

SUMMARY

2011/53: Does disclosing employee's sexual orientation constitute discrimination or harassment? (UK)

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Facts

The facts of this case have already been reported in the February 2011 issue of EELC. To re-cap briefly, Mr Grant was an employee of Her Majesty's Land Registry ('HMLR') in its Lytham office. Whilst employed there, he had told colleagues that he was homosexual. He was subsequently promoted and transferred to a different office in Coventry where he did not tell

people that he was gay. In this new role, several incidents occurred involving his new manager, Ms Kay, some of which related to Mr Grant's sexual orientation. These incidents included:

- A telephone conversation between Ms Kay and another colleague, Irene Crothers. Ms Crothers had indicated to Ms Kay that she thought Mr Grant was 'very pleasant'. Ms Kay responded, 'don't go fluttering your eyelashes at him, he's gay.'

- A remark made over dinner with colleagues where Ms Kay asked Mr Grant about his partner, saying 'How is your partner Chris, how is he?' making clear to those present that Mr Grant was gay. Mr Grant brought a claim against HMLR asserting discrimination and harassment under the Employment Equality (Sexual Orientation) Regulations 2003 (the 'Regulations'). In particular, Mr Grant claimed that he had suffered direct discrimination and harassment in a number of ways, all stemming from the fact that Ms Kay had revealed his homosexuality to his colleagues against his wishes. He asserted that he ought to have had the right to control how and when (if at all) his sexual orientation was revealed in his new workplace.

Under the Regulations, direct discrimination is defined as less favourable treatment on grounds of sexual orientation. 'Harassment' is defined as unwanted conduct on grounds of sexual orientation which has the purpose or effect of violating an employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. The conduct in question will only be regarded as having either of these effects if, having regard to all the circumstances including the employee's perception, it should reasonably be considered as having that effect. (Note: these Regulations have now been replaced by substantially similar provisions under the Equality Act 2010).

The Employment Tribunal's decision

The Employment Tribunal ('ET') rejected certain of the allegations made by Mr Grant, but upheld his claims of direct discrimination in respect of six incidents, including the two mentioned above. The ET went on to find that five of the six incidents also amounted to unlawful harassment. In reaching its decision, the ET did not take into account the fact that Mr Grant had revealed his sexuality while at the Lytham office. There was no finding in the ET's decision that Ms Kay's purpose had been to harass Mr Grant on the ground of his sexual orientation.

The Employment Appeal Tribunal's decision

HMLR appealed to the Employment Appeal Tribunal ('EAT'), arguing that the ET had failed to

have regard to the fact that Mr Grant had ‘come out’ in the Lytham office, and that this ought to have been central to the ET’s legal analysis of the case. The EAT agreed with HMLR’s submission and overturned the ET’s decision, remitting the case to a different tribunal for it to consider all the relevant incidents afresh.

The Court of Appeal’s decision

Mr Grant appealed to the Court of Appeal, seeking to restore the ET’s decision. He argued that the EAT had approached the case on a false premise; namely, that Ms Kay had known that he had been open about his sexuality in the Lytham office, whereas she had not. As such, the fact that he had revealed his sexual orientation at Lytham was immaterial. In putting forward this argument, Mr Grant relied on the right to privacy under Article 8 of the European Convention on Human Rights and submitted that because sexuality was a private matter, he had the right to disclose his sexual orientation at a time and in a manner of his own choosing. He argued that it was not for others to make comments on his private life and frustrate that wish, and that the Regulations ought to be read consistently with Article 8.

The Court of Appeal stated that the fact that Mr Grant had ‘come out’ at his previous office did not mean that subsequent comments or references to his sexuality could not amount to discrimination. In this case, however, the Court found that the fact that Mr Grant had come out earlier was a ‘highly significant factor,’ irrespective of whether or not Ms Kay knew that this was the case.

The Court noted that, if a Lytham employee had innocently mentioned to Ms Crothers that Mr Grant was gay, it would be ‘bizarre’ if that employee could, by simply disclosing that information, be liable for discrimination or harassment. Such information dissemination would still have been unwanted by Mr Grant, but it would ‘make a mockery of discrimination law’ to suggest someone could be liable in those circumstances.

Because Mr Grant had made his sexual orientation public, the Court held that the telephone conversation incident could not constitute direct discrimination because any objection he had about the information being discovered by others was unreasonable and unjustified. Similarly, the Court could not find that the incident constituted harassment. The ET had decided as a matter of fact that Ms Kay had not *intended* any ill purpose when she had revealed Mr Grant’s sexuality. The Court of Appeal considered that, given the fact that Mr Grant had already ‘come out’ Ms Kay’s revelation could not have had the effect of creating a ‘humiliating environment’ either. Putting the matter very forcibly, the Court said that: ‘...to describe this incident as the tribunal did as subjecting the claimant to a ‘humiliating environment’ when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.’ For

similar reasons, the Court found that the incident over dinner could not amount to direct discrimination or harassment. Even if Mr Grant was made 'uncomfortable' by Ms Kay's comments, the Court found that it could not properly be described as a detriment. Finally, in remitting the case to a different tribunal, the Court stressed that nothing in its judgment was intended to minimise concerns about the consequences of 'outing' colleagues in the workplace. However, where someone has chosen widely to reveal their sexual orientation, as was the case here, such information placed the case in a different category in assessing whether there was discrimination and/or harassment.

Commentary

The Court of Appeal's judgment is both interesting and useful in that it recognised that there will be circumstances where revealing or discussing a colleague's sexual orientation may amount to direct discrimination and/or harassment. In this case, however, the Court made very clear that the fact that Mr Grant had chosen to reveal his sexual orientation put his case into a different category. Another interesting point made by the Court concerned the importance of keeping separate the issue of privacy and the question of discrimination. In particular, the Court stated that the fact that the law must be interpreted consistently with the rights found in the European Convention on Human Rights did not mean that Convention rights must be actively promoted whenever a statute falls to be construed and "*discrimination law cannot be used as a surrogate to enforce rights of privacy.*"

The judgment is also significant in relation to the issue of intent with respect to discrimination and harassment. With both the telephone incident and the dinner incident, the Court noted that Ms Kay had no ill purpose in commenting on Mr Grant's sexual orientation. In the Court's view, this, along with the critical fact that Mr Grant had revealed his sexual orientation in Lytham, meant that the ET could not properly have concluded that there was either direct discrimination or harassment. This point was expanded upon by the Court in referring to other forms of possible discrimination where the person in issue has revealed certain information about him or herself:

*"An individual may choose to make generally known in the workplace certain aspects of his or her private life, such as the fact that he or she has contracted some debilitating illness, or is pregnant, or has become a Christian. In my judgment if that information is discussed in the course of conversation, even idle gossip, **provided at least there was no ill intent**, that would not make the disclosure of that information an act of disability, sex or religious discrimination, as the case may be. That is so even if the victim is upset at the thought that he or she will be the subject of such idle conversation. By putting these facts into the public domain, the claimant takes the risk that he or she may become the focus of conversation and gossip."*

Subject: Sexual orientation discrimination

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