SIMKINS' EMPLOYMENT DEPARTMENT WINTER BRIEFING JANUARY 2019

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT'S THE GOVERNMENT GOING TO DO?

Introduction

Employment law is constantly changing but recent developments in respect of sexual harassment in the workplace have undoubtedly been driven by a cultural shift in attitudes following the #MeToo and #TimesUp movements from America and consequential litigation.

As legislators are tasked with developing the law to reflect societal evolution, we look at some likely practical developments in this area following the House of Commons Women and Equalities Select Committee's (**WEC**) report into sexual harassment in the workplace (the **WEC Report**), from July 2018 and the Government's response, in December 2018.

The WEC Report followed that of Fawcett's Sex Discrimination Law Review in January 2018 and the Equality and Human Rights Commission's (**EHRC**) report into sexual harassment: Turning the Tables (which we reported on in our Summer Newsletter last year). Various recommendations have been made across the three reports and there has been some overlap in that respect. Those of the WEC Report are summarised below and the Government's response gives us an indication of which are likely to be taken forward.

The WEC Report's recommendations

These included:

- an extension of protection to interns and volunteers;
- the reintroduction of employer liability for harassment carried out by third parties (i.e. not just its staff), use of statutory questionnaires, and broader employment tribunal powers to make recommendations for the benefit of people other than the claimant;
- a mandatory duty on employers to protect workers from harassment and victimisation, supported by a statutory Code of Practice and enforcement powers for the Equalities and Human Rights Commission including financial penalties for breaches;
- punitive damages to be available, and costs to be paid, as a standard, by the losing employer in a sexual harassment cases in the employment tribunals;
- extension of limitation periods for harassment claims (currently three months) to six months and a "stop the clock" rule while internal procedures are completed;
- mandatory use of approved text for confidentiality clauses (for example in settlement agreements);
- use of provisions in confidentiality agreements that can reasonably be regarded as potentially unenforceable should be a professional disciplinary offence for lawyers advising on such agreements;

- it should be a criminal offence for an employer or their professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence;

- whistleblowing legislation should be amended to clearly cover disclosures of sexual harassment to the police and all regulators, including the Equality and Human Rights Commission and Health and Safety Executive, and to any court or tribunal; and

- sexual harassment by regulated persons should clearly be a breach of regulatory requirements by the individual and their organisation.

Government's Response to WEC Report

In its response, the Government noted the lack of data and research on this issue. It therefore committed to further consultation to identify the most effective changes. It did however agree with the WEC that a new statutory Code of Practice for employers should be implemented.

With the introduction of a new statutory Code it seems less likely that there will be the requirement for a new express mandatory duty on employers to protect workers from harassment as recommended by the WEC. However, the Government will consult on this proposal as well as on:

- whether further legal protections are required for interns and volunteers;

- regulation of NDAs (non-disclosure agreements), the potential use of standard approved confidentiality clauses and the best means of achieving a clear explanation to workers of the rights they cannot waive by signing one;

- how best to strengthen and clarify the laws on third-party harassment at work; and

- extending employment tribunal time limits for workplace discrimination and harassment cases from three to six months. It did not consider the WEC's recommendation of pausing the limitation period to allow for the conclusion of internal procedures was workable.

It has also committed to:

- working with regulators "for whom sexual harassment is particularly relevant" to ensure they are taking action;

- amending whistleblowing law to make the EHRC a "prescribed person" to whom protected whistleblowing disclosures can be made, and considering whether to also add the police and additional regulators to the list in relation to disclosures of sexual harassment;

- working with ACAS, the EHRC and employers to raise awareness of appropriate workplace behaviours and individual rights, to include LGBT harassment;

- ensuring the public sector takes action for the prevention of sexual harassment;

- considering whether it can learn from the criminal justice system to ensure vulnerable claimants have appropriate protection in the employment tribunal system; and

- gathering data on the prevalence and nature of sexual harassment at work at least every three years and exploring what data on tribunal claims can be collected.

No timetables for the consultations have been specified.

Whilst it will take some time for the law to catch up with society in respect of sexual harassment, employers should not wait for changes in the law to react. It is advisable to keep workplace policies on appropriate behaviour under review and ensure managers and employees are trained accordingly.

DISABILITY DISCRIMINATION - CAN ADVANTAGEOUS TREATMENT BE UNFAVOURABLE IF IT COULD HAVE BEEN EVEN MORE ADVANTAGEOUS?

