UK Employment Law Round-up

November 2017 | Issue 18

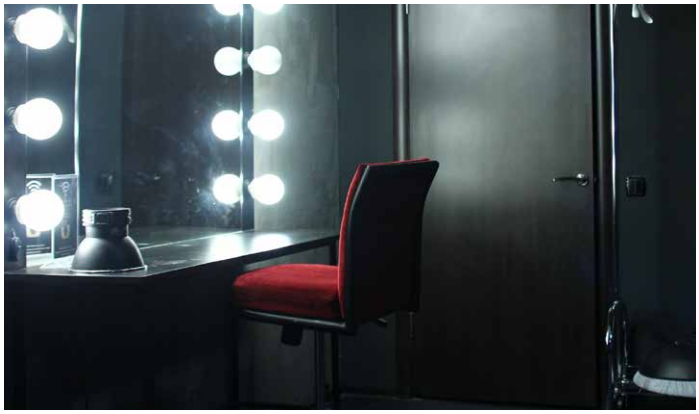
In this issue:

It has been another busy month for the growing Dentons' UK labour and global mobility team following our merger with the Scottish firm of Maclay Murray and Spens at midnight on 27 October 2017. It has been an equally busy month in terms of developments in employment law. In this issue, amongst other things, we will help you navigate the tricky issue of disciplinary warnings. We also couldn't have a round up of the employment news that didn't mention the case which has got everyone talking, the Uber case. We will also take a look at a recent case examining the reach of the protection from discrimination on the grounds of religion or belief.

#MeToo

Since the publication of the damning *New York Times* article in which allegations of sexual harassment were made against film mogul Harvey Weinstein, more than 30,000 women have joined the "#MeToo" campaign. Originally started by the actress Alyssa Milano, the campaign was joined by thousands of women from around the world, including Anna Paquin, Debra Messing, Gabrielle Union, Lady Gaga and others. Once the hashtag appeared on Twitter, it was used 850,000 times within the first 48 hours. The aim of the campaign – to raise awareness about sexual harassment both in and out of the workplace and to address power imbalances – has undoubtedly been achieved as, using the hashtag, women around the world are sharing inspiring but saddening stories on a daily basis. The campaign sends an empowering message to women who may be victims of sexual harassment at work by showing that they are not alone and have nothing to be ashamed of. It has also proved an eye-opener for the world in relation to the scale of a problem and the changes in behaviours that are still required. The campaign is also about more than simply empowering women. Men who have suffered sexual harassment are encouraged to come forward too.

Google Trends analysis shows that searches for the term "sexual harassment" multiplied almost threefold from 1 to 15 October 2017. Sexual harassment is not, however, a new issue. It is also not only relevant to those in high-profile jobs or in the entertainment sector.



In the Press

In addition to this month's news, please do look at publications we have contributed to:

- Big hospitality – Victoria Albon shares her advice on employing a flexible workforce – Three key ways to manage a flexible workforce
- People Management – Verity Buckingham reports on the health and safety considerations of agile working – Health and safety considerations of agile working
- People Management – Anjali Raval offers tips to help HR navigate the murky waters of social media – What does case law say about social media?

We would love to hear from you if you have an idea for a topic you would like us to cover in future editions of our Round-up or if you have any comments on this edition. Please provide your comments here.

The Trades Union Congress' report on sexual harassment in 2016 provided alarming statistics:

- 52% of the female respondents had been sexually harassed at work.
- 35% of the female respondents had heard inappropriate comments or jokes of a sexual nature about other women.
- 32% of the female respondents had been subject to unwelcome jokes of a sexual nature.
- 28% of the female respondents had been subject to comments of a sexual nature about their body or clothes at work.
- 20% of the female respondents had suffered unwanted sexual advances at work.
- 12% of the female respondents had experienced unwanted sexual touching or attempts to kiss them at work.

So with awareness growing, what should employers do when faced with claims or allegations of sexual harassment?

The law

Harassment is a form of discrimination. Protection from harassment extends not only to employees but, for example, to job applicants, workers, LLP members and agency workers. The duty not to discriminate also continues following the termination of employment in relation to, for instance, references. Individuals as well as the employer may be liable for acts of harassment.

