Homophobic banter in the work place – Employment Appeal Tribunal decision

The Employment Appeal Tribunal (EAT) has upheld an employment tribunal decision that a heterosexual employee who was subjected to homophobic banter at work did not suffer harassment under the Employment Equality (Sexual Orientation) Regulations 2003. The employment tribunal had correctly taken into account the employee's own "*extremely offensive behaviour*" (it was reported that he had himself written a number of articles which were "riddled with sexist and ageist innuendo") and the fact that he had remained friends with his alleged tormenters and not complained about them, in concluding that the relevant conduct did not have the effect of harassing him.

Mr Steven English ("the Claimant") alleged that when he was working for Thomas Sanderson Blinds Limited ("the Respondent") he was subjected for a protracted period to banter and innuendo of a homophobic nature. He argued that his colleagues had subjected him to homophobic banter by calling him names such as "faggot" because he had attended boarding school and lived in Brighton. In a landmark ruling on a preliminary issue, the Court of Appeal held that he was protected by the Sexual Orientation Regulations, even though he was not gay and his tormentors did not perceive him to be gay.

It was, however, common ground that he was not homosexual and that the colleagues who treated him in this way did not believe him to be homosexual. This, said the Court of Appeal, did not take him outside the protection of reg. 5(1) of the Employment Equality (Sexual Orientation) Regulations 2003 ("the SOR"), which prohibits harassment on grounds of sexual orientation. Under the Employment Equality (Sexual Orientation) Regulations 2003 (Sexual Orientation Regulations) harassment was defined as unwanted conduct on grounds of sexual orientation which had the purpose **or** effect of violating a person's dignity **or** creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Only conduct which, having regard to all the circumstances including the perception of the alleged victim, should reasonably be considered as having that effect, was to be regarded as having that effect (*regulation 5(2), Sexual Orientation Regulations*). Under the Equality Act 2010, which replaced the Sexual Orientation Regulations as of 1 October 2010, the phrase "*related to*" replaces the phrase "*on grounds of*", but the harassment provisions are otherwise substantially the same.

The tribunal concluded that the conduct did not "*in his eyes*" have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. Mr English appealed against the decision; arguing in particular, that the tribunal had incorrectly adopted a purely subjective test in finding that he had not suffered harassment.

The EAT rejected the appeal and upheld the tribunal's decision in this respect holding that the tribunal had adopted the correct test in considering Mr English's own perceptions and feelings in deciding whether the alleged unwanted conduct was harassment. The EAT considered that "*no general rule*" applied where, in cases such as this, fellow workers use language relating to a protected characteristic against each other.

Click here for the full transcript:

http://www.bailii.org/uk/cases/UKEAT/2011/0316_10_2102.html

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