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Employment Newsletter

Discrimination in the workplace. Everything an employer needs to know.

This newsletter covers:

- Harassment in the workplace
- Top tips to avoid discriminating against carers in the workplace
- Workplace dress codes- are they discriminatory?

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Introduction

Discrimination in the workplace is a real risk to business owners. This is not least because claims of discrimination do not require a minimum length of service and can be raised by workers and employees, but also because these claims can be very costly and problematic to defend.

Contents include:

In this newsletter, we bring employers up to date on current, topical issues of discrimination in the workplace and how to prevent them, including:

- **Harassment in the workplace.** What this is and the proactive steps which can be taken to prevent this;
- **Top tips to avoid discriminating against carers in the workplace.** Whether your employees could also be carers, the rights to leave and protections they have and top tips for managing these rights and minimising risks; and
- **Workplace dress codes - are they discriminatory?** The risk of discriminating with your policy and two recent cases from the European Court of Justice (ECJ) regarding religious dress and symbols of belief.

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Harassment in the workplace

In 2021, the government responded to its consultation regarding sexual harassment in the workplace and highlighted how prevalent this still is. It said "…there is still a real, worrying problem with sexual harassment at work… the steps we plan to take as a result of this consultation will help to shift the dial, prompting employers to take steps which will make a tangible and positive difference…"

It is therefore clear that the government intends to update and bolster statutory harassment protections in the future, including by placing new obligations on employers to take proactive steps to prevent harassment. However, given the severity of the issue, it is crucial for employers to be alive to this and to be taking preventative steps now.

This article looks at common forms of harassment and sexual harassment, what claims can be brought and by whom, what businesses can and should be doing to minimise harassment and what defence may be available if claims of harassment arise.

What is harassment?

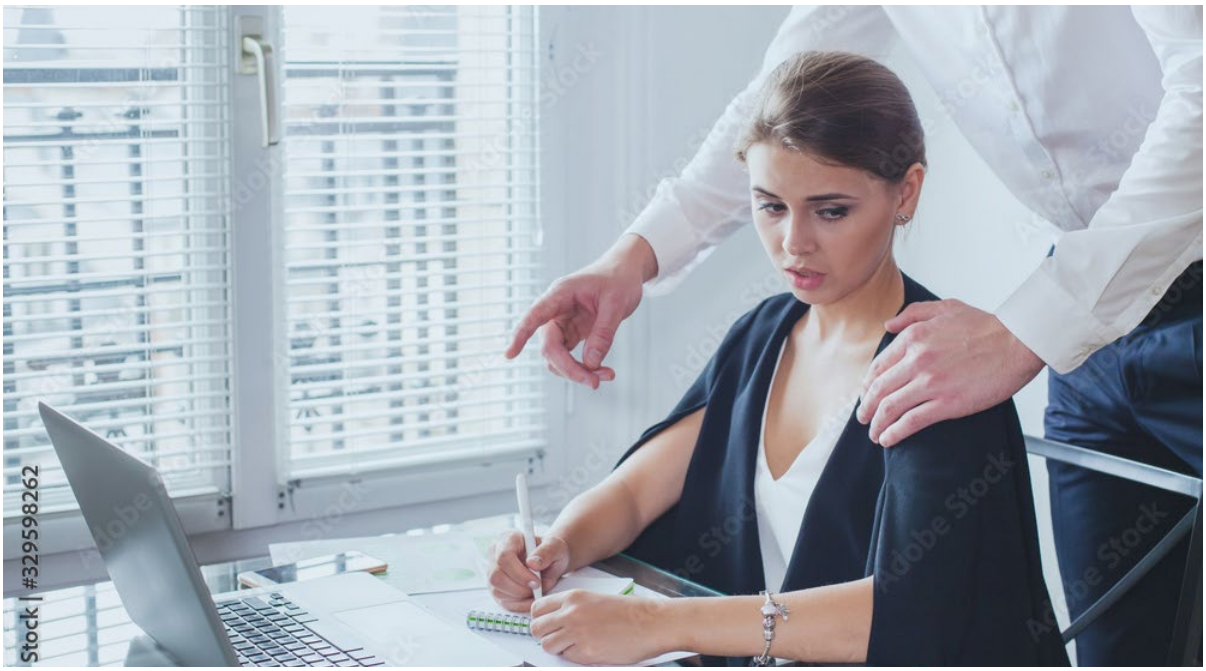
Harassment is defined, under section 26 of the Equality Act 2010, as '…any unwanted conduct, related to a protected characteristic, that has the purpose or effect of violating a person's dignity or which creates an intimidating, hostile, degrading, humiliating or offensive environment.'

