

Workers do not need to allege discrimination explicitly to acquire protection from victimisation

In *Kokomane v Boots Management Services Ltd* the EAT has underlined that workers may be protected from victimisation where they raise complaints which do not clearly refer to discriminatory treatment. The key question is what the employer would have reasonably understood the worker to mean, considering both what was said and the relevant background context.

What happened in this case?

The Claimant began working for the Respondent in January 2001. She was the only non-white member of staff employed on a full-time basis at the particular store where she worked.

In April 2020, she raised grievances about her treatment by a colleague, Ms Suteu. She alleged that Ms Suteu had bullied, harassed and victimised her and treated her differently to other workers. In particular, she referred to an incident where Ms Suteu had accused her of shouting and chastised her for doing so. However, the grievances did not state that the Claimant believed she was treated this way because of her race.

A grievance hearing was held in March 2021. When discussing

the shouting incident, the Claimant appeared to suggest that she had been chastised by Ms Suteu because of a stereotype that Black women are loud. She said, *"I called out for CD and Corolla responded "Stop shouting, not allowed"...Black girl woman, we are known to be loud."*

Two months later, the Claimant was made redundant. She brought claims alleging that her selection for redundancy and dismissal amounted to victimisation, because she had complained about race discrimination in her grievance (constituting a "protected act"). However, the Employment Tribunal dismissed the claim on the basis that there had been no specific complaint of race discrimination and so no protected act.

The Claimant appealed to the Employment Appeal Tribunal (the EAT).

What was decided?

The EAT considered previous case authorities, which had taken a more nuanced approach to the question of whether a protected act has occurred. For example, in *Waters v Commissioner of Police of Metropolis* (1997) it was stated that *"...the allegation relied on need not state explicitly that an act of discrimination has occurred... All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer."* In the later cases of *Durrani v London Borough of Ealing* (2012) and *Fullah v Medical Research Council* (2012) it was accepted that the specific type of discrimination does not have to be expressly stated, but there must be something present to indicate that it is a complaint of discrimination.

Summing up the law, the EAT said that Tribunals must:

- take account of all of the factors that are provided in the information given by the employee to the employer; and
- consider that information on the basis of how it would have been reasonably understood by the employer in context, including general facts about the employee and the place of work.

Here, the Respondent knew that the Claimant was the only Black employee in the workplace, and she had complained about having been treated differently to others, including the accusation of shouting. It was also aware that she had drawn a link between that accusation and the stereotype that Black women are loud. It was not clear that the Tribunal has approached its decision with this wider contextual information in mind when determining whether or not a protected act had occurred. Instead, the Tribunal had focused on whether a specific complaint of race discrimination had been raised.

The EAT upheld the Claimant's appeal and remitted the case back to the Employment Tribunal to be considered again.

What does this mean for employers?

This case underlines that protection from victimisation may be

engaged even where a written complaint or grievance does not expressly refer to discrimination. What matters is what the employer would have reasonably understood the worker to mean, taking into account the surrounding context, which might include comments made in a grievance hearing, as was the case here. In other words, more complaints might amount to protected acts than initially thought. This is important because a failure to spot a protected act means the opportunity to safeguard against subsequent detrimental treatment is lost and risks an uncapped victimisation claim.

Line managers and HR will need to take care to decipher whether informal and formal complaints of apparently non-discriminatory treatment (e.g. unfairness or bullying) could, in fact, amount to complaints of discrimination when set against the background context. As this requires a good understanding not only of the relevant facts but of discrimination law, it is important that these stakeholders receive sufficient training on handling grievances and equality law. If you need help delivering such training programmes, please get in touch with us at BDBF.

[Kokomane v Boots Management Services Ltd](#)

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