



EMPLOYMENT TRIBUNALS

Claimant: Mr S E Toughfar

Respondent: Search Education Trust

Heard at: Watford

On: 15,16,17,18 January 2024
(In Chambers 30 January 2024)

Before: EJ Bansal
Members – Dr Von Maydell
Mr P Miller

Representation

Claimant: In person (assisted by Ms B Aksu)

Respondent: Mr J Braier (Counsel)

RESERVED JUDGMENT

The unanimous judgment of this Tribunal is that;

1. The claimant's complaint of direct discrimination on grounds of religion contrary to s13 of the Equality Act 2010 is not well founded and is dismissed.
2. The claimant's complaint of harassment related to religion contrary to s26 of the Equality Act 2010 is not well founded and is dismissed.

REASONS

Background

1. By a Claim Form presented on 17 April 2023, following a period of ACAS early conciliation which started on 22 February 2023 and ended on 4 April 2023 the claimant brought complaints of direct discrimination on grounds of religion and harassment related to his religion contrary to s13 & s26 of the Equality Act 2010.
2. The respondent in their response filed on 31 May 2023 denied the complaints.

The Legal Issues

3. At a Preliminary Case Management Hearing held on 27 September 2023, Employment Judge Young discussed and agreed with the claimant and the

respondent representative the legal issues to be determined by the Tribunal. At this hearing, both parties confirmed their agreement to these issues, which are repeated below.

4. Direct religious discrimination (s13 Equality Act 2010)

4.1 The Claimant's religion is Islam.

4.2 Did the Respondent do the following things on 16 December 2022:

- 4.2.1 Make a Grinch award to the Claimant;
- 4.2.2 Close the award competition one day earlier so that the Claimant was at the top of the votes;
- 4.2.3 Put the Claimant's name on the award;
- 4.2.4 The SLT member of staff who presented the Claimant with the Christmas Grinch award pretend to run away;
- 4.2.5 Staff members present at the ceremony award were laughing.

4.3. Was that less favourable treatment?

The Claimant says he was treated worse than Emily (a staff member) in relation to Para 4.2.2. The Claimant does not know Emily's religion or if she has one.

The Claimant has not named anyone in particular who he says was treated better than he was in respect all the other issues 4.2.1, 4.2.3, 4.2.5.

4.4. If so, was it because of his religion?

4.5 Did the Respondent's treatment amount to a detriment?

5. Harassment related to religion (s26 Equality Act 2010)

5.1 Did the Respondent do the following things:

5.1.2 Give the Claimant a Christmas Grinch Award.

5.2 If so, was that unwanted conduct?

5.3 Did it relate to the Claimant's religion?

5.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

5.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

The Hearing

6. The claimant was represented by his wife, Ms B Aksu. The respondent was represented by Mr Braier of Counsel.

7. An agreed bundle of documents of 315 pages was provided. The Tribunal

read and considered the documents referred to in the witness statements and those referred to in evidence during the hearing.

8. The Tribunal was provided with a witness statement from the claimant, and witnesses in support, Antonella Achler, and Mrs Monnaf. For the respondent there were statements for Mr Lee Mills (Assistant Head Teacher), Mr McKay Wood (Assistant Head Teacher), Ms Lucia Santi (Head Teacher), and Bronja Elton (Director of 6th Form). All witnesses gave oral evidence and were cross examined. The Tribunal also asked questions of the witnesses for clarification.
9. At the conclusion of the parties evidence, both representatives produced written submissions which they supplemented orally.

Findings of Fact

10. Based on the evidence heard and read, including making an assessment on the credibility of the witnesses the Tribunal made the findings of facts as set out below. Where a conflict of evidence arose the Tribunal resolved the same, on a balance of probabilities. The numbers appearing in brackets in this judgment is reference to a page number in the hearing bundle.

