Employment Law Newsletter

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NEW CODE ON SEXUAL HARASSMENT

The Equalities and Human Rights Commission has published technical guidance on the law that relates to sexual harassment. It is essential that HR review their equality policies in light of this. It is anticipated that ultimately this will become a code of practice. A judge is likely to refer to this document in any employment tribunal hearings. Issues that it covers are as follows:

1) How to devise a good anti-harassment policy
2) What other policies need to be checked/updated/ reviewed
3) How to publicise these policies internally and externally, including social media/websites
4) Annual reviews on effectiveness need to be carried out
5) Employers need to be proactive and have good support systems in place
6) Risk assessments on harassment and victimisation should be undertaken. Factors such as power imbalances, job insecurity, lone working, the presence of alcohol, customer-facing duties, local or national events raising tensions, lack of diversity, and secondment of workers all need to be factored in and addressed.
7) Guidance on when an employer should override a victim's request not to take matters further
8) A specific action to avoid power imbalances
9) Guidance on reporting outcomes to victims and how this outweighs data protection concerns.

There is also a mini guide available – www.equalityhumanrights.com – which contains a useful seven step summary of what an employer needs to do to combat sexual harassment. The Government also consulted on this issue last year. We don't have a scheduled date as to when it will publish its recommendations/proposals.

ETHICAL VEGANISM

It is fairly well known that it was a Norwich employment judge who recently ruled that ethical veganism can be regarded as a protected belief under the Equality Act. It doesn't mean that this will be the case for every vegan – on the facts, the Claimant had adapted his life significantly to reflect his views. It won't be enough on its own just to eat a vegan diet. Every case will be determined on its own facts.

That said, the Vegan Society has published some guidance on what employers should consider:

- sending out a 'dietary requirements' sheet for catered events, ensuring vegans can request appropriate food
- designating food storage areas for vegans, for example a shelf in the fridge above non-vegan foods
- providing milk alternatives for tea and coffee making
- ensuring vegans have access to vegan friendly clothing, such as synthetic safety boots
- exempting vegans from attending corporate events such as horse racing or barbecues
- exempting vegans from participating in signing off the purchase of non-vegan products
- supporting vegan employees to discuss their pension investment.

Employers should also take appropriate steps to deal with any harassment or 'banter' on the basis of such beliefs and provide training for staff. In my opinion, this latter point is the most significant factor to address.

ANNUAL INCREASES FROM APRIL 2020

From 6 April 2020 the cap on the unfair dismissal compensatory award will increase from £86,444 to £88,519 and the cap on weekly pay (used to calculate the unfair dismissal basic award and statutory redundancy pay) will increase from £525 to £538. This will give a maximum unfair dismissal award of £104,659 (subject to the additional cap on the compensatory award of 12 months' pay).

The weekly rate of statutory sick pay will increase from £94.25 to £95.85 and the weekly flat rate of statutory maternity, paternity, adoption and shared parental pay will increase from £148.68 to £151.20.

The national minimum wage rates will increase from 1 April 2020. Workers of 25 years and older will be entitled to be paid a minimum national living wage of £8.72 per hour (increased from £8.21), the rate for workers aged 21-24 will be £8.20 per hour and the rate for those aged 18-20 will be £6.45 per hour.

SHARED PARENTAL LEAVE

The Court of Appeal ruled that an employer was not breaking discrimination law even though it failed to pay an enhanced rate of pay to parents who were on shared parental leave. This might seem unfair given that the same employer paid an enhanced rate to mothers who were on maternity leave. The couple tried to appeal to the Supreme Court against this but were unsuccessful.

Commentators have noted that this decision only applies to the first 14 weeks of leave and that it is possible to have another case with a different result over enhanced maternity pay for later periods. I wouldn't recommend having different periods – it's easier and less risky to be consistent.

STATUTORY CHANGES FROM 6 APRIL 2020

Employees will be entitled to two weeks' **statutory parental bereavement** leave following the death of a child under 18 or a stillbirth after 24 weeks of pregnancy. There is also a right to statutory pay for those with 26 weeks' service.

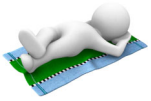
Employers must provide employees or workers with more detailed **written statements of terms** on or before day one of work. The same principle applies to changing key terms for existing staff.

The threshold required for employees to make a request to their employer (where it has at least 50 employees) to negotiate on the introduction of **information and consultation arrangements** will be reduced from 10% to 2% of employees (subject to a minimum of 15 employees) of the workforce.

SETTLEMENT AGREEMENTS: NATIONAL INSURANCE RISE

From 6 April 2020, the cost to employers of many termination compensation payments will increase. Employers will have to pay Class 1A employer NICs (currently at 13.8%) on termination payments above the £30,000 tax-free threshold in respect of terminations on or after 6 April 2020 (bringing NICs into line with income tax).

HOLIDAY PAY CALCULATIONS FROM 6 APRIL 2020



The 12 week **reference period used for calculating statutory holiday pay** for workers without normal working hours (e.g. zero hours workers), or whose pay varies according to the amount of work done within those hours (e.g., piece workers) or with the time of work (e.g. shift workers whose weekly shifts vary, or term-time only workers), will be extended to 52 weeks (or the number of weeks that a worker has been employed if less than 52) with effect from 6 April 2020. Where that period includes weeks where no remuneration was payable, earlier weeks (to make up 52 in total) should be taken into account when calculating the average pay, but ignoring any weeks earlier than 104 weeks before the calculation point.

