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UK Employment Law Round-up

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In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: the benefits and pitfalls for employers who want to move to smart working; tips for employers on running effective performance management processes; issues for employers who offer employee loans; and considerations for non-disclosure agreements.

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IN THIS ISSUE

Could your business, and your employees, benefit from a move to smart working in 2019?

In this article we look at the government's recent decision to relocate thousands of employees in departments formally based in Whitehall to a hub in Canary Wharf. We analyse potential benefits or pitfalls private sector employers could face if they decide to pursue similar "smart working" aims.

On 16 October 2018 the Minister for Implementation officially opened a new inter-departmental government hub in Canary Wharf. This followed the government's announcement that it would look to move more than 6,000 civil servants to Canary Wharf to save money and reduce Whitehall office buildings. HMRC's agency estates director has recently confirmed that more than 2,000 HMRC staff are already benefiting from the hub's "modern flexible workspaces, great IT and excellent transport links". It is estimated that £20 billion of savings may be achieved in reduced running costs over 20 years. A further 14 regional hubs have already been announced.

So what could private sector employers learn from the government's focus on smart working?

Day-to-day employee occupancy may be reduced by allowing some homeworking, or flexible working. This may enable employers to increase staff numbers or the concentration of employees, without overcrowding. Employers may also introduce shared spaces for collaboration, and quiet areas for work requiring an intense focus. Spaces may also be shared with partner or mutually interested organisations to promote collaborative working.

Businesses should consider:

1. There may be ways in which their existing workplace could work better for it and its employees. Potential benefits may include:
    - a greater pool of potential employees (based in a broader range of locations) from which to recruit;
    - reduced travel and real estate expenses and liabilities for the employer;
    - a positive impact on the employer's health and safety record; and
    - improved environmental performance and reduced fuel costs.
2. If a relocation is on the horizon, this can be sold as a positive change. Potential benefits may include:
    - opportunities to forge stronger links with clients and the communities that employees support - employees may feel more connected and engaged;

- diversification of the workforce;
- more cash to invest elsewhere; and
- an improvement to work life balance, assisting in recruitment and retention.

3. Cultural changes may make a drastic difference to output and engagement without being particularly costly. Potential benefits may include:
   - time back that could, if used effectively, improve output; and
   - the ability to interact with and feel connected to colleagues in more distant locations.

Comment

Employers should sensibly consider all the implications of any potential move to smart working, and invest some time in planning before making any changes to working practices. In particular, employers should think about the need to draft, or update, company policies on homeworking, lone working, confidentiality and information security to ensure that their valuable information is not compromised by any such change. Employers should also make sure that employees are aware of the company's data protection requirements. If employers decide to enter into space-sharing arrangements with third party organisations, they may need to draw up commercial agreements with those parties to ensure that their valuable and private information is adequately protected.

Any office relocation may result in the need to change employees' terms and conditions. Employers should check if they have the benefit of any flexibility in affected employees' contracts of employment (mobility clause), to change the affected employees' normal place(s) of work, or whether this could amount to a redundancy situation. Such clauses may, if properly drafted and relevant in all the circumstances, avoid the need for the employer to go through a formal consultation with the affected employee(s) to change their contractual place of work. Advice should be taken before relying on such mobility clauses. Employers should be mindful that such clauses will be interpreted narrowly by the courts and tribunals and any ambiguity will be decided in favour of the employee. Notwithstanding this, the courts and tribunals do not go as far as to restrict employers to only make these changes "reasonably" or for "genuine operational reasons". Instead, employees are expected by the courts or tribunals to move their place of work, provided the new workplace is still within reasonable travelling distance of their home (Jones v. Associated Tunnelling Co Ltd [1981] IRLR 477 and Courtaulds Northern Spinning Ltd v. Sibson [1988] IRLR 305).

