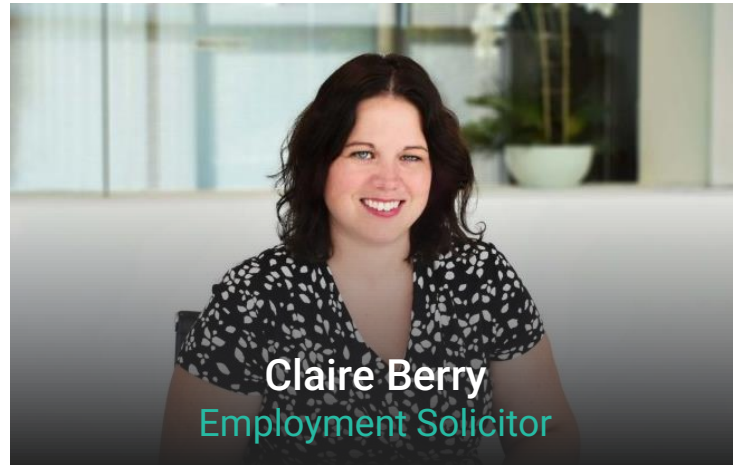


HR/Employment law update



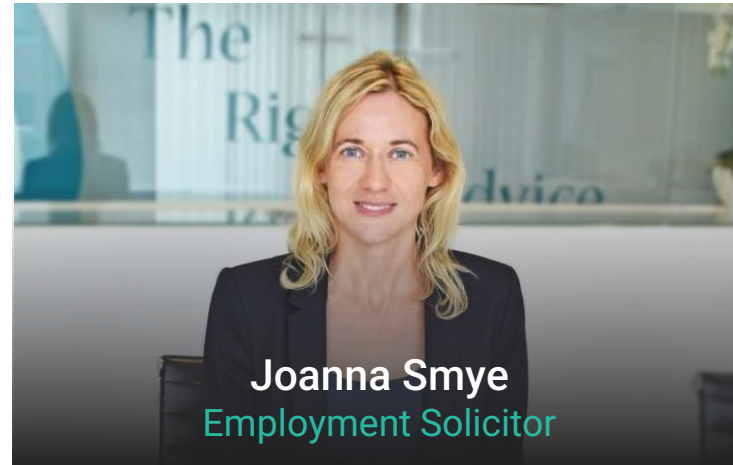
Autumn 2024

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Topics for discussion



Hot Topics

- » New duty on employers to take reasonable steps to prevent sexual harassment at work
- » Case Law update: a successful claim for harassment relating to sex
- » Case Law Update: when a redundancy process can result in both unfair dismissal and age discrimination



What's on the horizon- legislation update

- » Employment Rights Bill:
 - > Unfair Dismissal
 - > Zero hours/low hours
 - > Other key rights
- » Equality (Race and Disability) Bill
- » Longer-term reforms

Sexual harassment in the workplace



What is sexual harassment ?

Introduction:

The law prohibits three types of harassment:

- > Harassment related to a protected characteristic.
- > Sexual harassment.
- > Less favourable treatment because the employee rejects or submits to unwanted conduct of a sexual nature or that is related to gender reassignment or sex.

What is sexual harassment?

Sexual harassment occurs where both:

- > A engages in unwanted conduct of a sexual nature.
- > The conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B .

Unwanted conduct:

Means:

- > 'unwelcome' or 'uninvited'.
- > Any unwanted verbal, non-verbal or physical conduct.
- > Sexual conduct that has been welcomed in the past can become unwanted.

Sexual harassment in the workplace



What is sexual harassment ?

Conduct of a sexual nature:

This includes a wide range of behaviour:

- > Sexual comments or jokes.
- > Displaying sexually graphic pictures, posters or photos.
- > Sexual gestures.
- > Sexual harassment.
- > Intrusive questions about a person's private or sex life, or a person discussing their own sex life.
- > Sending sexually explicit emails or text messages.

The conduct need not be sexually motivated, only sexual in nature.

Example from EHR technical guidance:

A male worker alters a pornographic image by pasting an image of his female colleague's face on to it.

He then sends it to their other colleagues, causing them to ridicule her.

There was no sexual motivation behind this act, but the use of the image is sexual in nature. A engages in unwanted conduct of a sexual nature.

Purpose or effect:

- > If A's unwanted conduct of a sexual nature is shown to have had the **purpose** of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out.
- > Where A's conduct is not shown to have that purpose, the **effect** of their conduct on B must be determined. When doing so account must be taken of
 - > B's perception
 - > The other circumstances
 - > Whether it was reasonable for the conduct to have that effect.

Sexual harassment in the workplace

Example

- > Male members of staff download pornographic images on their computers in an office which a woman works. She may make a claim for harassment if she is aware that the images are being downloaded and the **effect** of this is to create a hostile and humiliating environment for her.
- > In this situation it is irrelevant that the male members of staff **did not have the purpose** of upsetting the woman, and that they merely considered the downloading of images as “having a laugh”.



