Neutral Citation Number: [2024] EAT 183

Case No: EA-2022-001419-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 October 2024

Before:

HIS HONOUR JUDGE BEARD

- -

Between:

(1) THE GOVERNING BODY OF WINDSOR CLIVE PRIMARY SCHOOL
(2) MR K FISHER

Appellants

- and -

(1) MRS STEPHANIE FORSBROOK
(2) CARDIFF COUNCIL OF COUNTY HALL

Respondents

- -
- -

Ms H Roddick (instructed by Cardiff Council Legal Services) for the **Appellants**
Mrs Forsbrook the **Respondent** appeared **In Person**
No appearance or attendance from second Respondent

Hearing date: 16 October 2024

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JUDGMENT

SUMMARY:

Disability Discrimination/Harassment

The ET provided insufficient reasoning for its conclusions that the claimant was subjected to harassment.

When considering whether conduct is related to disability within the meaning of the section it is necessary to describe the conduct and to spell out the relationship between the conduct and the disability in question. Although the test for “related to” in the statute is a much broader concept than causation is generally considered to be, there is still a requirement for a connection to be established.

The ET having found that the application of the absence process could not be unwanted conduct, was obliged to state in its reasons why the specific application of the process on this occasion amounted to unwanted conduct. This required that either something extraneous to the process or in addition to the process was in play as part of the reason making it unwanted.

Per Curiam

Unwanted conduct should usually be approached based on the subjective view of the individual. Unless the purpose of conduct is to create the prohibited environment or to violate dignity, the reasonableness of “effect” within the statutory meaning will be the key to whether such conduct could amount to harassment.

HIS HONOUR JUDGE BEARD:

1. This is an appeal from the judgment of Employment Judge Havard and Members who heard this claim between 20 and 23 September 2022, promulgating a judgment in a reserved decision on 23 November 2022. I shall refer to the parties as they were before the Employment Tribunal (ET) as “claimant” and “respondents”.

2. Ms Roddick (of counsel) represents the respondents, the Governing Body of Windsor Clive Primary School and Mr Fisher, the headteacher of that school. Stephanie Forsbrook, the claimant, acts on her own behalf. The other party, the local authority Cardiff Council, has decided not to take part in the appeal. This is not unusual as although the authority is named as a respondent the local management of schools is via the school governing body (although the local authority will have to pay any damages ordered).

3. The grounds of appeal permitted by Mr John Bowers KC sitting as a Deputy High Court Judge were: (1) that the ET failed to apply the correct test for harassment, in that it did not ask itself whether the “unwanted conduct” was related to the claimant’s disability as required by the relevant section of the Equality Act; (2) that the ET failed to engage with the question of whether sending the letter in error and the follow-up emails amounted to “unwanted conduct”, the ET did not ask themselves what amounted to “unwanted conduct” and/or failed to give any reasons for this finding; (3) that the finding of harassment was perverse (i) because the finding that “unwanted conduct” related to the claimant’s disability is inconsistent with other findings (ii) that the finding against the school and Mr Fisher is inconsistent with the finding that the Council’s conduct did not amount to harassment.

4. It is clear that the Tribunal found that the claimant was disabled with asthma but not with PTSD. The claimant had made claims of unfair dismissal, direct and indirect disability discrimination, a failure to make reasonable adjustments and victimisation. All of these

claims were dismissed. The claimant relied on a number of factual matters as harassment and all but one of those incidents were dismissed. It is the single claim of harassment that succeeded which is the subject of this appeal. That claim was limited to requiring the claimant to attend a second stage absence meeting under the respondent's procedures. This requirement was made in error and was only in place for a short period time. The requirement was removed as soon as the error was recognised by the respondents.

5. The relevant findings of fact by the Employment Tribunal are as follows. Mr Fisher was supported and guided through absence processes by Cardiff Council HR which provided that service to the school. On 24 February 2020, an automatically arranged formal stage 1 meeting for absence took place between the claimant, Mr Fisher and Ms Emma Walker from HR. Instead of the claimant's absence being considered deserving of a caution, at the meeting the respondents discounted the absence made a referral for an occupational health appointment for the claimant.

6. Through an error, probably made by a clerical assistant, a caution was recorded in the digital HR records kept by the Council. In January of 2021 the claimant was absent through illness. As a result of the caution being on the record, the Council informed Mr Fisher that he was required to hold a stage 2 absence meeting with the claimant.

