Employment

Office banter: a dangerous path to tread?

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There are some phrases which make an employment lawyer's heart sink, and pride of place amongst them undoubtedly goes to "but it was just office banter". Usually a signal that something offensive has indeed gone on within the workplace, it might be thought that short shrift is likely to be given to such a defence by the employment tribunal. In fact, background context is key, and a culture of "banter" can, in the right circumstances, help to explain potentially discriminatory conduct and protect an employer from a discrimination claim. Such was the outcome at both first-instance and appeal to HHJ Stacey in *Evans v Xactly Corporation Ltd UKEAT/0128/18*.

In this case, the claimant was a sales representative for the respondent. He worked in an office environment in which there was culture of banter. He suffered from type 1 diabetes and hyperthyroidism. He also had some links to the travelling community about which only one colleague was aware. He began work in January 2016 but was part of a sales team which collectively failed to hit their targets. In December 2016 he was dismissed for poor performance.

Although the claimant did not have the length of service to claim for unfair dismissal, he did bring claims relating to discrimination on the basis of disability and/or race, including claims for discrimination arising from disability, direct discrimination, harassment, and victimisation. These claims arose from various occasions during his employment during which he was called a "salad dodger", "fat Yoda", "Gimli", and "fat ginger pikey" by his colleagues. He alleged that he was disciplined and eventually dismissed for raising such treatment as an issue.

The tribunal dealt simply with the claims for discrimination, as while the claimant was indeed disabled as a result of his type 1 diabetes, he had failed to adduce evidence that this and/or his hyperthyroidism had a real impact on his weight. Therefore, any claims which sought to rely on insulting comments made about his weight could not arise from or be connected to his disability and failed.

This left the claimant's allegations of race-related harassment, however, which is covered by section 26 of the Equality Act 2010. In order to succeed in such a claim, an individual must show that they have been subjected to unwanted conduct relating to a protected characteristic, and that the unwanted conduct had the purpose or effect of violating the victim's dignity; or creating an environment that is intimidating, hostile, degrading, humiliating or offensive to them.

In considering this test, the tribunal first determined that the respondent's office culture was one where teasing and banter was common. Indeed, the claimant himself would often reply in kind, referring to a close colleague as a "fat paddy" and a female colleague as a "pudding". This behaviour appeared to be accepted and treated as normal within the office, and in a memorable turn of phrase, the employment tribunal described it as "indiscriminatingly inappropriate".

In fact, the only person who had been reprimanded for their behaviour in this context was the claimant, who had been warned for trying to hug and cuddle the co-worker whom he had called a "pudding". It was also considered relevant that the claimant only reported the comments in November 2016, after the performance process had begun. In those circumstances, the first instance tribunal held that harassment within the meaning of section 26 was not established.

On appeal, the EAT confirmed that the first-instance tribunal was best placed to make findings of fact about the context

and office culture, and was then fully entitled to conclude that the comments complained of did not amount to harassment as defined within section 26. Comments such as "fat ginger pikey" were plainly "derogatory, demeaning, unpleasant and potentially discriminatory", but that did not mean that the test for harassment was made out. In that connection, both tribunals cited the EAT judgment in *Richmond Pharmacology v Dhaliwal UKEAT/0458/08*, in which Underhill P pointed out that "dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended."

When applying the statutory wording of section 26, the EAT therefore confirmed the following:

- The comments were not unwanted since the claimant was such an active participant in the culture of banter.
- They did not have the purpose of violating the claimant's dignity or creating an intimidating environment for him.
- Nor did they have the effect of violating the claimant's dignity or creating an intimidating environment for him, as he was not offended.
- In any event it would not have been reasonable for him to have considered his dignity was violated or the environment was intimidating given the particular circumstances and all the context and material facts relevant to the claim.

Of course, employers should not feel that such an office culture is acceptable or non-problematic, or that this decision gives the green light to offensive behaviour within the workplace. The factual background of this matter, with only very tenuous potential links made to protected characteristics and clear evidence that the claimant was a willing participant in the behaviour, will certainly not always be duplicated when the "banter defence" is deployed. It is still, by far, the safest route for employers to ensure that their workplace environment is professional, respectful and free of offensive comments, however well intended.

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Matthew Sellwood is frequently instructed in the Employment Tribunal, and has recently also appeared in the Employment Appeal Tribunal. He has conducted successful defences in a range of multi-day hearings involving elements of unfair dismissal, discrimination and whistleblowing, and also advises across the whole range of employment law. As both a former employer at a public authority and a former trade union representative at a national charity, he brings a pragmatic view to employment litigation and is able to view ‘both sides’ of any issue.