The Grove School ("School")

11. The respondent runs The Grove School ("School"), which is a specialist free school based in North London for students aged 5-19 with primary diagnosis of autism. The School has some 120 pupils, and approximately 100 staff, of which 54 are Learning Support Assistants. The School is one of two schools run by the respondent. The Head Teacher is Ms Lucia Santi.
12. The School is multi diverse, and has Muslim staff. According to the claimant there are about 10 Muslim staff, whereas the respondent said there are 15. In evidence the claimant accepted that the School is diverse and that pupils and staff come from all backgrounds. The claimant confirmed that not every staff member would have known that he was Muslim.

The Claimant

13. The claimant is from Morocco. His religion is Islam, and he is a practising Muslim. The claimant commenced employment at the School on 20 April 2020, in the role of Learning Support Assistant. His Line Manager is Bronja Elton. He remains employed by the respondent.
14. In evidence the claimant said that as a Muslim he does not celebrate Christmas and on Christmas Day his family do not have Christmas dinner. At School, as part of his role he did prepare the classes for Christmas and got involved in their Christmas activities, for example by putting up the decorations in class, cooking with the pupils and engaging in activities. However he did not have Christmas dinner at School.

The Oscar Awards

15. In the summer of 2020, towards the end of the academic year, the School held its first internal staff awards. The awards are designed as a fun

celebration for the staff and these have continued to be held at the end of the summer and autumn terms. Mr McKay Wood confirmed that he is the responsible person for organising and leading the awards. This includes coming up with the categories of awards, preparing the nominations and voting form, collating the nominations and announcing the winners at the end of term staff meeting.

16. It was explained that participation in the awards is not mandatory. It is voluntary and any staff member who does not want to participate in the awards can withdraw by telling him. In this case, the claimant did not inform Mr McKay Wood that he did not want to be part of the awards.
17. The voting is done electronically. The votes are cast anonymously. There is no record showing which staff member voted and for who. The staff members are not given any checklist or criteria to assist them in their voting decision.
18. In the previous year awards, the categories have been, for example, "caffeine addict" and "stationery hoarder". In one year the theme was Peter Pan. As the awards were well received in the previous years the awards were continued for the end of the autumn term in December 2022. This was the first time the awards were held at the end of the Christmas period.
19. In one previous year, the claimant received "The Prankster Award", which at that time the claimant did not raise an issue about. In evidence he said he found this award to be negative as according to him it portrayed him to be a trouble maker, which he was not.

December 2022 – Oscar Awards

20. In December 2022, Mr McKay Wood prepared a list of awards categories for the end of term awards. He decided to make it a Christmas theme. He did a Goggle search and selected some of the suggestions from his search. The category of awards selected were The Rudolph; The Santa's Little Helper; The Hardest Working Elf; The Abominable Snowman; The Christmas Grinch and the SEARCH Award (based on the values, i.e Support; Empathy; Acceptance, Resilience, Compassion and Honesty. (p85)
21. Mr McKay Wood explained these awards had no religious connotation at all. Neither was this in his mind or his intention when he decided to use this Christmas theme. He is non-Christian and did not consider that any of the selected awards had religious connotations or that they might cause any staff member to be upset or offended.
22. Mr McKay Wood prepared the voting form. Voting was done electronically by submitting using google link. The Google form recorded the time when the vote was made and the name of the person that had been nominated.
23. On 1 December 2022, Mr Mackay Wood sent an email to all staff, headed, "Christmas Staff Awards 2022/23. It began by stating, ***"It's Awards Season! Please see the staff Christmas Awards for 2022. These will also go in the bulletin tomorrow. Remember to cast your vote and good luck! Deadline for entries is Thursday next week (7th) at which point the engraving on the trophies will begin.....(p83)***

