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EMPLOYMENT JULY 2024

Newsletter

Welcome to our latest employment law newsletter

In this edition we take the opportunity to remind you of the imminent legal changes coming in October regarding sexual harassment in the workplace.

We also look at the cases of Valimulla v Al-Khair Foundation relating to redundancy pools, as well as Hilton Food Solutions Ltd v Wright relating to parental leave.

Finally, we simply cannot ignore the hot topic of the moment, the General Election on 4 July! We look briefly at the potential employment law implications that could follow depending on who is voted in as the next Government.

Never a dull moment in employment law!

What's Inside?

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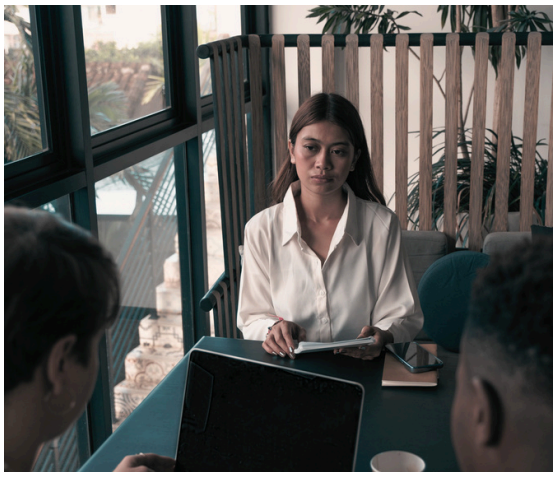
Are you ready for October and the new positive duty to prevent sexual harassment in the workplace?

Sexual harassment (as defined by the Equality Act 2010) happens where someone engages in conduct of a sexual nature which has the purpose or effect of violating another's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. It does not matter if the person engaging in the conduct is of the same or different sex.

It is already important for employers to take active steps to prevent sexual harassment in the workplace given not only the risk of costly employment tribunal claims but also reputational damage. However, from the 26 October 2024 there will be a new positive duty on employers to take reasonable steps to prevent sexual harassment. This is courtesy of the Worker Protection (amendment of Equality Act 2010) Act 2023.

For employers not complying with this new obligation employment tribunals will have the power to uplift any compensation awarded by a further 25%. For those that do comply you may even be lucky enough to give yourself a complete defence. Either way this new duty should not be ignored!

At the time of preparing this newsletter we are still waiting for the Equality and Human Rights Commission (EHRC) to update its current technical guidance to reflect this new duty and which, when they do, should be implemented as far as possible by employers.



It will also be important to look out for potential further developments after the general election. For example, if Labour come into power, they could yet look to further increase an employer's obligations here to taking "all reasonable steps".

In the meantime, employers not already doing so should be taking active steps to prevent sexual harassment in the workplace. For example:

- Have you carried out a risk assessment lately identifying potential areas of risk within the business?
- Do you have an appropriate and effective anti-harassment policy in place? When was the last time it was reviewed to ensure it remains fit for purpose? Do staff even know where to find it or how to report sexual harassment concerns and are they encouraged to do so?
- When was the last time you backed up your policies with training? Do staff know what is and is not appropriate conduct both in and outside the workplace, including drinks after work or other social events?
- Do you have a process in place to ensure all complaints are appropriately investigated? Do you have anyone trained to carry out what could be highly sensitive investigations? What about support for the alleged victim, whilst also not overlooking the mental health impact on the alleged harasser?

These are all questions you should be asking NOW, putting effective practices in place. If gaps are identified, get in touch.

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Redundancy – the importance of consulting about pools

For any business unfortunately having to make redundancies, the importance of meaningful consultation should never be overlooked. Even if collective consultation does not apply, the fairness of any redundancy dismissal will be determined by the consultation process adopted and whether it truly provided an opportunity for the employee(s) affected to provide feedback, comment or make other observations which could have potentially helped shape the final outcome.

This consultation also includes discussions on "pool" selection as the recent case of **Mr Z Valimulla v Al-Khair Foundation** confirms.

The Facts

Mr Valimulla worked as a Majid Liaison Office (MLO) for the Al-Khair Foundation, a faith-based charity, in the Northwest of England. His role involved fundraising in the community, with the charity having four other MLO's across the country.

