Third party harassment

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Bessong v Pennine Care NHS Foundation Trust UKEAT/0247/18/JOJ

Facts

The Respondent ("R") provides mental health services including a secure, residential unit for men who are the subject of a treatment order under s3 Mental Health Act 1987.

C was employed as a mental health nurse within the residential unit. C is Black and African.

On 7 April 2017 C was subject to a serious assault by a Patient ("Patient A"). Patient A threw about 8 punches at the Claimant and held a pen as a weapon. The assault was accompanied by racist abuse including Patient A saying, "You fucking black I'm going to stab you now".

Although C managed to fend Patient A off, he sustained significant facial swelling and redness and had to go to hospital. The assault was reported to the police and a record of the assault was made by the Trust. An incident report for the assault was completed but made no reference to the racist element of the assault.

The Claimant ("C") presented a claim form to the Employment Tribunal ("ET") in respect of direct race discrimination, indirect race discrimination and harassment on the grounds of race.

The direct race discrimination complaint involved an allegation that R had failed to take steps to counter the threat posed by Patient A on the day of the assault and that C was exposed to racial abuse from patients without redress. The particular failures included failing to provide an adequate number of staff, adequate training and a failure to redeploy C to other roles.

The indirect race discrimination complaint relied on 3 PCPs which were said to be discriminatory. The principal PCP for present purposes was that R had failed to ensure that all staff reported each and every incident of racial abuse by patients on an incident reporting form, referred to as "the incident reporting failing".

The harassment complaint was based on the failures by R to take the steps relied upon in the direct discrimination complaint and the incident reporting failing (through inaction).

The ET

The claim of indirect discrimination succeeded in respect of the incident reporting failing. Although there was a policy for reporting incidents of racial abuse it was evidentially clear that not every such incident was reported using the incident report system in place. An investigation into a grievance raised by C prior to the ET claim illustrated that there were more instances of racial abuse than were formally reported. Not only were staff not reporting such matters but that the incident reporting system was not being properly adhered to. The ET concluded that a perception had formed amongst many black staff that reporting every single racist incident was pointless and accordingly the incident reporting system fell into disrepute. The ET concluded that there were steps that R should have taken to reinforce the message to staff that an incident report should be completed after every incident.

The type of steps which should have been taken included ensuring that patients were made aware that racist incidents were unacceptable, reinforcing that message, completing an incident report every time a racist comment was made (irrespective of how it came to their attention), providing clear feedback once the report was made, conducting a staff survey and focusing on racist abuse in staff training.

In determining the effect of the failure to take such steps, the ET concluded that the failure to create a culture in which all such incidents were formally reported contributed towards an environment in which racial abuse from patients was more likely to occur. Some staff had a perception that it was simply part of the job and had to be tolerated, which made it more likely that there would not be a challenge to racist comments and abuse. At corporate level this caused an under-appreciation of the risk of racist abuse and it was not sufficiently prioritised as a risk to be addressed.

The ET concluded that a practice of reporting incidents would have made a difference to the situation in which C was in when attacked.

The Tribunal was satisfied that the incident reporting failure meant that non-white British members of staff are much more likely to be subjected to racial abuse than white British staff and it helped to create an offensive and humiliating environment for non-white staff in which they felt unsupported.

With those findings the claims of direct discrimination and harassment were considered.

In respect of harassment, the incident reporting failure was unwanted conduct on the part of R. However, the ET concluded that it was not related to race within the scope of s26(1) EA.

The claim of direct discrimination therefore also failed because the ET declined to draw the inference that the incident reporting failure was because of race (either consciously or unconsciously). The fact that the abuse was racial in nature played no part in the mental processes of the management in failing to ensure that such matters were properly reported on the incident reporting system.

The Issues

Third-party harassment provisions were carried over to the EA 2010 under s40(2), (3) and (4). However, those subsections were repealed by the Enterprise and Regulatory Reform Act 2013 s65. The effect being that there is no explicit liability on an employer for failing to prevent third-party harassment. However, the issue in the present case was one of interpretation and compliance with the Race Directive.