Even if employers do have the benefit of a mobility clause in employment contracts, they need to consider its interplay with other relevant clauses. In United Bank v. Akhtar [1989] IRLR 507 the employer, who wished to rely on a mobility clause, refused to exercise its express contractual discretion to pay relocation expenses. The tribunal held that the employer's actions breached three terms implied into the employee's contract, namely 1) that the employer should give reasonable notice of any move, notwithstanding the scope of the mobility clause, 2) the employer would not exercise its discretion to provide relocation expenses in a way which made the employee's performance of his duties under the

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Government framework for voluntary reporting on disability, mental health and wellbeing: what is expected of employers? – http://www.ukemploymenthub.com/government-framework-for-voluntary-reporting-on-disability-mental-health-and-wellbeing-what-is-expected-of-employers
- Disciplinary investigations: Common sense and even-handedness should prevail – http://www.ukemploymenthub.com/disciplinary-investigations-common-sense-and-even-handedness-should-prevail
- Further inquiry into the use of non-disclosure agreements in the workplace – http://www.ukemploymenthub.com/further-inquiry-into-the-use-of-non-disclosure-agreements-in-the-workplace
- Food for thought: Employment Tribunal to consider whether ethical veganism is protected under discrimination legislation – http://www.ukemploymenthub.com/food-for-thought-employment-tribunal-to-consider-whether-ethical-veganism-is-protected-under-discrimination-legislation

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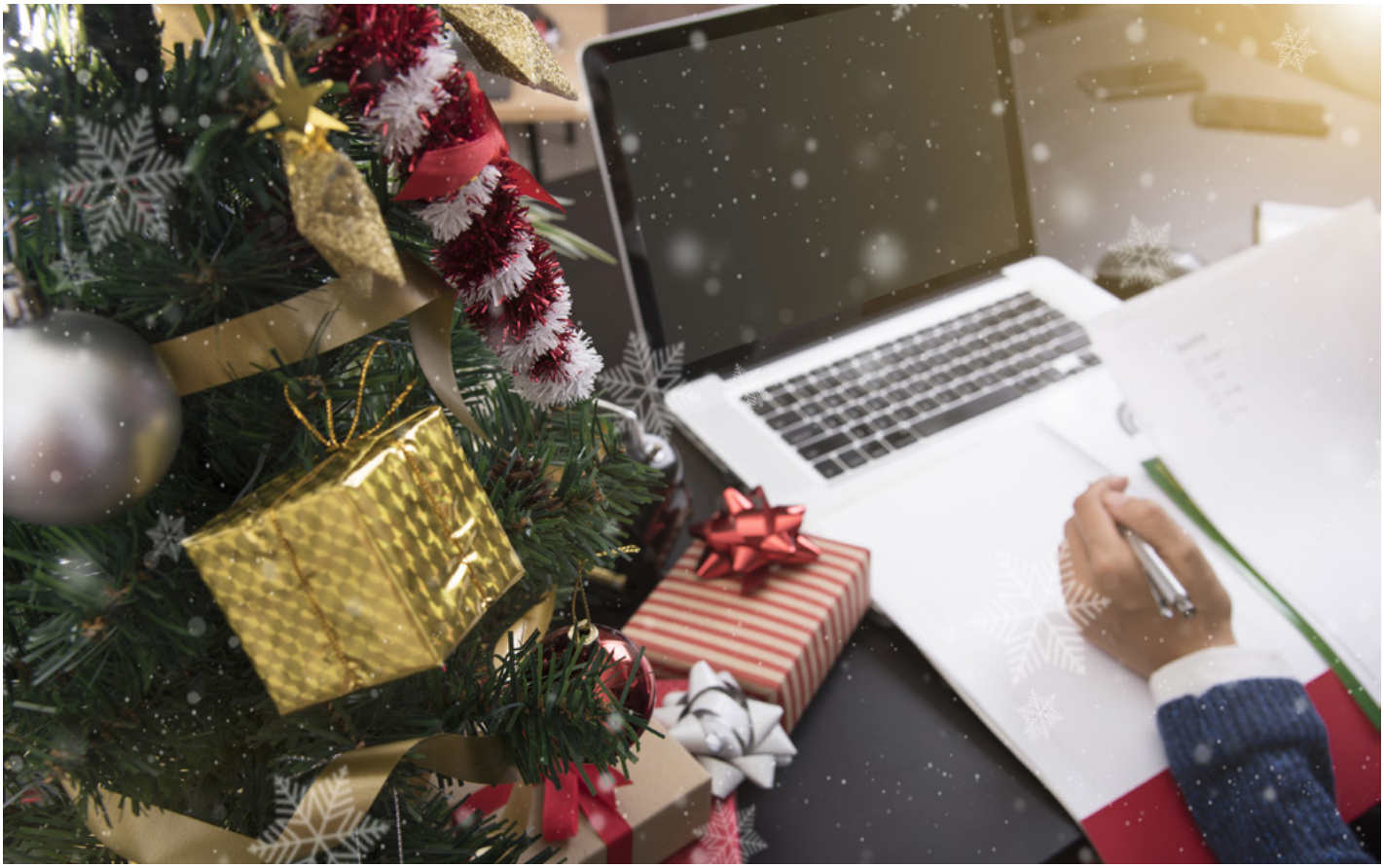
contract impossible and 3) the employer would not act in such a way as to damage the relationship of trust and confidence between the parties. Employers should therefore always give employees reasons for any such proposed change and notice of when that change is expected to take effect if they want to avoid an argument that the implied duty of mutual trust and confidence has been breached.

