EMC HR Bulletin – In Deep with Darren

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This month, Darren offers advice following an employment case relating to victimisation and clarifies what victimisation means in employment law terms and when it applies.

Victimisation is an important concept in the Equality Act 2010 – but it has a very specific meaning. Many employees when raising a complaint of bullying or harassment, may refer to being 'victimised' buy a manager and they often simply mean that they have been 'picked on' and been the victim of the manager's unfair treatment of them.

But when we use the phrase victimisation in its proper discrimination law sense, we mean something different. Victimisation occurs when an employee is subject to a detriment because they have done a 'protected act'.

A protected act is then defined as one of the following:

- Making any claim under the Equality Act
- Giving any evidence or information in connection with such a claim
- 'doing any other thing' in connection with the Equality Act or
- Making an allegation that someone has acted in contravention of the Equality Act.

At an obvious level, this means that if someone brings a discrimination claim against their employer they should not be sacked for doing so. This is so even if the complaint itself is ultimately rejected or found to be wholly misconceived.

There is an exception where it can be shown that the employee has deliberately made false allegations in bad faith – but that is not a matter that it is easy to establish, and employers would be wise not to rely on it except in the clearest of cases.

The need to avoid victimisation can present significant challenges for employers. Individual managers may be personally affronted or hurt if they are accused of discrimination, but even when the allegations are not substantiated, they need to be able to interact with that person as though nothing has happened. In very rare cases, the employee's complaints may be so disruptive or damaging that those effects may be separable from the allegations themselves to the extent that the employer can decide that the employee should be dismissed. But any employer relying on that being the case will be taking a huge risk. The overarching principle is that an allegation of discrimination or harassment – unless made in bad faith – is a protected act.

A recent case also highlights that the right not to be victimised may exist even where it is not made explicitly clear that the employee's complaint relates to the Equality Act.

In Kokomane v Boots Management Services Ltd the employee was the only non-white full-time member of staff at a pharmacy. She complained that a colleague subjected her to 'bullying, harassment and victimisation' but did not explicitly allege that the employee in question was motivated in any way by race. She also referred to being told off for 'shouting' and in the notes of a meeting about this, she was recorded as saying that as a black woman 'we are known to be loud'. She stopped short however of expressly saying that this incident was one of race discrimination or harassment.

The Tribunal found that this was not enough to amount to a protected act and so the part of her claim that alleged victimisation (in the legal rather than the parochial sense) could not succeed.

On appeal the EAT held that the Tribunal had taken too strict an approach. It was not necessary for the employee to expressly cite discrimination on a particular ground in order for a complaint to amount to a protected act. What mattered was that the complaint was about something which, if proven, would amount to a contravention of the Equality Act. So the complaint in this case had to be 'about discrimination', but it would not have to state explicitly that an act of discrimination had taken place. The whole complaint had to be considered in the factual context in which it occurred.

So the question was what the employee's complaint was really about, and how it would be interpreted by the employer in the light of all the surrounding circumstances.

It was not sufficient for the employee to show that she was a different race from other employees. The mere identity of an individual does not mean that any complaint they raise about their treatment is a protected act. But in this case, there was more to it than that. The fact that she was the only black employee on the team, that she had raised issues about being treated differently from the others were matters that should have been taken into account by the Tribunal. The Tribunal also had evidence that the employee had been accused of shouting and that in the claimant's mind this was connected to race – in fact she had specifically raised this connection in the course of a meeting. The implication was that she was being subjected to stereotypical assumptions about black women being particularly 'shouty' even if she never quite expressed her complaint in these terms.

The case was sent back to the Tribunal for them to reconsider whether or not these surrounding circumstances were enough to demonstrate that her allegation was one of discrimination. This does not mean of course that the employee's victimisation claim will succeed or even that she will be found to have done a 'protected act'. If she did raise a complaint of discrimination that does not mean that any detriment she suffered at a later stage was inflicted because of her complaint. That is a matter that will have to be decided by the Tribunal if it finds that – taken in context – her initial complaint was indeed one of discrimination.

Darren's Advice for Councils

The best lesson employers can take from this is to keep a clear distinction between matters that are raised in a grievance and behaviour that occurs in the course of employment. There is little to be gained from trying to categorise complaints into those which will constitute a protected act and those that don't. The best approach is to ensure that employees are allowed to raise complaints without recriminations whether they are protected acts or not. That way, whatever a Tribunal decides, you will always be able to argue that there is no link between that initial complaint and whatever detriment was later suffered by the employee.