Elements of Harassment Re-emphasised

Introduction

In the recent case of ***Betsi Cadwaladr University Health Board v Hughes and others*** (UKEAT/0179/13) Langstaff J, the President of the Employment Appeal Tribunal, reviewed the leading authorities on harassment under s.26 Equality Act 2010. It is a valuable summary of the key principles and is certain to influence the way in which tribunals assess evidence when applying s.26.

Statutory Definition

Section 26 of the Equality Act 2010 defines harassment as follows:

26 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) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection 1(b).

(3) A also harasses B if –

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection 1(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

Subsection (5) lists the "relevant protected characteristics". It omits "pregnancy and maternity" and "marriage and civil partnership" from the familiar list of protected characteristics in section 4 of the Equality Act 2010.

Leading Cases

The essential structure was examined by Underhill J in ***Richmond Pharmacology v Dhaliwal*** [2009] ICR 724, EAT, a case which was primarily concerned with the definition of harassment under s.3A of the Race Relations Act 1976, but which also considered the similar definitions in other legislation, all of which has now been repealed and replaced by the Equality Act 2010. The necessary ingredients of liability (modified so as to reflect the broader scope of the Equality Act 2010) are that:

(1) the respondent had engaged in unwanted conduct;
(2) the conduct had either the *purpose* or the *effect* of either violating the claimant's dignity or creating an adverse environment for her ("the proscribed consequences");
(3) the conduct was on grounds of a protected characteristic; and
(4) it must have been reasonable for the conduct to have had the effect in (2), above.

A respondent would not be held liable merely because its conduct had the proscribed consequence, it must have been *reasonable* for it to have had that consequence. Overall, this question of reasonableness was an objective test, despite the statutory reference to the perception of the victim. It was "quintessentially a matter for the factual assessment of the tribunal".

Underhill J recognised that there might be factual overlap between those separate questions. For example, the question whether the conduct was "unwanted" would often overlap with the question whether an adverse environment had been created. The "proscribed consequences" might also overlap in many cases. Nevertheless, it would be healthy discipline for tribunals specifically to address each element in their findings.

Context would be important, because the same remark might have a very different weight if it were innocently intended than if it were intended to hurt.

Finally, a warning regarding the use of authorities. Case law pre-dating the enactment of statutory definitions of harassment in equality legislation was unlikely to be helpful, since it had previously been constructed, somewhat uncomfortably, out of the normal statutory definitions of direct discrimination (see e.g. ***Porcelli v Strathclyde Regional Council*** [1986] ICR 564, CS). Cases decided under the Protection from Harassment Act 1997 were even less likely to be helpful.

The EHRC Code of Practice on Employment (2011) gives guidance on harassment in chapter 7. While that is not, of course, an authoritative statement of the law, it can be used in evidence in legal proceedings brought under the Equality Act 2010. Courts and Tribunals must take into account any part of the Code that appears to them to be relevant to any questions arising in the proceedings. It provides a detailed explanation of the provisions of the Act together with practical examples. In practice, it is not often referred to by representatives. Advisors and representatives might wish to consider making rather greater use of the Code in litigation.

Assessing the Evidence

As practitioners know, allegations of harassment are frequently rather nuanced and context will often be key to an evaluation of their seriousness. In practical terms, what approach should employment tribunals take to the allegations and evidence before them?

In ***Grant v H.M. Land Registry*** [2011] ICR 390, EAT, Elias LJ observed that the words "violating dignity" and "intimidating, hostile, degrading, humiliating, offensive" were significant words and that "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".

Similar points were made by Underhill J in ***Richmond Pharmacology v Dhaliwal*** [2009] ICR 724, EAT:

> *"Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

*A*t paragraph 12 of the judgment of the EAT in ***Betsi Cadwaladr University Health Board*** Langstaff J quoted the above passage from ***Richmond Pharmacology*** and added:

> *"We wholeheartedly agree. The word 'violating' is a strong word. Offending against dignity, hurting it, is insufficient. 'Violating' may be a word the strength of which is sometimes overlooked. The same might be said of the words 'intimidating' etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."*

In ***Warby v Wunda Group plc*** [2012] EqLR 536, EAT, Langstaff J said at paragraph 23:

> *"…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context..."*

Where there are a number of allegations it is appropriate to consider the circumstances as a whole, and the aggregate effect of the various incidents complained of. In ***Read and Bull Information Systems Ltd v Stedman*** [1999] IRLR 299, EAT, Morrison J said at paragraph 28:

> *"It is particularly important in cases of alleged sexual harassment that the fact-finding tribunal should not carve the work environment into a series of specific incidents and try and measure the harm or detriment in relation to each."*

That is not to say that Tribunals are not obliged to grapple with the detail of individual allegations, plainly they must. The point is that Tribunals should not lose sight of the cumulative effect of particular allegations by focussing on individual incidents. To use the statutory language, the Tribunal must have regard to the "environment" created by the incidents (see also ***Driskel v Peninsula Business Services Ltd*** [2000] IRLR 151, EAT).

Betsi Cadwaladr University Health Board v Hughes and others

The claimant had contracted Parkinson's and could no longer do clinical work. Her grade and pay were maintained by the creation of a non-clinical post which was initially meaningful but through a series of events became menial. The ET concluded that the menial nature of the non-clinical post and a number of other matters constituted unwanted conduct which had the effect of violating dignity and of creating a demeaning environment. The claim for harassment because of disability was upheld on that basis.

Although it upheld the overall conclusion reached by the tribunal the EAT held that some of the individual matters found by the tribunal to constitute harassment did not themselves justify that finding, in particular because it was not reasonable for them to have that effect. The EAT felt that although the correct approach to s.26 Equality Act 2010 was common ground between counsel appearing in the appeal, certain aspects of it and its interaction with the facts of the case needed to be reemphasised. Quoting and applying the guidance derived from ***Richmond Pharmacology*** and ***Grant v H.M. Land Registry*** (referred to above), the EAT considered that the tribunal had failed to balance some of the facts against the strictness of the statutory tests, and in some respects failed to assess whether it was

reasonable for the incidents complained of to have the relevant proscribed effects. For example, a referral to occupational health services did not and could not violate dignity or create a degrading environment. The same went for a letter which the tribunal had found to be "insensitive, though well-intentioned".

Comment

Betsi Cadwaladr University Health Board v Hughes and others is just the latest in a series of cases reminding tribunals to give full effect to the wording of s.26 of the Equality Act 2010 and not to set the bar too low. In addition to the cases cited above, see ***Environment Agency v Donnelly*** [2014] Eq.L.R. 13, EAT at paragraphs 12-17 for another recent example.

There is now a fairly muscular body of case law focussing attention on whether it was *reasonable* for the conduct or action in question to have one or more of the proscribed effects listed in s.26. Representatives or tribunals that lose sight of that crucial part of the test will have done only half a job. In practical terms, parties will need to ensure that evidence and submissions deal with the overall context of the events complained of, in order to show not only that:

(a) the comments or acts complained of occurred as alleged; and that
(b) they had one or more of the proscribed effects listed in s.26;

but also that in all the circumstances of the case it was reasonable for them to have had that effect.

The parties should also beware: since the assessment of that question of reasonableness is, according to ***Richmond Pharmacology***, "quintessentially a matter for the factual assessment of the tribunal" it will be difficult to challenge on appeal provided that the tribunal has adopted the approach required by the authorities considered above.

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