The Multiple Definitions of Harassment and Direct Discrimination: A ‘Pandora’s Attic’?

Redfearn v Serco (t/a West Yorkshire Transport Service) [2006] EWCA 659
English v Sanderson [2008] EWCA 1421

Michael Connolly
University of Surrey, UK

ABSTRACT

It has been received wisdom for some time that some statutory definitions of harassment and discrimination embrace treatment on the ground of a third party’s race, or sex, etc, and ‘perceived’ discrimination, that is where the discriminator has acted on a mistaken belief that the victim belonged to a protected group. What was less certain is whether the definitions could embrace a scenario where the treatment was not grounded in anyone’s particular protected status, or where a worker was fired for his racial views. This article explores the precise meanings attributable to the statutory formulas, and considers the recent Court of Appeal decisions of Redfearn v Serco and English v Sanderson. It concludes that there is an inconsistent and incoherent range of statutory formulas, some narrow, some broad, and some hybrid, and the cases are decided more on policy and purpose than literal interpretation of these formulas.

MULTIPLE DEFINITIONS OF HARASSMENT AND DIRECT DISCRIMINATION

The UK’s statutory definitions of harassment and direct discrimination centre on the phrase on the ground of. Domestic legislation carries two varieties of this phrase for harassment, one narrow and one broad. To paraphrase, harassment is unlawful either ‘on grounds of’ a protected status (broad), or ‘on the ground of his’ protected status (narrow). It is, for example, the difference between ‘on the ground of race’, or ‘on the ground of his race’. At present, the UK legislation provides a broad definition for race, sexual orientation, and religion or belief. The narrow definition covers gender reassignment and age. (For sex, the harassment need only be related to her sex, an even broader phrase used to resolve a different issue.[i]) There is a similar discrepancy for direct discrimination, save that for religion or belief there is a hybrid definition, and for sex there is a narrow definition.

The Disability Discrimination Act 1995 carries the narrow definition for harassment and direct discrimination, but this is likely to change soon in light of the ECJ’s ruling that the parent ‘Framework’ Directive 2000/78/EC should be read to impose the broad version.[ii]

The significance of the broad definition is that it extends the coverage to harassment or discrimination on the ground of a third party’s protected status, and to ‘perceived’ discrimination.

‘Third party’ discrimination itself covers two scenarios. First, an employer may discipline a white manager for refusing to obey an instruction to discriminate against black customers: Showboat Entertainment Centre v Owens.[iii] Second, a worker may be harassed or discriminated
against by association, for instance, because white woman has a black husband, or because her son is gay, or has a disability.[iv]

‘Perceived discrimination’ occurs where an employer discriminates against a person because he assumes, or perceives, incorrectly, that the person belongs to a protected group. Examples would include an Asian worker harassed on the mistaken ground that he is Muslim, or a straight man harassed on the mistaken ground he is gay.

The third, hybrid, definition applies to religion or belief discrimination (but not harassment). Regulation 5 of the Employment Equality (Religion or Belief) Regulations 2003[v] uses the formula ‘on grounds of the religion or belief of [the claimant] or of any other person’. This covers third party discrimination, but not perceived discrimination. It was extended to cover perceived discrimination for the supply of goods and services (but not employment), by adding the phrase: ‘a reference to a person’s religion or belief includes a reference to a religion or belief to which he is thought to belong or subscribe’: Equality Act 2006, s 45(2)).

This hybrid formula was deployed because the standard formula had the potential to cover the scenario where an employer discriminates because of his own religion, for instance, by refusing to hire homosexuals, which is a matter appropriate for the Sexual Orientation Regulations 2003.[vi] It is harder to imagine the narrow definition of sex discrimination causing problems. But there are possibilities. It excludes, for instance, instructions to a barman not to serve women at the bar.

