

Victimisation: An employee who referred to “discrimination” without specifically referring to sex discrimination was not protected from victimisation

Published 8 February 2021

A comment in a grievance that an employer’s actions “might amount to discrimination” was not a “protected act” for the purposes of victimisation.

THE FACTS

Mrs Chalmers, who worked in Human Resources, was one of two women employed by Airpoint Ltd in its Glasgow office. She raised a grievance to and about her manager, part of which read:

“I do not find you approachable of late, your manner is aggressive and unhelpful. As such I prefer to have a written record of work instructions.

My work is mostly ignored and I have been excluded from both the Christmas night out and from the hardware refresh, neither of which is acceptable to me and both of which may be discriminatory.”

Her grievance was not upheld, and she later brought claims of sex discrimination, including a claim that she had been victimised for having raised the grievance. Key to whether or not her victimisation claim was successful was the question of whether or not her grievance had disclosed a complaint or allegation that Mrs Chalmers had been discriminated against on the grounds of sex. If it had done so, the grievance would have been a protected act, and she would have been protected against victimisation.

The tribunal did not consider the grievance had included any complaint or allegation that discrimination legislation had been breached. While the grievance had stated that the exclusion of Mrs Chalmers from the Christmas night out “may be discriminatory”, it also referred to her manager being unapproachable and to his manner being aggressive and unhelpful. As part of their analysis the tribunal commented that Mrs Chalmers was experienced in HR, that she is articulate and well educated.

Mrs Chalmers appealed to the EAT, arguing that the tribunal had erred in construing the email as a complaint of “general unhelpfulness and aggression”, and that it had ignored her “explicit statement” of sex discrimination.

The EAT dismissed her appeal, holding that the tribunal was entitled, on the facts, to find that the words used by Mrs Chalmers were not a protected act. The EAT considered the actual words used by Mrs Chalmers and the factual context. It considered that the tribunal had been entitled to take Mrs Chalmers’ HR experience, articulacy, and education into account. The wording in the grievance, including the word “may”, (which signified doubt and uncertainty), and no specific reference to sex discrimination, entitled the tribunal to conclude that the grievance did not make an allegation of sex discrimination. Given its reference to Mrs Chalmers’ experience in HR and education, the EAT commented, that had Mrs Chalmers wanted to assert sex discrimination, she would have been able to do so. Also relevant was the fact Mrs Chalmers had met her manager the day after the Christmas event and had complained to him but had not mentioned sex discrimination.

WHAT DOES THIS MEAN FOR EMPLOYERS?

The factual context of this claim - including Mrs Chalmers’ HR background and education - meant that the tribunal was entitled to find that her ambiguous wording did not amount to a complaint of sex discrimination. Were the surrounding facts different, the grievance might have amounted to a protected act in spite of the ambiguous wording. Additionally, had Mrs Chalmers claimed she was victimised because Airpoint believed that she was going to bring tribunal proceedings, she might have been successful.

Employers should usually treat any mention of discrimination by an employee as a red flag and ensure they do not treat the employee detrimentally as a result. They should also usually make sure there is no substance to the allegation being made if it is specific enough to be explored.

[Mrs L Chalmers v Airpoint Ltd and Others 2020WL 08265722 \(2020\)](#)

Authors

Hilary Larter



Leeds
+44 (0)113 251 4710
hlarter@dacbeachcroft.com

Ceri Fuller



London - Walbrook
+44 (0)20 7894 6583
cfuller@dacbeachcroft.com

Zoë Wigan



London - Walbrook
+44 (0)20 7894 6564
zwigan@dacbeachcroft.com

dac
DAC BEACHCROFT