

‘Racially motivated’ or ‘racist’, what’s the difference?

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Lambert-Simpson v HCPC [2023] EWHC 481 (Admin)

Introduction

This case concerned an appeal brought by a registered psychologist (‘Registrant’) against a determination of the Conduct and Competence Committee of the Health and Care Professions Council (‘HCPC’), in respect of allegations of ‘racially motivated’ social media posts/comments. The Registrant challenged (unsuccessfully) the determination on several grounds but the discussion below is focussed on the distinction drawn between the terms ‘racially motivated’ and ‘racist’. References to paragraphs are to paragraphs of Fordham J’s judgment unless otherwise indicated.

Allegations

The allegations against the Registrant were as follows.

As a registered Practitioner Psychologist your fitness to practise is impaired by reason of misconduct. In that:

- (1) You posted inappropriate and/or offensive comments and/or posts on your social media account:
 - (a) On 22 May 2019, you posted a picture of a fire-damaged van with the caption ‘Look a Van-b-que on probably the busiest street in Europe. I think it was full of Asians. So it was a Korean Van-b-que’ on your social media account.

- (b) On or around [a given date], you responded to a comment on your photograph stating, 'Had to look good for the 87-year-old kiddie diddler I saw today' on your social media account.
 - (c) On or around 26 February 2020, you responded to a comment on your post sharing your location at a Latin American restaurant stating that it was 'Weirdly white people good' on your social media account.
 - (d) On 29 February 2020, you posted 'I have decided to self-isolate. Not because of any chink based "it's got a pulse let's eat it" stuff but mainly because I really hate people' on your social media account.
- (2) Your posts and/or comments in allegations (1)(a), (1)(c) and/or (1)(d) above were racially motivated.
- (3) The matters set out in allegations (1)(a)-(d) and/or (2) above constitute misconduct.
- (4) By reason of your misconduct your fitness to practise is impaired.

The Determination

The Registrant was found to have made each of the four social media comments/posts set out under allegation 1.

The Panel did not find racial motivation in relation to allegation 1(a). While comparing a crash resulting in a fire and the potential for people to have been burnt with a barbecue was inappropriate and offensive, the Panel reasoned that the comment was an attempt at humour and there was no evidence of hostility towards Asians or Koreans.

Allegation 1(b) had nothing to do with race and is not considered further in the discussion below.

The meaning of the comment in allegation 1(c) was ambiguous. The Panel considered one possible interpretation to be that the food in the Latin American restaurant was good enough for white people to eat. However, the Registrant gave an account indicating that the comment had been intended as a compliment and not a racist slur. The Panel could not be satisfied, on the balance of probabilities, that racial motivation was established.

The comment in allegation 1(d) was found to have been racially motivated; there was no doubt that the word 'chink' was a racial slur. Notably, while the Registrant denied he was racist, he said that he 'cringed' when he read what he had posted. The Registrant also pointed to the fact that the post was written around the time of Covid-19 when there was a 'lot of stuff going around about where it had come from and why it happened'. The Registrant also stated that he had been to rural China and had a poor experience as he came back with health issues.

The Panel went on to find current impairment and it imposed a four-month Suspension Order.

The meaning of the term 'racially motivated'

The term 'racially motivated' is primarily about personal motivation (paragraph 21). It can be contrasted with the allegation in *PSA v General Pharmaceutical Council (Ali)* [2021] EWHC 1692 (Admin), in which it was alleged that a practitioner had used 'antisemitic words': that allegation imported an objective test which did not depend on intention. Fordham J explained that this case would have been different if the allegation had been that the Registrant had 'used racist words'. If the allegations had been drafted in that way, an objective test would have been required. But, being framed in terms of 'racial motivation', the Panel needed to consider the Registrant's subjective state of mind (paragraph 21).

During the appeal, HCPC suggested that an inappropriate and/or offensive communication will be 'racially motivated' if two conditions are satisfied: (i) the act in question must have a purpose behind it which at least in significant part is referable to race; and (ii) the act must be done in a way showing hostility or a discriminatory attitude to the relevant racial group. Fordham J described this formulation as 'helpful' (paragraph 24(iii)).

Fordham J observed that the purpose of a comment may be referable to race in a significant part, and the necessary hostility and/or discriminatory attitude may be established, even if a practitioner makes a comment to 'get a laugh' (paragraph 24(iii)).

Discussion

The lesson for defence representatives is clear: while a practitioner's subjective intention will be of central importance in any case where 'racial motivation' is alleged, a practitioner's state of mind is unlikely to offer a complete defence where words or conduct are alleged to be 'racist'; in such cases it will be necessary to carefully address the context and circumstances in which the conduct occurred.

In this case only allegation 1(d) was found to be ‘racially motivated’ and, arguably, the decision to allege ‘racial motivation’ failed to capture the real gravamen of the case. The Panel found the comment in allegation 1(a) was ‘at the expense of an ethnic and racial group’ and had ‘racist connotations’, and that there was a potentially racist interpretation of the words in allegation 1(c); comments of this nature are surely capable of causing damage to the reputation of any given profession regardless of a practitioner’s subjective intention. The outcome of the case might have been different had the allegations been drafted in a way that required an objective approach to be taken; for example, it could have been alleged that the Registrant’s ‘social media posts and/or comments were racist’. However, there is little guidance about the precise scope of an allegation of ‘racist words/comments/conduct’ or how Panels should approach such allegations in practice.

It is notable that there is no discussion in the judgment of the test for harassment related to race in section 26 Equality Act 2010, which is as follows:

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to [race], 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.

It can be seen from s.26(1)(b) Equality Act 2010, that there is no requirement for any hostile or discriminatory purpose or intention to be proven. Rather, if the conduct in question has the effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, the focus is usually on the matters in s.26(4), namely the perception of the other person concerned, the circumstances of the case and whether it is reasonable for the conduct to have the effect complained of. It is suggested that those three matters would be appropriate considerations in the field of professional regulation in cases concerning potentially discriminatory words or conduct.

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