Assessing 'effect' in harassment claims: how should mental impairment be taken into account?

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Introduction

Succeeding in a claim of harassment under **s26 Equality Act 2010** ('EqA') depends on there being a finding that the conduct in question has either the "*purpose or effect*" of "*violating dignity or creating an intimidating hostile, degrading, humiliating or offensive environment*". The question of ***effect*** can be particularly tricky to assess in cases of disability-related harassment, especially where the disability is one of mental impairment. The recent cases of **Harkins v Marks and Spencer PLC [2026] EAT 131** and **McManus v British Airways PLC [2026] EAT 155** provide invaluable guidance on the approach to be taken by tribunals when making these assessments.

The statutory test

S26 EqA sets out the test for harassment. The conduct must be "*unwanted*", be "*related to a relevant protected characteristic*" and have the requisite "*purpose or effect*" of *"violating dignity or creating an intimidating hostile, degrading, humiliating or offensive environment"*. This article focuses on how tribunals should assess whether the conduct in question has the requisite ***effect.***

The statute sets out that the Employment Tribunal must take into account three factors when considering whether the conduct has the proscribed effect (**s26(4) EqA**);

a. The Claimant's perception
b. The other circumstances of the case
c. Whether it is reasonable for the conduct to have that effect.

Assessing effect in cases involving mental impairment

In cases of disability discrimination involving mental impairments, the assessment of the ***effect*** of the conduct on a worker can be particularly difficult, as it is often contended that their mental impairment impacts their perception of the employer's actions towards them. Should this perception be treated as determinative? The two recent cases of **Harkins** and **McManus** provide answers on the correct approach to be taken.

Harkins

Firstly, is the case **Harkins v Marks and Spencer PLC [2026] EAT 131**. This was an appeal against the dismissal of multiple complaints of disability discrimination. Due to the broad scope of the appeal the judgment provides a helpful overview of the law on multiple elements of disability discrimination, however this article focuses purely on the analysis of the question of ***effect.***

Recorder Jones KC emphasises, as above, the need to look at the three matters set out in **s26(4) EqA** when assessing ***effect*** **(Harkins, 33)**. He effectively splits this assessment into two steps.

Firstly, is the assessment of the perception of the claimant, which is a "*subjective question*" **(Harkins, 34**). This is said to depend on a claimant's evidence of what they felt and whether the Tribunal accepts this evidence.

Secondly, is the assessment of the other two factors; the other circumstances and reasonableness. Recorder Jones KC acknowledges that these matters are "*closely inter-related"* **(Harkins, 35)** in that *"the question whether it is reasonable for the conduct to have a harassment effect is likely to depend on the circumstances*". This secondary assessment is crucial to avoid the *"culture of hypersensitivity"* described in the case of **Richmond Pharmacology v Dhaliwal [2009] UKEAT/0458/08.**

When assessing the second question, Recorder Jones KC emphasises that there is a "*balance to be struck"*. Although an employee's vulnerability (i.e their mental impairment) is a factor to be taken into account, the tribunal should not find itself in a position where unrealistic expectations are being placed on employers **(Harkins, 36)**.

Looking at a situation where a worker is unhappy with the manner in which they are managed, Recorder Jones KC acknowledges that it is easy to see why a worker being told they are not meeting standards would be "unwanted" and an upsetting experience. However, he explains

that it would be difficult for an employment relationship to function without an employer being able to proportionality draw attention to concerns about someone's work in good faith, even when that conduct could be said to relate to a protected characteristic **(Harkins, 38).**

Using the example of an employer trying to address an employee's disability impacting their performance, he stresses that it must be open to an employer to address those concerns without triggering a liability in harassment **(Harkins, 38)**. However, it is not the case that a management interaction of this kind would *never* have a harassing effect. For example, there may be harassment where concerns are confected, they are addressed in a disproportionate mater (i.e. in front of others where it would have been possible to do so in private), or communication is unnecessarily aggressive, disrespectful or insensitive, or the worker is picked on by relentless concerns. What is proportionate will also depend on the characteristics of the employee (**Harkins, 39**).

