All Inclusive **December 2010**

A matter of intent

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Tribunals frequently hear the "no offence was meant or intended" defence to a harassment claim. But can it lead to an employer or an employee escaping liability? It might do. But as the case on Page 4 demonstrates, it might not.

Harassment occurs where unwanted conduct related to a protected characteristic has the purpose (intentionally) or effect (unintentionally) of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive working environment.

Where there is no intention to offend, conduct will only be considered as constituting harassment where, given all the circumstances of the case, it is reasonable to reach that conclusion, having taken the 'victim's' perception of the behaviour into account. This may mean that in some circumstances an over-sensitive complainant who takes offence unreasonably at a perfectly innocent comment might not be considered as having been harassed.

Last year, in Richmond Pharmacology v Dhaliwal, [2009] IRLR 336, the EAT held that a remark made to a female employee of Indian ethnic origin referring to the possibility of her being "married off in India" amounted to harassment even though there was no intent to offend, because it evoked the racial stereotype of forced marriage. In the X v Y case on Page 4, during a fancy dress "drag queen" day held to raise funds for charity, a number of male employees who had dressed up as women acted in such an effeminate way that it disgusted a gay employee. Although there was no intention to cause any offence, the tribunal nevertheless found that the test for harassment had been satisfied.

These cases show that employers and work colleagues should be sensitive to the hurt that can be caused even by innocent comments or conduct which relate to personal characteristics. One person's idea of 'innocent', may not be another's, therefore the clear message for employees is "think before you act".

News in this Edition

Equality Act's socio-economic duty to be abandoned

The socio-economic duty set out in the Equality Act 2010, which would have required all public sector bodies to tackle wider socio-economic problems when making strategic decisions, is to be scrapped.

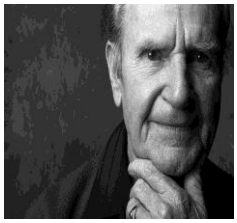
While the main provisions of the Equality Act 2010 came into force on 1 October 2010, a number of provisions, including those within Sections 1-3 dealing with the introduction of a socio-economic duty for the public sector, were identified as needing further consideration by ministers. The duty would require public sector bodies to exercise their functions in a way designed to reduce the inequalities of outcome which result from socio-economic disadvantage.

Government Equalities Office

The Government has now announced that the socio-economic duty will be "scrapped for good" because it would force public authorities to take into account inequality of outcome when making decisions about their policies and in reality, it would have been just another bureaucratic box to be ticked, i.e. more time filling in forms and less time focusing on policies that will make a real difference. The Government, however, has reiterated its commitment to implementing the single public sector equality duty in April 2011.

Hint to retire amounted to age discrimination

In Newey v Sainsbury's Supermarkets Ltd, a tribunal found that remarks designed to encourage a 54 year old manager to consider taking retirement as an alternative to proceeding through the capability procedures amounted to direct age discrimination.



Sometimes employers are tempted to try and 'persuade' an employee to leave rather than face going through disciplinary procedures. One of the risks associated with this approach has been highlighted in Mr Newey's case. He was a 54 year old store manager whose performance was subject to criticism at a time when Sainsbury's allowed early retirement from age 50.

Mr Newey satisfied the tribunal that on two occasions, two different managers suggested that he should consider early retirement as an alternative to proceeding through the capability procedures. When comparing the treatment Mr Newey received with that of a store manager underperforming in the same way who could not take early retirement, the tribunal decided that such a person would not have been encouraged to retire. Mr Newey had therefore established a prima facie case that the treatment was on the grounds of age, since only persons over 50 at the relevant time were eligible for early retirement.

The burden of proof shifted to Sainsbury's. They contended that Mr Newey's treatment was because of his poor performance, and not because of his age. The tribunal rejected this argument. The employer had not produced any evidence that its policy was to encourage managers under age 50 to resign in circumstances where they were not performing. This led to a clear inference that Mr Newey had suffered direct discrimination on grounds of his age.

Government publishes equality strategy

The Government has published its future equality strategy, Building a Fairer Britain, which provides an update on two Equality Act measures yet to be introduced - gender pay gap reporting and positive action in recruitment.

S.78 of the Equality Act provides a power to require large private sector employers to report on their gender pay gap starting in 2013. For the meantime, the Government, has decided that it will work with employers to promote reporting of equality data on a voluntary basis. Each year the Government will review how many companies are publishing such information and its quality in order to assess whether alternatives are required, including using a mandatory approach through S.78 of the Equality Act. While this voluntary approach is being assessed, the Government will not commence, amend or repeal S.78.