Where there is no suitable mobility clause to rely upon, the move may amount to a redundancy situation. A redundancy consultation procedure should be followed, and the change of location be considered as potentially alternative employment in a redundancy situation (which may be subject to a statutory trial period).

In any new smart working environment, employers should ensure that they are applying a co-ordinated and consistent approach in the treatment of staff. This includes in dealing with requests for flexibility in working hours, or working arrangements. To avoid potential discrimination complaints, employers should also ensure that employees who spend a large amount of time working remotely have the same access to opportunities as their colleagues who spend more time physically present in the office. This can often be achieved by using technology to disseminate information. If employees feel that they are being treated less favourably than their colleagues, they may as a minimum raise a grievance or complaint about that treatment. Even if this is not well founded, it may incur management time and cost.

Smart working arrangements will not necessarily work for, or in respect of, all staff. There may be certain times that staff need to be physically present in the office to avoid an impact on business performance. There may be risks if too many employees are absent from the office at the same time due to remote working. Certain roles within the business may not be able to be performed from home, or remotely. However, most of these issues can typically be overcome with some prior planning. They will not necessarily be a reason to shy away from a new smarter way of working. As the recent government move has demonstrated, smart working is not only for employers looking to reduce their property costs, but can have real benefits for employers in respect of employee welfare, engagement, and recruitment and retention.



Performance management – getting it right

Acas recently published a report entitled "Improvement Required?" which contained the results of research into employers' use of performance management systems. This article looks at tips for employers on running effective performance management processes and how employers can customise systems for employees with disabilities.

Performance management systems are processes which aim to maintain and improve employee performance in line with the goals and objectives of a business. Acas found that most of the businesses it consulted did not use any kind of performance management system (this was particularly the case for smaller businesses) and did not feel that they needed one. Only a quarter of respondents were able to confirm that their performance management systems were customised for staff with special needs, disabilities and neurological conditions. In response to its findings, Acas has called for organisations to increase the fairness and inclusivity of their systems and has published new guidance on performance management which can be found here.

Implementing an effective process

The report highlights the importance of performance management for employers of all sizes. It does not require a large amount of resources to put in place a way of effectively managing employees – often the simplest systems are the most effective. Here are a few practical tips for employers wishing to improve their performance management systems:

- The process should begin early in an employment relationship. Employees should be given a clear and accurate job description and should understand what is expected of them when starting a new role. Fair and reasonable performance measurements should be set early on and communicated to the employee. They should inform the basis of their performance assessment moving forward.
- Employers should work hard to maintain an open dialogue with their employees about their development throughout their employment. Regular informal meetings should form part of any performance management process to keep employees up to date on progress towards meeting targets and to identify areas of improvement.
- Formal meetings between line managers and employees should be scheduled throughout the year, where agreed objectives are reviewed and any issues which have arisen through informal channels discussed. An annual appraisal should also take place where a formal rating of the employee's performance is provided. It is important to keep records of any formal process and provide the employee with a copy to ensure both the business and the employee benefit from these meetings.

