

s.26 Harassment: The correct approach

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Mr F Ahmed v The Cardinal Hume Academies (UKEAT/0196/18/RN)

(Judgment handed down on 29th March 2019)

The Facts

1. C is a qualified “Teach First” teacher and has dyspraxia which causes difficulties with reading, comprehension speed and handwriting. In particular, he has difficulty writing for more than a few minutes due to pain in his hands. Concerns were raised about his ability to cope with the demands of the role. At a meeting with the headteacher, Mr Rowland, remarks were made about C’s difficulty in writing which C perceived to amount to harassment related to disability. C was later suspended and required to stay at home until the issues raised were considered further. Around the same time, C raised this issue at another meeting alleging that it may have breached anti-discrimination legislation. Upon returning from his suspension, it was suggested to him to change to an alternative teaching scheme which was more supportive, albeit less prestigious. C raised a grievance regarding the insensitive questioning by Mr Rowland and that his suspension was without reasonable grounds. He subsequently resigned claiming that he had been the victim of direct disability discrimination, discrimination arising from disability (which was not appealed), and harassment.
2. Section 26 EqA, so far as relevant, provides:

(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)

[...]

(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.

(5) The relevant protected characteristics are—

[...]

disability

3. Guidance as to the application of this provision is set out in the judgment of **Pemberton v Right Reverend Inwood [2018] ICR 1291, [2018] IRLR 542**, in which the Court of Appeal considered whether the ET had been correct to conclude that the revocation of a Canon's Permission to Officiate at services, and the withholding of an Extra Parochial Ministry Licence, following the Canon's marriage to his same-sex partner did not constitute harassment within the meaning of section 26 EqA. Underhill LJ, having referred to the predecessor provisions to section 26 EqA and the judgment of the EAT in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, which considered those provisions, stated as follows¹

"...I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the Claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective

¹ Paragraph 25 of the Judgment.

question is that if it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so".

ET's Decision

4. The harassment claims related to the meeting with the headteacher and being suspended. The ET accepted that the remarks made by the headteacher were unwanted, but that it would not be reasonable to hold these as amounting to harassment. In relation to the suspension, the minority of the tribunal did consider that it would be reasonable for C to feel it had violated his dignity and that therefore his complaint of harassment should succeed, but the majority did not. Rather the majority concluded that it was not reasonable to regard C's sending home on suspension as amounting to harassment within the meaning of section 26(4)(c) EqA. Also by a majority, the constructive dismissal claim was dismissed.
5. C appealed to the EAT. Firstly, in relation to harassment, he argued that the ET had erred in regarding reasonableness of whether the conduct had had the proscribed effect under s.26(1)(b) as determinative instead of recognising that it was one of three factors that were to be considered: perception, circumstances and reasonableness.
6. Secondly, in relation to direct disability discrimination, the ET had erred in failing to give effect to its own finding that C was disabled by reason of his handwriting. Further, that the ET had erred in relation to his claim of direct disability discrimination in failing to give effect to its own finding that the reason for the C's suspension was his disability, namely his difficulty in handwriting. Further, it had also failed to consider how C's comparators and/or a hypothetical comparator would have been treated.

EAT Decision

7. The harassment point was narrow and can be summarised as follows: the new statutory formulation of s.26 under the EqA means that it would be possible to find conduct having had the proscribed effect, notwithstanding it might not be reasonable to have had that effect. Whereas, under the previous provisions, conduct would be regarded as having the proscribed effect only if having regard to all the circumstances, including the perception of that other person, it should reasonably be

considered as having that effect. Therefore C argued that the ET was wrong to regard reasonableness as determinative, as opposed to a factor to be taken into consideration.

8. Choudhury J rejected this argument. If this proposition was correct, section 26 EqA would have intended to have made a “substantive difference”. But Underhill LJ, in **Pemberton v Right Reverend Inwood [2018] ICR 1291**, albeit in obiter remarks, expressed a clear view that this was not the case. At paragraph 88, Underhill LJ expressly considered the changes that ought to be made to the guidance he gave in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** when considering cases of harassment.
9. In **Pemberton** Underhill LJ had specifically considered why the change came about and expressed the view that it was probably “simply a matter of the 2010 Act having its own drafting style”. In the absence of *Hansard* references to suggest a material change, or specific examples where conduct may have the proscribed effect without it being reasonable to have that effect, the EAT stated it is “*effectively determinative*”. He confirmed that the approach as set out in paragraph 88 of **Pemberton** is the correct approach and that if it was not reasonable for conduct to be regarded as violating C’s dignity or creating an adverse environment for him, then it should not be found to have done so.
10. The EAT also dismissed the argument that the suspension was also because of the disability. The ET’s conclusion was that C had been suspended because of his difficulties with handwriting. That was a finding that treatment was because of the adverse effect of an impairment or of something arising from disability; it was not a finding that the treatment was because of the disability – whether dyspraxia or some other unspecified physical or mental impairment – itself.

Comment

11. There are frequently cases before ETS where conduct does have the proscribed effect, yet it is not considered to be reasonable to have had that effect. In these situations, it is frequently s.26(4)(b) EqA relating to ‘circumstances’ which will become key to establishing the context of a particular remark or act. Thus claimants and employers must adduce evidence in their witness statements or otherwise highlighting other circumstances of the case which might be relevant to the section

26 test. Underhill J (as he was then) recognised this in Dhaliwal when he highlighted the importance for employers and tribunals to be “*sensitive to the hurt that can be caused by racially offensive comments or conduct*”, but equally, he stated that it is “*important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*”.



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