As a result of the covid pandemic the need to make nationwide redundancies arose. At this point Mr Valimulla was placed at risk and into a pool of one. Three consultation meetings then took place before his redundancy was confirmed. However, there was no consultation with Mr Valimulla as to why he had been placed into a pool of one.

Mr Valimulla challenged his dismissal pursuing a complaint of unfair dismissal. Included within his complaint were assertions that his dismissal was unfair because he had not been consulted about being placed into a pool of one and that the charity's decision to do so was not reasonable.

The EAT's decision

Mr Valimulla's complaint was initially dismissed by the employment tribunal but this was overturned on appeal.

Whether or not a dismissal is fair will generally depend on whether or not the employer's decision was within the range of conduct which a reasonable employer could have adopted (Williams v Compair Maxam Limited [1982] IRLR 83). The EAT acknowledged that this test equally applies to the pool selection process. The EAT also emphasised that consultation is a key ingredient for a fair redundancy process. It also must be meaningful, so must take place at a point in time when it can potentially make a difference. The EAT felt that unfortunately in this instance the employment tribunal had not properly considered the question as to whether the approach adopted by the charity here, namely to place Mr Valimulla in a pool of one and not include the other MLO's, was within the band of reasonable approaches a reasonable employer could have adopted; a question the employment tribunal will now need to revisit. It also held that the lack of any meaningful consultation regarding why Mr Valimulla was placed into a pool of one rendered his dismissal procedurally unfair.

Takeaway for employers

There is no legal requirement that a pool should be limited to employees doing the same or similar work. It is also acknowledged that employers are best placed to determine who needs to be added to the pool of at-risk employees.

However, if you want to have the greatest chance of successfully defending a claim of unfair dismissal you need to:

(a) Consult with the individuals in the pool regarding the choice of pool, even if this is intended to be a pool of one. Consider any challenges / suggestions raised and respond to them; and

(b) Document your decision-making process at every stage of the consultation process. Make sure you can show you "genuinely applied" your mind to the question "which employees should be placed in the pool?" and why you reached the decision you did, being prepared to back it up as necessary.

This, of course, does not mean the decision reached regarding pools will never be open to challenge but by following the steps above any challenge will be more difficult. Either way consulting regarding pool choice will limit the risk of any redundancy being found procedurally unfair.

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Parental leave and the case of Wright v Hilton Food Solutions Ltd

Employees with at least one years' continuous service and responsibility for a child are legally entitled to take up to 18 weeks' unpaid parental leave for each child. The purpose of the leave is to care for that child. The leave must be taken before the child's 18th birthday, and no more than four weeks' leave can usually be taken in respect of any individual child in a particular year.

The leave, when taken, should be taken in week blocks or whole number of weeks. Employees wishing to exercise this right need to give advance notice, namely at least 21 days' notice setting out the dates when the leave will start and finish. Employers can, of course, implement a more favourable parental leave policy if they wish.

It is unlawful for employers to dismiss, or otherwise subject an employee to a detriment, because they take or have "sought" to take parental leave. Employers cannot prevent or attempt to prevent eligible employees taking such leave, with there also being limitations on when an employer can insist on an employee postponing leave. What counts as an employee having "sought" to take parental leave was an issue arising in the recent case of **Hilton Foods Solutions Ltd v Andrew Wright.**

Mr Wright's claim

Mr Wright had two children, one of who was disabled. At the time of his dismissal, he had not given the required 21 days' notice to formally exercise his right to take parental leave. However, there had been informal discussions with his line manager and HR on this subject and it was his intention to take such leave. HR, for example, had confirmed the notice requirements Mr Wright would need to follow, and what he was eligible to take by way of parental leave.

Mr Wright also discussed his intention to take leave with Hilton Foods managing director asserting that the managing director's response had been negative, something denied by Hilton Foods. Shortly thereafter Mr Wright was made redundant.

Following his dismissal Mr Wright instigated tribunal proceedings for automatic unfair dismissal alleging that the real reason he was dismissed was not redundancy but because he had "sought" to take parental leave.

Hilton Food's challenge

Hilton Foods applied to strike out the claim on the basis it had no reasonable prospects of success. In a nutshell they argued that because Mr Wright had not yet given the required notice to take parental leave, by law he could not say he had "sought" to take parental leave.

