EAT upholds Tribunal decision that "Allahu Akbar" security check is not harassment

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Ali v Heathrow Express Operating Company Limited and another [2022] EAT 54

Background facts

1. Mr Ali brought claims for direct discrimination and harassment relating to a number of discrete complaints. Some complaints succeeded, whilst others were withdrawn or dismissed.

2. The appeal concerned one complaint of harassment related to Mr Ali's Muslim religion, referred to as the "security bag incident". The Second Repondent provided Heathrow Airport with security testing, which included deploying suspect packages to test security staff. On one such occasion, a carrier bag was concealed containing a cardboard box, electric cabling, and a note saying "Allahu Akbar" written in Arabic. Afterwards, an email was circulated containing the outcome of the test and included photographs of the bag and note. Mr Ali considered this to violate his dignity and created a hostile environment for him.

The decision of the ET

3. Section 26 of the Equality Act 2010 states:

> *(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.

...

(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.

4. Whether or not it is reasonable for the conduct to have the effect it had on a claimant is an objective question and a matter for factual assessment.

5. The ET found that the incident was unwanted conduct related to Mr Ali's religion. It also accepted that the Claimant considered this to violate his dignity and create a hostile environment. However, it found that, regrettably, the phrase in question had been used in connection with terrorist attacks and that its use to reinforce the "suspicious" nature of packages was therefore legitimate. The ET did not consider it reasonable for the conduct to have the effect described, stating:

> *He should have understood that in adding the Phrase, Mr Rutherford's team were not seeking to associate Islam with terrorism – instead they were seeking to produce a suspicious item based on possible threats to the airport.*

6. Consequently, this claim was dismissed, as the requirements of section 26(1)(b) of the Equality Act 2010 were not made out.

Decision of the EAT

7. Mr Ali appealed against the findings of the ET on the grounds that they were perverse or insufficiently reasoned. It was argued that using the phrase amounted to stereotyping, falsely associating the use of a particularly significant expression with the acts of a tiny number of extremists. It was argued that the security bag incident necessarily linked acts of terriorism with Islam, therefore the ET's conclusion that it was legitimate to use this term to enhance the suspicious nature of a package was perverse. With regard to insufficient reasoning, it was argued that the ET did not

consider all the 'other circumstances' of the case, including the fact that the vast majority of Muslims do not support terrorism.

The EAT dismissed the appeal on both grounds. The judgment starts by setting out the respective roles of itself and the ET. The role of the ET is to find facts and evaluate them. An appeal is not an opportunity to rerun a hearing. It is not to reconsider findings of fact unless no reasonable tribunal would make such a decision. On the perversity appeal, the EAT said:

> *we do understand that he also says that, because such stereotyping is a significant and serious blight on the lives of Muslims, the use of these words in this context was particularly charged for him, more than, say, the use of an animal-rights slogan co-opted by some terrorists would be for a vegan. However, we cannot say that these features point to the conclusion that the tribunal could only properly have found that the claimant's perception that the conduct had the effects on him of the kind referred to in section 26(1)(b) was a reasonable one.*

8. Considering the inadequate reasons appeal:

> *there is no reason at all to suppose that the tribunal's failure to mention these propositions – that the vast majority of Muslims do not behave in the manner of the terrorist extremists, or support them, that it is wrong to tarnish Muslims generally by using their sacred terms in association with possible terrorist acts, and that law-abiding Muslims would be deeply offended by the association of their religion with terrorism – was because it had failed to consider them, or took issue with them as such. Their nature is such that the tribunal did not need to confirm if it regarded them as uncontroversial as such*

9. The EAT held that the ET had set out the relevant facts and reached a conclusion that it could reasonably reach. The judgment is neither perverse nor insufficiently reasoned. Consequently, the appeal was dismissed on both grounds.

Commentary

10. As acknowledged by the EAT, a perversity appeal faces a high hurdle, requiring an overwhelming case. It can only succeed if no reasonable tribunal could have reached

the relevant conclusion. An ET could find that it was not reasonable for the security bag incident to have the effect it had. The fact that a differently constituted ET could have found that it was reasonable does not allow the EAT to overturn the decision.

11. Although the EAT dismissed the appeal, the judgment does recognise that stereotyping is a serious and significant blight on the lives of muslims. Although it was open to the ET to make the findings it did, it is also possible that differently constituted tribunals would make findings in favour of claimants in similar cases.

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