THE CASES

The broad definition triggered an unintended claim in Redfearn v Serco (t/a West Yorkshire Transport Service)[vii] where a driver, whose passengers were 70-80% Asian, was dismissed for being a member of the British National Party (an all-white racist political party). The EAT held that he was dismissed on racial grounds (i.e. his racial views). The Court of Appeal reversed, Mummery LJ stating that the logical conclusion of Redfearn’s argument was that an employer dismissing a worker for serious racial harassment would be treating him less favourably ‘on racial grounds’, which was not the aim of the Act.[viii] On the matter of strict interpretation, Mummery LJ found that Redfearn was not dismissed on racial grounds. Instead, ‘he was dismissed on the ground of a particular non-racial characteristic shared by him with a tiny proportion of the white population, that is membership of ... a political party like the BNP’.[ix]

More recently, the Court of Appeal was again invited to rule on perhaps another unforeseen scenario. In English v Sanderson[x] the issue was whether someone could be liable for harassment ‘on grounds of’ sexual orientation, under Regulation 5 of the Employment Equality (Sexual Orientation) Regulations 2003,[xi] when the treatment was unrelated to any particular person’s sexual orientation. Mr English was harassed by colleagues using sexual innuendo suggesting he was homosexual. This conduct was rooted, apparently, in two things: he lived in Brighton (a well known centre of the gay scene) and had attended boarding school. What made this case unusual was not that Mr English is heterosexual, but because his tormentors neither assumed nor perceived Mr English to be gay, and that Mr English was aware throughout that his tormentors never mistook him for being homosexual. The Court of Appeal, by a 2-1 majority, found that the mockery amounted to unlawful harassment on grounds of sexual orientation, reversing the decisions of the EAT and the employment tribunal.

Quite clearly, the phrase ‘on grounds of sexual orientation’ lends itself to cover the
scenario where the harassment was unrelated to any person’s sexual orientation. As Sedley LJ observed, the distance between perceived harassment and harassing a man as if he were gay when he is not ‘is barely perceptible’. [xii] However, policy considerations were prevalent in the speeches. Sedley LJ reasoned:

[People] ... may desire to keep their orientation to themselves but still be vulnerable to harassment by people who know or sense what their orientation is. It cannot possibly have been the intention, when legislation was introduced to stop sexual harassment in the workplace, that such a claimant must declare his or her true sexual orientation in order to establish that the abuse was ‘on grounds of sexual orientation’. ... The case would have been exactly the same if Mr English had elected, for whatever reason, to remain silent about his actual sexual orientation .... And the same would be the case if he were actually gay or bisexual but preferred not to disclose it. [xiii]

Collins LJ considered the logical conclusion of the defendant’s case: ‘it would follow ...that if the claimant is actually homosexual, but those who victimise him do not in fact believe him to be so, then Regulation 5(1) would not be engaged.’ [xiv] He did not consider this outcome to be the intent or policy of the legislation.

The underlying policy consideration in both speeches is to protect homosexual (or bisexual) workers from being ‘outed’ by a systematic campaign of abuse. In such a pernicious scenario, the worker would have to suffer the abuse in silence unless or until he ‘came out’. As such, this decision helps preserve the dignity of workers that discrimination law is supposed to enshrine. However, the outcome is relevant to any of the statutory definitions employing the phrase on the ground of, such as harassment and direct discrimination, on grounds of sex, religion or belief, race, age and disability, and gender reassignment.

Laws LJ dissented. He considered that the purpose of the domestic and EC legislation did not extend beyond the case where someone’s ‘condition’ was involved. Thus the ‘extended’ cases Showboat here, Coleman in Luxembourg - are all connected with someone’s actual, perceived or assumed condition’. [xv] The logic of the claimant’s argument applies to all the protected grounds, and this ‘would amount not to a Pandora’s box, but a Pandora’s attic of unpredictable prohibitions’. [xvi] For Laws LJ, Showboat and Coleman had taken the definition to its intended limit.

SEXUAL HARASSMENT

In addition to harassment on protected grounds, sexual harassment is unlawful. The Sex Discrimination Act 1975, section 4A, prohibits ‘conduct of a sexual nature that has the purpose or effect of violating her dignity or, of creating an intimidating, hostile, degrading, humiliating or offensive environment for her ...’