Examples of harassment in the workplace can include offensive jokes, derogatory comments or gestures, inappropriate emails and the way in which procedures like recruitment, promotion, performance management and disciplinaries are conducted. In order to be protected under the Equality Act, harassment must be in relation to a protected characteristic, namely age, disability, gender reassignment, marriage or civil partnership, race, religion or belief, sex or sexual orientation. This means jokes or banter about someone's football team would be unlikely to amount to harassment unless it relates to international football and is more about a person's nationality, which is a protected characteristic.

It is also important to note that the statutory definition refers to having the 'purpose or effect of violating...' This means that it is irrelevant whether a particular joke or decision-making process was intended to be hostile or offensive etc. If it caused the offence then it would still potentially amount to harassment, regardless of the intention.

What is sexual harassment?

In addition to the overarching definition of harassment, sexual harassment occurs when a person engages in unwanted conduct of a sexual nature. Non-exhaustive examples of sexual harassment include making sexual remarks about a person's appearance, telling sexually offensive jokes, displaying sexual images and unwanted physical touching.



Harassment claims and who can bring them

A person who has suffered harassment may bring a claim in the Employment Tribunal. In most cases this must be raised within three months of the act of harassment. Compensation for a successful harassment claim comprises of two elements.

1. The first is financial loss that flows from the harassment, namely loss of income if the employee is dismissed or is forced to resign.

2. The second element is injury to feelings. This is a specific payment intended to compensate an employee for the impact of the treatment they have suffered.

The right to bring a claim of harassment is not limited to employees. It can also be brought by apprentices and people carrying out work personally, including zero-hours contract workers and some self-employed workers.

An employee does not need to have a period of qualifying service before bringing a harassment claim. It can be brought on their first day of work or even during the recruitment process.

What can you do to prevent or stop harassment in the workplace?

The clear message from the government is that businesses should be undertaking a proactive approach in preventing harassment, rather than taking reactive steps to manage and remedy complaints after the event. Employers are encouraged to:

Examine the workplace culture

Undertake a detailed and honest assessment of the workplace culture. It could be that the historic, unoffensive office banter has become offensive with jokes aimed at a particular age group, race, or gender, for example. Other employers may find that issues of harassment go to the core of the business. If there are issues that need to be addressed and remedied, this should be done without hesitation.

Put in place anti-harassment policies and procedures

Carry out a process of reviewing and scrutinising anti-harassment policies, procedures and training. If no such policies or procedures apply, employers should look to adopt these as a matter of urgency.

Anti-harassment policies should, as a minimum, set out what amounts to harassment, provide non-exhaustive examples of harassment that employees can recognise, set out the employer's zero-tolerance stance of any form of harassment and set out a safe mechanism for employees to raise any complaints.

Building upon that, employers should ensure they have procedures to properly and sensitively deal with complaints of harassment. After all, if an employee does not feel safe to raise the complaint, an employer cannot be said to be proactively preventing or stopping harassment.

Provide regular anti-harassment training

Give all employees training on anti-harassment, with additional training provided to those in HR and management roles who will need to implement and manage the policies and procedures.

Training should be tailored to the business and should seek to deal with cultures that may have developed in the workplace. Off-the-shelf anti-harassment training is unlikely to engage employees or persuade a Tribunal or other government body that the issue is being taking seriously and proactively. Training also stops employees being able to argue that they did not see or read the company policies.

Employers should bear in mind that sporadic training and outdated anti-harassment policies will not demonstrate a proactive approach to prevent harassment. Training should be delivered as regularly as is appropriate and anti-harassment policies should be frequently reviewed to ensure they are kept up to date. Tribunals often criticise businesses for relying on outdated policies and for not providing updates and regular training on issues of harassment and discrimination at work.

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Can you rely upon the 'all reasonable steps' defence to a harassment claim?

Generally speaking, employers are responsible for the actions of their employees. This means that most harassment claims are raised against the employer and some are also raised against the individual harasser as well.

The statutory defence, as set out section 109(4) of the Equality Act 2010, is that the employer took ***all reasonable steps*** to prevent harassment from occurring. If a tribunal is persuaded that all responsible steps were taken, an employer may not be liable for the actions of its employee(s).

The hurdle for demonstrating that an employer took all reasonable steps is a high one and, as such, it is rarely persuasive. In the case of *Allay (UK) Ltd v Gehlen*, the employer could not rely on the defence of taking all reasonable steps to prevent harassment as its equality and diversity training was "stale". However, having regular interactive training and ensuring that policies are regularly updated and re-circulated to all employees would go some way towards demonstrating reasonable steps.

