Lightfoots SOLICITORS

OCTOBER, 2024

EMPLOYMENT NEWSLETTER

Welcome to the latest edition of our employment law newsletter.

We have already seen plenty of employment law changes in 2024 and October promises to be no different. We start this newsletter by focusing on two legal changes coming into effect this month, as well as the one change that was expected but has been parked for now. We cannot stress to employers enough the importance of being ready for the new positive duty to prevent sexual harassment coming into effect later this month!

Sticking with the sexual harassment theme we also take a look at the case of Bratt v JGQC Solicitors Ltd and what is commonly referred to as "banter".

We finish this newsletter by highlighting the importance of having an effective social media policy in place, and what it should include.

OCTOBER LEGAL CHANGES – ARE YOU READY?

New positive duty to prevent sexual harassment

This legal change has been a focus of previous newsletters, remains very much a "hot topic" and one every employer needs to be alive to.

To recap from the 26 October 2024 there will be a new positive duty on employers to take reasonable steps to prevent sexual harassment. This is both an anticipatory and preventative duty, meaning you should be taking steps NOW to prevent sexual harassment rather than simply implementing change in response to a complaint.

Any employer failing to comply risks being on the receiving end of a 25% uplift on any employment tribunal awards made against them. In addition, the EHRC (Equality and Human Rights Commission) also has power to take enforcement action against non-compliant employers. This is an independent power that the EHRC will be able to exercise at any time.

There is no one size fits all solution here and what reasonable steps you will need to take will depend not only on the industry you operate within but also the size of your business and the resources available to you.

Whilst steps such as introducing / updating your existing harassment policy and backing this up with regular training will be important, your obligations will not end there. It will be important to consider where the areas of risk are in your business, documenting this thought process, as well as identifying what pro-active steps can be taken to address them based on your size and resources. Where a step is identified but not taken, likewise document why.

In addition, it will be important to ensure everyone is clear on how concerns can and should be reported, as well as ensuring you are ready, if the need arises, to respond quickly and sensitively to any allegations made. Having an action plan in place here and communicating it to relevant managers will also be important.

These measures will need to include protections to your workforce from third party harassment, a matter of some emphasis in the EHRC's draft updated technical guidance. Making third parties attending your premises and / or using your services aware of your zero-tolerance policy will also be important and you will need to consider how this will be communicated.

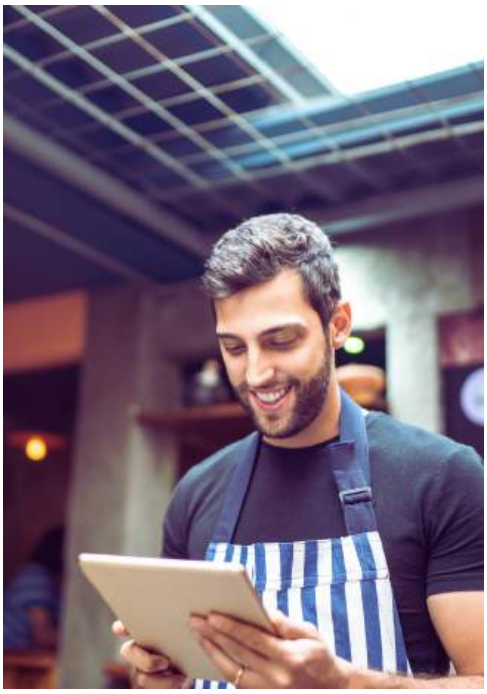
One obvious area of risk, but by no means the only risk, is that of social events and, dare we say it, with Christmas parties around the corner this new duty cannot be ignored. That is unless you are prepared to bear the risk of having to pay more in either tribunal awards or settlements going forward, and bearing in mind there is no financial cap on what can be awarded for loss of earnings in discrimination claims!

We can work with your business to help identify the measures you should be putting into place now, including updated policies and support with training.

Lightfoots SOLICITORS

OCTOBER, 2024

FAIR ALLOCATION OF TIPS AND SERVICE CHARGE



In May last year the Employment (Allocation of Tips) Act 2023 (The Tipping Act) received Royal Assent, its aim to ensure the fair and transparent allocation of tips and service charges within the workforce. Its substantive provisions and the accompanying statutory Code of Practice will come into force on the 1 October 2024.

