Welcome

With sexual harassment so much in the news, this is a good opportunity for employers to make sure that they are taking adequate steps to protect themselves from claims. The key point to understand is that employers will be liable for any harassment of one employee by another if it is done 'in the course of employment'. This is a wide enough test to cover not only inappropriate behaviour in the workplace but also things said and done within the context of work – including business trips, conferences and work-related social functions. It is a cliché to warn employers of the potential dangers of the office Christmas party, but this year such warnings will carry some additional weight.

The best way an employer can protect itself against claims for harassment is to try their best to ensure that employees do not harass their colleagues. This is not just because there will then be no harassment on which a claim can be based, but also because an employer has a defence to a claim if it can demonstrate that it took all reasonable steps to prevent the harassment from occurring. To meet this test the employer will have to show that it treats harassment as serious misconduct and ensures - through induction and training - that all staff are aware of the standards of behaviour required. It is important that the matter is not simply dealt with in a written policy that sits somewhere near the back of the employee handbook, but that the employer actively promotes a workplace culture that does not tolerate harassment and encourages employees to speak up at an early stage if the behaviour of a colleague makes them feel uncomfortable. Employers who meet this standard will not only enjoy a measure of legal protection – they will also be providing happier and more productive places to work.

Paul Housego
Beers LLP

Whistleblowing

An employee is entitled not to be dismissed for whistleblowing – or making a 'protected disclosure' to use the language of the legislation. But how can you tell what the reason for dismissal is if it is the result of the actions of more than one manager – only one of whom may have had the disclosure in mind? In Royal Mail Ltd v Jhuti the employee had made internal disclosures about the way in which existing customers had been offered incentives that she alleged breached OFCOM guidance. When her manager heard of these disclosures he was very hostile towards her – even forcing her to draft an apology. She was a new employee and had to pass her probation period in order to have her employment confirmed, but found that the behaviour of her manager towards her was the cause of increasing stress. She was eventually signed off as sick and subsequently dismissed.

About Us

Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

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Contact
Plymouth Office
North Quay House
Sutton Harbour, Plymouth
PL4 0RA
Tel: 01752 246000

Kingsbridge Office
29 Fore Street
Kingsbridge, TQ7 1AA
Tel: 01548 857000

The decision to dismiss her was made by another manager who genuinely believed that she was unable to meet the standards required of her. That decision was made on the basis of misleading information given by her line manager, but the tribunal found that that fact was not sufficient to mean that the protected disclosures formed part of the reason for dismissal. Accordingly, while Ms Jhuti had been subjected to an unlawful detriment in the way in which she had been treated by her line manager, she had not been automatically unfairly dismissed for making a protected disclosure.

The case reached the Court of Appeal, which agreed with this approach. The reason for the employer's decision to dismiss an employee could only refer to the mental processes of the person who actually made the decision. In this case, the person who decided to dismiss did not do so because the employee had made a protected disclosure. It followed that the dismissal was not automatically unfair – and of course the employee did not have sufficient service to claim unfair dismissal on the normal principles of reasonableness.

This did not mean, however that the employee was unable to recover for the losses she had suffered as a result of her dismissal. The Court of Appeal held that if the action taken by Ms Jhuti's line manager led to her being dismissed, then the compensation awarded by the tribunal for unlawful detriment could take into account the loss caused by her dismissal. The matter was sent back to the tribunal to decide on the appropriate remedy.

Voluntary redundancy

Employers will often consider offering an incentive to employees to volunteer for redundancy in order to reduce the need for compulsory redundancies. Doing so carries the risk, however, that the wrong people might volunteer. To protect the business it is therefore important for the employer to retain a discretion as to whether or not to accept an application for voluntary redundancy. Nevertheless the creation of a voluntary redundancy scheme may create contractual rights that take the employer by surprise. In Lynham & Rooney v Birmingham City Council the Council undertook a major restructuring programme and announced that there would be an opportunity for 'eligible' employees to apply for voluntary redundancy on favourable terms.

Two employees – Mrs Lynham and Mr Rooney – sought to apply for voluntary redundancy but were told that they were not eligible to apply. The employer's view was that the section in which they were employed was to be closed down completely and so it was inevitable that they would be selected for compulsory redundancy. On that basis, the employer said there was no point in giving them an opportunity to volunteer first.