Modernising the approach to performance management

Acas reported that one in 10 employers felt that their performance management system was demotivating for staff and only one in 10 employers said that their systems were used for planning and monitoring training and development.

Although a performance management process can be followed in relation to an employee who is struggling to perform as expected, these systems should not be used exclusively in this situation. The management of an employee's performance should be a continuous process which spans the length of their employment and should involve motivating staff and identifying areas for growth and development. Performance management should not be viewed only as a tool to identify poor performance or as a hurdle to clear before dismissing an employee with a capability issue.

There are a number of practical steps that an employer can take to ensure that the right approach is adopted: performance management processes should be kept separate from misconduct procedures; managers should engage with employees about their career progression and alert them to opportunities when they arise; and performance management processes should be used to celebrate the good work of employees. It is important that employers review and modernise their systems to get the most out of their employees – a well-structured performance review process can increase productivity and motivate staff.

Customising systems for those with disabilities

Performance management processes must be flexible and adaptable, particularly where employees have a disability. Acas reported that half of organisations adjusted the way they monitor employee performance for those with flexible working arrangements, but only a quarter did the same for those with disabilities. Many smaller businesses felt that adjusting processes for specific groups was unfair to other employees.

An employer will be indirectly discriminating against a disabled employee if they apply their performance management procedure to all employees equally, but it disadvantages those who are disabled. An employer will also fail to comply with the Equality Act if it does not make reasonable adjustments to its practices (including performance management processes) to ensure these practices do not disadvantage disabled employees.

When assessing the performance of an employee, managers should consider whether the employee has any conditions or impairments which may impact on their ability to carry out their role. If such a condition is identified, it is important to consider whether that condition could be responsible for any poor performance or whether additional support or training should be offered to assist in their career progression.

All managers involved in the performance management process should be briefed on the importance of modifying the procedure where necessary to ensure disabled employees are not discriminated against. If a manager has concerns, they should engage with the employee and discuss adjustments which could be made to the performance management procedure to alleviate the effect of a condition or disability. For example, an employee's dyslexia may impact on their ability to perform part of their role during a busy period as their difficulties may become more pronounced when they are stressed. Dealing with such an employee in the same manner as other employees may not be appropriate and following the employer's performance management process rigidly would result in discrimination. In such circumstances, the manager should focus on treating the employee fairly, consulting them where necessary and implementing appropriate support before appraising their performance.

The effective use of performance management processes by employers can motivate employees, increase productivity and help businesses to achieve their goals and objectives. The recent Acas findings highlight the need to ensure that those systems are used properly throughout the employment relationship and can be adjusted where necessary to accommodate disabled employees.

Henri Pouvin and Marie Dijoux v. Electricité de France (EDF)

In this article we look at the Attorney General's opinion in Pouvin v EDF which decided that contractual benefits provided to employees could be challenged for unfairness under the Unfair Contract Terms Directive. We analyse the reasons behind the Attorney General's decision and potential risks this raises for employers

IN THE PRESS

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- Right response: New decisions on handling malicious insider data breaches – http://www.complinet.com/global/news/news/article.html?ref=202519
- Workforce planning 'can't afford to wait in wake of Brexit uncertainty' – https://www.peoplemanagement.co.uk/news/articles/workforce-planning-cant-afford-wait-brexit
- Part-time flight attendant treated 'less favourably' than full-time colleagues, rules Court of Appeal – https://www.peoplemanagement.co.uk/news/articles/part-time-flight-attendant-treated-less-favourably-full-time-colleagues

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who offer a myriad of contractual arrangements under employment contracts (e.g. car loans and training costs).

