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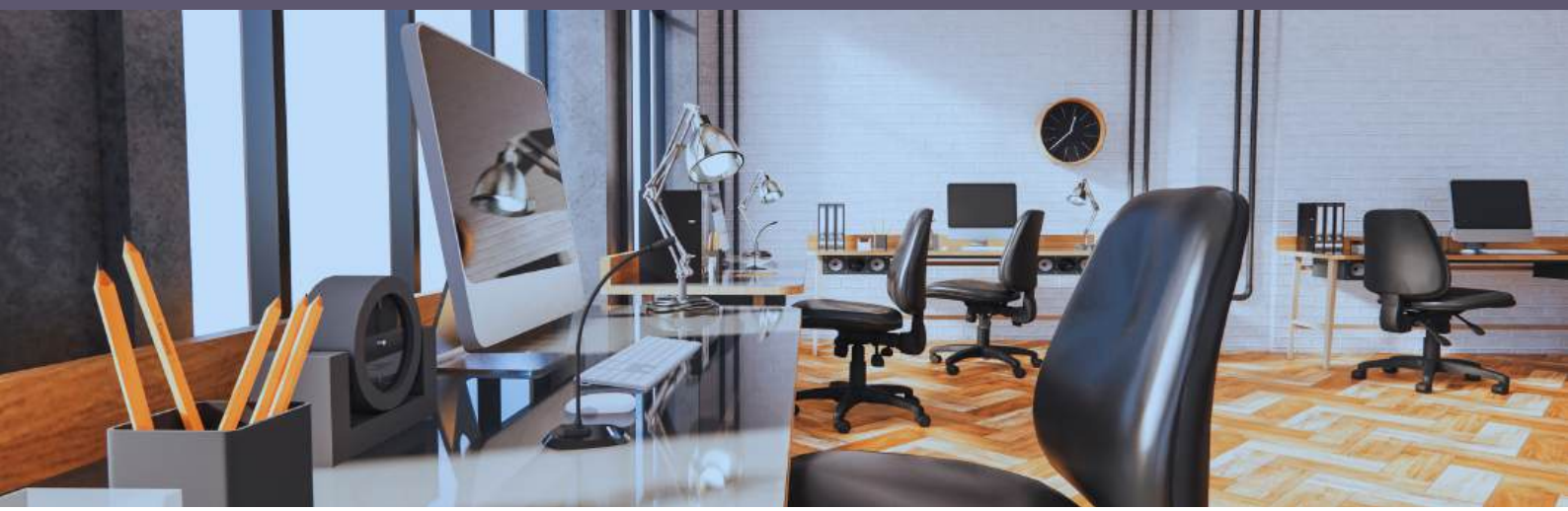
JANUARY, 2025

EMPLOYMENT NEWSLETTER



Welcome to our first employment law newsletter for 2025.

Throughout 2025 our attention will naturally be focused on the planned legal changes under the Employment Rights Bill, with this edition looking at changes planned to sexual harassment and third-party harassment. We also provide a recap on October 2024's changes in this area, just in case you missed them! Sticking to the theme of harassment we look at the recent appeal decision in Carozzi v University of Hertfordshire.

We also look at a recent case brought by a Mr Thomas against Surrey and Boarders Partnership NHS Foundation Trust, who alleged he was dismissed due to his belief in English Nationalism.

Finally, we share some helpful tips when it comes to gender identity in the workplace.

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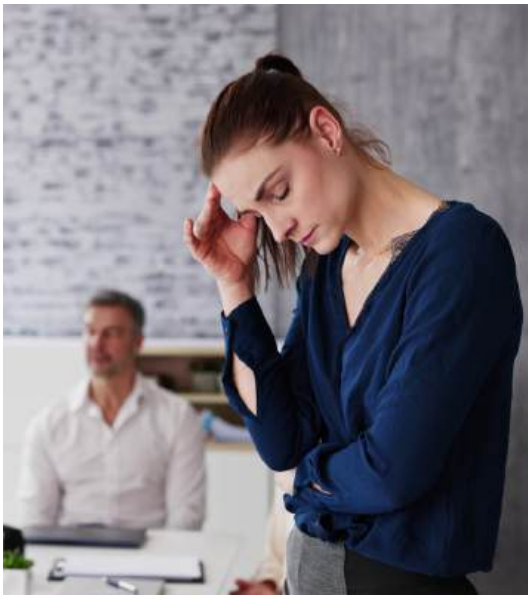
THE EMPLOYMENT RIGHTS BILL AND HARASSMENT – WHAT CHANGES ARE ON THE HORIZON?