They claimed that the refusal to allow them to claim voluntary redundancy meant that their dismissals were unfair – and also in breach of contract. The tribunal rejected both claims and the employees appealed purely on the contractual issue. They argued that the employer had clearly announced that employees affected by the restructuring exercise would be entitled to apply for voluntary redundancy. The Council sought to distinguish between employees who were 'affected' by the restructuring and those who were 'eligible' for voluntary redundancy. It was the latter group that were directly contacted by the employer to give them details of how they could apply and the Council argued that since there was no obligation to offer any sort of voluntary redundancy scheme, it was a up to them to decide who should be eligible for the scheme that they introduced.

The EAT disagreed. In communicating the availability of the scheme the Council had used the terms 'affected' and 'eligible' interchangeably. The impression given was that anyone who was affected by the restructuring would be entitled to apply for voluntary redundancy. This amounted to a contractual statement and so the Council was in breach of contract when it refused to allow the two employees to volunteer.

That did not mean, of course, that the employees had the right to have their applications for voluntary redundancy accepted. But the EAT suggested that the employer would not be able to show a valid basis for refusing based merely on the fact that the employees would inevitably have been selected for compulsory redundancy. Accepting the employees as volunteers in such circumstances would still have achieved the aim of reducing the number of compulsory redundancies. It was ultimately for the tribunal to decide whether the employer could reasonably have refused their applications and judge what loss – if any – they had suffered as a result of the employer's refusal to allow them to apply.

Trade Union Discrimination

It is unlawful to dismiss an employee for being a member of a trade union. Less well known is that it is also unlawful to refuse to employ someone on the grounds of their union membership. In Jet2.Com Ltd v Denby, Mr Denby had previously worked for the airline Jet2.Com as a pilot. He had been a prominent member of the Pilot's union – BALPA – and had sought to persuade the airline's executive chairman to recognise the union. He had met with an extremely hostile response - with the chairman referring to Mr Denby in terms too obscene to repeat here and which even the Tribunal felt obliged to reduce to a series of ***s.

Mr Denby subsequently left Jet2.Com to work elsewhere, but some years later applied to return. He made two separate applications but each was rejected. The Tribunal found that his recruitment had been blocked by the executive chairman on the basis that he had played an active role in seeking union recognition for BALPA. They therefore upheld his claim that he had been refused employment because of his membership of a trade union.

The employer appealed on the basis that the law only prohibited an employer from refusing to recruit someone because of their trade union membership. It was not Mr Denby's membership of BALPA that the tribunal had found to be the reason for the refusal to recruit him, but the history he had of actively campaigning for union recognition. The EAT rejected this argument. It was well established that a wide view had to be taken of what was meant by union membership so as to include not merely membership but also the participation in union activities. Mr Denby's previous activities on behalf of the union were inextricably wound up with his status as a union member and it followed that the reason for Jet2.Com's refusal to employ him did indeed relate to his union membership. The appeal was dismissed.

Race Discrimination – burden of proof

There are few issues more complicated than the burden of proof in discrimination cases. The Equality Act specifies that where there are facts from which – in the absence of an explanation from the employer - discrimination could be inferred, then the burden is placed on the employer to prove that there has been no discrimination.

What this means in practice is that where there is an accusation of discrimination, the employer must stand ready to provide evidence as to the reason for its conduct, rather than simply rely on the employee not having enough evidence to demonstrate that discrimination has taken place.

In Olatanwo v QualityCourse Ltd Mr Olatanwo was a Nigerian national with a permanent right to reside and work in the UK. He applied for a role with QualityCourse Ltd and was accepted, subject to the usual requirement that he demonstrate that he was entitled to work in the UK. He provided this in a range of documents, but his manager was concerned that his permanent residence card was stamped into his old, out of date, passport. This did not in fact affect its validity, but the employer nevertheless sought to check his ability to work in the UK via the Home Office online checking service. Unfortunately the online form was filled in incorrectly with the manager omitting to mention crucial documents that Mr Olatanwo had in fact provided. As a result, the Home Office stated that it was unable to confirm Mr Olatanwo's right to work in the UK and he was dismissed.

By the time the employer came to accept that he was in fact entitled to work in the UK – and that he had presented all of the documentation needed to establish that fact – Mr Olatanwo had found work elsewhere and no longer had faith in his former employer. He alleged that his treatment amounted to race discrimination because it was based on prejudiced assumptions based on his Nigerian nationality. Giving evidence for the employer, his manager said that he had only acted on the explicit instructions of members of the employer's internal compliance team, who were not called to give evidence.