24. Each award had a description. In respect of The Christmas Grinch Award, the description was, ***“The Christmas Grinch Award – for that member of staff who just won’t get into the Christmas Spirit”***.
25. On 2 December 2022, the School sent to all staff, the Staff Bulletin. (p89-99) In that bulletin there was a section headed, Staff Christmas Awards 2022 (DWO), which stated, ***“.. please see the attached google form. Remember that these are nominations across the whole school, not just limited to the class or department you work in. The Awards will be given out after the students go home on Friday 16th alongside the staff quiz trophy.”*** The link to the Goggle Voting Form was attached. (p90) In the staff bulletin of 9 December 2022, the staff were reminded that it was their last chance to vote for the Staff Oscars. As it happened this was an error as the voting closed on 6 December 2022.(p106)

Voting

26. Mr McKay Wood was the only person who had access to Google Form and could view the voting.
27. Initially, the voting was to close on 7 December 2022. However the voting was closed a day earlier on 6 December 2022. Mr McKay Wood explained this was because it was a busy time for him personally, due to his wife expecting their baby on 9 December 2022, and he was planning to take paternity leave in that week. He therefore was keen to ensure before he went on paternity leave that his outstanding work was done and the awards were finalised so they could be announced at the end of term meeting. He therefore closed the voting early, on 6 December 2022, between 1.45pm and 1.56pm. (p100). He did not consult with anyone before doing so. Mr McKay Wood explained that 40 votes had been received by this point. He then prepared the award list based on the votes that had been cast. In compiling this list he noted that for The Christmas Grinch Award, the claimant had received 4 votes being the highest, and two other staff members Emily and Mandy received 3 votes each. Accordingly, the claimant had the highest votes in this category. Mr McKay noted that Emily and Mandy did each receive one additional vote but that was after the voting had closed.
28. In evidence, the claimant claimed that he did not accept Mr McKay Wood’s explanation. He believed that Mr McKay Wood had created his own deadline without telling anyone, so that the award went to the claimant because he is Muslim. The Tribunal accepted Mr McKay Wood’s explanation given his personal circumstances with the arrival of their baby. The Tribunal also understood that he had to prepare the winners list, and deal with administration of the awards, as he could not pass on the goggle document for data protection reasons. This document was connected to his email account, which otherwise meant he would have had to share his personal email account and password.
29. Mr McKay Wood compiled the list of winners, and emailed this to Bronja Elton at 1.49pm on 6 December 2022. She was also given a hard copy. (p105) The Tribunal accepted Mr McKay Wood’s explanation that he did this in case he was not at School on the last day. As it transpired Mr McKay Wood’s last working day was on 13 December 2022. He did not attend the awards as he

was on paternity leave, and returned to School on 9 January 2023, when he learnt that the claimant was not happy with his award.

Announcement of the Awards – 16 December 2022 at 12.30pm

30. On the morning of 16 December 2022, Bronja Elton sent to Mr Lee Mills, an email at 8.18am, the subject being, "*Document shared with you; "Christmas Award Winners 2022."* (p298) This document was the list of winners which Mr McKay Wood had shared with Bronja Elton.
31. In evidence, Mr Lee Mills said he did not look at the email sent by Bronja Elton until just before the start of the staff meeting. It was Bronja Elton who stopped him on his way to the hall for the meeting, when she asked him to present the awards in the absence of Mr McKay Woods. Mr Lee Mills agreed to do so, and was given the printed list of winners (104). The Christmas Grinch Award was 5th on the list. At this point, only Bronja Elton and Mr Lee Mills were aware of the winners.
32. Bronja Elton was not present at the team meeting when the claimant received his award. She arrived late, as she was busy making sure everything was done before the School closed for the Christmas break. At this point, only she and Mr Lee Mills knew the names of the winners.
33. In evidence, Mr Lee Mills explained that he took into the hall the box containing the trophies and placed this on a table behind him. The trophies presented were a miniature Oscar statute. He stood in front of the staff who were sitting in rows facing him. The claimant in evidence claimed that everyone was seated at a table. However, Mrs Monnaf, confirmed in evidence that they were all seated in rows. She was in the front row, and was seated next to the claimant. The Tribunal accepted Mrs Monnaf's evidence, as she was certain about her recollection and also this was consistent with Mr Lee Mills evidence.

