything other than thoughtless. Quoting his decision in *Dhaliwal,* Underhill reiterated that: "It is…important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

Such "objective glosses" are not new to discrimination law: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337; and, pursuant to the Equality Act 2010 (EqA 2010) s 212 "substantial disadvantage" simply means more than trivial. This is a question of fact. The Equality Act 2010 Code of Practice, when dealing with indirect discrimination, states that "detriment" is something that a reasonable person would complain about.

Again, the EAT stated that the context is relevant to assessing the effect a phrase is said to have had. Taking into account the purpose and intention of the remark when assessing its effect is clearly appropriate and, as Underhill J noted, is sanctioned by case law in the higher courts: *Land Registry v Grant* [2011] ICR 1390 where Elias LJ noted: "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"

There may also be balancing interests to be considered: academic freedom and

freedom of speech are identified by the Equality and Human Rights Commission (EHRC) Guidance.

Dealing in this manner with element 2 of the *Dhaliwal* test, Underhill J disposed of the appeal. However, he went on to consider element 3 in a short, obiter paragraph that the conduct must be "on grounds of" the claimant's protected characteristic. The EAT did not embark on a detailed analysis of these "murkier waters", but Underhill J did note, in passing, that "if the inherent character of the act in question means that the protected characteristic was the ground of the action complained of, it will be unnecessary to consider the mental processes of the person in question at all". Thus, only where there is an overtly discriminatory action would there be no need to consider the motivation for that act. The test will therefore be subjective, save where the inherent character of the act means that there is no need to enquire into those mental processes.

Purpose or effect

Element 2 of the test requires a consideration of two alternative limbs: purpose or effect. Each case will need to be considered on its own facts, and when considering a complaint to a tribunal, a claimant must consider which limb the harassment alleged falls into – was it on purpose or did it result from the conduct complained of? Thus, an employer may have conducted itself with the purpose of creating the harassment alleged (in a culpable manner); this would be just as prohibited as an employer who did not set out to create the environment it did but the effect was nevertheless felt. However, it appears tolerably clear from the judgment of Underhill J that these tests will be applied on a "common sense" basis, looking at both the subjective and objective elements present in the facts of any given case. It is submitted that it is of great assistance for practitioners to have clarified that objective consideration both to purpose and to effect (and the application of a test of reasonableness) is the correct approach.

Equality Act 2010

It is important, however, to remember that this case was decided on the old regulations. EqA 2010 standardised all acts of harassment as prohibited where such harassment was "related to" a relevant protected characteristic, which is not necessarily the claimant's own protected characteristic. Therefore, associative or perceptive harassment applies universally, as does offence caused to a person by harassment even where they do not have any connection with the protected characteristic. Thus, whether these waters are any clearer under EqA 2010 is open to some debate, as the test covers "any connection with the protected characteristic" (EHRC Guidance).

Thus, under EqA 2010, the focus has shifted away from the reason behind the conduct: was it on grounds of the protected characteristic; to the form of the harassment, and the requirement for causation appears to be more lax. That said, the thinking of the EAT is, it is submitted, likely to continue to require a common-sense approach to harassment in employment contexts. The steering of the appellate courts and tribunals on harassment cases is clear: undue sensitivity is not enough to amount to an actionable claim. It is hoped that with the, now delayed, introduction of the sift of employment tribunal proceedings, a more robust approach will be taken to dealing with these matters early without spending considerable precious judicial resources on determining these claims. NLJ

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