Government Equalities Office

S.159 of the Equality Act 2010 allows employers to use positive action in recruitment and promotion. It will come into force from April 2011. Formal guidance for employers will be published early next year. Employers will be allowed to consider using positive action where there is enough evidence to make them reasonably think that people with a protected characteristic suffer some sort of disadvantage because of that characteristic or are disproportionately under-represented. When either of those two conditions apply, this new provision will enable an employer who is faced with making a choice between candidates who are of equal merit to opt to offer that job to a candidate with a targeted protected characteristic.

Dismissal for manifesting beliefs was not discriminatory

In Power v Greater Manchester Police Authority, the EAT upheld a tribunal's decision that an employee dismissed by the Police was not discriminated against on the grounds of his belief in spiritualism and the ability of mediums to contact the dead, but because he had expressed those beliefs at work in an unacceptable manner.

Mr Power, was employed as a trainer. He claimed to be an adherent of the Spiritualist Church and to have a belief in spiritualism, in life after death, that the dead can be contacted through mediums or psychics and could be useful to police work. He was dismissed after three weeks. A tribunal found that Mr Power's beliefs amounted to religious and/or philosophical beliefs for the purposes of the Religion or Belief Regulations. However, he had not been discriminated against on the grounds of his beliefs. He had been dismissed: (i) because of previous conduct as a volunteer, which came to light after he had been employed and which made him unsuitable to train young police officers; and (ii) because he had distributed spiritualist posters and CD-ROMs at work. The latter was not less favourable treatment because of his beliefs, but because of the unacceptable way in which he had expressed them.

The EAT upheld the tribunal's decision. There is a distinction between treatment on the grounds of a person's beliefs and treatment on the grounds of the expression of those beliefs. Mr Power's dismissal was partly because of his unacceptable expression of his spiritualist beliefs, not because he held those beliefs. Therefore he had not been discriminated against.

Muslim woman suffered discrimination on multiple grounds

In Khan v Ghafoor t/a Go Go Real Estate, an employment tribunal held that a female, non-practising Muslim employee, dismissed for refusing to wear a headscarf to work, suffered direct discrimination on grounds of her lack of belief that her religion required her to do so and her sex.

Miss Khan, a British Pakistani, identifies with the Muslim religion but is non-practicing, i.e. does not attend Mosque, pray regularly or cover her hair. Her boss Mr Ghafoor, is a practising Muslim. Mr Ghafoor asked Miss Khan on two occasions whether she would wear a headscarf to work as it would make him feel better about having a Muslim woman working in the office. Mr Ghafoor subsequently dismissed Miss Khan, explaining although she had not done anything wrong at work, friends had gossiped about how westernised she looked because she did not wear a headscarf and were implying that she was not respectable.

The tribunal upheld Miss Khan's claim of direct sex discrimination. Miss Khan's sex played a part in the decision to dismiss her for failing to cover her hair. The covering of hair is an expression of female modesty, and Mr Ghafoor would not have treated a male employee in the same way. The tribunal also upheld her religious belief discrimination claim. Mr Ghafoor did not require his female, non-Muslim employees to cover their hair. Requiring Miss Khan to comply was because she identified herself with the Muslim faith. Her refusal to wear the headscarf, was due to her lack of belief that her religion required her to do so.

Unwanted conduct amounted to unintentional harassment

In X v Y an employment tribunal held that comments and actions made at a charity fancy dress event held at the workplace, where a number of men dressed as women, had the unintentional effect of creating an intimidating, humiliating or offensive environment for a gay employee.

The claimant is gay. On a fancy dress "drag queen" day held to raise funds for charity, a number of male colleagues dressed up as women. One made a limp wrist hand gesture. Others were making direct comments to the claimant, such as "are you trying to look up my skirt." He found this behaviour disgusting, especially as the ‘drag queens’ were acting and talking very effeminately, which he perceived as taking the micky out of gay men.

The tribunal upheld the claimant’s harassment claim relating to the drag queen day. The tribunal referred to the Acas guidance - A guide for employers and employees on sexual orientation in the workplace - which includes advice that harassment "may involve nicknames, teasing, name calling or other behaviour which is not with malicious intent but which is upsetting".

This event was held in the workplace. Those scheduled to work that day had no choice but to continue working with the events going on around them. The conduct was unwanted and although there was no intention to create an intimidating, humiliating or offensive environment, it was reasonable in all the circumstances to determine that it nevertheless did have that effect, particularly given the claimant’s perception that he found the behaviour disgusting.