The Awards Ceremony

34. The atmosphere in the hall was light hearted and jovial. There was laughing, cheering, clapping and celebrating. The claimant and Mrs Monnaf also agreed with this observation.
35. Mr Mills explained the process he followed was like an awards ceremony. He called out the names of the winners for each award in the order of the list he had been given by Bronja Elton. His recollection was that the staff members laughed, cheered and clapped as each winner came up to collect their award. As each winner came up to collect their award, he took the trophy from the table and handed it over and shook their hand. He said he read the text on the front of the base of the trophy which had the name of the award. None of the trophies had the name of the winner written on it. His recollection was that the winners were pleased to receive the award and celebrated as they were winners.
36. The claimant claimed his name was on the base of the trophy. Mrs Monnaf, in her reply to a question asked by the Judge, replied the trophy did not have the name of the claimant only a sticker at the bottom, which had the name of the award. This evidence corroborated Mr Lee Mills evidence. The Tribunal

therefore rejected the claimant's assertion that his name was on his trophy.

37. The Tribunal was also satisfied that Mr Lee Mills read out the list of winners in accordance with order as written in the list he had been given by Bronja Elton. Therefore, contrary to the claimant's claim, he was not the last person to collect his award.

Presentation of the award to the claimant

38. In evidence the claimant explained he was surprised when he was called up as he was not expecting to receive an award because he did not vote for any staff member for any awards. He also stated he neither agreed to be included in the awards. The fact is that he did not inform Mr McKay Woods or anyone that he did not want his name to be included in the voting or wanted to be involved in any way. In evidence, the claimant admitted that he did not know anything about the "Grinch" or meaning of the award when he went to collect it. Mrs Monnaf, in evidence, explained that when the claimant returned to his seat after receiving the award, he asked her "What is the Grinch?". She said she googled on her iPhone and showed him a picture of the Grinch and a Wikipedia description, which he then read. This caused him to be upset and distressed.
39. According to the claimant, when he walked up to collect the award, he could hear laughter. This recollection of laughter is consistent with the general jovial atmosphere in the hall. The Tribunal rejected the claimant's claim that the audience was laughing at him because he received The Christmas Grinch Award or gave him the impression of any negativity about the award or towards him because he was the recipient of this award. The Tribunal found it difficult to understand how the claimant could have perceived the reaction of the staff members to be negative when it was a light hearted fun ceremony enjoyed by everyone. Also at this point the claimant, by his own admission did not know anything about the Grinch.
40. The claimant, in his witness statement which he repeated in oral evidence, asserted that when he went to collect his award and stood in front of Mr Lee Mills, he (i.e Mr Lee Mills) first began to pretend to fear him and to act like he was scared to give the award to him, and when he handed the award he pretended to run away from him to highlight his fear from him. According to the claimant this was dramatization with the purpose to humiliate him and to make the audience laugh. He further claimed that Mr Lee Mills could see the claimant was very distressed to receive this award, and that this had been pre-planned by him.
41. Mr Lee Mills recollection was that the reception the claimant got from the audience was no different to the others who had received their awards. Mrs Monnaf's recollection was that there was cheering, clapping, humour, and laughing in this ceremony. In her reply to a question from the Judge, she admitted the reaction of the staff members when the claimant received his award was, "it was the same response to all". In respect of the volume of noise and laughter, her response was that "it was no different". This evidence is consistent with Mr Lee Mills evidence.

