

Blue Car Rentals Ltd is a car hire company. They hire vehicles to the public with or without drivers. Ian is the owner of the company and Hilary is his top sales executive. They are both white Caucasians. Mr Bystander is the office receptionist.

Ian has just been to Antigua and has argued with almost everybody there and has consequently decided that he dislikes all people who speak with a Caribbean accent. On returning home he has instructed Hilary not to hire cars to anyone with such an accent. She is very upset by this. The conversation was also witnessed by My Bystander who felt very offended even though he is of African heritage and not of Antiguan descent.

The Company has a policy that its drivers should have short hair and as such Ash is put off from applying for a job as he has very long hair. Ash is turned down for a job as a driver after he explains to the company that he is a Sikh and that as a Sikh his religion requires him not to cut his hair.

Case Study Assessment:

1) Consider the impact of Ian's behaviour and how this might affect the employment relationship between him; Hilary and Mr Bystander.

2) Advise Hilary, Mr Bystander and Ash as to their rights in relation to employment with Blue Car Rentals Limited.

Introduction

The Equality Act 2010 (EA) which came into force on 1st October 2010 replaces and consolidates a number¹ of different acts into a comprehensive and wide-reaching 'unitary' statute.² The EA identifies and describes nine protected characteristics from the effects of discrimination .³ The purpose of this paper is to explain how two of these characteristics, race and religion, are treated under the EA in respect of the various actions performed and language communicated by Ian, the employer of Blue Car Rentals Ltd., and any resultant consequences that ramify as a result of his conduct. The paper will also briefly explain some of the potential remedies and actions available to the persons affected by Ian's behaviour.

Harassment

¹ Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995.

² Bob Hepple, 'The New Single Equality Act in Britain' Equal Rights Rev vol 5 (2010) 11.

³ Equality Act 2010 part 2 , ch 1(s4).

For the purposes of this paper it should be observed that in regard to Mr Bystander and Hillary's employment relationship with Ian, s26 EA prohibits harassment based on association and perception in respect of one of the protected characteristics defined by EA, race.⁴

The definition of harassment in the EA is set out in Section 26, and for the objectives of this paper the relevant sub-sections are (1) and (4):

- (1) 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 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.

Harassment Of Mr Bystander

One of the leading cases which is relevant and applicable for Mr Bystander to initiate a claim for racial harassment is *Morgan v Halls of Gloucester*.⁵ The circumstances in *Morgan* include the fact that Mr Morgan spoke in patois to a colleague of his, Brian Ennis, which then led to a white colleague reprimanding Morgan not to converse in 'jungle talk'. Further racial discriminatory language was observed and witnessed throughout the work-place, and the main distinguishing fact in *Morgan* that confers authority in Mr Bystander's potential success in an Employment Tribunal hearing, relates to the actions of a Mr White. This employee levelled extreme racist remarks (for example, 'that black people should be burnt at the stake like Jews'), comments which were not directly aimed at Morgan but which, nevertheless, Morgan witnessed. In *Morgan*, the tribunal decided that the racist comments and, furthermore, the inability and reluctance of the employer to address these issues, resulted in Morgan feeling violated as a result of his loss of dignity; as a consequence of this, the judgement stated that remedial damages were available to Morgan as a result of injury to his feelings.

⁴ Equality Act 2010 ,s9.

⁵ ET/1400498/09.

Harassment Of Hilary

Hilary is white as is her employer, Ian. Following the judgement in *English v Thomas Sanderson Blinds*, Hilary can undertake a harassment claim against Ian.⁶ In *English*, the claimant complained about homosexual language and banter aimed at him by other employees, despite the fact that these employees knew the claimant was not homosexual. Even though *English* was a sexual harassment claim, the distinguishing element of that judgement - within the context of the relationship between Ian, Hilary and Bystander - is that Hilary became very upset by the decision of Ian not to employ anyone with a Caribbean accent. The relevant provision in the EA for Hilary to initiate a claim is ss26(1)(b)(ii). Ian's behaviour has created a work-place atmosphere which would fall within the scope of this sub-section.

Similar reasoning could also be applied in Mr Bystander's claim against Ian; indeed, Bystander's African heritage does not preclude a claim as he was still offended by the perception of harassment in the language employed by Ian.

Harassment By Ian: Objective Or Subjective?

The relationship and dynamic between subjectivity and objectivity within the present context is evident in Ian's relationship with Mr Bystander and, specifically, the definition and applicability of sub-section 26(4) of the EA. In any claim by Mr Bystander, the Employment Tribunal will consider the subjective perception of Bystander and the circumstances of the case. Moreover, the court will apply an objective viewpoint⁷ in determining whether it is reasonable for Ian's unintentional conduct to have had that effect on Bystander.

Summary Of Rights And Remedies Available To Mr Bystander And Hilary

- Eligibility: Hilary and Bystander, as employees,⁸ must make a claim within three months of Ian's conduct.⁹

⁶ [2008] EWCA Civ 1421.

⁷ *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336.

⁸ Equality Act 2010, s39.

