Ignorance is bliss, or at least probably not harassment

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Greasley-Adams v Royal Mail Group Limited [2023] EAT 86

1. In *Greasley-Adams v Royal Mail Group* (handed down on 07 June 2023), the EAT considered whether *the effect* of conduct can amount to harassment when the Claimant was unaware of comments made by colleagues until later in time. The EAT held that without awareness at the time that the relevant act occurred, the effect cannot be harassment.

2. The decision leaves various questions and issues open about how far this principle stretches, considered below. Other minor parts of the judgment are excluded for the purposes of this article as they are of limited wider use beyond the facts of the case.

Summary of facts

3. The Claimant's relationship with his colleagues deteriorated such that two of them raised bullying and harassment complaints about him. An investigation was carried out and interviews were conducted as part of that process. During the investigation process, the Claimant became aware of disparaging remarks that his colleagues had been saying about him but – importantly – about which he did not know at the time the comments were made.

4. The Claimant issued various claims and the relevant one included harassment based on the comments from colleagues. At first instance, subsequently reconsidered, the ET dismissed all claims. The harassment claims failed because the ET found, "Disparaging comments about the claimant could have the effect of violating his dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant

(the "proscribed effect") but only to the extent that the claimant was aware of them" (paragraph 179 reconsidered). The Claimant appealed to the EAT.

The view on appeal

5. At paragraphs 19-21, the EAT looked at the harassment claim and the relevance of the claimant's awareness of the unwanted conduct in determining whether or not the conduct could have the prescribed effect. Highlighting that the statutory test at s.26 Equality Act 2010 "is a cumulative one", the EAT emphasised that when considering whether harassment has the relevant effect of "violating the claimant's dignity", the Tribunal "must" take into account factors including the perception of the Claimant.

6. The EAT stated, "the perception of the person claiming harassment is a key and indeed mandatory component in determining whether or not harassment has occurred". Applying that reasoning, the EAT's dismissal of the appeal is encapsulated in the pithy summary, "If there is no awareness, there can be no perception".

7. The EAT went on to reference case law that was said to fortify the EAT's reasoning, "such as" the Court of Appeal's view in *Pemberton v Inwood* [2018] ICR 1291, CA. *Pemberton*'s explanation of the law was adopted and the appeal dismissed on this ground (subsequently followed by dismissal of all grounds).

Analysis

8. As often is the case with appeal cases focused on such a discreet point, the EAT's view, confirming that of the ET, presents what may initially seem a fairly simple and commonsense approach. 'You can't feel harassed if you don't know about it'. However, there are still questions that remain and the complexity of the case lies in considering how far will its principles stretch.

<u>How close in time does the Claimant's knowledge need to be to the conduct in question?</u>

9. The EAT's reasoning is simple enough to understand at first glance, "If there is no awareness, there can be no perception". This rightly focuses on the statutory language of "perception" but the EA 2010 does not say that the perception has to be at the time of the relevant conduct or give any guidance as to how close in time the perception/awareness needs to arise. The EAT's reasoning is relatively short in addressing these issues. The only case cited with a quotation is *Pemberton,* which

includes a statement 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”. Again though, this does not say ‘the Claimant must perceive their dignity to have been violated *at the time the conduct occurred*’.

10. The analysis of the facts within the case also does not provide any great assistance because there is no in-depth analysis of the gap in time between the relevant conduct and the Claimant finding out. The statement of facts states there was a, “number of interviews between 21st August and 4th September 2019 and reported thereafter on his conclusions in relation to each complaint” (paragraph 7), so how long “thereafter” the Claimant gained knowledge of the complaints remains unclear from the EAT judgment, nor does it seem to have been a key feature of discussion. The ET decision suggests that it was as soon as 18 September 2019 that the Claimant knew about the comments, therefore at most within approximately 2 months of the conduct occurring (paragraphs 105-16).

11. It is not clear how the (maximum) 2 month gap affected the EAT’s decision. Was it simply that the Claimant did not know on the day? What if the gap was a few days? One week? One month? These questions remain unanswered and may be addressed by a further appeal, whether in this case or another.

10. It seems arguable that a Claimant has to perceive harassment ‘at the time’ of events and cannot simply apply a retrospective analysis later, as in the case, for example, of an employee engaging in ‘mutual banter’ at the time then later viewing the events differently, perhaps due to subsequent events. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336, a case cited in *Greasley-Adams*, Underhill J (as he was) held, “The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created” (para. 15). The explanation here is that the Claimant C must have “felt”, i.e. at the time, not “feel”, i.e. now after the events and at the time of submitting a claim form. The question remains though how to define ‘at the time’ and the EAT decision in *Greasley-Adams* leaves that matter open.

<u>Other effects?</u>

12. For example, the test for effect under s.26 EA 2010 is whether the conduct has the effect of “violating the claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant” and in this case the focus was on a

claim that the comments had the effect of violating the claimant's dignity. Presumably, the EAT's reasoning would be the same if a different part of the statutory test concerning effect was relied upon though, such as if the alleged effect was about creation of a certain environment referred to within s.26. For instance, applying the EAT's finding that there cannot have been a violation of dignity if the Claimant is unaware of the conduct, the broadness of 'violating dignity' would seem to overlap with the creation of a humiliating or degrading environment such that presumably the same principle also applies that without awareness there is no harassment to this slightly different scenario within the statutory test.

Purpose?

13. It is important to note that the EAT's analysis was focused on the "effect" of conduct. "Purpose", the alternative within the s.26 test, remains a separate issue. The ET had found as a fact that the purpose had not been to violate the Claimant's dignity (etc.) because the comments by colleagues were made as answers to interview questions (paragraph 178). Their purpose had been, "no more than the interviewees describing matters as they recalled them". There was no appeal on this factual finding.

14. It seems extremely unlikely that the EAT's view would apply to a case concerning purpose. If a harasser had the purpose of violating a Claimant's dignity and set about making comments or taking action to achieve that purpose, the fact that the Claimant was unaware would not seem to provide a defence within the meaning of s.26, nor does the EAT's reasoning in this case suggest so. The EAT emphasised the need to consider "the perception of the Claimant" as a key part of its reasoning, but this requirement only applies to an 'effect' claim within the statutory test, not one based on purpose. This makes sense given that purpose is focused on the harasser, they can complete their purpose even if the Claimant is unaware of their actions and this also removes a potential defence on the basis that there was no harassment because it was all done behind the victim's back, which would seem instinctively wrong if the harasser intended to violate the victim's dignity (etc.).

Conclusion

15. *Greasley-Adams* provides a clear answer on its facts that the victim's ignorance of potential harassment meant they could not claim later that the events had the relevant effect. However, the application to other facts is unclear, particularly where there is a shorter gap in time between the relevant events and the victim's knowledge.

16. A victim's ignorance is unlikely to provide a defence to the perpetrator of harassment if the perpetrator has the purpose of trying to violate dignity (etc.).

17. The issue of colleagues carrying out unwanted conduct without the victim's knowledge is as old as the playground bullying it often imitates. However, it may be more prevalent now due to the connectivity of us all, including outside of work, through social media and technology such as whatsapp groups. The exploration of some of the issues arising from this case may therefore be seen again soon in case law.

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