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An assertion of disability is not a sufficient basis for a harassment claim (UK)

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Summary

The Employment Appeal Tribunal ('EAT') considers the Equality Act – and to some extent the Equal Treatment Directive – and gives guidance about harassment and victimisation claims as well as on principals' liability for acts of their agents. In a decision that declines to expand the scope of harassment claims, the EAT has decided, in particular, that it is not enough for claimants alleging harassment to simply assert that they are disabled, without meeting the definition of disability or falling into another protected situation.

Background

In provisions which closely mirror those of the Equal Treatment Directive, the Equality Act 2010 prohibits harassment, which is defined for these purposes as unwanted conduct related to a relevant protected characteristic (including disability) which has the purpose or effect of violating the harassed person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. In particular, the concept of conduct 'related to' a protected characteristic appears in both the Directive and UK law. In deciding whether conduct has a particular effect, a court needs to take into account the perception of the harassed person, whether it is reasonable for the conduct to have that effect and the other circumstances of the case.

The Equality Act (the 'Act') provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a 'protected act', or A believes that B has done, or may do, a 'protected act'. 'Protected acts' include bringing proceedings under the Act, giving evidence or information in connection with proceedings under the Act, and making allegations that A or another person has contravened the Act. But acts done in bad faith are not protected.

The Act provides that anything done by an agent for a principal, with the authority of the principal, is to be treated as also done by the principal. And an agent contravenes the Equality Act if they do something which is treated as having been done by the employer/principal and amounts to a contravention of the Act by the employer.

Facts

The Claimant was a lawyer employed by Peninsula, a legal services provider. He had a caseload that involved representing clients at hearings. He could take on cases privately outside of his work for Peninsula if this did not interfere with his workload. He had seemingly always asked for permission to do this, and had respected the company's decision if it decided he could not undertake other work.

In June 2014, he told a manager that he suffered from dyslexia. A short time later, he did the following, which he claimed were 'protected acts' for the purposes of victimisation law:

- referred to his dyslexia as a disability that resulted in him taking longer to do certain things which impacted his work;
- presented his employer with a covering letter and the conclusion from a psychologist's report which stated that he had dyslexia and mentioned a learning disability; and
- discussed his dyslexia with his employer, saying it had been getting worse and that he had been struggling for some time.

The Claimant was referred to occupational health for a medical opinion.

In August 2014, a different manager took the decision to put the Claimant under covert surveillance for several days. She suspected that the Claimant was not working on Peninsula cases when he was supposed to be, as he wanted instead to build up a private caseload. The surveillance report showed the Claimant going to his mother's house for several hours at a time on the majority of the days on which he was observed. The employer took

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the view that there was a case to answer that the Claimant was not devoting all his time to his work for Peninsula and invited him to a disciplinary hearing. As part of this, and in compliance with the ACAS Code which sets out good practice in relation to grievance and disciplinary proceedings, Peninsula at that point told the Claimant that he had been under surveillance and disclosed the surveillance report to him. The Claimant stated that he had a very adverse reaction, emotionally, to learning that he had been the subject of surveillance.

The Claimant brought claims for harassment and victimisation related to disability.

In respect of harassment, the Claimant claimed that putting him under surveillance, and telling him about the surveillance as part of the disciplinary process, was unwanted conduct related to the protected characteristic of disability which met the conditions for harassment.

The Tribunal agreed and upheld his harassment claims.

What was interesting about the harassment claim was that the Claimant did not seek to prove that he was disabled within the meaning of the Act. He did not ask the Tribunal to decide this point. Instead, he relied on the fact that he had asserted a disability, which he said was sufficient to attract the protection of the harassment provisions in the Act.

Further, Peninsula had argued that it was obliged as a matter of good practice to tell the Claimant about the surveillance as part of the disciplinary process. It was therefore odd that following good practice could amount to harassment. The Tribunal did not appear to address this argument.

In respect of victimisation, the Claimant claimed that the decision to put him under surveillance was taken because of his protected acts (which involved raising issues about his dyslexia with his employer) and that this amounted to a "detriment". Peninsula argued that he had been put under surveillance because it had reason to believe that he was not devoting all his time and attention to work for Peninsula.

The Claimant claimed that although Peninsula had not carried out the surveillance itself, it was liable as a principal for the acts of its agent, the surveillance company.

The Tribunal upheld the victimisation claim against Peninsula. Peninsula appealed.

Judgment

The EAT considered the wording of the Equality Act, the Equal Treatment Directive and relevant previous case-law. It overruled the Tribunal's findings.

Regarding harassment, it decided that the Claimant could not proceed simply by asserting that he had a disability. This would make the scope of harassment too wide.

The EAT acknowledged that there were some circumstances in which a claimant who did not have the protected characteristic could succeed in a harassment claim. For example, in respect of associative discrimination (where the claimant is harassed because of their close association with someone who does have a disability) or perceived discrimination, where the harasser treats the claimant as if they have a protected characteristic even though they do not. The wording of the legislation allows for this. However, the EAT did not accept that perceived disability fell within these circumstances because of the definition of 'disability'. What exactly needs to be in the harasser's mind to succeed in such a claim? The EAT held that the natural home for a claim by a person who alleges they have a protected characteristic and claims to have suffered detriment as a result, is a victimisation claim, which has a carve-out for claims made in bad faith (which the harassment provisions do not).

Although the harassment claim failed on this ground, the EAT also remarked that the Tribunal's decision on the disclosure of surveillance being an act of harassment was perverse. The EAT commented that it cannot be reasonable for an act done to comply with a code of good practice to also be an act of harassment.

The EAT overturned the Tribunal's findings on victimisation because it had applied the wrong test. The correct test is whether the Claimant was subjected to the detriment "because of" the protected act and the Tribunal had failed to ask why Peninsula had subjected the Claimant to surveillance. Further, the Tribunal had not considered who at Peninsula knew about the protected acts – in particular, did the manager who ordered the surveillance know of them? If not, she could not have ordered the surveillance because of them.

Lastly, the EAT found that it was not open to the Tribunal to decide that Peninsula was liable for the acts of surveillance carried out by its agents. The EAT explained that, in order to fix Peninsula with liability, the Claimant had to show that the agent had discriminated against the Claimant and that Peninsula was liable for this. For the Tribunal to find the agent liable for victimisation, the Claimant would have to show that the agent acted "because of" the Claimant's protected acts. However, the agent's act was an innocent one, as it was told that Peninsula believed that the Claimant was working elsewhere. A 'composite' approach of adding together the agent's conduct and the principal's state of mind was not permissible or sufficient even if the same act, done by the principal, would have been an act of victimisation. The Tribunal had taken the impermissible 'composite' approach.

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Commentary

This case appears to be the first judicial consideration of whether a claimant asserting (but not proving) a disability can rely on this to make a harassment claim. Given the similarity of the wording between the Equality Act and the Equal Treatment Directive, this decision is relevant to both UK and European employment lawyers. The problems inherent in a perceived discrimination claim in the context of disability, although not discussed in any detail here, are also raised and worth thinking through.

Further, the EAT discusses the intersection between harassment and victimisation claims in cases of this kind, as well as interpreting what the legislation says about the liability of principals for the acts of agents.

Ultimately, the EAT's decision refuses to expand the scope of harassment claims in the way sought by the Claimant and initially supported by the Tribunal.

Subject: Disability discrimination

Parties: Peninsula Business Service Limited – v – Baker

Court: Employment Appeal Tribunal

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