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Employment Matters

It's Just Banter, Right?

Living in this 'post Weinstein' world, the recent President's Club scandal has sparked efforts to bring the law in England and Wales into line with #metoo movement.

A petition (which currently has over 100,000 signatures) was recently started to reinstate s.40 of the Equality Act 2010. This section was intended to prevent contractors or customers making derogatory racial comments, or making unwanted sexual advances to employees. Employees could bring a claim against their employer if they could prove that the employer knew the employee had been harassed by a third party on at least two occasions and did not take reasonable steps to prevent it. However, s.40 was repealed in 2013 as the government deemed it "unworkable", "needless bureaucracy" and seen as a "barrier" to growth.

Third-Party Harassment Case Law

With no legislative provision, we need to look to case law for guidance.

Burton and Rhule v De Vere

In the infamous case involving comedian Bernard Manning, the Employment Appeals Tribunal (EAT) held that an employer could be liable for discriminatory remarks made to employees by a person not employed by them. In the case, the De Vere Hotel was found liable for third-party harassment for observing and allowing two waitresses to be subjected to racist jokes made by Manning during his performance at their hotel, despite the fact that the comedian was not an employee of the hotel. A strong factor behind this decision was that Bernard Manning was well-known for making the types of comments he subjected the waitresses to, which the hotel would have known about.

Pearce v Governing Body of Mayfield Secondary School

However, in *Pearce*, the House of Lords said that the Manning case had been wrongly decided. They stated that for an employer to be liable for third-party harassment, it must have had a discriminatory reason (i.e., their motive for failing to prevent the harassment must be related to an employee's protected characteristic). An employer can't be liable for a mistaken or inadvertent omission to act.

Conteh v Parking Partners Ltd

Conteh was another "employer friendly" case in which the EAT said that that an employer's failure to take action in the face of third-party harassment will rarely create a "hostile environment" which is necessary in order to establish harassment. For example, if a manager does not take action because he or she is off sick, or if the employer is so disorganised that they do not get around to dealing with issue, this cannot be discrimination as the inaction does not relate to the employee's protected characteristic.

Sheffield City Council v Norouzi (2011)

The EAT again went further in a case involving Mr. Norouzi, an Iranian social worker who worked at a home for troubled children. One child was regularly aggressive to him on racial grounds. On one occasion the child even said that she "*would like to blow up the whole of Asia and all Asians*".

The EAT held that child's conduct constituted harassment, but they had to consider whether his employer had done enough to protect Mr. Norouzi. Despite Mr. Norouzi alerting his employer to the harassment, they had let the child's behaviour continue by not investigating the incidents. On the facts, the EAT said that the employer should have put in place more effective support mechanisms to protect Mr. Norouzi and so were liable for third-party harassment.

Whilst this was a just result for Mr. Norouzi, the EAT controversially acknowledged that there are some environments, including prisons, care homes and some schools, where harassment might just be "a hazard of the job" which cannot be easily prevented by the employer. In such situations, the employer is not liable unless the tribunal can set out what they should have done to prevent the harassment.

Conclusion

In summary, when it comes to third-party harassment, the scales currently seem to be tipped in favour of the employer. Notwithstanding this, employers in every sector are struggling to navigate this minefield. Is it just banter? When should HR and managers step in? Where is the line? Staff policies and training in this area are an employer's first line of defence. Should this problem rear its ugly head in your office, carrying out a comprehensive investigation which seeks to protect all parties at every stage is imperative. Clearly the #timesup movement has set the clock ticking for change in this area.

The Spanish Supermarket and Secret CCTV Surveillance

Lopez Ribalda and others v Spain

Facts

A Spanish supermarket suspected that some employees were stealing from their tills so they installed secret CCTV cameras to try and catch the suspects in the act. They caught five cashiers stealing money, who were subsequently dismissed. Despite the dismissals being procedurally fair, the European Court of Human Rights (ECHR) held that this covert surveillance breached the employees' right to privacy and the individuals—who were also found guilty of theft—were awarded 4000 euros in damages. The ECHR held that the Spanish courts had failed to strike a fair balance the employee's right to privacy and the employer's legitimate interest in safeguarding its business.

Comment

The decision highlights the need for employers to properly consider the impact that surveillance in the workplace will have on an individual's right to privacy. They should always choose the least intrusive method of infringing on privacy even where they have a genuine reason for doing so. With the GDPR coming into force in May of this year, employers should conduct impact assessments if they are considering any kind of employee monitoring.

