SUMMARY

2010/77: Employee being openly gay affected harassment claim (UK)

<p>The Employment Appeal Tribunal (EAT) allowed an appeal against a finding that an employee was subjected to unlawful sexual orientation discrimination after his manager revealed to other employees that he was gay. The Employment Tribunal had failed properly to take into account, among other things, that the claimant had been open about his sexuality whilst working at a different office of the same organisation.</p>

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Facts

The claimant, Mr Grant, was an employee of Her Majesty's Land Registry who had revealed his homosexuality to his colleagues. He was later promoted and transferred to a new office in Coventry. A number of incidents subsequently occurred involving his new manager, Ms Kay, some of which related to Mr Grant's sexual orientation.

Prior to Mr Grant's transfer, Ms Kay had revealed to one of his new colleagues at the Coventry office that he was homosexual. At a dinner with colleagues, she asked Mr Grant about his partner, placing an emphasis on the word "he" and making clear to those present that Mr Grant was gay. Another incident concerned a lesbian/gay/bisexual and transgender focus group meeting that Mr Grant had been scheduled to attend. Ms Kay insisted on obtaining

details of the nature of the focus group and it was found (by the Employment Tribunal) that she did so for the purpose of embarrassing him. On another occasion, Ms Kay made a "limp wrist" gesture towards Mr Grant whilst joking with colleagues, which he found offensive.

Mr Grant brought a claim against HM Land Registry asserting various acts of discrimination and harassment under the Employment Equality (Sexual Orientation) Regulations 2003. Direct discrimination is defined by the Regulations 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.

Conduct is regarded as having either of the above effects only if, having regard to all the circumstances – including in particular the employee's perception – it should reasonably be considered as having that effect.

(**Note**: Since this case, the 2003 Regulations have been repealed and replaced by substantively similar provisions concerning sexual orientation discrimination and harassment in the Equality Act 2010.)

In essence, Mr Grant alleged that he had suffered direct discrimination and harassment in various ways, stemming from the fact that his homosexuality had been revealed against his wishes. He claimed that he should have had the right to control whether and how his sexual orientation was revealed in his new workplace.

The Employment Tribunal's decision

The Employment Tribunal upheld Mr Grant's claims in respect of certain matters, finding that many of the incidents concerning Mr Grant's sexuality were interlinked. The Tribunal said that Mr Grant had been entitled to control whether or not information about his sexuality was divulged to his new colleagues. The effect of Ms Kay "outing" him was to create a humiliating environment in his new role. The Tribunal did not consider it relevant that he had revealed his sexuality to colleagues in his former office.

The Tribunal also found that the "limp wrist" gesture was an act of direct discrimination and harassment. Ms Kay had made this gesture because of Mr Grant's sexual orientation and she would not have made the same gesture to somebody of a different sexual orientation.

HM Land Registry appealed to the EAT contesting various aspects of the Tribunal's reasoning, including the finding that Mr Grant had suffered a detriment when his sexual orientation was revealed by Ms Kay. Amongst other things, HM Land Registry argued that the fact that Mr Grant's sexual orientation was widely known in his previous workplace should have been taken into account by the Tribunal.

The Employment Appeal Tribunal's decision

The EAT allowed the appeal and ordered that the case should be reheard by a different Employment Tribunal.

As a general proposition, the EAT accepted that the "outing" of a gay employee against his wishes to those whom he would rather not know of his orientation may, depending on the context, constitute an act of discrimination or harassment. However, in this case, the EAT identified two main errors of law in the Tribunal's decision.

Firstly, the Tribunal had failed to consider that Mr Grant had willingly disclosed his sexual orientation to colleagues in his previous office and that his sexuality was well known prior to his move to Coventry. The EAT said the Tribunal should have expressly recognised that Mr Grant had "come out" in his previous post and dealt with the implications of that and of Ms Kay's knowledge of it in its analysis of what took place. The EAT regarded this as a central issue in the case which the Tribunal had effectively ignored.