42. Mr Lee Mills in his evidence denied the claimant's claim of pretending to run away. His recollection was that he delivered the award to all winners in the same way. Also he denied that he did anything to humiliate the claimant.
43. The Tribunal considered the written statement and oral evidence of Mrs Monnaf. In her witness statement she stated, "*Mr Toughfar went to the front of the hall to collect the award from Mr Lee. As Mr. Lee was giving him the award Mr Lee began to act out that he feared giving the award to Mr Toughfar and then he ran away pretending to fear him. At this point some colleagues were still laughing and there was also uncomfortable tension in the hall*". The Tribunal noted this paragraph mirrored the claimant's account. In answer to a question asked by the Judge, Mrs Monnaf confirmed she wrote her own statement and not in consultation with the claimant. The Tribunal rejected Mrs Monnaf's explanation on this point and preferred Mr Lee Mills' evidence. The Tribunal concluded that Mrs Monnaf and the claimant, in all probability must have had a discussion about this issue, hence why the wording and account was similar. Also the Tribunal found it difficult to understand why would there be tension in the hall particularly as the claimant and Mrs Monnaf had accepted the award ceremony was a fun celebration conducted in a jovial manner. The Tribunal preferred Mr Lee Mills's evidence on this point. There was no reason or motive for him to act in the manner as asserted.
44. The Tribunal also rejected the claimant's view that Mr Lee Mills had pre planned to humiliate the claimant. On the facts, Mr Lee Mills did not know about having to present the awards until that morning having been asked by Bronja Elton. He was given the list of the winners which he followed in order. There was no reason or motive for Mr Lee Mills to humiliate the claimant. Neither, the claimant suggested a motive in evidence or in cross examination to Mr Lee Mills.

End of meeting

45. It is common ground between the parties that at the end of the meeting, the claimant handed the trophy back to Bronja Elton. The claimant told Bronja Elton, that it was not fair for him to receive this award. He claimed in evidence that this was harassment, discrimination and bullying. Bronja Elton, in her witness statement and oral evidence was unable to recall what was exactly said by the claimant in their discussion. The Tribunal considered Bronja Elton's interview note of 11 May 2023 with the Investigation Officer Ray Worsley. The question as to what was actually said was not asked or explored. The Tribunal also considered the claimant's email sent in the evening of 16 December 2022 and his note of the investigation interview held on 11 May 2023. It was noted that the claimant said in both accounts that he told Bronja Elton that his being given the award was "bullying and discrimination". The Tribunal therefore concluded that the claimant only used the words "bullying and discrimination", and not harassment.
46. Before Bronja Elton left the School that afternoon, she informed the senior leadership team, which included Ms Lucia Santi, that the claimant was not happy about the award. This School then removed the claimant's award in the School Bulletin that was issued that same evening. (p119)

47. That same evening the claimant sent an email at 19.18pm to Nasma Katon (HR Manager) and Bronja Elton. It was a detailed email sent to report the incident of the award. (p121-122) In summary, the email mentioned the claimant's dissatisfaction about the Prankster Award he received the previous year. However, in the main, the claimant explained that he found the award offensive and derogatory and should not have been associated with it because he is not of Christian Faith and did not celebrate Christmas. Also he did not have an understanding of the Grinch character when he was presented with it, and in his view this was an unkind and inappropriate trophy to give to him. In particular, the claimant stated in that email, "*I have never known a workplace let alone a school who would give a member of staff such an unkind and inappropriate trophy I do not understand how such a decision to give someone a trophy depicting this character could be permitted this is essentially promoting bullying in front of the whole school staff and this is an act of bullying and discrimination. As colleagues who work together we do not know the mental health of others or the problems they may be experiencing in their life outside of their working life to be given unkind trophies like this is completely unacceptable..... I would like this matter to be investigated because I do view it as discrimination and bullying.....Perhaps this was an award that was exclusively created for me without any such nominations...*"
48. Given the agreed List of Issues as determined, the Tribunal did not consider it necessary to make any findings about the events and grievance matters that occurred after the awards ceremony held on 16 December 2022.

Submissions

49. The Tribunal received both written and oral submissions on behalf of both parties, which were expanded upon orally. These were taken into account in the Tribunal deliberations.

The Law

Direct discrimination – s13 Equality Act 2010 (EqA)

50. Section 13(1) provides that :
A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Comparison

51. Section 23 of the EqA 2010 provides that:
(i) On a comparison of cases for the purposes of section 13..... there must be no material difference between the circumstances relating to each case.