The idea that an employment contract could also be a consumer contract would seem unlikely at first blush. However, in the recent case of Pouvin v. Electricité de France (EDF) (Case C-590/17), this is exactly what happened, the effect being that the contract was then brought within the scope of certain laws designed to protect consumer rights.

In this case, EDF agreed to provide a loan to one of its employees, Mr Pouvin, and his wife to help them finance the purchase of a new home. The loan contract included a clause which stated that if Mr Pouvin left his employment with EDF, the loan would become immediately repayable.

In 2002, Mr Pouvin resigned from his role at EDF and subsequently stopped paying the loan instalments. EDF brought a claim against Mr Pouvin and his wife for the repayment of the outstanding sum, plus interest. Whilst Mr Pouvin and his wife argued that the repayment provision in the agreement was unenforceable under Unfair Contract Terms Directive (93/13/EEC) (the Directive), EDF took the position that the Directive did not apply because there was no supplier/consumer relationship in place. It was a pure employment relationship.

At first instance the French court upheld Mr Pouvin's position, holding that the automatic termination clause was unfair; however, the Court of Appeal overturned that decision, saying that EDF had granted the loan in its capacity as an employer only, and not as a seller or

supplier under the Directive, meaning the Directive did not apply and so there was no need to consider the fairness of the loan contract.

Mr Pouvin then appealed to the Court of Cassation in France, which ultimately referred the case to the European Court of Justice (ECJ) to decide whether the Directive applied to the loan or not.

The Attorney General's view

The Attorney General (AG) has now given his view on this issue, in advance of the case being heard by the ECJ. Whilst his opinion is not binding, it tends to be persuasive and is often followed by the court.

In this case, the AG highlighted that the Directive is aimed at protecting consumers, who are in a weaker bargaining position than suppliers and who may therefore be forced to accept less favourable terms without negotiation. In reviewing the case, the AG commented that Mr Pouvin was clearly in a weaker position to EDF when entering into the loan contract in question because he was less informed, economically weaker and legally less experienced.

EDF tried to argue that it did not enter the contract in the capacity of a supplier, but the AG gave that argument short shrift. In particular, the AG commented that an employer can still be regarded as a supplier when acting outside the specific field of activity that corresponds to its realm of professional competence. Here, the AG said that the contractual arrangement was in fact ancillary to EDF's primary business activity and could be construed as conducive to the successful running of the business, because it had the aim of attracting and retaining staff.

EDF also argued that a recital to the Directive stipulated that employment contracts were specifically excluded from the protection of the Directive. However, the AG was also sceptical of that argument, pointing out that recitals are non-binding and that this could not be taken to mean that employment contracts automatically fall outside the scope of consumer relationships. The situation must always be reviewed on a case-by-case basis. In particular, the AG commented that it would be unfair if consumer-employees who are attracted to contract services or buy goods from their employers because of advantageous conditions being offered automatically lost their rights to consumer protection as a "hidden cost" for contracting with their employers.

Finally, EDF tried to argue that the loan contract was part of a social policy that sought to provide its employees with beneficial conditions, and that it was not seeking a profit for itself. The AG also rejected this argument, stating that the public or private character of the activity, the fact that it pursues a public interest objective, or that it is not carried out on a lucrative basis or for consideration, is not determinant of whether the Directive applies.

Decision

Taking these factors into account, the AG found that EDF had entered into the loan contract in its capacity as seller or supplier and passed the case back to the French courts for decision on the fairness of the loan contract under the Directive.

Whilst the AG's opinion is not binding, it raises potential red flags for employers who provide contractual benefits or arrangements to employees, such as car loans, mortgages, training costs and credit facilities. Such arrangements may fall within the scope of the Directive, as they provide an incentive for employees to stay with their employer, and are therefore ancillary to the successful running of any employer's business. This will be the case even if there is no visible profit for the employer arising from the contractual arrangement. Employers should therefore be aware that the terms of such arrangements

could potentially be challenged as unfair under the Directive, although whether those terms are indeed found to be unfair is a separate question to be considered.