Secondly, the EAT said the Tribunal had not given an adequate explanation for its findings of harassment. The Tribunal had not investigated whether Ms Kay had been deliberately undermining Mr Grant because of his sexuality (perhaps because she was homophobic) with the purpose of creating a hostile working environment, or whether she had merely been indulging in office gossip such that the effect of her actions was to create a hostile working environment for Mr Grant. If creating a humiliating environment was not Ms Kay's purpose, then it was necessary to review whether her conduct should reasonably be regarded as having that effect. Mr Grant's perception and whether it was reasonable for him to react in the way he did was relevant to that question.

According to the EAT, none of the Tribunal's decisions as to discrimination or harassment would necessarily have been reached if it had properly considered these issues – except perhaps the "limp wrist" gesture, which was inherently and obviously discriminatory of itself.

Commentary

The EAT's criticisms of the Tribunal's decision are quite subtle and it might be considered harsh that Mr Grant must now fight his case from scratch before another Tribunal. He has, however, successfully applied for permission to appeal to the Court of Appeal against the EAT's judgment which may avoid the need to do so.

In terms of the precise way in which "harassment" is defined in the UK, it is submitted that the EAT was correct. Where conduct violates an employee's dignity or creates a humiliating working environment, it is important to evaluate whether this was in fact the perpetrator's *purpose* or merely the *effect* of the conduct. If the former, that is sufficient in itself to meet the statutory definition of harassment. If the latter, the question of whether it was *reasonable* for the employee to take offence comes into play.

The EAT was also undoubtedly correct in observing that revealing an employee's sexual orientation against his or her wishes may constitute an act of discrimination or harassment. Clearly, employers should put in place policies in respect of harassment and discrimination and ensure that employees are adequately trained on these issues. In general, employees should be discouraged from discussing the sexual orientation of their colleagues in the workplace in case such remarks cause offence.

The slightly disturbing aspect of the case is the EAT's implicit suggestion that an employee who has previously revealed his or her sexual orientation to employees within an organisation could potentially lose the right to retain confidentiality in relation to other colleagues. This does not seem to be a satisfactory position for employees who wish to control whether or when information about their sexuality is divulged, even if they have been previously open about it.

Comments from other jurisdictions

Germany (Paul Schreiner and Heidi Banse): Under German law the relevant question is not specifically whether a supervisor/employer may "out" someone who has come out in relation to other colleagues within the same organisation, but relates more generally to an employee's privacy. Employers/supervisors may only share their employee's personal data if the balancing of the employee's interests and the legitimate interests of other employees, as well as corporate interests, so requires. Revealing Mr Grant's sexual orientation to his new colleagues

against his will was a violation of his privacy, even if he had revealed it himself to his former colleagues in his former office within the same organisation. It was his decision with whom to share this piece of information and it was a risk for him that someone in whom he confided might tell someone else whom he did not want to know. In "outing" him Ms Kay took this power away. Someone who has come out in another work environment may have reasons to prefer not to do so in a new workplace for the time being, e.g. because he or she initially is unsure whether to trust those in the group, or maybe even because they have given a homophobic first impression.

The wording of the anti-harassment-clause in the German Anti-Discrimination Act is slightly different from that in the UK. Harassment constitutes discrimination if an unwanted conduct, related to one of the non-discrimination strands (here: sexual orientation) has the purpose or the effect of violating the person's dignity and creates an environment that is characterised by intimidation, hostility degradation, humiliation or offence. The German Federal Employment Court shortens this and requires there to be a violation of dignity and a "hostile environment", i.e. cumulatively, and has ruled that the harassment must actually characterise the work-environment, so that – in general – a single discriminatory act will not suffice. Nevertheless, single very severe discriminatory acts may characterise the environment. Therefore the Federal Employment Court requires courts to evaluate the overall picture. In this case, one has to take into account that Ms Kay was the manager and had a supervisory role towards Mr Grant. When she made the "limp wrist" gesture in reference to Mr Grant whilst joking with colleagues; when she explicitly referred to Mr Grant's partner as "he" – whilst she knew (some of) those present did not know he was gay; and when she interrogated Mr Grant about the nature of the lesbian/gay/bisexual/transgender-focus group with the purpose of embarrassing him she reasonably interfered with his self-conception regarding his sexual orientation and therefore violated his dignity, which characterised the work-environment as intimidating, hostile, degrading, humiliating or offensive in relation to Mr Grant's sexual orientation. This would have constituted harassment under the German Anti-Discrimination Act.

Subject: Sexual orientation discrimination

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