Burden of proof (s136 EqA 2010)

52. Section 136 requires the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

53. The cases of Barton v Investec Henderson Crosthwaite Securities Ltd (2003) ICR 1205 and Igen Ltd v Wong (2005) EWCA Civ 142 provide a 13 point form/checklist which outlines a two stage approach to discharge the burden of proof, namely;
- (a) Has the claimant proved facts from which in the absence of an adequate explanation the tribunal could conclude that the respondent had committed unlawful discrimination?
 - (b) If the claimant satisfies (a) but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed.
54. The burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. The claimant must establish more than a difference in status (eg religion in this case) and a difference in treatment before a Tribunal will be in a position where it could conclude that an act of discrimination had been committed.
55. It is not enough for a claimant to show that he/she has been treated badly in order to discharge the burden of proof that he/she had suffered less favourable treatment because of a protected characteristic. The fact that the claimant has been subject to unreasonable treatment is not, of itself, sufficient to shift the burden of proof. (Glasgow City Council v Zafar 1998 ICR 120 HL). It does not matter if the employer acts in an unfair way, provide the reason has nothing to do with the protected characteristic. As Mrs Justice Simler (as she then was) observed in Chief Constable of Kent Constabulary v Bowler EAT0214/16 “merely because a Tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean that the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.”

Inferences

56. “Inferences” are where the Tribunal can draw conclusions from primary facts and must proceed on the basis initially that there is no adequate explanation (Igen Limited & others v Wong [2005] Court of Appeal). This set out a two-stage process:
- (a) First stage – a complainant is required to prove facts from which the Tribunal “could conclude in the absence of an adequate explanation that a respondent has unlawfully discriminated”. If the complainant does not prove such facts he or she will fail.
 - (b) Second stage – if the Tribunal could conclude the possibility of unlawful discrimination and there is a shift in the burden to the respondent, the respondent is required to prove that they did not unlawfully discriminate.
57. Tribunals cannot draw inferences from thin air (Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] House of Lords).
58. The mental processes of the discrimination should also be considered (Reynolds v CFLIS (IL) Limited [2015] Court of Appeal).

Reason why

59. In addition, the Tribunal can take a “reason why” approach and consider the evidence put forward by the respondent and if it is satisfied that the respondent has established the reason for the treatment and that it is not connected with discrimination it can proceed on that basis.

Harassment – s26 Equality Act 2010

60. Section 26(1) of the EqA 2010 provides that;
“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 (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.
61. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (Munchkins Restaurant Ltd v Karmazyn and others EAT 0359/09).
62. The Equality and Human Rights Commission: Code of Practice on Employment (2011) states as follows:

(i) Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person’s surroundings or other physical behaviour.

(ii) The word ‘unwanted’ means essentially the same as ‘unwelcome’ or ‘uninvited’. ‘Unwanted’ does not mean that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.
63. When considering whether a comment was “related to” a protected characteristic under Section 26 Equality Act 2010, a broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester [2018] UKEAT/0176/17).
64. In order to assess the “purpose” of the alleged conduct, the Tribunal must consider the alleged harasser’s motive or intention.

65. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant. If a complainant is hypersensitive and unreasonably prone to take offence, there will have been no harassment within the meaning of the section (Richmond Pharmacology v Dhaliwal (2009) IRLR 336 at paragraph 15).
66. In assessing whether the conduct met the required threshold by producing the proscribed consequences, Tribunals should not place too much weight on the timing of any objection (Weeks v Newham College of Further Education UKEAT/0630/11).
67. Whether it was reasonable for a claimant to regard treatment as amounting to treatment that violates his/her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context. In the case of Richmond Pharmacology v Dhaliwal (2009) IRLR 336, the EAT said at paragraph 22: *“Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct ... it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase”*.
68. In speaking of the statutory language in Section 26(1), Elias LJ in Land Registry v Grant (2011) ICR 1390 said (at paragraph 47): *“Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment”*.
69. When a Tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of religion, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of religion. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of religion. The Tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage after the burden of proof has passed. (Nazir v Asim & Nottinghamshire Black Partnership (2010) IRLR 336 EAT)

Analysis and Conclusion

70. The Tribunal in reaching its decision took into account the findings of facts and applied the relevant law. In doing so, the Tribunal took each complaint as set out in the list of issues.