New duty on all employers to prevent sexual harassment in the workplace

Came into force on 26 October 2024

This new duty includes not only sexual harassment by staff, but also by third parties.

What is the preventative duty?

- > Requires employers to take proactive, reasonable steps to safeguard workers from sexual harassment.
- > Employers must actively assess potential risks and take steps to prevent it happening.
- > If an incident does occur, the duty obliges employers to act to prevent recurrence.

What are reasonable steps?

What would be considered reasonable steps will vary and depend on factors such as:

- > Employer's size and resources.
- > The nature of the working environment.
- > The sector in which the employer operates.
- > The risk present in the workplace.
- > Nature of any contact with third parties.

EHRC guidance

Whether an employer has taken reasonable steps will be an objective test and depend on the facts and circumstances of each situation.

The EHRC have published technical guidance together with an eight-step guide for employers.

The guide makes it clear that the right steps identified are not an exhaustive list, but implementing the steps should help an employer take positive action to prevent and deal with sexual harassment.

New duty on all employers to prevent sexual harassment in the workplace

8-Step Guide:

Step 1: Develop an effective anti-harassment policy.

Setting out what conduct is unacceptable, how staff can report it, the process that will be followed and the support available.

Step 2: Engage with staff.

Conduct regular 1-2-1s, staff surveys, open door policies.

Step 3: Assess and take steps to reduce workplace risk.

Conduct a thorough assessment of risks relating to sexual harassment. Assessments should identify the risks, and the control measures identified to minimise the risks.

Step 4: Reporting.

Consider using a reporting system that allows workers to raise an issue either anonymously or in name. Keep centralised confidential records of all concerned raised.

Step 5: Training.

Workers, including managers and senior staff should be trained on what harassment looks like in the workplace, what to do if they experience or witness it and how to handle complaints of harassment.

Step 6: Handling harassment complaints.

Act immediately to resolve a complaint. Protect the complainant from ongoing harassment during an investigation. You should also protect witnesses. Communicate the outcome of the complaint in a timely manner and the appeal process.

Step 7: Dealing with third party harassment.

Any complaint should be treated as seriously as that raised by a worker.

Step 8: Monitoring and evaluating actions.

Regularly evaluate the effectiveness of the steps you put in place and implement changes that arise from that.

New duty on all employers to prevent sexual harassment in the workplace

What are the consequences of breaching the duty?

Enforcement action by EHRC

- > Investigate the employer.
- > Issue an “unlawful act notice”.
- > Enter into a legally binding agreement with the employer to prevent future unlawful acts.
- > Ask the court for an injunction to restrain an unlawful act.

Uplift to compensation

- > Where the Employment Tribunal finds that an employer has breached the duty, it may award an uplift to the compensation award. Any uplift must correlate to the extent of the employer’s breach but may not exceed 25%.



| Any questions?

Harassment related to a protected characteristic

What amounts to harassment related to a protected characteristic?

Introduction:

The law prohibits three types of harassment:

- > Harassment related to a protected characteristic.
- > Sexual harassment.
- > Less favourable treatment because the employee rejects or submits to unwanted conduct of a sexual nature or that is related to gender reassignment or sex.

What is harassment related to a protected characteristic?

This occurs where both:

- > A engages in unwanted conduct related to a protected characteristic.
- > The conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B .

How a Tribunal decides whether or not the conduct had that effect:

The following are considered:

- > B's perception.
- > The circumstances of the case.
- > Whether it is reasonable for the conduct to have that effect.

Harassment related to sex



British Bung Manufacturing Company Ltd and another v Finn [2023] EAT

Facts

Mr Finn worked as an electrician in a small family-run business of around 30 (mostly male) employees.

A male colleague (Mr King) called Mr Finn a “bald ****” and threatened him with physical violence.

Mr King was warned for his behaviour.

Mr Finn was subsequently dismissed for gross misconduct relating to another matter.

He brought claims including unfair dismissal and harassment related to his sex. We will look at the harassment claim only.

Issue

The conduct was unwanted and created a hostile and intimidating environment, with both the purpose and effect of doing so.

The question for the Employment Appeal Tribunal was whether or not the conduct related to a protected characteristic, in this case sex.

BBM argued that to be harassment related to sex, baldness would have to apply to one sex exclusively, and that as a woman could be bald, the definition was not met.

Decision

The EAT found that the Tribunal was not wrong in its approach, which had been to conclude that the feature Mr King had chosen to refer to in abusing Mr Finn (i.e. baldness) was more prevalent in those sharing Mr Finn's sex and more likely to be directed towards them. As such, it was inherently related to sex.

Learning points



- **Liability** – Under the Equality Act, employers are liable for acts of employees in the course of employment (but no criminal liability). Statutory defence – **all** reasonable steps.
- **Policies and procedures/training** – the mere existence of a policy is not sufficient, it needs to be effective and well communicated.
- **Culture** – use the induction process to reinforce importance of respect.

| Any questions?

