Victimisation and Protected Acts: The need for information

Tom Wood, Barrister

St John's Buildings

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The Equality Act 2010 prohibits the subjecting of an employee to a detriment because they have done, or the employer believed they have done or may do, a protected act.

A protected act is one of the following:

- bringing proceedings under the Act;
- giving evidence or information in connection with proceedings under the Act;
- doing any other thing for the purposes of or in connection with the Act;
- making an allegation that a person has contravened the Act.

With an eye, principally, on the final protected act in the above list, what of the simple statement that "you have discriminated against me?"

On the one hand, it seems a clear allegation of a breach of the Equality Act. On the other, should an employee who says no more than 'discrimination' qualify for protection?

A narrow interpretation of what will constitute a protected act has developed. In *Waters v. Commissioner of Police for the Metropolis* [1997] ICR 1073, the Court of Appeal stated that "*It is vital that discrimination, including victimisation, should be defined in language sufficiently precise to enable people to know where they stand before the law…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 that case, the Claimant had accused a colleague of sexually assaulting her. However, in her own account, the assault was not "in the course of employment." The Court of Appeal determined that, since the Respondent could not have been vicariously liable, and therefore could not have, as a matter of law, breached the Sex Discrimination Act 1975, the Claimant's allegation was not a protected act.

While that is recognised as a harsh approach (the Claimant would have needed legal advice as to whether her allegation had a sound legal basis before she knew she was protected), the approach of requiring precision of language was applied by the EAT in *Beneviste v. Kingston University* UKEAT/0393/05 and *Durrani v. London Borough of Ealing* UKEAT/0454/13.

In the former, the EAT stated that: "*There is no need for the allegation to refer to the legislation, or to allege a contravention, but the gravamen of the allegation must be such that, if the allegation were proved, the alleged act would be a contravention of the legislation. If a woman says to her employer, 'I am aggrieved with you for holding back my research and career development' her statement is not protected. If a woman says to her employer, 'I am aggrieved with you for holding back my research and career development because I am a woman' or 'because you are favouring the*

men in the department over the women', her statement would be protected even if there was no reference to the 1975 Act or to a contravention of it."

In *Durrani,* it was decided that it is not necessary for an allegation to specifically refer to a protected characteristic using the particular word (race, sex, disability etc.), but that there must be "*something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies*."

In that case, the Claimant used the word 'discrimination' in the sense of the actions against him simply being unfair. There was nothing from which the employer could have known that he was complaining about an infringement of the Equality Act.

The EAT did go on to say that the case "*should not be taken as any general endorsement for the view that where an employee complains of 'discrimination' he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act. All is likely to depend on the circumstances, which may make it plain that although he does not use the word 'race' or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised*."

So, a bald statement of 'discrimination' might not be protected, but a balance must be struck. Employees must be afforded protection in suggesting to their employers that they are the victims of discrimination.

Practically speaking, however, it is difficult to see how an employer can victimise the employee if they do not know that they are being accused of discrimination. ("*The person on the receiving end of a complaint of victimisation ought to be able to identify what protected characteristic it is in respect of*": *Fullah v. Medical Research Council* UKEAT/0586/12).

Plainly, the law does not require an employee to expertly plead an allegation but – perhaps as a rule of thumb and without proposing a new legal test – does require them to put something forward that, were it a claim before the Tribunal, would not be struck out as having no basis in law.

Any complaint by an employee must be read as a whole. It is likely to provide the context for the ultimate allegation, and may well provide sufficient information from which it could be inferred that discrimination is being alleged. Each case is going to depend on its own facts, but for employers and their representatives, it is worth considering whether or not what is said to be an allegation of breach of the Equality Act actually is.

Should an allegation not appear to be protected, there is the possibility of it amounting to "any other thing for the purposes of or in connection with the Act." It is not, however, clear whether this will be the case. First, it will be noted that that is the sweep-up for actions not caught by s.27(1)(a-b). It is positioned in s.27(1) after those subsections but before the act of alleging contravention of the Act. It is likely that it was not intended as an alternative to the making of an allegation, and thus the making of an allegation either stands or falls as above.

Second, in a case in which a shop steward made a statement to the press criticising her union for failing to secure equal pay for women employed by her employer, whilst she was found not to be protected as someone making an allegation of contravention of the Sex Discrimination Act, she

claimed to be protected under subsection s.4(1)(c) ("otherwise done anything under or by reference to the Act or the Equal Pay Act 1970…").

The EAT, without actually making any finding on the point, cast doubt on whether the sweep-up applied to allegations when it said: "*Where a statement is made alleging breaches of the Act, even supposing that para. (c) is wide enough to cover such a statement…*" (my emphasis) (*British Airways Engine Overhaul Ltd. v. Francis* [1981] IRLR 9). It is certainly arguable either way.

There has as yet been no test for whether or not an unprotected allegation might be otherwise protected. In any case, it is prudent to consider whether or not the issue of protected act can be determined at a preliminary hearing, with a view, in the right circumstances, to determining the case outright.

TOM WOOD

St. John's Buildings

clerk@stjohnsbuildings.co.uk