7. It is worth at this stage directly setting out part of the judgment. The ET set out at paragraph 124:

> "On 25 January 2021, a further letter is written by Mr Fisher's Clerical Assistant to the Claimant based on a template provided by DigiGov (that being the respondent's electronic digital system for keeping these records). The first two lines read as follows:
>
> *"I refer to the stage 1 interview which was held on 24th February 2020. As a result of this interview you were issued with a formal written caution on 10 February 2020".*

Paragraph 125:

> "This made no sense and, in any event, it had not been intended for the Claimant to be issued with a formal written caution as Mr Fisher had exercised his discretion to discount the absences of the claimant from work".

At paragraph 126:

> "The letter goes on to confirm that there would be a telephone meeting on 29 January 2021 and confirms that the purpose of the interview would be to discuss her attendance record and her failure to meet an agreed target, stating consideration would be given whether or not to issue a final formal written caution. The letter also states that unless there are specific reasons under the Equality Act 2010, a final formal written caution would be issued".

Paragraph 127:

> "On 27 January 2021 the claimant sent an email to Mr Fisher stating that she had received the letter of 25 January 2021 regarding the Stage 2 interview and expressed her shock at having received such a letter, indicating her understanding of the meeting in February 2020 that her absences were to be discounted entirely as a result of her medical condition. Whilst there is some dispute with regard to the basis on which the meeting on 24 February 2020 had been postponed to enable a referral to Occupational Health to be made, the fact remained that, following the Occupational Health report, all absences to that point were discounted and therefore the Claimant stated that a Stage 2 interview should never have been issued. The Claimant also complained that the letter of 25 January 2021 gave her inadequate notice of the meeting on 29 January 2021".

Paragraph 128:

> "On 28 January 2021, Mr Fisher sent an email to the Claimant apologising for the short notice and confirmed that this was a mistake, suggesting it should be rearranged, providing the Claimant with appropriate notice".

At paragraph 129:

> "Mr Fisher confirmed in this email that even though there may have been a decision to discount an absence at Stage 1, if an employee goes on to trigger Stage 2, the meeting would still be arranged to *"allow discussion to take place as per the stage 1 meeting."* Mr Fisher asked the Claimant to provide dates of availability and also confirmed that she was entitled to be accompanied by her trade union or work colleague".

8. The judgment then goes on to say that the claimant had confirmed that she had considered the email and would revert to him as soon as possible. About 8 February, Mr Fisher had written indicating he had not heard from the claimant and that he had set a date of 4 March for the meeting. The claimant responded on the same day saying she was trying to secure representation from her trade union.

9. On 8 February 2021, Mr Fisher sent a letter via email to the claimant in the exact same terms as the letter of 25 January 2021, save that it had the revised date of the meeting on 4 March 2021. It contained the same obvious error in the first paragraph. Both Mr Fisher and Ms Walker recognised the error that had been made and that a stage 2 meeting should not have been triggered due to Mr Fisher exercising his discretion in the claimant's favour to discount her absences. This was brought to their attention by the claimant's union representative.

10. As soon as Mr Fisher and Ms Walker had recognised the error, Mr Fisher sent an email to the claimant and her union representative confirming that due to an administrative error, there was no need to hold a stage 2 meeting and indeed the email states:

> *"It appears that following the Stage 1 meeting held on 24/02/2020, an error was made when the outcome of the meeting was inputted on DigiGOV. Therefore, [the Claimant] has not triggered the Stage 2.*
>
> *Please accept my apologies for any inconvenience".*

11. As a result of those findings, the ET went on to consider whether this communication amounted to harassment. Its findings are set out between paragraphs 300 and 303 of the judgment. The ET indicated that it recognised that there was a high threshold for a claim of harassment to be substantiated and then paragraph 301 says this:

> "The Tribunal concluded that the sending of the two letters and the email correspondence did amount to conduct which could be described as unwanted. The Tribunal was satisfied that, whilst this may not have

> violated the Claimant's dignity, the effect, as opposed to the purpose, of the unwanted conduct led to the Claimant feeling intimidated. In reaching this conclusion, the Tribunal had considered in particular the contents of the Claimant's email of 27 January 2021 and her expression of shock at having received the letter from Mr Fisher. Again, this was compounded by the subsequent correspondence from Mr Fisher before Mr Fisher's email of 26 February 2021 cancelling the Stage 2 meeting".

Paragraph 302:

> "For these reasons the Tribunal upheld the Claimant's claim of harassment as against the School and Mr Fisher. In doing so, the Tribunal had taken account of the perception of the Claimant in receiving such correspondence together with all the history and surrounding circumstances, and concluded that it was reasonable for the conduct to have that effect".