Should s26(1) EA be interpreted so as to impose liability on an employer for third-party harassment against employees?

Should s26(1) EA be construed in accordance with Directive 2000/43/EC ("the Race Directive") under which it is sufficient for liability to arise where the act of harassment "takes place" without any requirement that the employer's failings themselves had to be related to race?

The EAT

HHJ Choudhury (P) heard the matter sitting alone and handed down judgment on 18 October 2019.

Article 2(3) of the Race Directive treats harassment as discrimination when,

"unwanted conduct related to racial or ethnic origin takes place with the purpose of effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment." [emphasis added]

It was argued (amongst other matters) that the underlined words indicate that there is no requirement that the employer itself engages in conduct "related to" race and that it is sufficient that such conduct, by a third party merely "takes place" or occurs.

The arguments were rejected. In considering the Race Directive and applying a natural reading of the above article, HHJ Choudhury rejected the argument that it required Member States to outlaw third-party harassment where the harassment was foreseeable and preventable, without a requirement that the employer's failures were themselves "related to" race.

Whilst Article 2(3) does not stipulate that the unwanted conduct related to racial or ethnic origin must be conducted by the employer, that is because the Directive is broadly applicable and seeks to adopt a definition for harassment that can be applied in a number of contexts of which only one is employment. If the interpretation contended for by C was applied then it would give rise to a strict liability situation for employers irrespective of whether they were in any position to take preventative steps in respect of potential harassment. In effect, C sought to place far more weigh on the phrase "takes place" than it could bear.

The final part of Article 2(3) provides that, *"the concept of harassment may be defined in accordance with the national laws and practice of the Member States."* HHJ Choudhury considered that this gives Member States a degree of flexibility as to how harassment is defined and enabled parliament to adopt a definition of harassment which encompassed third-party harassment (before repeal as above) but it was not bound to do so by the Directive.

Given the EAT interpretation of the Race Directive the question of interpreting the EA to give effect to third-party harassment under the same did not arise. However, the EAT did give the view that if it did then s26 EA was no susceptible to an interpretative exercise that would encompass liability for third-party harassment. As set out in Unite the Union v Nailard [2019] ICR 28 CA, the "negligent failure to prevent another's discriminatory acts is a very different kind of animal from liability for one's own: it requires careful definition and I would expect it to be covered by explicit provision." HHJ Choudhury concluded that to extend the scope of s26 EA through an interpretive exercise conducted by the Court would, lead to uncertainty and

exceed the constraints on such an exercise (applying ***Vodaphone 2 v Revenue and Customs Commissioners [2009] EWCA Civ 446).***

HHJ Choudhury in any event confirmed that it was bound by the decision of the CA in ***Unite the Union v Nailard [2019] ICR 28*** which confirms that there is currently no explicit liability under the EA on an employer for failing to prevent third-party harassment.

Discussion

Whist the EAT has rejected C's contention that the EA should be interpreted as giving rise to liability to an employer for third-party harassment this is unlikely to be the end of the story. The EAT was bound by Nailard, therefore, whilst HHJ Choudhury gives a fully reasoned judgment the matter is likely to result in a further appeal. Before the EAT C applied for a leapfrog certificate but this was rejected. The CA did not expressly consider arguments based on the works "takes place" in Nailard CA and accordingly it must further consider the point before an appeal to the Supreme Court is made.

Alongside the issue of third-party harassment considered in the EAT, employers will no doubt be assisted by the ET's findings in respect of the incident reporting failing. This is likely to be an issue for all employers and lessons can be learnt from R's failings in this case. Employers should abide by their policies and take positive steps to ensure that racist incidents are reported properly, documented and processed appropriately. Employers will need to keep records of the same including steps taken to reinforce the message that incidents are unacceptable, the provision of feedback, staff surveys about such matters and focusing on the same in staff training. This clearly does not just apply to racist incidents but any form of abuse at work.

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