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Legally Speaking - Judge & Priestley's Quarterly Legal Update for Commercial Clients

SUMMER
2018

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Employers 'must prevent sexual harassment'

Employers must do more to prevent sexual harassment and remove toxic cultures in many workplaces, according to the Equality and Human Rights Commission (EHRC).

The Commission makes several recommendations to improve protection in a new report, *Turning the tables: ending sexual harassment at work.*

The report is based on evidence gathered from 1,000 employers and employees between December 2017 and February this year. The report says: "We uncovered the shocking and stark reality of individuals whose careers and mental and physical health have been damaged by corrosive cultures which silence individuals and normalise harassment.

"We also found a lack of consistent, effective action on the part of too many employers."

The Commission defines sexual harassment as: "unwanted conduct of a sexual nature, which is intended to, or has the effect of, violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

"Examples include unwelcome physical contact, sexual comments, promises in return for sexual favours and displaying sexually graphic pictures."

The research found that the most common perpetrator of harassment was a senior colleague. However, just under a quarter reported being harassed by customers, clients or service users.

The report says: "Around half our respondents hadn't reported their experience of harassment to anyone in the workplace.

"Barriers to reporting included the view that raising the issue was useless as the organisation did not take the issue seriously."

The Commission is recommending that the government introduces a statutory code of practice and a new mandatory duty for all employers to take effective steps to prevent sexual harassment.

The government hasn't formally responded to the recommendations, but it has stated in the past that it is determined to tackle the problem of sexual harassment in the workplace.

We shall keep clients informed of developments.

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Beauty spa manager granted injunction against Harrods

A beauty spa manager has been granted an injunction against Harrods department store after it decided not to renew her contract.

The case involved a woman who ran a hairdressing, beauty treatment and spa business called Urban Retreats from a concession within Harrods.

In 2014, she agreed with the store to extend her licence until 2022.

There was a provision that either party could terminate the agreement by giving six months' written notice. The store decided to open its own beauty spa and gave the spa manager six months' notice in August 2017.

Protect your business

However, she claimed that the notice provision had been a requirement of the store's bankers. She said she had an oral agreement with the store that it would not terminate the licence.

Harrods denied this. The manager applied for an interim injunction to prevent the store going ahead with the termination until the matter could be properly decided at a full trial.

The court granted the injunction, saying there was a real prospect that a trial judge could make an order for the licence agreement to be continued.

Damages would be an adequate remedy for Harrods if it won the case, whereas it was strongly arguable that losing the flagship concession would destroy the spa manager's business.

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Protection for SMEs against insolvent customers

The government has outlined plans to provide more protection for small and medium-sized businesses who supply companies that become insolvent.

It also wants to prevent directors from unfairly shielding themselves from the effects of insolvency.

Ministers say that in the worst cases, directors can even profit from business failures while workers and small suppliers lose out.

The government is considering a number of proposals including:

- clawing back money for creditors including workers and small suppliers by reversing inappropriate asset stripping of companies
- disqualifying and or holding directors personally liable when found to have sold a struggling company or subsidiary recklessly or knowing it would fail
- giving the Insolvency Service new powers to investigate directors of dissolved companies.

Business Secretary Greg Clark said: “These reforms will give the regulatory authorities much stronger powers to come down hard on abuse and to make irresponsible directors bear the consequences of their actions.”

The Insolvency and Corporate Governance proposals are now subject to a public consultation.

The government is also seeking views on new ways to protect payments to smaller firms in a supply chain, as they can be hit hardest when large companies become insolvent.

We shall keep clients informed of developments.

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Agency worker wins conditions claim against Royal Mail

An agency worker who was not provided with the ‘same basic working and employment conditions’ as regular employees has won his claim of unequal treatment.

The case involved Mr D Kocur, who had been supplied to Royal Mail by an agency.

He worked for the company for 12 weeks, triggering his entitlement to the same basic working and employment conditions as he would have received had he been recruited directly by Royal Mail.

However, while the regular workers were paid for a full hour’s lunch break each day, agency workers were only paid for 30 minutes of the break. They

only received 28 annual leave days compared to 30.5 days for regular workers.

On the other hand, agency workers earned an hourly wage of £10.50, while regular workers received £9.60 per hour.

Mr Kocur claimed that he should be entitled to the same working hours, paid rest breaks and annual leave as regular workers.

The Employment Appeal Tribunal ruled in his favour. It held that the failure to provide him with 2.5 days' additional leave could not be "compensated for" by an enhanced hourly rate.

Similarly, the fact that he was paid more overall for the whole shift did not change the fact that he was paid significantly less for the rest break.

However, the EAT also ruled that agency workers and regular employees were not required to have precisely equal working hours as this would remove the flexibility that comes with an agency/hirer relationship.

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Landlord wins rent dispute with liquidators of BHS

A commercial landlord has won a dispute with the liquidators of the former BHS retailer over the payment of rent.

The issue arose because BHS had entered into a Company Voluntary Arrangement (CVA) to pay reduced rents to landlords of its stores and offices.

The agreement contained a clause stating that if the CVA was terminated, the reduced rents were deemed never to have happened. The landlords would then be entitled to claim against the company for the original full rents, less payments made during the CVA.