All businesses should already be aware of the new positive duty to take reasonable steps to prevent sexual harassment. This came into force on 26 October 2024, and is covered in our October 2024 newsletter.



If you are yet to take any steps to comply, or even carry out risk assessments and associated review of existing measures in place to ensure their fitness for purpose, this is a duty you simply cannot ignore! A failure to meet your legal obligations carries the risk of a 25% uplift on any compensation awarded in the event of a successful employment tribunal claim.

Whilst this positive duty has only just come into force the Employment Rights Bill published last October proposes yet further reforms in this area. If the changes proposed come into force, as they currently stand, employers in the future can expect:

- Further increasing to a duty to take ALL reasonable steps to prevent sexual harassment.This will inevitably increase the risk of the 25% uplift to compensation biting in the event of a successful discrimination claim including any sexual harassment element; and

- Workers being able to bring standalone claims if they are the victim of third-party harassment at work. This will extend to all forms of harassment under the Equality Act 2010, not just sexual harassment. Presently workers cannot bring standalone claims against their employers for third party harassment. However, as an employer, how you handle complaints of third-party harassment, especially if not handled correctly, could presently leave you open to legal liabilities and risk of other claims.

It is also proposed to make void any attempt in agreements, such as settlement agreements, to prevent workers from making disclosures relating to harassment by fellow colleagues or clients. Again, this would be all forms of harassment, not just sexual harassment.

Reporting sexual harassment will also become a specific category benefiting from whistleblowing protections, although if an individual is subjected to a detriment / dismissed for reporting sexual harassment, or supporting a colleague's complaint, there are existing legal protections in place they can avail themselves of.

Clearly recent changes to the law, along with the above proposals, highlight the need for employers to take their duty to prevent all forms of harassment in the workplace seriously. The best way of doing this is by identifying key areas of risk and promptly addressing them where possible.

It will also be important to ensure at all times that you have fit for purpose policies and processes in place, backed up by regular staff training that is tailored to your business and the industry it operates within. There will not be a one size fits all approach here.

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HOW COMMENTING ON SOMEONE'S ACCENT COULD BE HARASSMENT

The Employment Appeal Tribunal (EAT) has recently had to consider whether an employment tribunal was right to dismiss an employee's claim for harassment in the case of Carozzi v University of Hertfordshire, following comments made by Miss Carozzi's line manager regarding her accent.

What constitutes harassment?

Under Section 26 of the Equality Act 2010 (EA 2010) harassment occurs where someone engages in unwanted conduct towards another, related to a protected characteristic, and where that conduct has the purpose or effect of violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them to work in.

Whether the conduct amounts to harassment in any given case will depend on the circumstances, including the perception of and effect on the complainant. There is no requirement for the alleged harasser to intend to cause offence. It is the effect of the conduct that is important, subject to it being reasonable for the conduct to have that effect in the given circumstances.

The offending comments

As part of her claim, which also included various claims of direct discrimination, victimisation and constructive dismissal, Miss Carozzi made allegations of harassment against her line manager, Mrs Lucas. The harassment allegations were based on the protected characteristic of race.

