SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

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NEW DUTY TO PREVENT SEXUAL HARASSMENT IN THE WORKPLACE

Responding to its 2019 consultation on workplace harassment, the Government has announced that it will introduce a duty requiring employers to prevent sexual harassment in the workplace. Employers will be required to take "all reasonable steps" to prevent harassment. There is no indication of when the new duty will take effect, only that it will be introduced "as soon as Parliamentary time allows".

The Government has not explained what reasonable steps employers should take, saying that it wishes to preserve the flexibility of this defence. However, a proposed statutory code of practice on sexual harassment and harassment at work is likely to include guidance on reasonable steps. The code is currently in draft form as Equality and Human Rights Commission (EHRC) technical guidance (see our Employment Bulletin February 2020).

It is unclear if the new duty will apply only to sexual harassment or to all workplace harassment. The consultation referred to all forms of harassment, whereas the proposal appears to be confined to sexual harassment, although the Government's response does not say this specifically. The response suggests that enforcement of the new duty will be through the EHRC and individual complaints, with the requirement for an incident to have taken place before an individual can make a claim. There will be further consultation with stakeholders on this.

Two other changes to discrimination law are planned:

- There will be explicit protections for employees from third-party harassment. Before it was repealed in 2013, a provision in the Equality Act made employers liable if an employee was harassed by a third party (such as a customer or client) in the course of their employment, but only if the employee had been harassed on two previous occasions. The Government plans to revive this duty in a different form – the "all reasonable steps" defence will apply. There has been no decision yet on whether it will apply only in situations in which an incident of harassment has already occurred and, once again, it is unclear whether the new duty will apply to all forms of harassment, or only to sexual harassment.
- Changes to the time limits for bringing Equality Act cases in the employment tribunal. The Government says it will "look closely" at extending the time limit from three months to six months. (The time limit for bringing an Equality Act claim is currently three months, except for equal pay claims, for which the time limit is six months. The employment tribunal has the discretion to extend this time limit where it considers it "just and equitable" to do so.)

No action is planned on extending Equality Act protections to volunteers and interns – an idea discussed in the consultation. The Government believes that many of the latter group would already be protected as "workers", and that extending protections to the former could have undesirable consequences.

Analysis/commentary: Employers are already potentially liable for discrimination (including sexual harassment) by employees in the course of their employment, unless the employer can show they have taken all reasonable steps to prevent it, but the new duty would mean employers could be held liable for failing to take steps to prevent harassment, even if no incident had occurred. The significance of this change in the law will be the switch from potential liability after the event, with a defence for reasonable preventative steps, to a proactive duty to prevent harassment. Until the concept of "all reasonable steps" is clarified, it is difficult to assess the extent of the new duty.

It is likely to be some time before the new duty is in place. In the meantime, the EHRC's guidance, which is expected to form the basis for the statutory code in due course, provides a reference point for employers. Compliance would clearly be an advantage for reliance on the "all reasonable steps" defence. Suggested action points for employers in the guidance include developing an effective anti-harassment policy, engaging regularly with and training staff, assessing and mitigating risks in the workplace and considering the use of a reporting system for employees. As the recent decision in *Allay (UK) Ltd v Gehlen* shows, even if the employer has taken some action, the reasonable defence may not succeed if there are further steps that the employer could reasonably have taken – in that case, to provide refresher equality and diversity training where this had become "stale and ineffective" (see our Employment Bulletin March 2021).

MAINTAINING HIGHER PAY NOT A REASONABLE ADJUSTMENT

Summary: The Employment Appeal Tribunal (EAT) held that it was not a reasonable adjustment to continue to pay an employee at her previous higher rate when she moved to a different, lower-paid, job because of a disability. Although it was a reasonable adjustment to maintain her salary at the higher rate while the new job was temporary and a grievance process was completed, the employer was not required to continue to pay the higher rate once the new role became permanent (*Aleem v E-Act Academy Trust*).

