



DISCRIMINATION LAW ASSOCIATION

Briefings

Express finding needed to establish that conduct is 'related to' a protected characteristic

Blanc de Provence Ltd v Miss Thu Lieu Ha • [2023] EAT 160; December 21, 2023

Facts

Miss Thu Lieu Ha (TLH) worked as a tailor at the employer's Marylebone store. In 2020, disciplinary proceedings were brought against her after she posted an inappropriate message on an internal messaging system. She refused to attend her disciplinary meetings and took an abrupt tone in related correspondence. As a result, she was issued with a first written warning on March 20, 2020.

Around the same time, the employer was considering making redundancies due to the Covid-19 pandemic. On the same day that the written warning was issued, one of the company's directors and its head of operations visited the store to inform TLH that she was to be made redundant. This news was given to her in the locked basement of the store after her fellow female colleagues were told to leave the premises.

TLH brought various claims against the employer, including for harassment related to sex.

Employment Tribunal¹

The sex related harassment claim succeeded. The ET found that the treatment TLH had received was inappropriate. She had been '*... knowingly deprived of her female companion and left as the only female in the store, contrary to her expressed wishes. The store having been locked from the inside so no-one else could enter, she was required to go down to the basement and submit to a one-sided process conducted by two managers standing over her. The conduct was the more unwanted because the Claimant was a woman, and the two managers were men.*'

The ET held that it was '*... not convinced that [the head of operations] would have felt at liberty to treat [TLH] in that way had she been a man*', noting that it was for **this** reason that the conduct was found to be related to sex.

The employer appealed on the following grounds, namely that the:

1. ET had erroneously concluded that the treatment was related to sex;
2. ET's decision had been procedurally unfair in that the head of operations was not asked by either the ET or TLH whether his actions were related in any way to sex; and
3. TLH had not advanced any sex-based connection to the incident in her witness statement or in the tribunal hearing.

Employment Appeal Tribunal

The EAT held that the ET erred in law in its approach to the claim of sex related harassment. Specifically, the EAT identified shortcomings in the ET's handling of the case, particularly the direct questioning of the two managers about the motivation for their conduct.

The EAT noted that it is clear that the harassment test (set out at s26 of the Equality Act 2010) is whether conduct is '*related to*' a protected characteristic. This is different

• [2024] IRLR 184

¹ *Ms T Lieu Ha v Blanc de Provence Ltd*: 2204806/2020

...the EAT noted that where there is an allegation of [sex-related harassment] it should generally be put '*fairly and squarely*' to the alleged perpetrator.

to the test in direct discrimination claims, where the test is whether the less favourable treatment was '*because of*' the protected characteristic. Put simply, '*related to*' has a wider and more flexible meaning than '*because of*'.

Conduct may be found to be '*related to*' sex where it was done '*because of*' sex, but this is not a requirement. For example, if A subjects B to unwanted conduct with the effect of creating an intimidating environment for B in circumstances in which it is **established** that A would not have subjected a man to the same conduct, that will establish that the conduct was '*related to*' sex (as was the finding of the ET in this case).

However, the EAT noted that where there is an allegation of this nature, it should generally be put '*fairly and squarely*' to the alleged perpetrator. Furthermore, even though the term '*related to*' is wider than '*because of*', there must still be a relationship between the unwanted conduct and the protected characteristic in question (in this case, sex). The EAT cited the case of *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another* [2020] IRLR 495 in which it was found that there must still '*... in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question*'.

In the present case, the EAT noted that the ET had failed to question the managers directly about whether their conduct was influenced by TLH's sex, nor did TLH put this question to them. Whilst the ET had considered the question of whether the head of operations would have treated TLH differently had she been male, it was held that there were fundamental problems with the tribunal's reasoning in reaching its conclusion on this, the most pertinent being that if the ET was to reach its determination on that basis, it needed to make an **express** finding on that point.

Next steps

The EAT remitted the issue back to a freshly constituted ET for redetermination. It instructed the ET to consider additional facts to reassess whether the conduct was indeed related to sex to enable it to '*articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion*'.²

In considering whether remission should be to the same or a fresh ET, the EAT accepted the submissions made on behalf of the employer that the ET's questioning, including suggesting that where two men '*confront*' a woman, it is '*common sense*' that harassment is established, could lead the employer to fear that the view expressed was more than provisional.

Implication for practitioners

In the ever-evolving landscape of discrimination law, the case serves as a reminder to practitioners and the ET alike that there are certain obligations when scrutinising harassment claims including that clear and cogent reasoning is required, and it is crucial that witnesses are given the ability to fully respond to allegations against them.

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