These new provisions will be relevant to any business where tips, gratuities and/or service charge is received either by the business itself from customers or where the business influences the allocation or distribution of tips given directly to members of the workforce e.g. staff are encouraged or required to place all tips received in a tip jar.

The method / form of the tip or gratuity is irrelevant and need not be a cash or card payment. For example, it could include the giving of a casino chip to a casino worker as a gratuity (an example given in the Code of Practice).

As the Code of Practice states “The desired outcome of the Tipping Act is to improve fairness for workers by ensuring that the tips consumers leave in recognition of good service and hard work are going to the workers as intended. The Act aims to increase fairness in tipping practices and create a level playing field for employers who already allocate all tips to workers by ensuring that all employers follow the same rules.”

So, for employers operating in industries where tips or gratuities may be paid or service charge applied you will now need to ensure:

- All tips are passed on IN FULL (less any applicable tax) to your workforce. This must happen within a month following the month of receipt. The Code of Practice gives the example that a tip left on 23 June must be distributed to the workforce by 31 July at the latest;

- The allocation of tips amongst your workforce must be done in a fair and transparent way. Unless gratuities are the exception, you will need to immediately implement (if not already) and communicate a clear tipping policy identifying how tips are accepted, how they will be allocated and how they will be paid over to your workforce;

- You are required to keep a record of all tips paid and how they are allocated. These records will need to be kept for a three-year period following the date of the tip. Your workforce will have the right to access these records, if requested. This right will be limited to periods of their own individual employment and to details of the total sums received in tips and amount allocated to them during the period in question. Only one request can be made in any three-month period; and

- You have familiarised yourself with the Code of Practice and adhere to it.

When determining how tips should be fairly allocated amongst your workforce this does not automatically require an equal split, although you should give due consideration to ALL workers involved in providing the service. Whatever factors you consider they should be clear, objective, fair and reasonable.

You can consider things like the nature of your business, the different roles each team member play, the hours worked during periods when tips are usually received, seniority and customer intention. However, care must be taken to avoid applying factors that could openly or inadvertently discriminate against members of your workforce. Agency, casual as well as permanent staff should all be included.

You could also consider consulting and agreeing with your staff a structure for the fair allocation of tips and service charge payments received.

For any employee who believes their employer is not complying with these new legal duties they will have the ability to present a claim to the employment tribunal, which will have the power to make public declarations of noncompliance, non-binding recommendations, or order the revision of previous tip allocations or even payment of compensation.

Also of note:

Finally and for completeness in our December 2023 newsletter we highlighted the planned introduction of the right to predictable working, a right originally due to come into force in September 2024. Following the general election our new government has confirmed this will no longer happen.

However, with their "Make Work Pay" plans including a proposed ban on exploitative zero-hour contracts it is likely that similar rights will be introduced as part of the raft of legal changes promised in the very near future (the draft bill should be presented to Parliament sometime this month).

As the saying goes, watch this space!

Lightfoots SOLICITORS

OCTOBER, 2024

IT'S NOT SEXUAL HARASSMENT, ITS JUST WORKPLACE BANTER, OR IS IT?

Sticking with the hot topic of the moment and the question of when workplace banter can amount to sexual harassment is the case of Bratt v JGQC Solicitors Ltd.

A reminder of what counts as sexual harassment

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 is important for employers and their workforce (the alleged harasser can be named as co-respondents in tribunal proceedings) to appreciate that:

- It is the effect of the conduct that is important, not the intention behind it. So harassment can take place even if this was not the alleged harasser's intention. There also does not need to be any sexual motivation on the part of the alleged harasser;
- Unwanted conduct can include a wide range of behaviours not just physical conduct, so can include words, gestures, facial expressions, jokes and gossip; and
- The conduct does not need to be directly aimed at the person making the complaint to count as harassment.

The facts of Bratt v JGQC Solicitors

The Claimant, Miss Bratt, was employed as a legal secretary for just shy of seven weeks in early 2022 before she resigned, bringing a claim of sexual harassment. Miss Bratt complained about several acts by the firm's owner including but not limited to telling Miss Bratt that she looked nice before commenting "am I allowed to say that", talking in some detail about the fact his ex-wife cheated on him, as well as showing Miss Bratt what she considered an inappropriate video of the owner's girlfriend. There was also the use of sexual expletives in frustration when talking to Miss Bratt over the telephone.