When redundancy results in unfair dismissal and age discrimination

Mr W Norman v Lidl Great Britain Ltd 1804509/2023

Facts

N was one of a team of 3 senior construction consultants (SCC). He was in his 60s and the other two (F and S) were in their 30s.

A business reorganisation was proposed which would result in only one SCC role.

Staff were given selection criteria and template scoring matrix.

N was notified that he had been provisionally selected for redundancy and was invited to consultation meeting. Scoring was enclosed but no explanation provided.

N was then informed that F got the SCC role.

Facts

At the consultation meeting he was advised that under the selection criterion of “knowledge”, he was marked down for not having “relevant construction qualifications” as he did not have a construction degree. He was not allowed to contest his scoring.

N was made redundant at the end of the second consultation meeting.

He brought claims for indirect age discrimination and unfair dismissal, amongst others.

Decision – age discrimination

The employment tribunal ruled that workers aged 60 were less likely to have a degree or indeed any other qualification compared to those in their 30s and that this put N at a disadvantage.

Since the Respondent hadn’t put forward any justification defence, N had suffered indirect age discrimination.

When redundancy results in an age discrimination claim

Mr W Norman v Lidl Great Britain Ltd 1804509/2023

Decision – unfair dismissal

The employment tribunal ruled that he had also been unfairly dismissed due to an unfair consultation process. N could not reasonably challenge his scoring as no explanation as to the basis of the scores had been provided.

The second consultation meeting had simply been a tick box exercise.

Points to take away

This case serves as a reminder of the importance of using selection criteria that are both objective and non-discriminatory.

Use two managers to undertake the scoring exercise to ensure it's as unbiased as possible. Scorers need to be able to substantiate their scores and explain how they have been arrived at. This enables those being scored to challenge the scores.

Points to take away

Whilst you can use knowledge as a selection criterion, focus on scoring what the employee brings to the role in terms of relevant skills and knowledge, rather than on whether they have a degree. If you do include relevant qualifications, such as having a degree, allow for equivalent ones, e.g. those gained overseas or vocational qualifications.

| Any questions?

Employment Rights Bill



Unfair Dismissal

- > The right to bring an ordinary unfair dismissal claim would become a day one right.
- > There is a specific provision in the Bill for future regulations to ensure that the right to claim unfair dismissal from day one will not apply to dismissals occurring during an initial period of employment (i.e. the probation period), if the reason for the dismissal falls under conduct, capability and statutory restriction, or for "some other substantial reason".
- > This means that if the reason for the dismissal is redundancy, the right to claim unfair dismissal would still apply during the probation period.
- > The government's preference is for a 9-month probation period

NB: The unfair dismissal reforms would take effect no sooner than Autumn 2026. Until then, the two year qualifying period will still apply.



Employment Rights Bill



Zero hours/low hours contracts

- > The Bill will introduce a right to a guaranteed hours contract that reflects the hours eligible workers regularly work over a reference period. While the employer will be required to offer the guaranteed contract after the reference period, the worker will not be required to accept it.
- > Workers will also be entitled to reasonable notice ahead of any changes made to their working hours and compensation if their shift is cancelled or ended early.
- > There will be consultation of what “low hours” actually means.



Employment Rights Bill

Other key rights

- > Paternity Leave will become a day one right (currently requires 26 weeks' service)
- > Parental Leave - Unpaid parental leave will become a day one right (current required one year's service)
- > Bereavement Leave - Unpaid bereavement leave will become a day one right. The parental bereavement leave provisions in the ERA 1996 will be replaced with wider bereavement leave provisions, applying to the loss of a wider group of persons, to be specified in future regulations.

JOB INTERVIEW
please keep quiet



Statutory Sick Pay (SSP) will be available from the first sick day rather than the fourth day. The lower earnings limit of £123 a week will be removed, but the Bill sets out a lower level of sick pay for lower earners.

Employment Rights Bill



Other provisions relate to:

- > Flexible working
- > Collective redundancies
- > Trade unions
- > Fire and Re-hire
- > Harassment
- > Equality Action Plans



Equality (Race and Disability) Bill

The government has also committed to begin consulting on the Equality (Race and Disability) Bill “in due course”, with a draft Bill to be published during the current parliamentary session.



The Bill will:

- > Extend pay gap reporting to ethnicity and disability for employers with more than 250 staff.
- > Extend equal pay rights to protect workers suffering discrimination on the basis of race or disability.

Longer-term reforms



The government's plans for the longer term include:

- A review of parental leave.
- A review of carer's leave.
- A consultation on workplace surveillance technologies, including negotiations with trade unions and staff representatives.
- A consultation on moving towards a single worker status. As part of this, the government intends to explore how to implement its manifesto commitments to enhance protections for self-employed workers.
- A call for evidence to examine a "wide variety of issues" relating to TUPE and process.
- Looking at modernising health and safety legislation and guidance, including neurodiversity awareness in the workplace, extreme temperatures and long COVID.
- Consulting with Acas on enabling employees to collectively raise grievances about conduct at work.

| Any questions?

Thanks for
watching



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