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Insights

WHISTLEBLOWING JOB APPLICANTS, DISCRIMINATION OUTSIDE EMPLOYMENT, AND LIABILITY FOR HR CONSULTANTS, PLUS A NEWS ROUNDUP

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SUMMARY

Our employment law update for May covers a new EAT case on whether job applicants can bring whistleblowing claims, whether a blatant racial insult falls outside the scope of the Equality Act 2010 because it was not made "in the course of employment", and a case covering the possible liability of external HR consultants as agents of the employer. We also have a general news round-up, including the government's responses to proposed third party discrimination liability under the Employment Rights Bill, and a summary of the issues surrounding the EHRC's interim guidance and subsequent developments.

JOB APPLICANT CANNOT BRING WHISTLEBLOWING CLAIM

In a recent decision, the Employment Appeal Tribunal (EAT) gave guidance to employers on how to approach protected disclosure/whistleblowing claims brought by external job applicants.

The claimant applied as an external applicant for two positions with the respondent in 2019. She was unsuccessful in both. Presumably unhappy, she filed an online crime report to the Police alleging, amongst other things, that an employee of the respondent had referred to her as 'mentally insane' during the interview process. She also contacted the respondent's confidential safeguarding helpline, the respondent's chief executive, the Care Quality Commission, and her MP.

The respondent carried out an investigation into the claimant's allegations under its internal disciplinary procedure. The investigation found no evidence of any wrongdoing on the part of the respondent's staff and the claimant's complaint was not upheld. The respondent concluded that the usual right of appeal under their complaint procedure was not appropriate given the extent of the investigation and the impact it had on the staff involved.

The claimant alleged that her letter to her MP, which raised serious allegations, amounted to a protected disclosure/whistleblow. The claimant brought a tribunal claim alleging that she had made protected disclosures, and that making those disclosures was the reason that her job applications had been unsuccessful.

Usually, only employees or workers have whistleblower protection under the Employment Rights Act 1996 (ERA). The claimant, as an external job applicant, was neither an employee or a worker. To circumvent this, the claimant relied on the 2019 case of *Gilham v Ministry of Justice*. In *Gilham*, the Supreme Court held that Articles 10 and 14 of the European Convention on Human Rights (ECHR) extended whistleblower protection to a district judge, who was an office holder rather than an employee or a worker.

The tribunal held that *Gilham* did not apply, as the claimant was not an office holder, and the fact was a job applicant meant she could not be an employee or a worker. She was not entitled to whistleblower protection under the ERA (or the ECHR).

The claimant appealed to the EAT.

At the EAT, the claimant claimed that being an external job applicant was analogous to, or the same as, being an internal job applicant and/or an external NHS job applicant, relying on the fact that the ERA confers special whistleblowing protection on external NHS job applicants. The EAT dismissed the appeal, making the following findings:

- an external job applicant was not at all analogous to an internal applicant. An internal applicant is already embedded in the workplace as an employee or a worker and derives ERA whistleblower protection from that - they are capable of making a protected disclosure claim under the ERA because they are already at work;
- the special whistleblower protection given to external NHS job applicants applies specifically to protecting patient safety, and that consideration did not apply here; and
- the less favourable treatment relied on by the claimant was not suffered by her in her capacity as an external job applicant. The disclosure relied on did not relate to the job application process, with the detriment claimed concerning the application of a local authority complaints procedure which was independent of the job application process.

The appeal was dismissed.

WHY THIS MATTERS

This is an EAT case that usefully restates and confirms the position regarding ERA/ECHR whistleblowing claims and external job applicants.

Sullivan v Isle of Wight Council

DISCRIMINATION AND HARASSMENT HAS TO BE IN THE "COURSE OF EMPLOYMENT"

The Equality Act 2010 (EqA) provides that an employer is liable for acts of discrimination, harassment, and victimisation carried out by its employees "*in the course of employment*". An employer has a defence where it can show that it took all reasonable steps to prevent this from occurring or recurring.

The claimant, who was black, worked for the respondent as a Branch Secretary for UNISON. His colleague, who was white, decided that he wanted to leave UNISON. The colleague spoke to HR about membership subscriptions and was told he needed to speak to the union directly. The colleague then spoke to the claimant, asking if his membership subscription deductions could be refunded. He was told by the claimant this would not be possible.

At a second meeting matters became heated, and the claimant was subjected to verbal insults from his white colleague, including a blatant racial slur. The claimant brought a claim for race discrimination and harassment.