The harassment allegations included comments made during a probation review meeting for which Mrs Lucas prepared a script in advance that included the following:

You have a very strong accent, and although your English language is very good it can be difficult for you to be understood… and

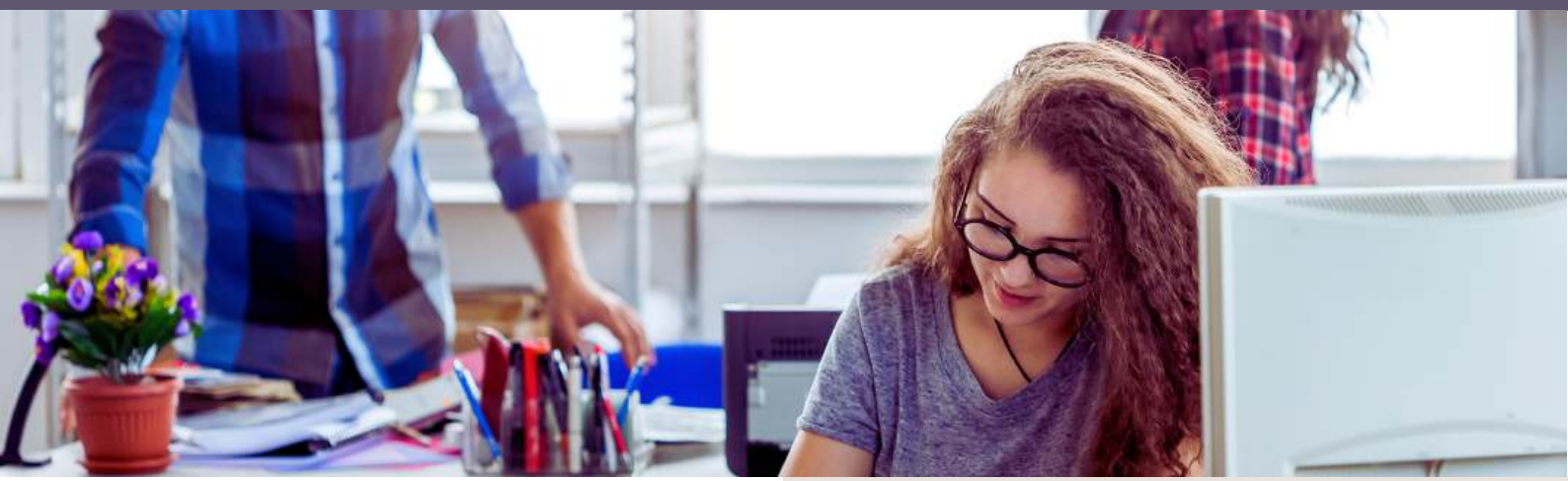
I would like to see more improvement.

And I would like to see this across:
…

5. I need you to work on your accent / logical delivery of information so that you can be easily understood.

Notes from the meeting itself also suggest Miss Carozzi's accent was indeed discussed.

This part of Miss Carozzi's claim was dismissed by the tribunal, their concluding that the references to Miss Carozzi's accent were not motivated by her race, rather her "intelligibility or comprehensibility when communicating orally".



Miss Carozzi's appeal

Miss Carozzi appealed the dismissal of her harassment claim as well as other parts of the tribunal's decision. The EAT held that the Tribunal had wrongly approached the legal test when considering harassment claims. It had wrongly focused on whether the comments were because of the protected characteristic of race (a requirement in direct discrimination claims), so motivated by Miss Carozzi's race, when they only needed to be related to Miss Carozzi's race for a harassment claim to succeed.

The EAT also commented that "An accent may be an important part of a person's national or ethnic identity. Comments about a person's accent could be related to the protected characteristic of race. Criticism of such an accent could violate dignity. Obviously, that does not mean that any mention of a person's accent will amount to harassment".

Accordingly, the tribunal having applied the wrong legal test, Miss Carozzi's appeal was successful. This means her claim will now need to be reheard by a different employment tribunal to determine whether the comments reasonably constituted harassment in this particular case.

It will be clear from the EAT's comments above that not every mention about an individual's accent will count as harassment. However, with the line manager's comments causing offence in this case, it is always important to remember it is the effect of the comments, not the intention behind them, that an employment tribunal will have to consider when deciding harassment claims.

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ENGLISH NATIONALISM AND PROTECTED BELIEFS UNDER THE EQUALITY ACT 2010?

We now turn to a recent Employment Appeal Tribunal decision, Thomas v Surrey and Borders Partnership NHS Foundation Trust 2024, which looks at whether English Nationalism is a protected belief where part of those beliefs involve anti-Islamic views.