Comparator

71. The Tribunal first considered it necessary to address the issue of the comparator which is relevant for the direct discrimination claim. The claimant did not name anyone as a comparator for issues 4.2.1, 4.2.3, 4.2.4, & 4.2.5. Therefore, for these complaints the Tribunal considered its decision based on a hypothetical comparator, namely someone who was not a Muslim but who won the Christmas Grinch Award.
72. In relation to complaint 4.2.2 the claimant first compared himself with staff member Emily and in evidence included Mandy. The claimant did not know their religion or if they had one. In submissions, Mr Braier argued that the claimant's comparator is flawed. The Tribunal agreed with this for the reason explained by Mr Braier, namely that as a matter of fact Emily and Mandy received 3 votes at the point the votes were closed, whereas the claimant received 4 votes. Therefore these staff members were in a materially different position to the claimant. Therefore, the correct comparator is a hypothetical comparator, namely someone who was not a Muslim and was awarded the Christmas Grinch Award.

Complaint - Make a Christmas Grinch Award to the claimant.

73. In relation to this complaint the Tribunal had to first determine whether the claimant had been treated less favourably than a comparator, and if so, whether that treatment was because of a his protected characteristic, namely religion.
74. The claimant advanced this complaint on the basis that according to his understanding Christmas is a religious event for Christians and that the Grinch (after reading the Wikipedia description) hated the Christmas period. He was of the view that because he is a Muslim and does not celebrate Christmas it was unfair for him to receive this award, and also amounted to less favourable treatment on the grounds of his religion.
75. The Tribunal found that the respondent did not treat the claimant less favourably than it would have treated a hypothetical comparator in not materially different circumstances to the claimant. They reasons for this decision are set out below;
- (i) the claimant did not put forward any evidence whatsoever that his being awarded the Christmas Grinch Award was either because of or related to his religion. Also, the Tribunal heard no evidence or supposition about how a comparator might have been treated in the same circumstances.
 - (ii) the claimant focused on a the conduct of the respondent which he did not like. (i.e. Selecting a Christmas theme for the award with the inclusion of the Grinch Award, and the manner in which the award was presented to him) There was no evidence upon which the Tribunal could infer or understand that the claimant's religion played any part whatsoever in the motivation for choosing the particular Christmas theme or that the conduct was related to his religion.

(iii) the Tribunal was satisfied that the reason why the claimant received the Christmas Grinch Award was because he had received the highest number of votes at the point the voting had closed. There were no facts from which it could be inferred that the claimant received the number of votes because of his religion. There was no evidence before the Tribunal that the claimant's religion was a factor or consideration in the votes cast for him. Muslim.

76. Accordingly, this complaint failed as the claimant did not establish a prima facie case. Therefore the burden of proof did not shift to the respondent.

Closing the award competition one day early so that the claimant was at the top of the votes.

77. The Tribunal preferred and accepted Mr McKay Wood's compelling explanation for deciding to close the voting early. Given his personal circumstances his actions were reasonable and genuine. The Tribunal also accepted without hesitation that Mr McKay Woods only found out about the votes cast for the claimant after he had closed the voting. The Tribunal also concluded that Mr McKay Wood could not have anticipated how many more votes, if any, would have been cast for the claimant or any other person in other categories had the voting closed on the 7 December 2022.

78. Accordingly, this complaint failed as the claimant did not establish a prima facie case. Therefore the burden of proof did not shift to the respondent.