The tribunal found that whilst the owner and others working for JGQC sought to brush this off as nothing more than "innocent office banter" which they were trying to include Miss Bratt in, the acts complained off met the statutory test for sexual harassment.

For Miss Bratt it was unwanted conduct of a sexual nature, with it being found that it was reasonable on the facts for her to feel that way, a relevant factor.

The Tribunal also found that the way the firm responded to Miss Bratt's grievance of sexual harassment was also revealing of the workplace culture; an important factor to consider when faced with arguments that Miss Bratt did not express being uncomfortable at the time and may have even laughed things off. Miss Bratt's junior position in the firm and the identity of the harasser, was also relevant.

Key takeaway for employers

Whilst this is not the first tribunal claim to make the position clear, saying it was only “office banter” is not going to give you a defence to harassment claims. Just because an employee does not complain, or even partakes in the banter as a coping mechanism does not mean it does not make them feel uncomfortable or that it cannot be classed as “unwanted”.

This applies regardless of whether we are talking about new employees coming into an existing workplace culture or long-standing employees. Even for long-standing employees who have willingly joined in with office banter previously, their position could change and become unwanted conduct if that banter goes too far.

As always, the outcome of any employment tribunal claim will be fact specific and the best way you can protect your business is to ensure your workforce is clearly aware of the types of behaviour that is not acceptable at work and why. The best way of doing this are ensuring you have a clear and effective anti-harassment policy in place, backed up with regular training and effective monitoring. Also take any complaints you receive seriously!

IS YOUR SOCIAL MEDIA POLICY UP TO SCRATCH?

Use of social media has surged in recent years but when the line between your employee's professional and personal lives becomes blurred this can cause issues.

Inappropriate use of social media by your staff has potentially serious legal and reputational ramifications to your business, whether this be making derogatory comments about your business, posting offensive content that could be linked back to you, harassing customers or colleagues, or divulging company sensitive information the risks are there.

It is therefore crucial for employers to have a robust social media policy in place to set out the behaviour expected of employees online.

In particular, we recommend including the following in any social media policy as applicable:

- Expected best practice / guidelines for staff posting on business social media as part of their role;
- If employees link their personal social media profiles to your business, request that their profile or posting states somewhere that their views are their own and do not represent those of the business;
- Set clear guidelines about whether accessing personal social media accounts is allowed / not allowed during working hours;

- If employees want to earn additional income via social media ("side hustles") consider what, if any, limitations you want and can place on this. Will they need the company's permission first and be required to provide full details if requested? In this instance we also strongly recommend including mirroring wording in employment contracts;

- Whether the business is content for employees to add clients / business contacts on personal or professional social media accounts and whether such details need to be deleted when an individual's employment ends;

- Information about what monitoring the business may undertake, who may undertake this, and how the results of such may be used, making sure any monitoring is kept within legal limits; and

- Include reference to any supporting business policies such as your Data Protection Policy, Anti-Bullying / Harassment Policy or Confidentiality Policy.

As with any policy it is important to draw such to the attention of all employees, review the policy regularly (ideally at least annually) and ensure it is enforced consistently. If you would like us to review an existing social media policy, or prepare a fresh policy for you then please do not hesitate to get in touch.

It will also be important to promptly respond to any complaints of harassment or discrimination alleged to have taken place via social media, as you would any other complaint.

Finally, remember that whilst by its nature social media is publicly available Data Protection laws still apply and so before you go looking at your employee's / prospective employee's profiles make sure you have an appropriate lawful basis to do so.

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 you be ready for the 26th October and your new positive duty to prevent sexual harassment by providing updated policies, a risk assessment template and even internal training, protecting you from future claims as far as possible; and
- If your business will be caught by the new Code of Practice on tipping and you are yet to put compliant policies in place we can assist with this; and
- We can provide you with an effective social media policy that meets your business' specific needs; and
- We can help you prepare for future employment law changes, of which plenty are expected!

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.

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

Charlotte Coles
Solicitor
01844 212 305
ccoles@lightfoots.co.uk