The facts

Mr Thomas was employed as an agency worker on a fixed-term contract with Surrey and Borders Partnership NHS Foundation Trust (the Trust) for approximately 3 months in 2018. On 24th July 2018 he received notification via the agency that his employment was terminated as the Trust discovered he had failed to disclose an unspent criminal conviction for electoral fraud when applying for the job.

Mr Thomas, however, believed this to be a rouse and the real reason for his dismissal was due to the Trust discovering his political affiliation with the English Democrats and his associated belief in "English Nationalism".

He subsequently brought a claim for discrimination on the grounds of religion or belief under the EA 2010.

Before the Tribunal considered the true reason for Mr Thomas' dismissal they firstly needed to decide whether his beliefs formed "protected beliefs" under the EA 2010 and were therefore suitable for protection against discrimination. If not the discrimination claim would fail at the first hurdle, so to speak.

The Tribunal heard evidence from Mr Thomas about his beliefs, in particular that "English Nationalism", to him, includes a love for English culture, language and history, along with a sense of pride in England and the cultural unity of English people. However, it was also revealed that Mr Thomas held strong anti-Islamic beliefs. He had made and shared numerous social media posts backdating many years featuring hashtags such as "RemoveAllMuslims" and "BanTheBurka", and had made many derogatory statements about Islam such as it should be banned in its current form unless it could be "Anglicised" and "toned down" to fit in with English society.

The Judge accepted that Mr Thomas' attitude towards Muslims formed part of his belief in English Nationalism, but then had to decide whether such beliefs were protected under the EA 2010. The Judge considered the criteria applied in the case of Grainger PLC v Nicholson [2010], a leading case law authority here. Mr Thomas satisfied four out of the five necessary criteria but fell at the last hurdle; he could not satisfy the Tribunal that his belief in English Nationalism, with anti-Islamic views forming part of that, were worthy of respect in a democratic society, compatible with human dignity and did not conflict with the fundamental rights of others.

The Judge called his views "ill-informed, recklessly offensive and pure prejudice". Whilst English Nationalism is capable of being a philosophical belief, Mr Thomas' anti-Islamic views which formed part of his philosophical belief prevented it from being a protected characteristic under the EA 2010 in this instance. Mr Thomas' claim was therefore dismissed.

The appeal

Mr Thomas recently appealed the Tribunal's decision which was also dismissed by the EAT. The EAT Judge reiterated the original decision reached by the Tribunal was correct.

It was held that Mr Thomas' beliefs amounted to a "disdainful and prejudiced focus on Islam" and were "consistently cloaked" in language that did not meet the fifth Grainger criteria such as a desire to forcibly remove Muslims from the United Kingdom which, in the Judge's view, shared features with an ideology like Nazism.

The EAT Judge commented that, whilst Mr Thomas is not prevented from holding his views, he is outside the right to complain that he has been discriminated against in relation to his beliefs under the EA 2010.

Take away

In light of the above the Tribunal did not get as far as having to determine the true reason for Mr Thomas' dismissal; whether this was due to the Trust discovering his unspent conviction or due to the Trust discovering his links to the English Democrat party.

Regardless, discrimination is a complex area of law. Advice should always be sought if you believe a protected characteristic (e.g. disability, race, religion or belief) may factor into any decision-making, or if an employee could try to infer that it does.

GENDER IDENTITY IN THE WORKPLACE

Gender identity is a term used to describe how a person identifies their gender. For some people their gender identity does not match the gender they were assigned at birth, e.g. transgender, and for others they feel their gender is not defined as either male or female, e.g. nonbinary.

Gender identity in the workplace should be approached flexibly as everyone's experience is personal. A "one size fits all" approach is unlikely to be sufficient. Having a gender identity policy in place not only makes clear that staff are supported by their employer to express their gender identity, but it also promotes inclusivity of gender identities.

Gender identity policies are often put in place as a reactive measure to a situation, however we recommend putting a policy in place now so you are ready to guide and support individuals where needed. Here are some of the things you should consider as part of a gender identity policy:

- Your approach to recruiting. Individuals should be hired regardless of gender identity. To encourage this you should use gender-neutral language in job adverts or descriptions. During the interview process staff should not make assumptions about a candidate's gender and they could ask candidates how they would like to be addressed.

