Forbes v LHR Airport Limited UKEAT/0174/18/DA: Offensive image shared on Facebook not 'in the course of employment' (s.109 Equality Act 2010)

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Introduction

This case provides a useful insight from the President of the Employment Appeal Tribunal ('EAT') as to what the relevant considerations are when deciding whether a particular act was done in the course of employment, such that an employer will be liable for it by virtue of section 109(1) Equality Act 2010.

All references to paragraphs below are to paragraphs of the EAT's judgment in this case.

Facts

Mr Forbes ('Claimant') worked for the Respondent as a security officer. He had a colleague, Ms Stevens, who worked in a similar capacity. Ms Stevens had a Facebook account. The Claimant was not one of Ms Stevens' Facebook friends. Ms Stevens shared an image of a golliwog ('the image') on her Facebook page. One of Ms Stevens' Facebook friends, BW, was also a work colleague of the Claimant. BW subsequently showed the image to the Claimant in the workplace. The Claimant was shocked and appalled. The Claimant complained to his line manager and subsequently raised a grievance. The grievance was upheld. A disciplinary investigation into Ms Stevens' conduct was commenced; Ms Stevens appeared contrite when the offensive nature of the image was explained to her. Ms Stevens was given a final written warning by the Respondent: the Respondent considered that Ms Stevens' conduct was in breach of its dignity at work policy.

Subsequently, the Claimant was required to work alongside Ms Stevens. He objected to this. The Claimant was thereafter moved to another location without any explanation.

The Claimant took the view that he was being victimised because he had done a protected act, namely complaining about the image on Ms Stevens' Facebook page.

The Claimant brought claims of harassment, victimisation and discrimination. Those claims were dismissed by the Employment Tribunal ('ET') (para 10). The ET unanimously concluded that Ms Stevens' conduct was not in the course of her employment.

However, the majority of the ET also held that Ms Stevens' act of sharing the image on Facebook did not 'have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant' (para 11) (section 26(1)(b) Equality Act 2010).

The ET also held that the Respondent had made out the 'reasonable steps' defence in section 109(4) Equality Act 2010.

The victimisation claim was dismissed on the basis that the individual who implemented the decision to impose a restriction on the Claimant and Ms Stevens working together was not aware of the reasons behind the restriction (para 13).

The issues

The appeal concerned the Claimant's harassment (section 26 Equality Act 2010) claim only.

First, the Claimant argued that the ET's conclusion, that 'the sharing of the image by Ms Stevens on her Facebook page was not conduct in the course of her employment, was perverse' (para 28).

Second, it was argued that the ET erred in law in finding that the act of sharing the image did not have the requisite purpose or effect for the purpose of section 26 Equality Act 2010 (para

45). In particular, it was argued that the ET ought not to have taken into account Ms Stevens' apology.

Third, it was argued that the ET had not been entitled to find that the 'reasonable steps' defence in section 109(4) Equality Act 2010 was made out (para 50).

The EAT's judgment

Ground 1

The EAT held that 'the question of whether conduct is or is not in the course of employment within the meaning of section 109 of the **EqA** is very much one of fact to be determined by the [Employment] Tribunal having regard to all the relevant circumstances' (para 25).

Ground 1 boiled down to a perversity challenge. The EAT took the view that the ET had taken proper considerations into account (para 31) and a 'lay person would not consider that the sharing of an image on a private non-work-related Facebook page, with a list of friends that largely did not include work colleagues, was an act done in the course of employment (para 31). In those circumstances, it is perhaps unsurprising that the appeal on this ground was dismissed (para 42).

However, the EAT's judgment contains a wider discussion of what is meant by the words 'in the course of employment'. As to the factors that may be taken into account, at paras 26 and 27, the EAT held as follows:

> It is also apparent from these authorities that the relevant factors to be taken into account might include whether the impugned act was done at work or outside of work, and if done outside of work, whether there is nevertheless a sufficient nexus or connection with work such as to render it in the course of employment. Those kinds of factors are readily understood when one is dealing with the physical environment of the workplace. It is much more difficult to apply them to the virtual landscape in which many people these days spend their time. Thus, it may not be very easy to say

> whether a person is doing something whilst at work where some of that person's work activity is conducted online at home. Equally, it may be very difficult to ascertain whether there is a sufficient nexus between an activity carried out on a personal social media account and their employment. If that account is used for purposes relating to work then it might well be open to the Tribunal to consider that there is a sufficient connection with work to render an act done on that social media account as being done in the course of employment; whereas if the link with work is tangential or more tenuous then it might well be open to the Tribunal to conclude otherwise.
>
> We do not consider that it is possible or even desirable to lay down any hard and fast guidance in respect of these matters, especially as the extent to which social media platforms are used continues to increase. Just as is the case with the physical work environment, whether something is done in the course of employment when done in the virtual landscape will be a question of fact for the Tribunal in each case having regard to all the circumstances. No clear boundary as to when such conduct will be in the course of employment can be defined.