A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either:

- violating B's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

In deciding whether conduct shall be regarded as having the effect referred to above, the following must be taken into account:

- the perception of B;
- the other circumstances of the case; and
- whether it is reasonable for the conduct to have that effect.

There are nine protected characteristics under the Equality Act 2010, one of which is sex or sexual orientation.

There is also a specific protection in relation to sexual harassment: A harasses B if A engages in unwanted conduct of a sexual nature, and the conduct has the purpose or effect referred to above. This is usually referred to as "sexual harassment".

A also harasses B if:

- A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex;
- the conduct has the purpose or effect referred to above; and
- because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

Practical tips

1. It is essential to undertake a full, fair and discrete investigation of any allegations, recognising the serious impact that such allegations might have on both parties. Some situations can be dealt with by the way of an apology whilst, at the opposite end of the spectrum, certain allegations, once investigated, may need to be progressed to the relevant authorities.
2. Employees may feel concerned about raising allegations of sexual harassment. They may not want to "rock the boat" and may even fear that raising such allegations could result in them losing their job. It is important to have a clear equal opportunities policy and an expressed zero-tolerance approach to discrimination of any form so that employees feel supported in raising any concerns.
3. Larger employers may also consider providing a helpline, perhaps using an external provider, so that employees can seek advice anonymously in the first instance.
4. Diversity training should be given to all employees to engender a culture of equality and respect.

Taking into account disciplinary warnings

In the recent case of *NHS 24 v. Pillar* an employer dismissed the Claimant nurse practitioner for gross misconduct after she was involved in her third Patient Safety Incident (PSI). Training had been used to address previous similar incidents and disciplinary action was not taken. The main question raised in this case was to what extent, if any, should the employer have taken into account those previous similar incidents when considering the appropriate sanction in relation to this third PSI. They weren't considered under the disciplinary procedure at the time, so could they be included?

Facts

Ms Pillar was employed by NHS 24 (NHS) as a nurse practitioner. She was involved in a PSI in August 2010 and then again in July 2012. Neither of these PSIs resulted in disciplinary action being taken against Ms Pillar. She was instead the subject of a development plan and additional training. In December 2013, she was dismissed following a third Patient Safety Incident. These previous PSIs were included in the investigation report in relation to the third PSI, for which Ms Pillar was dismissed.

The Employment Tribunal (ET) held that the NHS had been entitled to treat the third PSI as gross misconduct and the decision to dismiss was reasonable on the basis of the material before the dismissing manager. Notwithstanding this, the ET ultimately held that Ms Pillar's dismissal was unfair as the investigation should not have included details of the two previous PSIs. It would have been sufficient to set out the training that she had received as a result of those PSIs without mentioning the PSIs themselves. The two initial PSIs should not have been mentioned as they did not result in disciplinary action. The NHS appealed to the Employment Appeal Tribunal (EAT).

Decision

The EAT found that the NHS's decision to dismiss was reasonable and fair, despite the procedural defects identified by the ET. The EAT stated that the PSI in question was in itself dismissal-worthy, and the facts of the previous PSIs only served to demonstrate the Claimant's incompetence.

Formal warnings

This case is fact specific and employers will be left wondering how best to deal with previous performance

or misconduct issues and, in particular, formal warnings. It is interesting to note that Ms Pillar would have been in a stronger position had her employer relied on an expired formal warning.

The ACAS Code of Practice on Disciplinary and Grievance Procedures (the Code) suggests that first written warnings should be "live" for six months. For final warnings, this increases to 12 months. The Code does not forbid imposing time-unlimited warnings, though this would be a question of fairness.

The case of *Thomson v. Diosynth Ltd* [2006] confirms that expired warnings should not be taken into account when making decisions in relation to subsequent misconduct. Employers can, however, take note of expired warnings when considering the penalty to impose in relation to such misconduct once the decision has been reached as to whether the act complained of is indeed gross misconduct.

Expired warnings and those given for unrelated incidents are not irrelevant when deciding the reasonableness of dismissal, as they may show a pattern in an employee's behaviour. However, as pointed out in the case of *Airbus Ltd v. Webb* [2008], such previous warnings must not be the sole factor that "tips the balance" when deciding whether an employee should be dismissed.