- Burden of proof is **reversed** in harassment cases, in contrast to the procedure adopted in indirect discrimination cases, so effectively the burden of disproving racial harassment is Ian's responsibility. Generally, in indirect discrimination cases, the burden of proof criteria is a two step process, following judgement in *Madarassy v Nomura International plc.*¹⁰
- (1): s136 of EA provides that where a complainant can determine facts from which a tribunal could decide that there has been a contravention of a provision of the EA, the tribunal must find unlawful discrimination (unless the employer shows that it did not contravene the provision).
- (2): Under *Igen v Wong*,¹¹ the complainant(s) must prove, on the balance of probabilities, facts from which a tribunal could conclude, in the absence of an adequate explanation that their employer has discriminated against them (*Barton v Investec*¹²).
- Remedies and rights:
- declaration of all employees' rights;
- Ian recommended to take action to ease ramifications of the discrimination;
- Compensation award;
- monetary losses;
- injury to feelings;
- mental injury to Hilary and Bystander;
- award may be increased for unreasonable failure by Ian to comply with ACAS.

Direct Racial Discrimination Of Ash

Section 10 of the EA relates to religion or belief, the second protected characteristic analyzed in this paper:

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
- (3) In relation to the protected characteristic of religion or belief— (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief; (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

⁹ *ibid*, s123.

¹⁰ [2007] EWCA Civ 33.

¹¹ [2005] ICR 9311 para 16.

¹² *Barton v Investec Henderson Crosthwaite Securites Ltd* EAT 18/03/0304.

Also of relevance within the context of Ash is s 39(1) EA which focuses on recruitment:

- An employer (A) must not discriminate against a person (B)—
- a) in the arrangements A makes for deciding to whom to offer employment;
 - b) as to the terms on which A offers B employment;
 - c) by not offering B employment.

In the case of *Singh v Rowntree Mackintosh Ltd.*, it was decided that it was not racial discrimination when Mr Singh, a sikh, was required to trim his beard – contrary to his religious beliefs – in order to be considered for employment with Rowntree Mackintosh. The employer was justified, as a manufacturer of confectionery and other food products, to stipulate a requirement from a hygiene perspective, to insist on such a requirement.¹³

The reasoning behind *Mohmed v West Coast Trains Ltd* is also material in the present context.¹⁴ The relevant facts were that Mohmed, a muslim, claimed religious discrimination as the determining factor in his dismissal from his employers. However, the court held that there was no such discrimination. Part of the judgement relied on the fact that West Coast employed a Mr Singh, a sikh, at their Euston branch. In the course of his employment duties it was held that, as a comparator with Mohmed, Singh – even though his religion, like that of Mohmed, forbade the cutting of beard hair – had trimmed his beard so as to make his countenance and appearance tidy. The employer's conduct was thus regarded as justifiable and proportionate in the requirement for Mohmed to keep his beard tidy; the nature of Singh and Mohmed's comparable employment duties in dealing with the general public being deemed significant in the decision. Therefore, in the matter of employment recruitment discrimination against Ash by Ian at Rentals Ltd. based on religious beliefs - the rule of proportionality and justifiability observed in *Mohmed* clearly would not apply in the circumstances of employing Ash, with his long hair, as a rental car driver.

Summary Of Rights And Remedies Available To Ash

¹³ [1979] ICR 554; Ian Smith and Aaron Baker, *Smith and Wood's Employment Law* (12th edn, OUP 2015) 343.

¹⁴ UK EAT/0682/05.

- Ash ***will need to prove*** that he has been treated differently and less favorably because of his religion in the recruitment process.
- Following the decision in *Chief Constable of West Yorkshire Police v Khan*, it is not relevant to any potential successful claim that Ash has to prove any tangible or monetary loss.¹⁵
- Objective test applied as to whether Ash would have been treated differently- and more favorably - had it not been because of his religion .
- Direct discrimination follows the two-step procedure following *Madarassy*.
- Actual or hypothetical comparator required (*Shamoon v Chief Constable of the Royal Ulster Constabulary*¹⁶), pursuant to s23 EA.
- Motive and intention of Ian does not need to be proven following *Birmingham City Council v EOC*.¹⁷
- Remedies: Under s124 of EA, there are three options open to the tribunal: Declaration of rights, orders and recommendations (*Lycee Francais Charles De Gaulle v Delambre*)¹⁸; pecuniary losses; and, finally, compensation due to injury to feelings following *Vento v Chief Constable of West Yorkshire Police*.¹⁹

Conclusion

From the facts of the present case, and applying the provisions of the Equality Act 2010 - together with the applicability of relevant case law - there are strong arguments in favour of the potential success of any claims by Hilary, Bystander and Ash.

Moreover, support for this conclusion is evidenced by consideration of European Law (Council Directive 2000/43/EC of 29 June 2000) and the Human Rights Act (and specifically, articles 9 and 14 of the ECHR).

Bibliography

Statutes

¹⁵ [2001] UKHL 48.

¹⁶ [2003] UKHL 11.

¹⁷ [1989] AC 1155.

¹⁸ UK EAT/0563/10.

¹⁹ [2002] EWCA Civ 1871.

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