Protected acts: beware a cautious approach

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Mrs l Chalmers v Airpoint Ltd & Others UKEATS/0031/19/SS

Background

R indicated that it wanted to arrange a Christmas dinner, and proposed a date for it. No objections were raised. Hotels and planes were consequently booked. Thereafter C (and a co-worker) indicated that the planned date did not suit them. R considered the matter but declined to change the date, various arrangements having already been made.

C complained about this, and also an issue of a separate issue of "hardware refresh", by way of an email in the following terms:

> "I do not find you approachable of late, your manner is aggressive and unhelpful. As such I prefer to have a written record of work instructions. My work is mostly ignored and I have been excluded from both the Christmas night out and the hardware refresh, neither of which is acceptable to me and both of which may be discriminatory"

It seems that further difficulties may have occurred in the working relationship thereafter.

The claim

C claimed direct sex discrimination (in respect of the Christmas dinner and other matters) and also victimisation under s27 EqA 2010. In that regard, C relied on three alleged protected acts: (1) an oral complaint about the Christmas dinner, (2) the email above; (3) commencement of ET proceedings.

The ET

The ET dismissed C's claims for direct sex discrimination, including that as regards the Christmas dinner.

In respect of her claim for victimisation, the ET concluded that neither the oral nor the written complaints were protected acts; the commencement of legal proceedings post-dated alleged victimisation and as such did not assist C.

In respect of the email copied above, the ET appeared to have reached its conclusion taking into account various matters such as:

> The lack of express reference to sex discrimination
>
> The use of the word "may"
>
> C's HR experience
>
> The fact that C was articulate and well-educated

As later noted by the EAT, in reaching its conclusion the ET had regard to relevant authorities indicating that a bare allegation of discrimination (i.e. without mention of a protected characteristic) may, if the context permits, be interpreted as a protected act (*Durrani v London Borough of Ealing* EAT0454/12 and *Fullah v Medical Research Council* EAT0586/12).

The EAT

C raised various grounds, many of which it seems did not survive the sift. However her argument that the ET had erred in its conclusion that her email was not a protected act was permitted to proceed.

C explained at EAT that she had made a deliberate choice in the wording she used in her email. Although she believed that she had been discriminated against, she had consciously chosen not to affirm this positively. She submitted to the EAT: "it was not for her to say whether her exclusion was unlawful discrimination", "that was a matter for a tribunal" and "she was not the ultimate arbiter of that matter."

The EAT recognised that the email could potentially be a protected act: "I accept that the Tribunal was not obliged to interpret her words literally and that it could have held that the

phrase “may be discriminatory” was an affirmation that the Claimant had been discriminated on the ground of sex.”

However, the EAT noted that the ET had had regard to relevant authorities (see above); in the circumstances of the case, the EAT was unable to accept that there was no evidence to support the ET’s conclusion or that it was perverse. As such the appeal on the point was not upheld.

Comment

In light of this judgment it seems that even if C had made reference to a protected characteristic, her email still may not have been a protected act. Ultimately it would have been a matter for the ET to determine having regard to the context. Her use of the word “may” placed the matter in doubt; it created a situation whereby the ET would have been entitled to reject the email as a protected act, so long as in doing so the ET had proper regard to the full context.

It is perhaps surprising that a worker who uses the words “may be discriminatory”, or similar, risks losing the protection he/she might otherwise have had. It is a rare case indeed in which a worker knows that an act of discrimination has occurred; more often a worker will have, at best, a suspicion of the same; indeed, the EqA 2010 burden of proof provisions are in place due in part to the rarity of clear evidence of direct discrimination.

As such there may well be occasions where a worker would prefer to state “I believe I may/might have suffered from discrimination” rather than making an outright positive allegation. However, workers who adopt such an approach run the risk of losing the protection which would otherwise arise from a clear positive allegation that discrimination has in fact taken place. If workers want to be sure of protection, clear positive allegations are required.

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