The tribunal found, as a question of fact, that the remark had been made by the claimant's colleague but held on the evidence that it had not been made "*in the course of employment*". It found that, even then, the respondent had taken all reasonable steps to prevent the individual from making racial slurs or from doing anything else of that nature.

The claimant appealed arguing that: (a) the conversation where the racial slur had been made took place at work, (b) that there was a natural link between union membership and work/the workplace, and (c) that the respondent did not take "all reasonable steps" and should have done more to prevent the situation from happening.

The EAT dismissed the appeal. It held that the tribunal had reasonably concluded that the racially offensive comment was not made "in the course of employment". Although the conversation had taken place on the respondent's premises during working hours, the conversation was **not** related to work, it was related to union matters. It was a conversation between a union official and a union member about union membership and was not related to or in the course of employment. This finding in itself meant the appeal had to fail, but the EAT went on to consider the "all reasonable steps" defence.

The EAT agreed with the tribunal and listed the following reasonable steps that the respondent had carried out:

- an induction session at which the issue of "acceptable behaviour at work" and the respondent's core values of "affording dignity, trust and respect to everyone" were emphasised;

- annual performance assessments, including consideration of compliance with the respondent's values;
- displaying the respondent's values on posters in areas where staff worked; and
- mandatory training for all staff on equality and diversity issues every three years (the most recent being held only days before the incident), when training was conducted in small groups and involved staff going through a PowerPoint presentation. The presentation referred to the promotion of "a positive attitude towards equality and diversity by showing respect for others, valuing people's differences and treating people with dignity".

It is worth looking at this judgment both in its own right and in the context of the sexual harassment preventative duty.

The preventative duty, which came into force last October, requires employers to take "reasonable steps" to prevent sexual harassment in the workplace. The new Employment Rights Bill intends to change "reasonable steps" to "all reasonable steps", effectively mirroring the existing employer's defence used in this case.

While regulations will expand on what "all reasonable steps" actually means in the context of the preventative duty, employers can take some comfort from this case in that it sets out sensible steps carried out by the respondent, which ensured the potential harassment risks in the workplace were assessed, where the employer took proactive steps to train its staff and avoid liability for discrimination.

However, it is not a like-for-like comparison. The EHRC Technical Guidance on the preventative duty is explicit that a risk assessment is necessary for compliance, and there is no evidence that the respondent in this case undertook a risk assessment. However, the live and frequent training, along with staff being made aware of the employer's values are nonetheless helpful.

The finding that the conversation during which the act of discrimination took place fell outside the scope of employment is unusual, as most acts that take place on the employer's premises during working hours are likely to be held to be within the scope of an employee's duties. In this case, the finding was that it was exclusively union business, not work related.

WHY THIS MATTERS

Although the case breaks no new ground, it illustrates how strict the discrimination test of "in the course of employment" can be, and gives some helpful guidance on steps to take to comply with both the "all reasonable steps defence" and, more theoretically, steps to comply with the sexual harassment preventative duty.

Campbell v Sheffield North Hospitals NHS Trust

CAN HR CONSULTANTS BE LIABLE IN WHISTLEBLOWING CLAIMS?

In a recent decision that will be of interest to both employers and HR professionals, the EAT clarified the circumstances under which external HR consultants might be held liable for employment claims, in this case a whistleblowing detriment claim. The EAT provided important guidance on the legal status of external HR consultants and the limits of their liability.

The claimant was a director at a hotel company who raised concerns about alleged financial misconduct. Shortly after raising those concerns, several employees lodged grievances against the claimant, alleging bullying and harassment.

The respondent engaged two independent external HR consultants to:

- investigate the grievances. The consultant upheld two of the grievances and recommended disciplinary action; and
- conduct the disciplinary hearing. The report prepared by the HR consultant stated that a finding of gross misconduct might be justified, but specifically did not recommend dismissal as a sanction.

The respondent suspended the claimant and removed him as a director. A few days later, he was summarily dismissed. His dismissal appeal was rejected.

The claimant brought a whistleblowing dismissal claim against the respondent. He also brought claims for whistleblowing detriments, against:

- two directors of the respondent; and
- the two external HR consultants. The claimant argued that the external consultants were agents of the employer, and therefore equally liable for his dismissal.

The tribunal struck out the claim against the HR consultants, finding that they were not agents of the employer and that the claim had no reasonable prospect of success. The claimant appealed.