The tribunal accepted that the burden of proof lay on the employer to prove that there was no discrimination and went on to find that the employer had discharged that burden. The Tribunal accepted that the employer had merely fallen into error because it was confused about the documentation that was required and had failed to appreciate that Mr Olatanwo had provided everything that was needed.

The EAT allowed an appeal against this finding. The error that the tribunal had made was to treat the role of the compliance team as being merely advisory, with the line manager being the decision maker. It was clear from his evidence, however, that he was acting on the instructions of his colleagues. This meant that their mental processes were relevant to the question of whether

there had been discrimination – not just in the decision to dismiss but also in the way in which the document checks had been handled. For example, the compliance team had refused to accept Mr Olatanwo's assurances that his residence card remained valid despite it being stamped on his old passport. Could this refusal have been based on stereotypical assumptions? The case was sent back to the tribunal to consider the matter afresh.

…and more on proving discrimination

The issue of the burden of proof was also to the fore in Kumar v DHL Services Ltd. Mr Kumar applied for a managerial post with the employer but was unsuccessful. He suspected that he had been subjected to discrimination when he was given feedback on his interview which suggested that he was not as assertive as the role demanded and that his previous experience meant that the new role would be a 'step down' for him. He felt that this was not a fair reflection of what had happened at the interview and that it indicated some other motivation behind the decision not to recruit him.

On hearing the case the tribunal decided – with the agreement of the parties – to act on the assumption that the burden of proof fell on the employer and move straight to the question of the 'reason why' Mr Kumar's application was unsuccessful. The Tribunal made a number of criticisms of the recruitment process but accepted the evidence of the manager as to why she had felt that Mr Kumar was not suitable for the position and dismissed his claim.

On appeal Mr Kumar argued that more weight should have been given to evidence showing a lack of diversity in the employer's management structure and a lack of equal opportunities training for those taking part in recruitment exercises. There had also been no clear selection criteria set out for the job in question and the notes kept in relation to the interviews had been inadequate. The EAT accepted that these were all relevant circumstances for the tribunal to consider, but they did nothing more than point to the possibility of discrimination taking place. The tribunal had accepted that possibility by considering the case on the basis that it was for the employer to prove that there was no discrimination. What mattered was the actual reason for the rejection of his application and the tribunal had carefully tested and then accepted the evidence of the manager as to why Mr Kumar had not been offered the role. By accepting that evidence, the tribunal had found that race did not form part of the employer's reasoning and there was no wider obligation to show that the recruitment process was a fair or reasonable one. The appeal was dismissed.

Indirect sex discrimination

The UK is still a member of the EU and so decisions of the European Court of Justice continue to be binding on UK courts when interpreting areas covered by EU law - such as discrimination. The Greek case of Esoterikon v Kalliri is hardly ground-breaking, in fact, it almost has a nostalgic feel. The case concerns the recruitment of candidates for places in police training schools, which required that all candidates had to be at least 1.7m tall (just over 5'6''). A discrimination case was brought by Ms Kalliri who was just two centimetres short of the required height. The Greek court found that a much larger proportion of women than men would be unable to meet the height requirement, but it nevertheless decided to refer the question to the European Court of Justice.

The CJEU held that women were clearly placed at a particular disadvantage by the requirement. The key issue was whether the employer could show that the requirement was justified. That was a matter for the national court to decide, but the CJEU was able to provide some guidance on the issue. The Greek Government claimed that it was appropriate and necessary for police officers to have a certain physical stature in order to perform effectively. The CJEU, however, said that even if the duties of a police officer required a certain 'physical aptitude', it was not clear that such an aptitude was necessarily connected with height. In other words, just because someone was shorter, that did not mean that they lacked the physical presence needed to be an effective police officer. The aim of ensuring the selection of suitable candidates could better be achieved through specific tests of each candidate's physical ability. It followed that the defence of justification would be unlikely to succeed and the height requirement would amount to unlawful discrimination.

And Finally…

It is of course untrue that hard work never hurt anyone – but in Spain it seems, hard work can also get you sacked. It has been reported that a manager was dismissed by a Spanish branch of Lidl for consistently arriving at work several hours early to prepare the store for opening. This contravened the company's policy that employees should not work any unpaid overtime. It seems, however, that he had been coming in early for something like 12 years before his dismissal, which suggests that the policy was one that the company did not enforce too rigorously - and his legal challenge is on-going. Of course, no one wants their employees to work so hard that their health is at risk, but it is difficult to imagine many British employers taking such a strong objection to an employee volunteering to work additional hours for free.

Paul Housego

Julian Parry