In *Williams v The Trustees of Swansea University Pension & Assurance Scheme & Another [2018] UKSC65*, the Supreme Court gave judgment on whether advantageous treatment, which nonetheless could have been more advantageous, could constitute unfavourable treatment within the meaning of the Equality Act 2010.

The facts

Mr Williams suffered from Tourette's syndrome, depression and other psychological problems. He worked for the university for approximately 13 years. A reasonable adjustment saw his working hours reduced by half for the last 3 years. At 38 he applied for ill-health early retirement, which was granted. Under the terms of the pension scheme, in addition to an accrued pension, he was entitled to an enhanced pension calculated as if he had continued to be employed to normal pension age. Both the accrued and enhanced pension were based on his final salary at retirement, without actuarial reduction.

Mr Williams complained that the calculation of the enhanced pension amounted to unfavourable treatment since it was based on his part-time salary and he had only been working part-time because of his disability. Initially the tribunal agreed with him, but the EAT and the Court of Appeal disagreed.

Mr Williams appealed to the Supreme Court.

The decision

The Supreme Court unanimously dismissed the appeal.

The Court said the questions to be asked were simply what was the relevant treatment and was it unfavourable to the Claimant.

In this case, the relevant treatment was the award of a pension. There was nothing intrinsically "unfavourable" or disadvantageous about that.

The Court said that the only basis on which Mr Williams was entitled to any award was by reason of his disabilities. If he had been able to work full-time, the consequence would not have been a more advantageous entitlement but no immediate right to a pension at all. Thus his treatment was not in any sense unfavourable nor could it reasonably have been so regarded.

Comment

The Court's decision therefore confirms the general proposition that advantageous treatment cannot be unfavourable even though it could have been more advantageous.

AFTER-PARTIES AND THE POTENTIAL AFTERMATH

Although the Christmas party season is now over, the case of *Bellman v Northampton Recruitment Limited* has given employers something to consider if faced with allegations of staff misconduct outside of the workplace. It is a timely reminder for employers on vicarious liability for employees' actions in that respect.

The facts

Mr Bellman was Sales Manager at a recruitment company. Mr Major was the company's Managing Director. The company held its Christmas party at a local golf club, which was attended by most of the employees, their partners and a few guests.

When the party was finishing, at around midnight, some of the employees including Mr Major went to a nearby hotel where they could continue to enjoy themselves. Although this was not a prearranged part of the Christmas party, the company did pay for taxis to the hotel and some of the drinks.

After a couple of hours, an argument broke out. Mr Major became irate and assembled all the employees present to lecture to them on his authority. Mr Bellman challenged Mr Major's behaviour. Mr Major punched him. Mr Bellman was knocked to the floor, fracturing his skull. He was left with severe brain damage to the extent that he will never likely work again.

Mr Bellman brought a claim against the company alleging that it was vicariously liable for Mr Major's assault. The High Court found that the company was not liable for Mr Major's actions as the drinks at the hotel were separate from the Christmas party.

The decision

The Court of Appeal found that there were two points to determine:

1) the nature of Mr Major's role, to be considered broadly and objectively; and

2) whether there was sufficient connection between his position and his wrongful conduct.

Given that Mr Major was the "*directing mind and will*" of the company and had authority for all management decisions as owner and Managing Director his remit was very wide.

In relation to the second point, the Court of Appeal agreed with the High Court that the drinks at the hotel were not a seamless extension of the initial company party; however, they did have to be seen in the context of the evening's events. It could not therefore entirely discount the link to the Christmas party as the High Court had done. When Mr Major lectured staff at the after-party, he was clearly wearing his metaphorical Managing Director's hat. The assault also preceded a lengthy discussion regarding his decisions and company business.

Accordingly, the Court of Appeal decided that Mr Major was acting as Managing Director at the time he assaulted Mr Bellman as there was a sufficient connection and the company was vicariously liable for his actions.

Comment

This case does confirm the emerging approach to employer liability, with a broader interpretation on vicarious liability becoming more common. That being said, Lord Justice Irwin stressed that this case was unusual and highly fact specific and, in particular, Mr Major's high level of authority and an unrestricted role were quite unusual.

This case should not therefore be regarded as authority for the position that employers will always be held liable for their employees' actions outside of work. However, it is a reminder that their responsibilities and potential liabilities do not always end at close of business or, indeed, closing time!

If there is anything in this newsletter that raises any queries or you would like to discuss further then do contact a member of the team.

This briefing is for general guidance only. Legal advice should be sought before taking action in relation to specific matters.