The Government has updated its guidance on calculating holiday pay for workers without fixed hours or pay to reflect the change – www.gov.uk

AGENCY WORKERS: LAW FROM 6 APRIL 2020

(i) Agencies must issue new work-seekers with a 'key information document', in a prescribed format and containing prescribed content, before agreeing the terms of the contract;

(ii) Currently workers who have a permanent contract with the agency are excluded from the right to equal pay with comparable direct hires from week 13 if they are paid a minimum amount between assignments and the contract satisfies certain conditions. This "Swedish derogation" is being repealed from 6 April and agencies are required to notify the workers of this by 30 April 2020. Businesses that hire agency workers employed under the Swedish derogation may need to review, and possibly renegotiate, their contracts with the agencies in light of any increased cost.

NATIONAL MINIMUM WAGE: GOVERNMENT RESPONSE

GOV.UK The Government has provided its response to National Minimum Wage (NMW) – salary sacrifice consultation (www.gov.uk). It is going to introduce legislative changes. It also indicated that it will ease penalties if errors occur due to salary sacrifice.

Of greater significance is that the Government is going to revive its 'naming and shaming' scheme where employers have not complied with NMW and are shown to have underpaid an employee by at least £500.

CORONAVIRUS GUIDANCE

There is plenty of guidance available now.

ACAS:

www.acas.org.uk

The UK Government's advice:

www.gov.uk/coronavirus

Public Health England:

www.gov.uk/government/organisations/public-health-england

World Health Organisation (WHO):

www.gov.uk/government/organisations/public-health-england

Take care!

DISMISSALS FOR REPUTATIONAL REASONS

The Employment Appeal Tribunal (EAT) has provided important guidance on dismissals for reputational reasons (SOSR) which are not uncommon in the Council world. It recently ruled that it would not be fair for an employer to dismiss an employee for reputational reasons just because the employee has been charged with a criminal offence for conduct outside work. It emphasised that there must some relationship between the matters alleged and the potential for damage to reputation. Other factors needed to be considered: whether it was reasonable to reject alternatives such as suspension on full pay pending resolution of the criminal case, the size and resources of the employer and whether a trial date has been set.

Ultimately, everything hinges on the particular set of facts and circumstances and the tribunal will consider the fundamental principles of an employer genuinely holding the belief of reputational damage, conducting a thorough investigation and that the dismissal decision must be one that a reasonable employer could come to which is essentially a confirmation that its belief was a reasonable view of the facts and whether it is suitable for the employment to remain in their post. It is also important to challenge matters critically and not take everything at face value.

In *Lafferty v Nuffield Health*, the employer's dismissal of an employee charged with assault with intent to rape (unconnected with work) was held to be fair, despite the employee's 20 years' unblemished service. However, it was relevant that his role as hospital theatre porter transporting anaesthetised patients could have given him an opportunity to commit a similar act to that charged, and that the employer was in the charitable sector which was under particular scrutiny at the time following exposure of sexual offences at other organisations. It was therefore reasonable for the employer to genuinely believe there was a significant reputational risk if the employee were convicted, given that having allowed the employee to work between charge and conviction would mean that additional patients would arguably have been exposed to risk. Suspension on full pay was not reasonable given the employer's charitable status and the lack of a trial date.

It is significant that the EAT did query whether a large employer would genuinely be **'financially troubled' by suspending on full pay**, meaning that dismissal by such employers might well not be fair.

In contrast, Herbert Smith noted that the employment tribunal in *Bosher v EUI Limited* ruled that it was unfair to dismiss an insurance claims validation co-ordinator because of risk of reputational damage, on his being charged with possessing indecent images involving children. The tribunal made it clear that a fear of reputational harm "cannot be presumed on the basis of a presumed extreme or scaremongering reaction in the press or public". The tribunal considered that the public should be credited with understanding that a prosecution is not the same as being found guilty, and that there was a difference between criminal activity and the viewing of legal pornography which might be viewed as "unsavoury or inappropriate" but was not criminal. At the time of dismissal, it was not yet clear whether there would be a public hearing, and the employer should have considered alternatives to dismissal such as redeployment, reducing responsibilities, or suspension pending developments in the criminal proceedings.

That said, in the Court of Appeal in *Leach v OFCOM*, the claimant had been the subject of a disclosure by the Metropolitan Police Child Abuse Investigation Command ("CAIC") indicating that the claimant posed a potential threat or risk to children. This was based on information suggesting that he had visited brothels in Cambodia known to supply children and had allegedly posed as a doctor in order to gain access to children in Cambodia. The information supplied by the CAIC to the employer in that case was described as being just "the tip of the iceberg". That disclosure was not taken at face value in that the employer probed and questioned the CAIC about the information provided. The employer decided to dismiss the claimant taking the view that it had to accept the advice of the CAIC that the claimant continued to be a risk to children and that amounted to a breach of trust and confidence which lies at the heart of the employment contract. The employment tribunal found that the employer's dismissal was fair. That decision was upheld by the EAT and the decision was in turn upheld by the Court of Appeal.

Contact details

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