In respect of situations involving interactions with colleagues, Recorder Jones KC doubts that a mere reference to a claimant's protected characteristic would ever give grounds for a finding of conduct that could reasonably be considered to have a harassing effect, without something more. This "something more" could be a reference to a matter a worker had made it clear they are particularly sensitive about, where the reference was disparaging or mocking, or conduct was otherwise inappropriate, intrusive or insensitive **(Harkins, 40).**

Ultimately Recorder Jones KC's analysis is one of a balancing exercise to be carried out when assessing reasonableness, looking at all relevant circumstances. Whilst the characteristics and sensitivity of a claimant (including the impact of mental ill health) can be taken into account, this needs to be balanced against other factors to avoid an employer being set an impossible task of managing and interacting with their workers in a proportionate way.

McManus

The approach in **Harkins** was helpfully applied, approved and expanded upon in the case of **McManus v British Airways PLC [2026] EAT 155**. This was an appeal against unsuccessful complaints of disability-related harassment. The Claimant was a disabled person by reason of depression, anxiety and social phobia.

In particular, the appeal related to a complaint that an Occupational Health ('OH') adviser had said to the Claimant that the organisation 'Access to Work' was "*not for people like you, it's for people in wheelchairs*". The Tribunal concluded that whilst it may have been incorrect or wrong for the OH adviser to say this, effectively she was saying that 'Access to Work' did not deal

with mental health conditions. It concluded that this comment did not amount to having the requisite effect in this context, despite the Claimant's perception to the contrary.

HHJ Auerbach reviewed the case law and analysis in **Harkins**, again setting out that there are effectively *"two substantive stages*" to the Tribunal's enquiry when looking at "effect" (**McManus, 30)**.

Stage 1 is the subjective test of perception. Although this is a subjective test it does not mean that the Claimant's statement on her perception is always decisive. The Tribunal may decide, after considering all the evidence, that the Claimant's evidence on perception is not accurate (**McManus, 31)**.

Stage 2 is the reasonableness question looking at all the circumstances, which in effect means all the relevant circumstances; "*this is a fact-sensitive matter for the appreciation and evaluation of the tribunal in the given case, as is the question of how to weigh and evaluate those circumstances".* (**McManus, 32**).

When conducting the reasonableness analysis, it will not be wrong for a tribunal to take into account a claimant's mental ill health, along with all other relevant circumstances (**McManus,37**); *"the question is whether it is reasonable to treat the conduct as, for example, violating her dignity, or creating a proscribed environment for her (see Dhaliwal at [15]). But it will still be for the appreciation of the tribunal to decide whether, taking her mental ill health into account along with all the other relevant circumstances found by the tribunal, it is objectively reasonable to treat the conduct in question as having the proscribed effect".*

Drawing on the discussion in **Harkins**, HHJ Auerbach emphasised that the finding that a Claimant's mental ill health is a relevant consideration is not bound to lead to the conclusion that the conduct should reasonably be regarded as having the proscribed ***effect.*** Cases of legitimate management enquiry or investigation into an unavoidably sensitive subject may be of particular relevance to this assessment (**McManus, 38)**.

Again, the conclusion in **McManus** is that the question of the reasonableness of the proscribed ***effect*** requires a balancing act of all the relevant circumstances, which can include the mental ill health of a claimant. In **McManus** it was found that the Employment Tribunal had correctly taken in account the impact of the claimant's mental impairment alongside the other relevant context when determining the question of ***effect***. Therefore, it had not erred in law.

Conclusion

The cases of **Harkins** and **McManus** effectively set out a two-stage approach to the question of proscribed **effect**; involving analysing both the subjective perception of the Claimant and objective reasonableness taking into account all relevant factors.

When looking at stage 2, the question of reasonableness, the impact of a Claimant's disability (in particular mental ill health) can be relevant to the assessment. However, it must be balanced against the wider context. Therefore, to answer the question posed at the outset, the perception of a worker is not alone determinative of the issue of **effect**, even if that perception is impacted by mental ill health.

Grace Holden appeared for the successful Respondent in the case of Harkins, both at the final hearing in the Employment Tribunal and EAT.

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