The EAT also noted that 'Ms Stevens was not at work when the image was posted; that the image had not made reference to the Respondent or any of the Respondent's employees; and that she did not use the Respondent's equipment in sharing the image' (para 31).

In addition, it was held that the fact that BW showed the image to the Claimant was not probative of whether the act was done in the course of Ms Stevens' employment (para 35).

In relation to images shared on Facebook more generally, Choudhury P held that (para 36):

> There may of course be many circumstances where the sharing of an image on a Facebook page could be found to be an act done in the course of employment. This could include situations where the Facebook page is solely or principally maintained for the purposes of communicating with work colleagues or is routinely used for raising work-related matters. In those circumstances, one can see that an ostensibly private act could be regarded as being sufficiently closely connected to the workplace to render it an act done in the course of employment. Whether or not such an act is seen as such will depend on the facts of the individual case.

Furthermore, at paras 37 and 38, Choudhury P continued:

> The fact that the Respondent treated the matter as a disciplinary one as far as Ms Stevens was concerned is not determinative. In the first place, the Respondent's actions were after the event, and, as with BW's sharing of the image with the Claimant, was [sic] not necessarily probative of the prior question of whether Ms Stevens' sharing of the image was done in the course of her employment…
>
> The employer can, for example, take action, again depending on policies, against an employee where it transpires that he or she has committed criminal acts outside employment, or acts which are otherwise considered offensive or unacceptable. An employee found to be chanting racist slogans at a football match, for example, might be regarded by an employer as engaging in conduct worthy of censure. However, no reasonable person would regard such conduct as being done in the course of employment, unless there was shown to be some connection between attendance at the football match and employment that suggested otherwise. There is, in other words, no necessary correlation in this context between conduct outside of work, which is considered by the employer to be unacceptable, and the statutory test of an act being done in the course of employment.

Ground 2

The appeal on Ground 2 was dismissed. At para 48, the EAT held:

> There was no error in going on also to consider Ms Stevens' apology, as that would fall within the wide rubric of the "other circumstances" which the Tribunal must take into account in applying Section 26 of the **EqA**. There is no warrant, in our judgment, for treating the reference to the other circumstances under Section 26(4)(b) as being confined only to those extant at the time of the alleged act of harassment. Unlike the situation under Section 109, where the Tribunal, in determining whether an act was in the course of employment, will focus on matters at the time the act took place, under Section 26, the Tribunal is required to consider whether conduct has the purpose or effect of creating a hostile and intimidating etc., environment. That may, in appropriate circumstances, include taking account of an apology that is made shortly after the impugned conduct or the immediate cessation of the conduct once it is

> brought to the employer's attention. Both of those matters could be relevant in assessing whether there was the hostile environment which has been proscribed by the legislation.

Ground 3

The EAT also dismissed the appeal on Ground 3; it held that (para 52):

> In the present case, the Tribunal regarded as significant that the employer treated Ms Stevens' conduct seriously and gave her a final written warning. The Tribunal was, in our judgement, entitled in those circumstances to conclude that, notwithstanding the absence of any evidence as to the publication, auditing or monitoring of the policy, the Respondent did take reasonable steps to prevent its employees from doing the discriminatory act in question.

Comment

This judgment is likely to be cited frequently by employers in cases of alleged harassment via private social media accounts. But the EAT made it plain that whether an act is done 'in the course of employment' is very much a question of fact; the scope for appealing ET decisions on this point is therefore limited and each case is likely to turn on in its own facts. Indeed, if Mr Forbes had put his case on the basis that BW's act of showing him the image in the workplace was done in the course of employment, his case might well have had a different outcome (para 39).

It should also be noted that the EAT's decision on Grounds 2 and 3 is not strictly binding, as those Grounds became academic following the decision on Ground 1. And while the rubric of 'other circumstances' to be considered when applying section 26 Equality Act 2010 permits consideration of a broad range of matters, it is doubtful that an apology made a significant time after the act complained of is capable of tipping the balance against a finding of liability: in this case, the EAT's view was simply that an apology '*made shortly after*' the act

complained of is capable of being a relevant factor in relation to the assessment of whether there was the requisite hostile environment (para 48).

Finally, the decision in respect of the 'reasonable steps' defence (section 109(4) Equality Act 2010) should be treated with some caution as it appears that, at first instance, the Claimant did not argue that there were any particular steps the Respondent should have taken prior to the Claimant being shown the image (para 53).

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