The case of *Stratford v. Auto Trail LTD* [2016] confirmed that relying on previous expired warnings as the sole and primary reason to dismiss an employee is most certainly not permissible.

As always, ultimately, the test of fairness and reasonableness as set out in section 98 of the Employment Rights Act 1996 must be applied on a case-by-case basis. To ensure compliance with section 98, a few simple steps can be taken:

1. Properly document all warnings. Despite the findings of the Pillar case, informal warnings should be given with caution since they do not follow the framework of formal warnings – they cannot be appealed and reliance on them in future cases of misconduct may be questionable.
2. Ensure that the terms, consequences and expiry date of every formal warning are stated clearly.
3. Make sure that disciplinary policies and staff handbooks make it clear that expired warnings may still be considered as context in relation to future disciplinary proceedings.
4. Ensure the flexibility of warning procedures. For example, the period for which warnings may be live does not have to be the same for every warning. In circumstances where the misconduct currently in question is substantially the same as misconduct for which a previous warning was given, the length of any new warning may be longer in recognition of this.
5. Managers must know the clear difference between, on the one hand, considering previous warnings when the current offence is dismissal-worthy of itself and, on the other, taking account of expired warnings for the sake of increasing a sanction to justify dismissal.

Is it all in the expression?

In the recent case of *Page v. NHS Trust Development Authority* an Employment Tribunal dismissed Mr Page's claims of discrimination on the grounds of religion or belief.

Mr Page was a non-executive director of an NHS Trust, but was removed from office after publicising his opposition to same-sex adoption in the national media. Mr Page claimed direct and indirect religious discrimination, harassment related to religion or belief, and victimisation. The Tribunal therefore had to consider the extent to which an employer can censor the expression of religious beliefs outside the workplace.