Keeping it confidential – settling sexual harassment claims

Recent media attention has once again brought sexual harassment in the workplace back into the spotlight. In this article, we look at the use of non-disclosure agreements and how to deal effectively with issues of sexual harassment in the workplace.

Discrimination, particularly harassment by another employee or by a group of employees, can impact an employer's business in many ways, including leaving employees feeling vulnerable even where the discrimination is dealt with appropriately and damaging the employer's reputation. In view of the latter risk it has been standard practice to settle claims of this nature using settlement agreements, which include a non-disclosure agreement (NDA).

On 13 November 2018, the Women and Equalities Committee launched an inquiry into the use of non-disclosure agreements in harassment and discrimination cases. The Committee sought written submissions on whether there are certain types of harassment for which non-disclosure agreements are being used, whether these agreements should be banned or restricted and the possible safeguards that may be necessary to curtail their unethical use.

When allegations of harassment or any other discrimination surface, employers clearly need to take action to establish what has happened. This is a vital part of the wider obligation to ensure as far as they can that their employees work in an environment that is free from harassment. However, harassment claims can be particularly tricky to investigate, thus putting employers in a difficult position. Often employers do not have any real certainty about what has really happened and have limited means available to them to establish the full truth of the matter. Nevertheless, the first step should always be to investigate the allegations fairly and to take disciplinary action where harassment has occurred.

Confidentiality, settlement and non-disclosure agreements

However, even where a matter is investigated and a harasser disciplined, there remains the need to resolve the claims to which that conduct gives rise. In doing so employers will quite understandably want to protect their businesses from adverse publicity and further liability. Hence the desire to agree settlements of potential claims as quickly and as quietly as possible. Most employers would expect any such resolution to involve an NDA.

Although the benefits of an NDA can seem like a good idea at the time, they have been the subject of considerable debate and indeed criticism. The Committee's inquiry highlights the concern that NDAs could be used to silence victims of harassment, to avoid having to deal with that harassment appropriately and, in the worst cases, allowing the harassment to continue. The confidential nature of these agreements inevitably makes it difficult to assess how ethically they are being used. In particular the current public concern focuses on ensuring victims of sexual harassment are not "bullied" or "bribed" into silence.

In what may be a response to these concerns it is notable that some organisations have recently started being more open about having had to deal with harassment claims. While not giving any specifics, several companies have recently made announcements that they have dealt with allegations of harassment, usually by dismissals. This approach recognises that there is more than one way of protecting an employer's reputation in these circumstances. One alternative to ensuring confidentiality about there being any issue at all is to be public about the issue and emphasise the organisation's zero tolerance to harassment by explaining that action has been taken.

This approach is, of course, dependent on the employer having responded to an allegation of harassment and then taken the appropriate action. However, this approach too is subject to limits and details of

individuals should not be made public. Care also needs to be taken to respect the wishes of the harassed employee who may prefer total confidentiality.