Paragraph 303:

> "The Tribunal found that, at the time the error was made, the absence and need to shield had been caused by the Claimant's asthmatic condition as opposed to PTSD which in turn led to the error being made in January 2021 when the Stage 2 absence review was initiated".

12. The claimant's oral submissions, perhaps unsurprisingly, concentrated on her distress about the case in general. However, relevant to the issues that I have to decide today, in her skeleton argument, the claimant contended that because there was a finding of a requirement that the claimant attend a stage 2 meeting, harassment was substantiated. Although the ET found that this was the result of an administrative error, the obvious concern was that the error was compounded by emails and letters that followed up on the error. That was despite the claimant reminding her employer that the first meeting had not resulted in a caution. Therefore, the ET was in a position to come to the conclusion that despite the high threshold, the claimant's claim should succeed. It was the two letters and the email correspondence that amounted to the conduct which could be considered unwanted.

13. The claimant contended that the ET was entitled to come to the conclusion that this led to the claimant feeling intimidated. She was entitled to feel intimidated because of the environment created by the correspondence. The relationship to asthma, the claimant's disability, is set out in the judgment and therefore that the reasoning at paragraphs 300 to 303 creates the relationship between the disability and the unwanted treatment.

14. Ms Roddick, in her submissions, argued that a key matter is that the ET had not recited either statute or case law in support of their reasoning in this case. Therefore, examining the way in which the ET had reasoned matters, it is not clear how the conduct found relates to the disability established to meet statutory requirements. The respondent argued that the conduct cannot simply be the sending of the letter. In order to be relevant conduct it is the error sending the letter at the wrong stage that must be connected to the disability. The argument continues, if it is that error and not the sending of the letter per se, then there is no explanation as to why the error, as opposed to the absence procedure itself, provided a relationship to disability.

15. The respondent contends that if this argument is correct, then this is also a matter that I can conclude without remitting to the ET. This is because all the necessary facts have been found by the ET so that I am entitled to apply the law to those facts and come to a conclusion. The respondent contended that the necessary facts are set out in various paragraphs within the judgment. At paragraph 283 the ET found that the stage 1 absence review in 2020 could not amount to unwanted conduct. Further, that that review would not have the purpose or effect of violating the dignity or creating the prohibited environment. At paragraph 284 the ET showed it had taken account of the perception of the claimant and the other circumstances in drawing this conclusion. In particular, it had included the operation of the attendance and wellbeing policy which related to all employees and that the policy operated whether or not an employee

had a disability. The ET had also considered whether it was reasonable for the conduct to have that effect.

16. In terms of the ET's findings in direct discrimination on the point, I was further taken to paragraph 296 which says as follows:

> "By reference to a hypothetical comparator, whilst the Claimant had presented evidence from which an inference could be drawn that the Claimant had been treated less favourably due to her disability, the Tribunal was not satisfied that, due to an error, the Claimant was treated less favourably than others would have been treated. The Tribunal concluded that the Respondents had established that this process could have been commenced in error in relation to any employee whether or not an employee with a disability".

17. Paragraph 298, in dealing with discrimination arising from disability, for similar reasons, the Tribunal found that the claimant had been treated unfavourably because of the administrative error. However, they did not consider that this was because of something arising from the disability.

18. In paragraph 299, the Tribunal set out this:

> "The chain of events flowing from the administrative error which led to the unforeseen consequences did not arise from the Claimant's disability. Such consequences flowing from the same administrative error could equally have occurred in relation to an employee without a disability, but whose absences from work were due to sickness".

19. The respondent's argument was, examining the ET's finding of fact and its approach to those other forms of discrimination allows me to terminate this claim. This would recognise that harassment is also to be considered a form of discrimination in the Equality Act. That should allow me to conclude that, based on those facts and given those findings on other forms of discrimination related to those facts, there is sufficient material for me to resolve that there is only one way in which that this is a matter could be decided on proper application of the law.

20. It is further argued in respect of ground 2 that there is no explanation from the ET which aspect of the conduct was unwanted. The finding of the Tribunal in one respect is that this form of communications, generally, would always be unwanted conduct. If that was the case that the ET's conclusion was that it was the sending of the letter alone that is inconsistent with earlier findings. Therefore, it must be the contents of the letter. If it is the contents then it is the error which led to those contents that must be the basis upon which the ET decided that it was unwanted. The ET has not explained with any clarity at all the basis of its conclusions.