Top tips to avoid discriminating against carers in the workplace

The government has recently confirmed that unpaid carers will be given the right to take up to five days of unpaid leave from their employment each year, for the purpose of their caring responsibilities. Whilst there is currently no timescale for the introduction of this leave, it is now more important than ever for employers to be conscious of those employees who may also be carers and to be aware of the rights and protections they have.

This article looks at who carer employees may be, the rights they have and provides practical tips for employers to take in managing carer employees and minimising potential issues arising in relation to their rights.

Who is an unpaid carer?

An unpaid carer can include anyone who looks after another person, whether this be a child, a family member, a partner or a friend who needs help and could not cope without that support, alongside their unrelated day job. In reality, anyone could become a carer, unexpectedly, at any time.

What rights to protection or leave do carers have?

Whilst being a carer is not a protected characteristic in itself, carers in the workplace can be at risk of harassment and/or discrimination by association (e.g. less favourable treatment due to having to care for a disabled child), or by perception (e.g. the carer is perceived to have a disability themselves).

Carer employees may be entitled to request:

- Parental leave - up to 18 weeks' unpaid leave available to some working parents, to be taken for the purpose of caring for their child at any time up to the child's 18th birthday, with the right to return to the same job at the end of the leave.

- Dependants' leave - the right to take reasonable time off, where necessary, to provide care to a dependant (including a spouse, civil partner, child or parent) in certain circumstances, usually where this is unexpected and urgent, such as a dependant falling ill.

- Flexible working - a formal request, made in certain circumstances, to change their hours or working arrangements as discussed below.

Top tips for employers in managing carer employees:

1. Create a dialogue – this sounds simple but many issues can be picked up and resolved by having a conversation. Some employees may not be open or vocal about being a carer. Others may have taken on the role due to an unexpected life changing event and some may not even realise that they are classed as carers. Having a workplace culture where employees feel comfortable talking about their caring responsibilities, or any issues they have had at work, promotes a more positive work force. It also helps to assess any adjustments that the employee may need and it can prevent problems escalating in the future.

2. Review policies – ensure all policies in respect of carers' rights to leave and protection from discrimination are up to date and are accessible to all employees. It is recommended that these policies contain information as to what sort of behaviour would be deemed inappropriate and how this should be dealt with. This allows employees to raise matters with confidence.

3. Provide training – HR and managers should be trained in the rights available to carers, what discrimination is, how it can occur and how it should be dealt with. This ensures a consistent approach is taken. It also assists in identifying scenarios where employees may be exercising their rights, without actually using specific terminology. For example, an employee may leave work early to attend an elderly relative who has tripped and injured themselves, which could be them exercising their right to dependants' leave. Similarly, an employee may be taking excessive sick days to arrange care for their child as they were unsure how to request parental leave. By having staff trained to be able to identify such situations, it ensures that these are responded to appropriately and avoids the employee being unfairly treated.

4. Offer flexibility, where possible – many charities and individuals are strongly in favour of flexible working as it helps unpaid carers balance their caring responsibilities with employment. In fact, the Government has recently confirmed that it intends to make the right to request flexible working available to employees from day one of their employment (currently employees need to be employed continuously for 26 weeks before they can make such request). Flexible working can come in many different forms, including home working, part time working or flexi-time. Employees should not suffer detriment for submitting such a request. There are specific timescales for employers to respond and the request can only be rejected for certain business reasons. Failure to do so could lead to a claim from an employee.

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Top tips for employers in managing carer employees:

5. Make sure decisions have been thought out and can be fully justified – it's very easy to continue doing something because *'it's always been done that way'* but that can cause problems for employers. For example, having stringent practices of working late may discriminate against women who have childcare responsibilities or deciding to terminate an employee's employment because they work from home to look after their disabled relative would likely land a company in an employment tribunal. It's important to ask the question *'why does it need to be done this way?'* and *'is there another option?'* Protection from discrimination occurs even from the job application stage so issues surrounding the wording of the job advert, place of work and hours should all be carefully considered in advance.

6. Keep an eye on the news – it's important to keep up to date with current affairs. This is especially given carer's leave is a hot topic at the moment with the government recently confirming the right for unpaid carers to take up to one week of unpaid leave per year to provide care, from the first day of employment. The legislation to implement this right is still awaited and no date has been given.

7. If in doubt, seek advice – claims associated with leave and discrimination are often complex and can be costly to defend so it's important to obtain advice if you are in any doubt as to what rights carers have or how to respond to a specific work situation. Seeking advice at the outset of any issues also helps to minimise any disruption to your workforce or reputational damage in the long term.