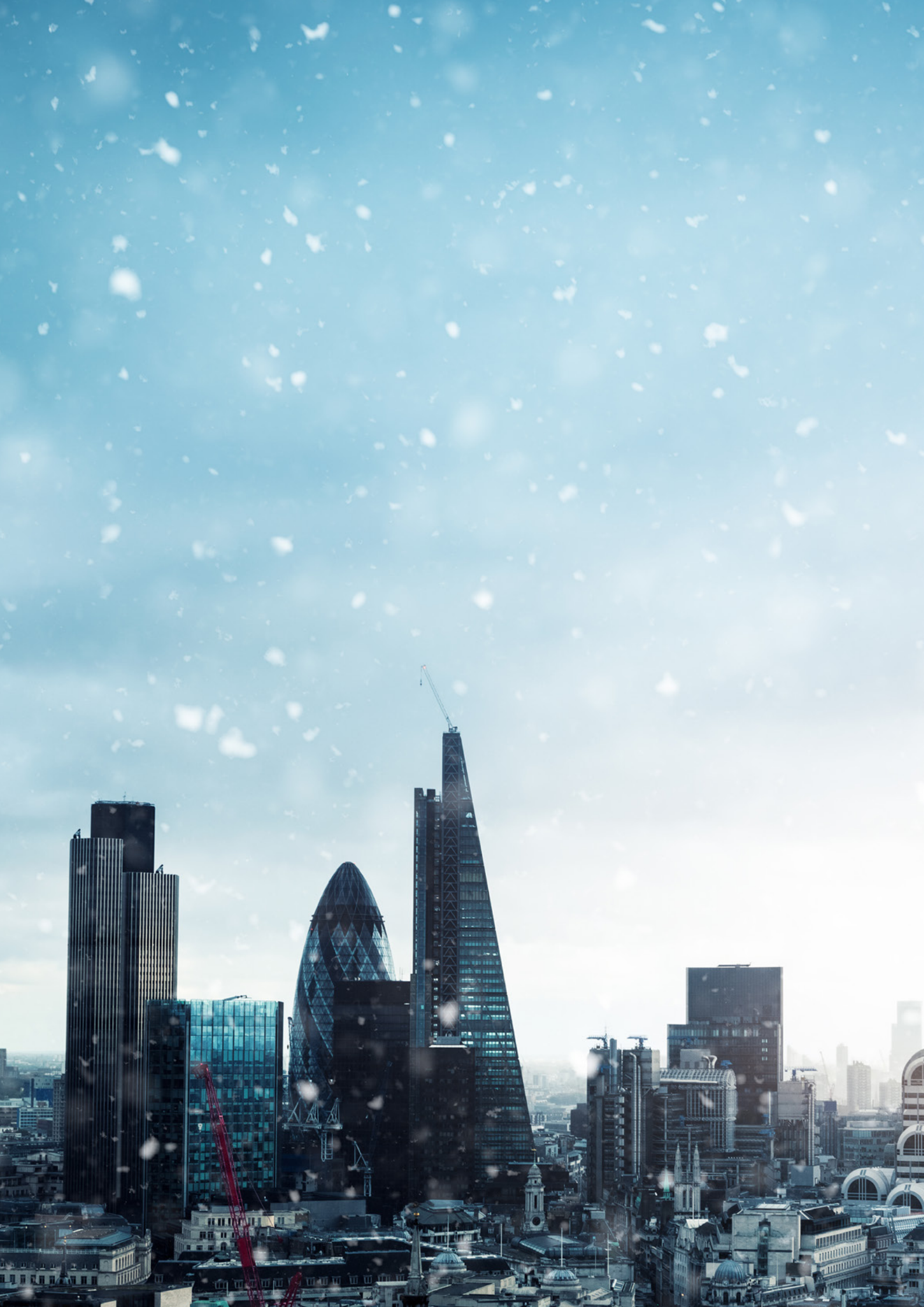
Employers – what should you consider?

Allegations of sexual harassment are both a serious and sensitive issue. For employers, the Committee's inquiry is a reminder to investigate a victim's allegations of sexual harassment seriously and, while focusing on the individuals involved, not presuming from the outset that suppressing all mention of the issue is the best outcome for the organisation.

As part of ensuring, to the best of their capability, that their employees are working in an environment that is free from harassment, employers should:

- implement regular and up-to-date training for all employees on harassment, victimisation and bullying in the workplace;
- review policies on equal opportunities and harassment so they are up to date and being used effectively by all employees;
- investigate allegations of sexual (or other) harassment fairly and formally with both the victim and the harasser;
- where there is credible evidence (which sometimes can be the testimony of the harassed employee even if no other supporting evidence is available), take appropriate action to discipline the harasser in accordance with their disciplinary procedure; and
- consider on a case-by-case basis whether an NDA is the best way forward.

Confidentiality is one option, but it is important to note that it is not the only option. By carefully considering these options and taking appropriate action in any particular case, employers can promote, as far as possible, an environment where employees are free from sexual harassment in the workplace and protect their reputation.



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