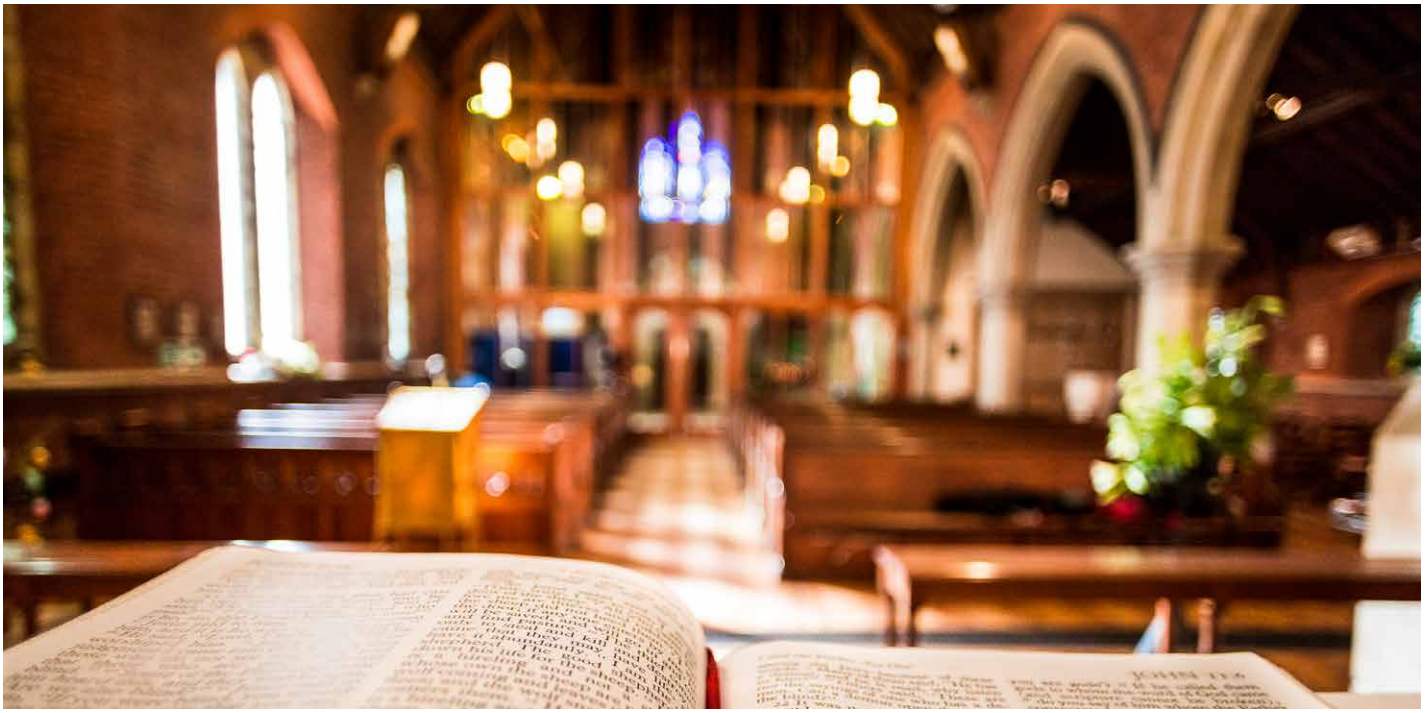
Facts

Mr Page was a non-executive director of the Kent and Medway NHS and Social Care Partnership NHS Trust (the Trust) from 2012 to 2016.

The Trust's policies included a requirement to promote equality for LGBT people. It saw it as vital that its staff and Board should not do or say anything that could be perceived as giving rise to a risk of losing the confidence of trust of any section of the community it serves, including those, such as LGBT individuals, where there has been historic distrust and difficulty with engagement. Mr Page accepted it was vital that LGBT members of the community should feel welcome in the Trust and should be encouraged to access its services if they needed them.

Mr Page is a devout Christian and is opposed to same-sex adoption. He had shared these views during a number of appearances on television news programmes, even though he had been advised by the Trust's chairman of the potential negative impact such publicly expressed views could have on the Trust's stakeholders and their confidence in the Trust's commitment to equality for LGBT people. Mr Page was asked to inform the Trust of any future media appearances in advance. However, he continued to engage the media without notifying the Trust.

This included appearing on ITV's Good Morning Britain where he voiced his opposition to same-sex marriage and adoption. He went on to state that he considered homosexual activity to be wrong. As a result of this he was removed from his role as a non-executive director. This decision was taken by the NHS Trust Development Authority, which is the body responsible for appointing non-executive directors.



Mr Page therefore raised Tribunal proceedings against the Development Authority, claiming direct and indirect discrimination on the grounds of religion or belief, harassment related to religion or belief, and victimisation.

Mr Page also sat as a lay magistrate until 2016. He was issued with a reprimand in 2014 for allowing his religious beliefs to influence his decision in an adoption case involving a same-sex couple. The refusal of adoption services to same-sex couples due to their sexual orientation has been unlawful discrimination since 2008. Mr Page was later removed from the magistracy for serious misconduct.

Decision

The Tribunal held that Mr Page's removal from office was not because of his religion or belief, or because he held or expressed his religious views. The reason for dismissal was that he accepted invitations to appear in the media without informing the Trust as requested. Therefore, there was no direct discrimination.

The Tribunal took into account Mr Page's high profile within the Trust, together with his unwillingness to distinguish between his personal views and what was appropriate given the seniority of his role.

The Tribunal found that there was also no indirect discrimination. This was due to the difficulty of finding an appropriate provision, criterion or practice, or a group disadvantage.

Mr Page's human rights claim was also dismissed.

Practical impact

This case will be reassurance for employers that they can act where directors and employees make statements of this nature outside work. This includes dismissal where the statements warrant it. The fact that the statements are an expression of religious or philosophical belief may not be enough to protect a director or employee from action being taken.

Recent case law demonstrates that the more extreme a view, the more a Tribunal may concentrate on the way in which it was manifested or expressed.

If employees and directors wish to express their private and personal views, they must do so carefully and make it very clear that they are speaking in a private capacity. Even when they do so, they must be aware that it can impact on their employment and or their Board role. Where there are clear policies which require advance authority to make public comments, employees and Board members should take care to follow them. However, employers should ensure their policies are up to date. They must also recognise that it may not always be appropriate to dismiss. This is going to depend on what role the person has and what sector the employer operates in. Ultimately it will be a question of who said what and to whom.

Lessons to be learned from *Uber* and *Deliveroo*

Aslam and others v. Uber BV and others

Hot on the heels of the article in our last newsletter on Addison Lee and the "gig economy", on Friday 11 November 2017, the Employment Appeal Tribunal (EAT) confirmed an employment tribunal's decision that Uber drivers should be classified as "workers" and are not self-employed. This is now the most high-profile case on the employment status of the so-called "gig economy" workforce. The full judgment can be found here.