21. Ground 3 was not pursued with any vigour by the respondent but was not specifically withdrawn.

22. Section 26 of the Equality Act 2010 provides, in so far as is relevant to this case:

> "A person, A, harasses another, B, if he:
>
> 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"
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> -----------------------
>
> (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.

23. In **London Borough of Haringey v Mrs C A O'Brien**, UKEAT/0004/16/LA Her Honour Judge Eady QC (as she then was) gave judgment which, *obiter*, dealt with harassment. The majority of the reasoning deals with practice and procedure and issues of estoppel and abuse of process. The case also considers issues in respect of reasonable adjustments and section 15 discrimination. However, the decision in respect of harassment, the EAT having already decided that the appeal would succeed on other issues was dealt with in passing.

24. At paragraphs 68 and 69 of **Haringey v O'Brien** the following is set out:

> "Similar points arise in respect of the Respondent's appeal against the ET's findings on the section 26, harassment claims relating to (i) the return to work meeting in July 2011, and (ii) the subsequent deduction of overpayment claim. The real criticism is that the ET's reasons failed to demonstrate any engagement with the requirement that the unwanted conduct be "related to" the protected characteristic".

25. I bear in mind that section 26 does not import a strict test of causation. The unwanted conduct need not be because of the protected characteristic, it need only be related to it. That is a broad test requiring an evaluation by the ET of the evidence in the round see **Hartley v Foreign and Commonwealth Office Services** UKEAT/0033/15.

26. In the present case, however, I am simply unable to see that the ET has engaged with this question of the relationship between the conduct and the disability of asthma. It may be, as the claimant submits, that this is an adequacy of reasons point, or it may be as the respondent contends, that the ET simply failed to apply the correct test. Either way, I consider the challenges raised by the appeal to be well founded.

27. The next important authority is **Jafri v Lincoln College** [2014] EWCA Civ 449 where the Court of Appeal held that, on appeal, if the Employment Appeal Tribunal identifies a legal error, it must remit to the Employment Tribunal. This is unless the EAT concludes either; (1) that the error could not have affected the result and was therefore immaterial, or (2)

that although the result would have been different without the error, it is able to conclude what the result would have been flowing from the findings of fact made by the ET and supplemented, if at all, only by undisputed or indisputable facts.

28. The final authority that I have been referred to is that of **Henderson v General Municipal and Boilermakers Union** [2016] EWCA Civ 1049. In terms, this is a case which involves harassment of a union employee which is said to be related to his political beliefs. The facts could not be more different from the case before me. However, the argument was not that the ET had not got the test of harassment wrong but that the Employment Appeal Tribunal had failed to remit the matter when it ought to have done so. In very straightforward terms, a Court of Appeal decision was that Mrs Justice Simler, as she then was, in the EAT, had correctly set out all of the facts which had been found by the ET which related to the situation, that the approach she had taken was correct and effectively this is a case which sets out that the **Jafri** position needs to be followed. I do not intend to read all of the highlighted aspects relied upon by the respondent into the judgment, but I have taken account of it.

29. The reality of this appeal is that I am to decide, in the context of the facts of this case, the meanings of “related to” and separately, “intimidating environment” in section 26. It is clear that “related to” is a broad concept, as set out in **Haringey v O’Brien**. However, the concept cannot be so broad as to be meaningless. I am of the view that, as Ms Roddick argues, the conduct must relate to the protected characteristic, here disability, in some clear way. It is for the ET to spell out that relationship between the conduct and the disability. It will be necessary, therefore, for an ET to identify with some clarity the precise conduct which creates the prohibited environment. This will also be true in deciding whether that conduct is unwanted in the sense that the statute applies to it.

30. Here, the Employment Tribunal, in paragraph 300, expresses that it is considering a high threshold to establish harassment. In paragraph 301 the conduct is identified as the sending of the two letters and the email correspondence. That paragraph must connect to the ET's findings of fact described in paragraphs 124 onwards. These dealt with the 25 January letter referring to a formal caution from the previous year and the correspondence on 27 January where the claimant expressed her shock. It must also include the response to that email on 27 January from Mr Fisher. The overall picture is of the back and forth in the email correspondence, along with the letters. This is because the decision made by the Tribunal that the shock felt by the claimant in the letter of 27 January formed part of their reasoning. The error arose from an initial mistake which was to enter the wrong detail in the digital system. That was later compounded by the further correspondence.

31. The ET took account of all of this in coming to the conclusion that this was properly described as an environment. The question is whether that intimidating environment, which the Tribunal had sufficient reasons to find because of the reaction of the claimant and which was a reasonable reaction in the context.