Although this is provided by the Sex Discrimination Act, its scope is not limited to male-to-female conduct, or the reverse. The perpetrator is ‘a person’ while the victim is ‘her’, which can be interchanged with ‘him’. [xvii] Thus ‘same-sex’, and more specifically, ‘male-to-male’, sexual harassment is caught by this provision. Thus, even before the English decision, victims of sexual harassment were under no obligation to reveal their sexual orientation.

The abuse of Mr English included ‘sexual innuendo’ and ‘lurid comments’, [xviii] and so he could have claimed for sexual harassment. No mention of this apparent oversight was made in the judgments of the Court of Appeal or the EAT. Indeed, Sedley LJ (see the extract above) appeared to confuse sexual harassment with harassment on the ground of sexual orientation.
A vivid and somewhat graphic example of ‘male-to-male’ sexual harassment led to the important US sexual harassment case, Oncale v Sundowner Offshore Services.[xix] The events occurred on an offshore oil rig, where all the workers were male, and included: threats of homosexual rape; two colleagues restraining the victim while a third placed his penis on his neck and another time, on his arm; in the showers forcing a bar of soap into the victim’s anus. The US Supreme Court held that ‘same-sex’ sexual harassment was actionable as sex discrimination under the Civil Rights Act 1964. The fact that the harassers did not believe the victim was homosexual was irrelevant. What mattered was that conduct of a sexual nature created a hostile environment for the victim.

That said, not all cases of homophobic abuse will be caught by the sexual harassment provision and so regulation 5 of the Sexual Orientation Regulations 2003 is not redundant. There will be cases of homophobic harassment not of a sexual nature, such as comments aimed at the victim’s effeminate deportment, or particular dress sense, or taste in the arts, and so on. English remains relevant to such cases.

THE IMPLICATIONS OF ENGLISH

The far-reaching implications feared in Laws’ LJ dissent are not necessarily beyond the intent of the legislation. Collins LJ considered that a parallel case of racial harassment should be actionable:

... where an employee is repeatedly and offensively called a Paki or a Jew-boy even when he is not of Asian or Jewish origin, and even when his tormentors do not believe that he is, that conduct can amount to harassment for the purposes of the Race Relations Act 1976.[xx]

Similarly, a white worker born in India of British white parents may be mocked as a ‘Paki’.

This of course would extend to harassment on the ground of religion or belief. Curiously, Collins LJ considered that this did not extend to the Disability Discrimination Act 1995, because its narrow definition excluded the case of ‘an able-bodied but clumsy person being called a “spastic”’. [xxi] In light of the ECJ judgment in Coleman (above) this is highly questionable. If, to accord with the ruling in Coleman, the DDA 1995 were amended with the ‘broad’ definition, then such cases would be caught on the logic of English. The policy underlying English suggests it is unlawful for someone with an undeclared disability to be ‘outed’ by harassment.

To complicate matters further, the same argument applies to the grounds of gender reassignment and age, where the narrow definition appears similarly to be out of line with the Framework Directive. If these formulas were redefined with the broad definition, ‘transsexual’ abuse (even if not of a sexual nature) for no apparent reason would become actionable, as would ‘softer’ or less pernicious cases such as ageist abuse of a young person who is particularly slow at some tasks, would be covered.

English has caused some uncertainty, but not so much because of the liberal interpretation of the legislation, but more because of the discrepancies between the EC and domestic definitions of harassment for gender reassignment, age, disability, and religion or belief.

Parliament could opt for a more precise definition, by specifying ‘third-party’ and ‘perceived’ discrimination (see the Equality Act 2006, above) and make the statutory intent explicit. Two difficulties would arise from this. First, it would place some claimants in the position of having to reveal their sexual orientation in order to bring a claim; a consideration at
the heart of the majority decision. Second, given this consideration, it is doubtful that such a restriction would comply with the parent Directives.