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Workplace dress codes- are they discriminatory?

The pandemic made most workplace dress codes redundant, as many staff swapped in-person meetings and business attire for video calls from the kitchen table in casual clothes.

Dress codes exist to help an employer ensure that their employees wear appropriate clothing for the business's nature, culture, and image. With COVID-19 restrictions lifted and workplaces now open, businesses are faced with planning and enforcing dress codes once more.

In this article, we will be looking at two cases from 2021 in which the ECJ was asked to consider whether dress codes could be deemed to be direct or indirect discrimination for prohibiting religious dress and symbols of belief.

What is direct and indirect discrimination?

Discrimination laws prohibit discrimination on several grounds, including age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (also known as "protected characteristics").

Direct discrimination is where an individual is treated unfairly because of their protected characteristic, e.g. a woman is refused a job because she is a woman, and a less qualified man is hired instead.
Indirect discrimination can occur when policies or practices that affect a group of employees or job candidates are, in practice, indirectly discriminatory to people with certain protected characteristics.

Indirect discrimination, if proven, can be objectively justified by a legitimate business aim, where the means of achieving that aim are appropriate and necessary. However, it is not possible to objectively justify direct discrimination (other than in some cases of age discrimination).

Workplace discrimination law facts

Case example: IX v WABE eV

IX was employed in Germany as a special-needs carer in a child centre run by WABE. WABE applied a policy of political, philosophical, and religious neutrality. Its staff were not permitted to wear any sign of their political, philosophical or religious beliefs that were visible to parents, children and third parties whilst at work. Despite this, IX wore an Islamic headscarf to work several times. IX was given warnings and suspended.

Case example: MH Müller Handles GmbH v MJ

MJ was employed as a sales assistant and cashier in a store in Germany. She refused her employer's request to remove her Islamic headscarf and was sent home. MJ's employer told her to attend her workplace without 'conspicuous' or 'large size' signs of political, philosophical or religious beliefs.

Both employees brought claims of discrimination in the German courts, who then applied to the European Court of Justice (ECJ) for its opinion on whether the policies amount to direct religion or belief discrimination and, if they amounted to indirect discrimination, whether this could be objectively justified.

Decision

The ECJ concluded that, in the case of *WABE*, the rule was not directly discriminatory as it had a universal and equal application and covered any visible manifestations of any belief. Even though the policy may have caused a particular inconvenience to staff wearing religious clothing, the ECJ felt that the dress code had been applied in a general and undifferentiated way and noted that another employee had been prevented from wearing a cross.

On the question of objective justification, the ECJ said that an employer's desire to display a policy of political, philosophical or religious neutrality in its relations with customers could be a legitimate aim. However, a mere desire for this was not enough to objectively justify indirect discrimination. The employer would need to go further and evidence a genuine need for such a policy.

In *WABE*, this "genuine need" was the need to take account of parents' wishes to have their children educated in line with their own religious beliefs and/or to ensure that a teacher will not manifest their own religious beliefs upon their child.

The ECJ also clarified two further conditions for objective justification: in pursuing the aim of neutrality, the rule must be applied in a consistent and systematic manner; and must be proportionate and reasonably scoped in trying to achieve its aims. Here, the ECJ may have been influenced by the fact that staff at WABE's headquarters were excluded from the restriction as they did not interact with parents or children.

In contrast, the ECJ ruled that the dress code in *Müller*, which only stopped large signs of beliefs, could be directly discriminatory as having a disproportionate impact on people with beliefs requiring larger signs to be worn, such as head coverings. For the same reasons as in *WABE*, indirect discrimination arising from such a ban could only be justified if the ban had extended to all visible forms of beliefs (rather than just conspicuous ones).

Comment

Following Brexit, UK courts and tribunals are no longer bound by ECJ rules. Nonetheless, they can have regard to such decisions if they wish, and we see this as a useful case for UK employers. The ECJ's ruling means that employers should carefully plan any restrictions that they want to include in their dress codes, to ensure that they are proportionate to the legitimate aim they are trying to achieve. For example, if the aim is to be politically and religiously neutral to children and parents at a childcare centre, as was the position in the case of *IX v WABE*, then such a policy should not also be applied to office staff or other employees who were not working directly with those children and parents. Additionally, it's crucial that employers ensure that dress code policies are enforced in a consistent manner.

If you would like more information on any of the issues covered in this newsletter, or if you need to seek legal advice for your business, please contact our Employment Solicitors on **0161 941 4000** or on **lawyers@myerson.co.uk.**

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