Discrimination: worker’s complaint about discrimination did not engage protection from victimisation

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March 1, 2021
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Discrimination: worker’s complaint about discrimination did not engage protection from victimisation

In Chalmers v Airpoint Ltd & Ors the Scottish EAT had to decide whether an articulate HR professional was protected from victimisation after she had made a vague allegation of discrimination in an email to her manager.

What does the law say?

Workers are protected from retaliatory action – known as victimisation – by their employer or colleagues because they have committed a "protected act", or it is believed that they have done so or may do so. The following are "protected acts":

- bringing a claim under the Equality Act 2010 (**the Act**);
- giving evidence or information in connection with such a claim, regardless of who brought it;
- doing any other thing for the purposes of, of in connection with, the Act; and/or
- alleging that the employer or another person has breached the Act.

In order for an allegation to attract protection it doesn't have to be factually correct, but it must be made in good faith. Although no specific form of words is required, the allegation must be clear, and the overall context should indicate a relevant complaint. The knowledge and experience of the complainant will be taken into account.

What happened in this case?

Mrs Chalmers worked for Airpoint Ltd as a Business Support Manager with responsibility for human resources functions. In December 2016, Airpoint arranged a Christmas party. Mrs Chalmers and the only other female member of staff were unable to attend. In January 2017, Mrs Chalmers sent an email to her line manager complaining about her exclusion from the Christmas party and also from an office hardware refresh. She said both of these matters "may be discriminatory", but she did not specify upon what grounds.

Mrs Chalmers brought claims for sex discrimination, harassment and victimisation. The allegation made in the January 2017 email was identified as the "protected act" for the purposes of the victimisation claim. Despite the use of the word "discriminatory", the Employment Tribunal held it was not clear that Mrs Chalmers was alleging that the Act had been breached. It took into account the fact that she was articulate and experienced in HR matters. Mrs Chalmers appealed to the Employment Appeal Tribunal (**EAT**).

What was decided?

Mrs Chalmers sought to argue that she had deliberately adopted a cautious tone because it was not her place to determine whether discrimination had occurred – that was for a Tribunal. The EAT acknowledged that that use of the words "may be discriminatory" could, in some cases, amount to an allegation of unlawful discrimination. However, this would turn on the overall context.

Here, Mrs Chalmers was an articulate and experienced HR professional, who was able to take a considered view on whether there had been discrimination on the grounds of sex. The cautious tone and the absence of the words "on the grounds of sex" was a deliberate choice. This was reinforced by the fact that other complaints in the grievance letter had been written in clear terms. The EAT concluded that had Mrs Chalmers intended to allege sex discrimination, she would have done so.

The EAT also went on to consider the factual background of the case. The Tribunal had found that Airpoint had not, in fact, discriminated against Mrs Chalmers in relation to the Christmas party. Rather, it was just bad luck that she and the other female employees were unable to attend on the selected date. By the time this had become clear, it was too late to rearrange things.

The EAT dismissed the appeal, holding that the Tribunal was entitled to find the words used in the January 2017 email did not qualify as a protected act.

What are the learning points for employers?

This decision shows that acquiring victimisation protection is not a certainty just because the word "discrimination" has been uttered. However, employers should not read this decision as setting down a hard and fast rule about the language that a worker must use to make a protected act. In different circumstances looser wording may be sufficient to get over the hurdle of having made an allegation of discrimination. A less articulate worker, without experience of HR matters, is likely to be given more leeway by a Tribunal.

In the real world, it's a high-risk strategy for employers to second guess whether such a complaint will count as a protected act or not. Getting it wrong carries with it the danger of a costly victimisation claim. For this reason, the prudent course of action is to treat any allegation of discrimination, no matter how vague, as a protected act. As well as investigating the allegation in a timely fashion, employers should ensure that the worker is ringfenced from any action that could be viewed as detrimental.

Chalmers v Airpoint Ltd & Ors

If you would like to discuss any issues raised in this post please get in touch with Amanda Steadman (amandasteadaman@bdbf.co.uk) or your usual BDBF contact.

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