**THE REDFEARN DECISION REVISITED**

Although they accepted *Redfearn* as good law and correct on policy grounds, in *English*, Laws and Sedley LJJ shared ‘unease’ with the reasoning of *Redfearn*. Laws LJ found it ‘difficult to see’ that the reason for Redfearn’s dismissal was anything other than the race of most of Serco’s customers and many of its employees.[xxii] Even Mummery’s LJ policy reasoning (above) is not watertight. There is a difference between racist conduct at work and publicly held views which are not manifested at work.

However, these doubts should not be used validate racial discrimination claims rooted in BNP (or similar) membership. Public policy is a well-established tool of statutory interpretation in English law. It is conceivable that Redfearn - a ‘satisfactory’ worker who did not manifest his views at work - was *unfairly* dismissed.[xxiii] But it would be against public policy principle for the Race Relations Act to come to a person’s aid because he was a racist, just as it would for an inheritance statute to favour a son who murdered his mother:

> The principle ... must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to the principle must be read and construed as subject to it.[xxiv]

This is a long-established tool of statutory interpretation. Thus, technical qualms with *Redfearn* should in no way cast doubt over its correctness. Of course, European-derived *purposive* interpretation would provide the same result, which reinforces the correctness of *Redfearn*.

**CONCLUSION**

The most obvious principle to emerge from the *English* decision is that victims of sexual orientation harassment are under no obligation to disclose their sexual orientation to succeed. Thus, workers cannot be ‘outed’ by a campaign of harassment. Accordingly, victims of racial harassment should not be obliged to disclose their race, and so on. Second, although a claim of sexual harassment appeared to be more appropriate, *English* establishes this principle even where the conduct is not of a sexual nature. Third, the doubts raised over the *Redfearn* decision are misplaced. *Redfearn* is perfectly consistent with long-standing principles of statutory interpretation. What emerges from both cases is that the outcomes are rooted in policy and purpose rather than the precise statutory formulas.

More broadly, the cases draw attention to the numerous possibilities when defining direct discrimination and harassment. They could be restricted to the claimant’s protected status, or extended to cover perhaps, instructions to discriminate, discrimination by association, perceived discrimination, and conduct unrelated to any particular person’s condition. These varieties appear inconsistently and incoherently across the domestic legislation. Further, those definitions falling short of the broadest possibility confirmed in *English*, fall short of the consistently broad definition provided by the parent EC Directives.
[i] See EOC v Secretary of State for Trade and Industry [2007] ICR 1234 (HC Admin). The problem was highlighted in Kettle Produce v Ward (2006) (unreported) UKEATS/0016/06/MT (EAT) where the treatment - a male supervisor bursting in on a female worker in the ladies toilet - was not on the ground of, but was related to, sex.


[iii] [1984] 1 All ER 836 (EAT). See also Weathersfield (t/a Van & Truck Rentals) v Sargent [1999] ICR 425 (CA), (white worker (constructively) dismissed after instruction not to hire vehicles to ‘coloured and Asians.’)

[iv] Coleman v Attridge Law Case C-303/06 [2008] IRLR 722 (ECJ).


[vi] For harassment on the ground of another’s religion, see Saini v All Saints Haque Centre [2008] UKEAT/0227/08.

[vii] [2006] EWCA 659.

[viii] Ibid [43].

[ix] Ibid [47]-[49].

[x] [2008] EWCA 1421.


[xii] [2008] EWCA 1421, [38].

[xiii] Ibid [39].

[xiv] Ibid [47].

[xv] Ibid [30].

[xvi] Ibid [27]-[28].

[xvii] SDA 1975, s 4A(5).

[xviii] [2008] EWCA 1421, [3].


[xx] [2008] EWCA 1421, [48].

[xxi] Ibid [49].


[xxiii] In the UK there is a right not to be unfairly dismissed (Employment Rights Act 1996, s 94), generally applicable to employees with at least one year’s service (ERA 1996, s 108). Redfearn did not qualify for an unfair dismissal claim because he had been employed for seven months only. (There are exceptions to the one-year rule, for example, for a protected disclosure (“whistle-blowing”), jury service, trade union activities, and health and safety issues).

[xxiv] Re Sigsworth [1935] Ch 89 (Ch) 92.