The CVA could not prevent the company from going into administration in April 2016, which prompted one of the landlords, Prudential Assurance Ltd, to trigger the CVA's termination clause relating to the payment of the rent in full.

Prudential argued that it was owed the outstanding rent on the full rent basis.

The court held that the clause in the CVA was not a penalty and it had not been subject to negotiation by the two sides. It was brought about by a statutory procedure under the Insolvency Act and was binding on both the company and the creditors.

The landlords had a legitimate commercial interest in the CVA's success or failure, and it was not an exorbitant provision for them to be returned to their pre-CVA position if it failed.

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Top business leaders welcome extra scrutiny of chief executive pay

Business leaders have welcomed government proposals to make large companies justify the pay of their chief executives and reveal how much higher it is than that of their average worker.

The move affects UK listed companies with 250 employees or more. They will have to disclose the pay ratios – the difference between the top and average earners – every year.

The new regulations are part of a package of reforms that will hold big businesses to account for the salaries they pay, while giving employees a greater voice in the boardroom. Ministers say they're addressing concerns that some chief executives have been receiving salaries that are out-of-step with company performance.

In addition to the reporting of pay ratios, the corporate governance laws will also:

- require all large companies to report on how their directors take employee and other stakeholder interests into account
- require large private companies to report on their responsible business arrangements
- require listed companies to show what effect an increase in share prices will have on executive pay to inform shareholders when voting on long-term incentive plans.

The Chief Executive of the Investment Association (IA) Chris Cummings said: "The UK has a global reputation as a leader in corporate governance and we welcome the reforms as they focus on the long-term interest of all company stakeholders, including shareholders and employees.

"Investors are demanding greater director accountability and transparency on executive remuneration.

"Pay ratios will shine a spotlight on what executives are being paid compared with their workforce, and investors will expect boards to articulate why the ratio is right for the company and how directors are fulfilling their duties."

Matthew Fell, Chief UK Policy Director of the CBI, said: "The CBI is clear that high pay is only ever justified by outstanding performance. High pay for mediocre or poor performance is unacceptable.

"This legislation can help to develop a better dialogue between boards and employees about the goals and aspirations of their business, and how pay is determined to achieve this shared vision."

Subject to Parliamentary approval, the regulations will come into effect from 1 January 2019 meaning that companies will start reporting their pay ratios in 2020.

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New measures to protect company directors against identity fraud

The government has introduced new measures to protect company directors from identity fraud after research showed they are twice as likely as other people to be targeted by cyber criminals, many of them based abroad.

Until now, directors were required to register their personal address with Companies House.

The records are public documents, so the information is available to anyone on request. This left directors vulnerable to fraudsters, who could use the information to steal their identity to make purchases online. The new measures enable directors to remove their personal address from the company register and provide their business address instead.

Business Minister Andrew Griffiths said: "These new laws will protect new and existing business owners from potential harm and identity fraud, while ensuring we maintain our high standards of corporate transparency."

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Property agent money protection schemes

The government is pressing ahead with its plans to make property agents in the private sector join "an approved or designated client money protection (CMP) scheme" if they handle client money.

Ministers say they're committed to ensuring all consumers are protected regardless of which agent they or their landlord choose.

A government statement says: "Larger agents tend to be members of professional organisations which require CMP scheme membership as part of the membership package.

"Small businesses are therefore less likely to have CMP cover than larger agents. It is therefore important to include small businesses in the mandatory requirement to ensure consumer' money is protected, regardless of the size of the firm.

"The requirement will only apply to agents that handle client money. Agents that are unable to obtain CMP would still be able to trade but would not be able to handle client money, for example the tenant would pay the rent directly to the landlord.

"The regulations will only apply to letting and property managing agents in the private sector. In the leasehold sector, landlords and agents are expected to comply with existing legislation regarding holding service charges and the Codes of Management Practice."

The government says it intends to introduce mandatory CMP before the proposed ban on tenant fees, which it announced last year. It says: "This is to ensure that consumers are protected, and that client money is not lost in the instance of any agent going out of business, as a result of the ban."

Two new measures will be put before parliament as soon as time allows. The first will set out the process and conditions for approval of scheme providers; the second will impose a requirement on property agents to join an approved/designated scheme and make provision for the enforcement of the duty.

The government says it will release further information in due course. We shall keep clients informed of developments.

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Store recovers £1m fire damages from negligent brokers

A supermarket has been awarded more than £1m damages from a broker that failed to give proper advice when setting up a fire insurance policy.

The case involved the supermarket Pakeezah Meat Supplies, which sought advice from Total Insurance Solutions about a policy to cover fire damage at its premises.

Total set up the policy, but when fire then destroyed the building, the insurance company refused to pay out. It said that Pakeezah had misrepresented the number of fryers on the premises, and that it had failed to disclose previous financial difficulties faced by the directors when they were at other companies.

Pakeezah claimed that Total, which went into liquidation, was responsible for the failures to disclose because it had not taken proper instructions.

The court found in favour of Pakeezah.

It held that if the broker had advised the directors properly and asked the right questions, the correct information would have been given to the insurers, including the higher number of fryers and the directors' history of financial difficulties.

There was no basis not to accept that evidence. If the broker had performed its duty, the directors would have accurately disclosed all relevant matters to the insurer.

The court assessed the compensation due to Pakeezah at more than £1m.

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