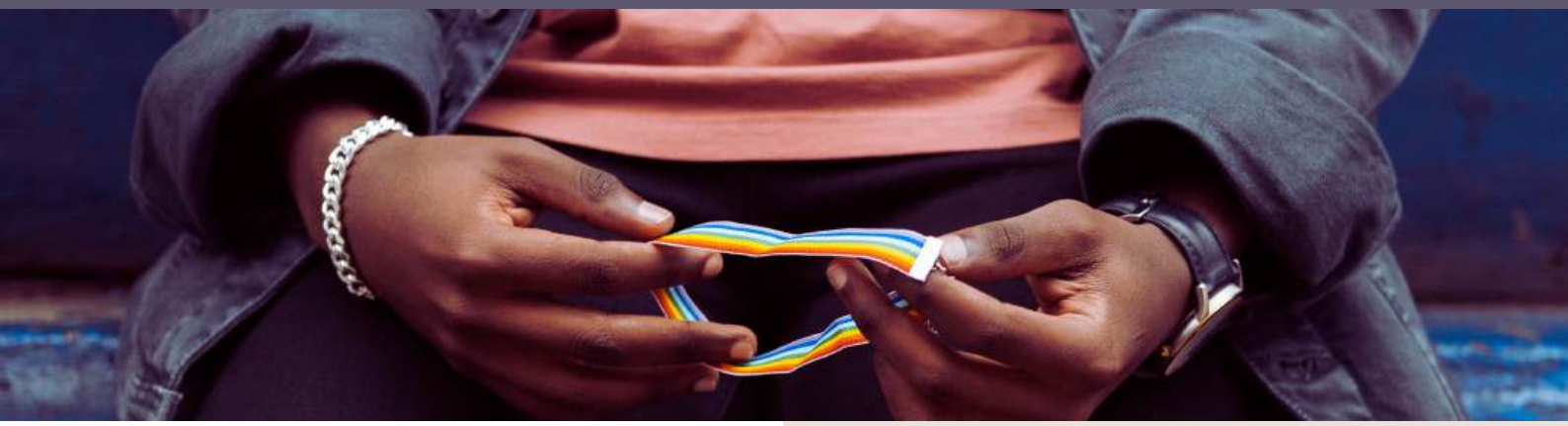
- The staff onboarding process. Privacy around gender identity is a big concern for some individuals. DBS checks can a standard part of hiring staff in certain sectors and the DBS now offer a sensitive applications route for transgender applicants where any previous identities under a different gender can be safely checked but are not disclosed to their new employer. Their DBS certificate will not contain any information relating to gender or their previous gender identity. Where it is necessary to check documents containing information about gender identity, e.g. a passport during Right to Work checks at the start of employment, this information should be handled sensitively and kept confidential. You should also ensure you have a robust data protection policy in place.

- Identifiers during employment, e.g. name tags and email footers. If staff members express a wish to be referred to by a preferred name (as opposed to their legal name) then you should respect their wishes. Similarly, if staff would like to use pronouns on their email footers or other written communications you should try to accommodate this.

- Dress codes. If you do not have a dress code then staff should be encouraged to dress however they feel best matches their gender identity. If a dress code or uniform is required then consider either giving staff a choice to wear the uniform which most closely aligns with their gender identity or making one gender-neutral uniform for all staff.

- Additional support for staff who are transitioning at work. It can be helpful to discuss arrangements for transitioning staff in advance of their transition if they feel comfortable doing so, as well as scheduling regular check-ins throughout the process to reassure staff that they are supported. Discussions could focus on the transition timeline and at what point the individual would like certain things to happen, for example if they plan on changing their name then at what point they would like to be called by their new name.

Please do get in touch if you would like assistance with preparing your own gender identity policy.



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 review existing internal policies to ensure they are fit for purpose or provide new ones tailored to your needs including as just some examples policies covering harassment in the workplace and gender identity;
- We can help you navigate the complexities of the Equality Act 2010 and our UK discrimination laws to help avoid claims arising; and
- We offer a full legal representation service if tribunal proceedings need to be issued or defended, providing straight forward pragmatic advice on your options.

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

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