Key practice point: A previous EAT decision - *G4S Cash Solutions (UK) Ltd v Powell* - suggested that protecting an employee's rate of pay despite moving to a lower paid role could be a reasonable adjustment. This latest decision makes it clear that this will not always be the case – the cost of the adjustment will be a relevant factor, as will what the employee has been told. It had been made clear to the employee in this case that her pay would reduce.

Facts: The claimant became unable to work full-time as a teacher as a result of a disability. On her return to work after sickness absence, she worked as a cover supervisor, a role that had a lower rate of pay. She continued to be paid as a teacher while her grievance was being dealt with and for a further period after the grievance was rejected, to allow options to be reviewed. At the grievance appeal hearing, the employer indicated that if she accepted a permanent cover supervisor role, she would receive the (lower) pay rate for that position. She continued as a supervisor and claimed that by not maintaining her teacher's salary, her employer had failed to make a reasonable adjustment. The Employment Tribunal rejected the claim, citing the employer's financial difficulties and its public funding.

Decision: The EAT confirmed that the Employment Tribunal had been correct to reject the claim. It was not necessary for the employer to show serious financial difficulty – cost was a factor in considering what steps were reasonable for the employer to have taken, along with practicability, service delivery and business efficiency. Regardless of the financial pressures, the Tribunal had come to a proper conclusion.

Analysis/commentary: The fact that in *Powell* the EAT had found that it was a reasonable adjustment to offer pay protection on an ongoing basis did not mean that it was a reasonable adjustment in this case. It was relevant that the employee in *Powell* had been led to believe that his pay protection was indefinite. Here, the employer was at pains to make it clear that the employee's pay would be reduced if she accepted the position on a permanent basis.

NATIONAL DISABILITY STRATEGY – EMPLOYMENT IMPLICATIONS

The Government has published a National Disability Strategy, as promised in the Conservative Party's 2019 election manifesto. One of the objectives of the Strategy is to reduce the disability employment gap, which currently stands at more than 28% when the employment rate of working age disabled people is compared with working age non-disabled people. Of particular interest to employers is the Government's commitment to consult this year on making disability workforce reporting mandatory for those with 250 or more employees. The Strategy also contains the Government's renewed commitment to two previously announced proposals:

- Consultation, by the end of 2021, on making the right to flexible working the default, unless employers have a good reason not to allow it.
- To introduce, by the end of 2021, one week's unpaid carers' leave.

The Government has also published its response to a 2019 consultation on proposals to reduce job losses related to ill health. The key point for employers is that the Government has decided not to proceed with the introduction of a right to request workplace modifications for all employees suffering from health conditions, not just those who have a disability (where the duty to make reasonable adjustments under the Equality Act 2010 applies).

SUPREME COURT CONFIRMS CLAIMANT HAS BURDEN OF PROOF IN DISCRIMINATION CASES

Summary: The Supreme Court has confirmed that an employee making a discrimination claim relating to recruitment had to prove facts from which the Employment Tribunal could draw an inference of discrimination before the claim could proceed (*Efobi*).

Key practice point: The decision confirms the position on burden of proof in discrimination cases - claimants must be able to prove facts that support their allegations; a mere assertion that discrimination has occurred will not be sufficient to shift the burden of proof to the employer. However, the Court noted that, had the Tribunal found that the burden of proof had shifted, the absence of evidence from the decision-makers might have placed the employer in difficulty in proving that there was no discrimination.

Facts: The claimant brought proceedings for direct race discrimination in relation to his failure to obtain posts. The Employment Tribunal rejected the claim because he had failed to establish a prima facie case of direct discrimination. The case was appealed all the way to the Supreme Court.

Decision: The Supreme Court confirmed that a change of emphasis in wording when discrimination law was consolidated in the Equality Act 2010 did not remove the initial burden of proof from the employee. The change from the claimant being required to prove facts to "*if there are facts*" merely reflects the point that a Tribunal can take evidence from any source into account at the initial stage and is not limited to evidence produced by the employee.