32. This returns me to the questions that I posited, that this environment must be "related to" and the unwanted conduct. The claimant was absent from work. That absence was caused by the disability of asthma. It was that absence which had led to the production of the initial stage 2 letter and it could be said that it also led to the further letters. However, the ET had already discounted in its earlier reasoning that the absence process *per se* could amount to unwanted conduct. What the ET does not deal with is the question of its relationship with the claimant's disability.

33. It is the incorrect use of the absence process that seems to be at issue. Taking account of paragraph 283 it must be the case that the error in the use of that stage of the process not the

process itself is what the ET considers problematic. In my judgment there is insufficient reasoning set out within paragraphs 300 to 303 as to what the relationship with the disability is. That insufficient reasoning, it seems to me, would mean that this is not a **Meek** compliant judgment. If the Tribunal had engaged in setting out the statute or case law that it was relying upon, it might be possible to see the pathway by which the ET has reached this conclusion. However, it is not possible from the judgment to understand that pathway. On this basis the appeal succeeds.

34. However, as to the second part of ground 1, having concluded that there is insufficient reasoning provided on how the conduct "related to" the disability, I cannot conclude that this is a clear-cut case on the facts. I do not consider there is only one answer to that issue because this is not about the application of a "but for" test but the much broader "related to" test. It is for the ET to set out the connections it relies upon. It is possible that, for instance, Mr Fisher was doubling down on the letter so that a meeting could take place because of his concern about the claimant's absences. The ET has not explained the connection and its reasoning is insufficient, but there are factual gaps which I am not prepared nor am I permitted to fill. It is on that basis that I would, in respect of ground 1, say that the reasoning is incomplete and that the finding made ought to be remitted to the Employment Tribunal because it is incomplete.

35. The "related to" test even though a broad concept could not be related simply to the error, if the error has no connection with the disability. There is no causation required but there must be a connection. "related to" could include the ET concluding that the decision to double-down was related to the disability or some other connection arising out of the way the overall process was pursued.

36. Gound 2 relates to unwanted conduct although it must encompass s.26(4) for context. This is an aspect which is not clearly explained in the judgment. At paragraph 283 the ET is

clear that there is no unwanted conduct involved in the absence process itself. Therefore, the unwanted conduct must either be separate from the absence process or something in addition to the absence process. I do not consider there is any difficulty in the Tribunal finding that the claimant considered this unwanted conduct because she found it intimidating and because the step was unwarranted. I am clear that any employee would consider an unwarranted step in an absence process as unwanted conduct. What the ET is really engaging with is the reasonableness of an employee having that perception. All employees would be aware that, if they are absent from work, that absentee processes may be brought into play. However, it would not always be reasonable for that employee to consider that that conduct created the environment prohibited by the statute and this must be explained by the ET.

37. In the ET finding this unwanted conduct and its finding as to the claimant's actual perception of feeling intimidated, the missing link, is how it was reasonable for her to perceive that as creating the prohibited environment. The ET had previously considered the process *per se* not to amount to unwanted conduct creating the prohibited environment. The ET did not explain which aspect of the two letters and the email correspondence amounted to the conduct, that was either separate from, or additional to, the absence procedure, there is a gap in reasoning. On that basis too, I would remit that question to the Employment Tribunal for decision.

38. It seems to me that the difficulty with the lack of reasons in respect of unwanted conduct may relate to a reluctance for the ET to describe the use of the absence process as unwanted conduct. In my judgment, properly constructed, the statute provides that unwanted conduct is based on the subjective view of the claimant. It is only in the unlikely circumstances that the "purpose" of the use of the absence procedure is to create the prohibited environment that a claim could succeed without more. In dealing with the "effect" of the conduct the

claimant's perception is subjected to the test of reasonableness pursuant s.26(4). It is through that subsection that the effect of unwanted conduct is to be viewed.

39. As far as the argument in respect of ground 3 is concerned, it was not advanced with any force. However, I consider that there is no substance in a perversity finding in circumstances where I have already found in respect of this case that the Tribunal, having found facts, misapplied the law to those facts. Perversity is essentially about the Tribunal finding facts which it could not on the evidence available to it, or applying the law to such facts in a genuinely perverse way rather than simply applying the law with errors of, in this case, lack of reasons.

40. It is on that basis that I will allow this appeal and I will remit the matter for the Employment Tribunal. The order will indicate that (1) the Employment Tribunal is to decide, without hearing further evidence but only argument, and applying section 26, whether or not the conduct was related to the disability and (2) whether the conduct was unwanted in the sense of being separate from or additional to the absence process itself.