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I Won’t Take This Sitting Down – How To Escape Liability for Kind Thoughts in The Workplace (UK)

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Into the second half of April we go with a strong contender for the No Good Deed prize in the 2024 Has it Really Come to This? Awards,.

Employers staring aghast at news in the Times on Saturday that “*Offering a seat to older staff risks discrimination*” should not worry – there is a great deal less to the case than is reported.

Mr Edreira, now 68, was dismissed by Severn Waste Services and claimed age-related discrimination and harassment, alleging that SWS had tried to force him out when he turned 66. A little while ago, his health had obliged him to move to a less physical role and around the same time, his manager asked him if he would like a chair, even though his younger colleagues all worked standing up. When I read the headline I assumed that it was a younger colleague who had made the complaint, but in fact it was Edreira took the view that the offer of a seat demeaned him by reason of his age.

The Employment Tribunal found that the offer of a chair, though not unheard of at SWS, was unusual. As per the Times report at least, the Judge went on from there to say that Edreira “*could legitimately conclude that he was being treated differently to others and therefore disadvantageously*“. In the end, the ET concluded that Edreira’s age had not been a conscious or unconscious factor in the manager’s offer of a chair, as opposed to his physical health. But suppose it had been, and that the manager had indeed made the suggestion based on concern for his perception or knowledge of Edreira’s age (he was the oldest in the workforce, though not by much)?

There are at least two saving arguments available to an employer accused in this way. The decision that the offer of the chair was not motivated by age meant that ET here did not need to consider them, but they are still both very much alive and well.

First, it is not technically possible to go automatically (the Judge’s “*therefore*“) from treatment being different to its being disadvantageous. Difference alone is not enough. Some assessment must be made of how it is also less favourable treatment. For all the manager knew, Edreira could have been desperate to sit down at work but didn’t feel he could ask because no one else had, and the offer could well have been aimed at extending his effective working life rather than shortening it and

welcomed as such, so different, yes, but not less favourable at all.

Second, Section 26(4)(c) Equality Act states that even conduct which is directly related to age will not be harassment if it is not reasonable for it to be taken by the employee as having the intimidating, humiliating or offensive effect required. Here there was an express finding that there was nothing unpleasant or rude about how the manager made the offer. Such a suggestion made politely in private is obviously very different in terms of the offence one could reasonably take from the same thing shouted across the shop-floor and prefaced with “Oi, Grandad…”.

There is considerable decided authority on Section 26(4)(c) to the effect that the degree of upset one can reasonably take from a remark must depend on what you know of the intent behind it. Even though intention to upset is not a pre-requisite of conduct constituting harassment, its clear absence can certainly go to whether the employee can reasonably claim any affront from it.

There are however also a number of cases which show that it is not a defence to a discrimination or constructive dismissal claim that the employer thought it was doing the Right Thing, for example, where a substantial part of a sick employee’s duties is removed unilaterally by the employer because it wants to make his life easier. Therefore you should not be shy of offering your Edreira (or your pregnant, sick or disabled employee) a chair, but you should do it one-on-one, and make it clear that they have no obligation at all if they don’t want it. If they refuse, don’t keep revisiting the question, tell lots of other people about the offer, hold it against them later or just leave the seat by their workstation anyway with their name plastered all over it. Doing the well-intentioned Thing unilaterally could well be poorly received, especially if the employee is looking for things to be unhappy about, but simply proposing or asking about it is very different. After all, suppose that Edreira’s physical issues amounted to a disability, actual or perceived. Then SWS would be in a position where it was obliged to make reasonable adjustments by the offer of a chair, but at the same time would be unable to make that offer in case Edreira felt singled out on that basis instead. If by any chance the employee does get all sniffy nonetheless about your making such an offer, just apologise and back off. That costs you nothing apart from some further erosion of your scant remaining faith in human nature, and will significantly undermine the employee’s claim to any actionable upset.

This case does not mark the death of courtesy or consideration in the workplace, though the temptation to think that it does is considerable. Much will depend on the facts, but nothing here automatically gives any sort of claim to an employee who feels himself the victim of gratuitous and unwanted thought and care on the part of his employer. That said, the **Vento** bands for compensation for injured feelings have just gone up, with the minimum award now £1,200 for successful claims brought on or after 6 April. That is not a bad prospective return for what should realistically not be more than a brief flicker of annoyance at worst.

We must therefore hope that the ETs will take a reasonably robust approach to claimed injury to feelings arising from conduct of this sort – at its worst, the sort of clumsy or unthinking micro-poke in the eye which (minus the Equality Act protected characteristic) assails all employees on a pretty much daily basis, and at its best, clearly thoughtful and well-intentioned. The “unreasonable offence” defence in Section 26(4)(c) is much under-used by the Employment Tribunals because Judges are understandably reluctant to assess upset related to protected characteristics they do not possess. Nonetheless, had an age component been found, it would surely have been the appropriate riposte here.

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