



When is discrimination not discrimination? When it's harassment

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I have had a recent run of discrimination cases: some direct discrimination, some discrimination arising from disability, and some harassment. That has given me cause to consider the relative merits of those heads of claim, when applied to a given set of facts. Indeed, harassment as a claim is often overlooked, when really it should perhaps be the first consideration.

Direct discrimination claims are often pleaded but we are all too familiar with the difficulties they present. The claimant must show that s/he was treated less favourably than someone else was or would have been, and that the reason for that treatment was a protected characteristic. Showing that someone was treated as they were specifically because of a protected characteristic is not easy. We know it is not a simple 'but for' test.

Moreover, where a protected characteristic comes in many forms (take nationality as an example), it is not enough to suggest that the alleged discriminator preferred their own nationality, therefore discriminated against the claimant's particular nationality. The claimant would have to identify his/her specific nationality and show that that was the reason for treatment. This is why the, often all-too-complex, construction of a comparator is still required, if for no other reason than to test the reason for treatment. In our example, the alleged discriminator would have treated all other nationalities in the same way, therefore, it could not be said that the claimant was treated less favourably than another would have been, the comparator arguably being someone with the same material circumstances but with a nationality different from both the discriminator and the claimant.

This is where harassment is often the better option. Harassment is too often viewed as the claim to make when some form of bullying is the complaint. It really has much wider application than that. Consider the definition (s.26 Equality Act 2010): unwanted conduct related to a relevant protected characteristic that has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for them.

The first point to make is a downside, and it is that marriage and pregnancy are not 'relevant protected characteristics', and so there can be no complaint of harassment related to these. Otherwise, the potential claim of harassment is a much softer target for those considering direct discrimination.

'Unwanted conduct' requires no comparator and no need to measure whether that comparator would have been treated differently. There is no requirement even that the conduct be unfavourable (as in claims under s. 15). There is no limit to what 'conduct' can be, which can include the claimant's dismissal.

'Related to' a protected characteristic is clearly wider than 'because of'. There is no need for the conduct complained of to be directly attributable to the characteristic of the claimant, or a consequence of disability. There only has to be *some* connection to the characteristic so as to bring the conduct within the protection of the Equality Act, and to distinguish it from simply bullying. A tribunal will examine the mental processes of the alleged harassers, but that is not determinative. The conduct does not have to be directed at the characteristic (and it is arguable that the alleged harassers need not even know of the characteristic).

‘Effect of violating dignity etc.’ broadens matters further again in that it need not be the intent of the alleged harasser to upset the claimant. Providing that they feel that their dignity has been violated, the claim will be made out, subject to the tribunal considering whether or not it was reasonable for the conduct to have had that effect. Realistically, only those that are particularly over-sensitive, or were fully-participant in name-calling, are going to fall at this hurdle.

In conclusion, given the lack of requirement for a comparator, and the broader causal test, it is surprising that harassment is not used more to cover situations in which direct discrimination would normally be pleaded. Why argue that a claimant was treated less favourably because of a characteristic when it can be argued that treatment (that broadly had something to do with a characteristic) was offensive?

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