The EAT made two key findings:

- An external HR consultant **can** be an agent of the employer. This is especially the case where they are engaged to carry out tasks that are closely tied to the employment relationship, such as conducting grievance or disciplinary processes. The key question is whether the consultant's services relate either to a significant aspect of the employment relationship or merely to the employer's day-to-day business activities. Where an external HR consultant is instructed to carry out a process closely related to the employment relationship, which would inevitably include a grievance or disciplinary process, there is no reason why they cannot be an agent of the employer, although the assessment is fact-sensitive in each case; and

- notwithstanding the above, in this case they were held **not** to be agents of the employer. The critical factor seemed to be that neither of the external HR consultants recommended dismissal as a sanction. The fact that the respondent relied on the work of the consultants to support its decision to dismiss and take its position that the dismissal was fair did not mean the consultants were liable for the detriment of dismissal. The fact that their work was part of a chain of events which led to the dismissal did not make them liable as agents for the dismissal.

The appeal was dismissed.

WHY THIS MATTERS

This decision provides guidance for both employers and external HR consultants although all will depend on the facts. In this case the external HR consultants were held not to be agents of the employer, mostly it seems because, although they stated that the conduct might justify such an action, they did not recommend such a sanction.

Employers should take care to protect both themselves and their external HR consultants by:

- clearly defining the external HR consultant's role by being explicit about whether they are advising, investigating, chairing a hearing, or (in particular based on this case) making a decision to dismiss or recommending to dismiss;
- keeping decision-making authority with the employer, which seems logical. The final call must rest with the employer who employs the employee, not the external HR consultant; and
- being mindful of disclosure: communications with external HR consultants may be disclosable in legal proceedings unless protected by legal privilege, which is a subject in itself.

External HR consultants should remain vigilant. If this claim had been about the process itself, for example that the grievance or disciplinary meeting was handled unfairly, the outcome may have been very different.

Handa v Station Hotel (Newcastle) Ltd

EMPLOYERS' LIABILITY FOR THIRD-PARTY HARASSMENT

On 25 April 2025, the government responded to concerns about the third-party harassment provisions in the Employment Rights Bill (ERB). The response clarifies how these provisions will operate and what is expected of employers.

KEY TAKEAWAYS

No Carve-Out for Overheard Opinions

- The government confirmed that no specific exemption will be made for "overheard opinions" (e.g. comments not directed at an employee but overheard). Employers should ensure that workplace policies and training address all forms of inappropriate conduct by third parties, even if the employee is not directly targeted.

No "Three Strikes" Rule

- The "three strikes" rule (requiring three incidents before action) will not be reinstated.
- A single incident may still amount to harassment, depending on the context. Employers should treat all complaints seriously and assess them on a case-by-case basis, regardless of whether similar incidents have occurred before.

Focus on Reasonable Steps

- Employers are only required to take reasonable steps to prevent third-party harassment.
- What is "reasonable" depends on the specific workplace context (e.g. size or nature of third-party interactions). Employers should review their current procedures to ensure that they are proportionate, documented, and enforceable.

Sexual Harassment – Specific Duties

- Clause 21 of the Bill allows for regulations to define "reasonable steps" for sexual harassment only. This reflects the government's focus on the preventative duty under section 40A of the EqA. Employers should ensure that sexual harassment prevention measures are robust, proactive, and well-communicated.

Tribunal considerations

- If a third-party harassment claim is successful, tribunals will assess whether the employer breached their preventative duty. This reinforces the need for employers to maintain clear records of training, policies, and actions taken in response to complaints.

MPS CONCERNED OVER DELAYS IN GENDER GUIDANCE FROM UK EQUALITY WATCHDOG

MPs and government officials are increasingly worried that the Equality and Human Rights Commission ("**EHRC**") may not finalise formal guidance on implementing the UK Supreme Court's gender ruling until after its chair, Kishwer Falkner, is replaced in November 2025. Although the EHRC has pledged to complete the guidance by July, it has been suggested that there may be significant delays due to internal issues at the EHRC.

The final guidance is meant to clarify how on a day-to-day basis service provers and employers should interpret the court's decision that the term "woman" in the Equality Act refers only to biological women. This has raised concerns about the rights of transgender individuals, especially regarding access to single-sex spaces.

The EHRC's interim guidance, published very shortly after the Supreme Court judgment, has been characterised as oversimplified and poorly handled. There are also concerns about the transparency and neutrality of the process. A six-week consultation period is now underway, but the volume of responses and internal issues may further delay progress.

A long delay is concerning for both employers and service providers, who currently only have the interim guidance, which is short and makes recommendations that many employers/service providers may find difficult to implement and could even lead to legal exposure.

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