The outcome

The tribunal refused to strike out Mr Wright's claim. Hilton Foods appealed, but their appeal was also dismissed. It will now be for the tribunal to determine the reason, or principle reason, for Mr Wright's dismissal and whether Mr Wright's claim should succeed.

Whether an employee has "sought" to take parental leave will be a question of fact in each case. However, the need to have complied with the applicable notice requirements is not a legal prerequisite before the protections from dismissal or suffering a detriment (and associated right to bring tribunal proceedings) kick in.

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The General Election

As we said this newsletter would not be complete without a brief look at the current hot topic, the general election. At the time of publication the polls have Labour Party in the lead. So, what potential changes could employers potentially see if Labour do come into power?

In their Manifesto and Plan to Make Work Pay they propose as just some examples:

- Banning what they called “exploitative” zero-hour contracts, ensuring “everyone has the right” to a contract that “reflects the number of hours they regularly work” and reasonable notice of any shift changes, with compensation for any cancelled or curtailed shifts;
- Further reform to the law when it comes to “fire and rehire” practices, namely a commitment to end the practice altogether (save in very restricted circumstances). Our current Government has presently put in place a new Code of Practice in this area coming into force next month;
- Making unfair dismissal a day one right, requiring the need for a fair reason to dismiss in all cases. There is express mention of employers still having the ability to use probationary periods with “fair and transparent rules and processes”;
- Consult on the potential simplification of the current framework when it comes to employment status and determining workers from the genuinely self-employed. This is an area that has created a lot of case law in recent years especially with the rise of the gig economy;
- Strengthen redundancy rights by increasing the circumstances in which employers with more than one workplace would need to carry out collective consultation;
- Further enhance existing family-friendly rights including as examples only (a) further potential changes to flexible working (not clear what these would be at present) (b) making parental leave a day one right (c) introducing further restrictions protecting expectant and new mothers from discriminatory dismissals (d) introducing a right to bereavement leave for all workers and (e) introducing a “right to switch off” similar to what some other European countries have introduced.

Whilst there is mention by Labour of introducing legislation within 100 days of entering government, they do at the same time appear to recognise the need to fully consult with both businesses and workers in relation to a number of their plans. Most of the above promises, if put into action, are therefore unlikely to result in any immediate change.

The easiest changes to implement, in reality, would be changing the qualifying length of service to bring unfair dismissal claims (which has varied in the past). There is also talk of extending the time limits for bringing employment tribunal claims from the current limit of three months to six months.

Of course, any new government seeking to make such changes will also need to be alive to the impact this will have on our employment tribunal system and existing workloads; a system already struggling in many regions.

Finally, unless the Conservatives remain in power it should be noted that some Conservative or Conservative backed legislative changes still require further steps to physically bring them into force. Accordingly, as and when they come into force will now be down to our new government (whoever that may be). These changes include:

- The new statutory right to request a predictable working pattern (see our December newsletter for details);

- The Paternity Leave (Bereavement) Act 2024 (which received Royal Assent on 24 May 2024) which will make it easier for fathers and partners to take paternity leave where the mother dies in the first year after birth or adoption, as well as the potential to introduce additional regulations covering situations where the child also dies as well as providing potential enhanced redundancy protections; and

- Parts of the Employment (Allocation of Tips) Act 2023 and associated Code of Practice designed to ensure the fair allocation of tips in the hospitality sector.

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HOW CAN WE HELP?

We can help you with any employment law needs, but we thought it would be useful to summarise how we can help you if you come across any issues or needs relating to the content of this newsletter so please do get in touch with us if that's the case (contact details below):

- We can help introduce and/or update any internal policies and practices to ensure you are ready for the legal changes on sexual harassment coming in October;

- We can help ensure that if you do need to make redundancies it is handled the right way so you do not inadvertently open yourself up to potentially costly unfair dismissal claims; and

- We can provide appropriate legal support and guidance should you receive any complaints (internal grievances or tribunal claims) from disgruntled employees alleging unfavourable treatment because of their intention to take or actual taking family friendly leave.

You should seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.

Contact Us

Louise Nunn
Partner/ Head of Employment Law
01844 268 316
lnunn@lightfoots.co.uk

Charlotte Coles
Solicitor
01844 268 341
ccoles@lightfoots.co.uk