The Court also decided that, on the facts, the Tribunal was entitled not to draw an adverse inference from the employer's decision not to call any of the decision-makers in the recruitment exercises to give evidence. Whether it is appropriate to draw an inference will depend on factors such as whether the witness was available, what relevant evidence the witness could give and the significance of the evidence in the context of the case as a whole. There was no expectation that an employer would call a witness simply so as to be able to recall evidence that could potentially advance the employee's case.

RESIGNATION FROM ALTERNATIVE EMPLOYMENT COULD BE CONSTRUCTIVE DISMISSAL

Summary: The EAT found that an employee who accepted but later resigned from an alternative job, after a fundamental breach by her employer in her previous role, had been constructively dismissed from that previous role (*Z v Y*).

Key practice point: The EAT decision is a reminder that there can be a constructive dismissal where the employee resigns following a breach of contract by the employer but stays employed on new terms. It is the termination of the contract, not the employer/employee relationship, that is the basis for a claim of constructive dismissal.

Facts: The claimant worked for the Council's Fire and Rescue Service as a data adviser, on a permanent contract. She had a prolonged period of sickness from work. Her employer refused to allow adjustments and indicated that she would not be allowed to return to work. Subsequently, following discussions, the Council found her an IT service desk job on a fixed term contract, but not with the Fire and Rescue Service. She later resigned. The Employment Tribunal found that she had been subject to disability discrimination which also amounted to a breach of the implied term of trust and confidence but held that there had been no constructive dismissal because she was still employed by the Council, albeit in a different job, and because she had waived any breach by applying for another job with the Council and continuing to work for it.

Decision: The EAT substituted a finding that the claimant had been dismissed. Constructive dismissal applies to termination of the contract under which the employee is employed and this was not affected by the fact that the

claimant had not reserved her rights in relation to her treatment by the employer. The EAT sent the case back to the Tribunal to decide whether she had waived the breach. The fact that the claimant continued with the Council was not the complete answer to the waiver question, but it could be one of the factors.

HORIZON SCANNING

What key developments in employment should be on your radar?

30 September 2021	Scheduled end of the Coronavirus Job Retention Scheme
5 October 2021	Deadline for reporting 2020 gender pay gap data
By end of 2021	Introduction of one week's unpaid carers' leave

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Stojsavljevic v DPD Group* (EAT: whether individuals working under franchise agreements were workers); *Stuart Delivery Limited v Augustine* (Court of Appeal: whether delivery courier with right of substitution is a worker); *Professional Game Match Officials Ltd v HMRC* (Court of Appeal: whether referees were employees for tax purposes); *Angard Staffing Solutions Ltd v Kocur* (Court of Appeal: agency workers' rights); *Nursing and Midwifery Council v Somerville* (Court of Appeal: whether an irreducible minimum of obligation is a prerequisite for worker status)
- **Discrimination / equal pay:** *Lee v Ashers Baking Co* (European Court of Human Rights: whether refusal to provide cake supporting gay marriage is discrimination in provision of goods and services); *Pitcher v Oxford University* (EAT: whether policy of retirement at 67 was justified); *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010)
- **Trade unions:** *Kostal UK v Dunkley* (Supreme Court: whether direct negotiations with individual employees about terms and conditions amounted to unlawful inducement); *Mercer v Alternative Future Group* (Court of Appeal: whether protection from detriment for trade union activities extends to participation in industrial action)
- **Vicarious liability:** *Chell v Tarmac Cement and Lime* (Court of Appeal: whether employer vicariously liable for consequences of employee's practical joke in the workplace)
- **Whistleblowing/detriment:** *UCL v Brown* (Court of Appeal: whether disciplining a trade union rep employee for failure to comply with an instruction was a detriment).

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