ICO Guidance

The ICO guidance makes clear that secret surveillance is rarely likely to be justified, and if it is considered necessary, the surveillance should be for as limited a period as possible and affect as few people as possible. Tailored and considered data protection policies will be vital in justifying any form of employee monitoring be it CCTV, interception of emails or otherwise. So to avoid having to pay out for privacy breaches, be sure to carry out a privacy impact assessment as your first step.

The First Case on 'Perceived Disability'

Chief Constable of Norfolk v Coffey

Mrs. Coffey is the first person to successfully bring a claim for direct discrimination based on 'perceived' disability under the Equality Act 2010.

An individual is considered “disabled” under s.6 of the Equality Act 2010 if they have a physical or mental impairment that has a substantial negative effect on their ability to do normal, day-to-day activities for 12 months or more. Disability can also cover a ‘progressive condition’, which gets worse over time.

Background

When Mrs. Coffey first applied to be a police constable, she suffered a hearing impediment, meaning that she fell slightly short of the national police standards for hearing. However, she passed a ‘practical functionality’ test, which meant she was able to join the force with reasonable adjustments. When Mrs. Coffey applied to transfer to another Constabulary some time later, she had an updated hearing test that showed there had been no change in her hearing ability, but she was not put forward to sit another practical functionality test. The Acting Chief Inspector rejected Mrs. Coffey’s application on the basis that she did not meet the hearing standards.

Mrs. Coffey lodged a claim for direct discrimination against the Acting Chief, arguing that she had “perceived” Mrs. Coffey to be disabled and rejected her application on that basis. The Acting Chief disagreed and argued that at the time she didn’t believe Mrs. Coffey suffered from a disability. She rejected the application because of the strain on resources and she couldn’t justify hiring someone who may not be able to carry out all of their duties.

Decision

The Employment Appeals Tribunal (EAT) considered that the Acting Chief ‘perceived’ that Mrs. Coffey had a ‘progressive condition’. They noted that a person with the same abilities as Mrs. Coffey, who the Acting Chief did not perceive had a condition that was likely to get worse, would not have been treated in the same way.

Comment

Mrs. Coffey’s case confirms that it is possible to succeed in a claim for perceived disability discrimination; however, the employee needs to establish that the discriminator (the Acting Chief in this case) perceived that the individual had a disability within the Equality Act definition at the time of the decision.

Firemen Get Injury to Feelings Award for Asserting Their Working Time Rights

South Yorkshire Fire & Rescue v Mansell

Under the Employment Rights Act 1996, all workers are protected from being subjected to a detriment for refusing to comply with a working pattern which is in breach of the Working Time Regulations 1998 (WTR 1998).

Facts

A new type of shift rota was introduced at the South Yorkshire Police Station without varying the terms of the collective agreement which was in place with the Fire Brigades Union. The new rota had insufficient rest breaks. It involved working consecutive 24-hour shifts, each divided into a 12-hour day-shift and 12 hours “on call” at night, followed by four days off. Hours “on-call” had to be spent at or near the station. When the firemen complained and refused to work the new rota, they were transferred to another station.

Decision

The firemen alleged that there had been a breach of the Employment Rights Act 1996, as they had refused to work the specified shift pattern in breach of the WTR 1998 and they were penalised for it. The firemen argued that in addition to financial loss, they suffered increased travel time, interference with caring responsibilities, loss of leisure and family time and disruption to their work patterns.

The tribunal agreed with the firemen and held that transferring them to another station amounted to a detriment for asserting their working time rights. It awarded injury to feelings to the firemen, but the fire service appealed on the basis that no injury to feelings award could be made in this situation. The firemen maintained that the Employment Appeals Tribunal (EAT) should look at other detriment cases (such as whistleblowing) and make an award on that basis. The EAT held that all claims for suffering detriment in employment were akin to claims of discrimination and victimisation and should be dealt with in the same way.

Comment

This case shows us that it is possible to claim injury to feelings in working time cases. However, the EAT was clear that whether an award should be made and any potential amount of damages will depend on the facts of each case.

For further information on training Katten provides, including sexual harassment and other employment issues, please contact Chris Hitchins via email or at +44 (0) 20 7776 7663.