Put the claimant's name on the award

79. The Tribunal found as a matter of fact that the claimant's name was not displayed on the trophy. The only name that was on the trophy was a sticker on the base identifying the name of the award (i.e The Christmas Grouch Award).

80. Accordingly, this complaint failed as the claimant did not establish a prima facie case. Therefore the burden of proof did not shift to the respondent.

The SLT member of staff who presented the claimant with the Christmas Grinch Award pretended to run away

81. The Tribunal found as a matter of fact that the SLT staff member, Mr Lee Mills did not pretend to run away. Accordingly, this complaint failed as the claimant did not establish a prima facie case. Therefore the burden of proof did not shift to the respondent.

Staff members present at the ceremony were laughing

82. As stated by Mr Braier in his submissions, the claimant did in cross examination concede that he did not intend to pursue this complaint.

83. However, the Tribunal decided to address this complaint in any event. The Tribunal found as a matter of fact that the staff members were in a jovial celebratory mood and that there was laughing, cheering and clapping going on when the awards announced and presented to the winners. The claimant

admitted in evidence that staff members were laughing as the awards were being given to other winners. Further, Mrs Monnaf in oral evidence, also accepted that when the claimant was presented with his award the response he received was no different to that received by the other winners. Therefore this complaint fails as the claimant has not established a prima facie case for the burden of proof to shift to the respondent.

Harassment

Give the Claimant a Christmas Grinch Award.

84. The complaint was put on the basis that awarding the claimant this award was an act of harassment related to his religion. The claimant in his evidence and which was repeated in submissions, maintained that at the time of receiving the award he experienced humiliation, distress, a loss of dignity, felt intimidated and unsafe, and that the environment was offensive.
85. In determining this complaint, the Tribunal applied the statutory definition and made the conclusions as set out below;

Was there unwanted conduct?

- (a) The claimant was subjected to unwanted conduct by the fact that he was presented with the award. This is not in dispute and was acknowledged by the respondent.

Was the conduct related to the claimant's religion?

- (b) The Tribunal concluded that the presentation of the award to the claimant was not related to religion, for the following reasons;
- (i) The "Staff Christmas Awards" as described in the Staff Bulletin dated 2 December 2022 was a celebration event to mark the end of the autumn term. It had no religious intent, connotation or significance. The awards had a winter theme associated with Christmas being the time of year for this event.
 - (ii) The inclusion of "The Christmas Grinch Award" as a category was not motivated by religion in any way. Mr McKay Wood explained clearly how he chose the particular categories. He was not either consciously or unconsciously motivated by religion.
 - (iii) There was no evidence before the Tribunal to show that staff members were informed that religion was a criteria to be taken into account when voting. Also, there was no evidence before the Tribunal to show that religion was a consideration, a factor or the reason for voting for the claimant in this category.

86. On the basis the Tribunal concluded the conduct was not related to the claimant's religion, the Tribunal was not required to consider the purpose or effect of the conduct. However, the Tribunal considered this question, and concluded that the conduct did not have the purpose or effect as required by the test under s26 EqA 2010.

87. On the point about purpose, the Tribunal concluded that the conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. This is because of the findings made in relation to the question of whether the conduct was related to the claimant's religion.
88. As to the effect of the conduct, the Tribunal was satisfied the respondent did not intend to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him.
89. The Tribunal considered the effect of the conduct on the claimant, and acknowledged the claimant was upset, distressed and offended once he read the Wikipedia definition of the meaning of the Grinch and made his own interpretation. However, the Tribunal concluded that it was not reasonable for the conduct to have that effect on the claimant in the context of the awards. This is because the awards were an end of term fun event and although the awards had a Christmas theme, they did not have a religious context or connection.

Conclusion

90. For the reasons stated the Tribunal concluded the claimant's complaints were not well founded and therefore are dismissed.

**Employment Judge Bansal
Date 4 April 2024**

JUDGMENT SENT TO THE PARTIES ON
4 April 2024

FOR THE TRIBUNAL OFFICE

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