Most of our readers will be familiar with this case. Two Uber drivers brought a claim for unlawful deductions from wages and a failure to provide paid leave. The drivers successfully persuaded an Employment Tribunal that they were workers and should be protected under the Employment Rights Act 1996 (ERA). Uber argued that they were self-employed and were not entitled to these protections.

EAT Appeal

Unsurprisingly, given the potential costs to Uber which could be triggered by this decision, Uber appealed to the EAT. However, the EAT has upheld the Tribunal decision and found that the drivers are workers. This means they are entitled to the national minimum wage and paid annual leave. They can also raise claims for unlawful deduction of wages.

It is useful to look at the arguments Uber put forward, and which have been dismissed by the EAT. Uber argued that:

- it does not provide taxi services itself but merely provides the technology platform facilitating those services;
- there is a contract between driver and passenger for each journey with taxi services provided by the drivers;
- the drivers are all self-employed; and
- Uber London Limited holds the required private hire vehicle operator licence.

However, the EAT endorsed the original Tribunal decision that this arrangement bore the hallmarks indicative of worker status, namely:

- potential Uber drivers are interviewed and successful candidates are given an induction;
- if drivers commit serious misconduct, or their ratings fall, then the arrangement with the drivers can be terminated; and
- although Uber drivers have the flexibility to decide when they can work, they are required to undertake to provide the work personally for Uber. This is one of the indicators of an employment relationship.

The Tribunal held that Uber drivers are never under any obligation to switch on the Uber application or even to accept a driving assignment when offered one. However, if the driver (i) has the application turned on, (ii) is within his authorised territory for work and (iii) is able and willing to accept assignments, then he is working for Uber under a worker contract and should be afforded worker rights and protections.

That said, it is not all doom and gloom for those looking for a flexible workforce. Both the Tribunal and the EAT made it clear that it is certainly not impossible for companies to enter into genuine relationships of self-employment. However, the important thing to remember

is how the relationship operates in practice. If the legal definition of "worker" is met, then, irrespective of the label that the parties may apply to the relationship, and the imaginative explanations and wordings that companies such as Uber might use, the party providing the services is likely to benefit from worker rights.

The *Uber* case can be compared with the outcome in the *Deliveroo* case, the judgment of which was delivered on 14 November 2017. As many of our readers will be aware, like Uber, Deliveroo is app-based. In this case, it is a food delivery service that enables customers to order takeaway food from participating restaurants for delivery by Deliveroo's riders (usually by bicycle, scooter or motorcycle). In this case, the Independent Workers Union of Great Britain submitted an application to the Central Arbitration Committee (the CAC) for recognition for collective bargaining in respect of the Deliveroo riders in the Camden area. In contrast to the *Uber* case, the CAC found that the Deliveroo riders were not workers and so statutory recognition was not possible in relation to these self-employed individuals.

The CAC made a decision on the basis of section 296 of TULRCA, whereas in the Uber case, the definition of a "worker" is set out in section 230 of the Employment Rights Act. However, the CAC stated that Deliveroo riders would not qualify as workers under either statutory test. The interpretation of the Employment Rights Act is outside the jurisdiction of the CAC and so its comments in this regard would not be binding on an employment tribunal. They certainly do buck the trend reflected most recently in the *Uber* case and also those seen in cases involving, for example, CitySprint. However, the CAC in the *Deliveroo* case did seek to distinguish Deliveroo's model and relationship with its riders from that of the Uber drivers in that, in the *Uber* case, the issue of personal service was never in serious dispute. The Tribunal and the EAT gave short shrift to any such arguments in this regard. In the *Deliveroo* case, on the other hand, there was evidence that certain riders did take advantage of their right of substitution and sent another rider on a delivery in their place.

This provides, therefore, an illustration of the fact that genuine self-employment relationships are possible, but certainly need thought.

Editor's top pick of the news this month

- The Real Living Wage has increased but is it benefitting anyone?
- Government update on settled status
- Cost v benefit of pensions complaints
- Risk assessments for breastfeeding mothers

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