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ByteSize Employment Law

Our summary of the latest developments in the Employment law arena.

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Vegetarianism not protected characteristic under the Equality Act

An employment tribunal has held that vegetarianism was not a belief protected under the Equality Act.

In a recent case the tribunal accepted the belief was genuinely held and worthy of respect. It described vegetarianism as a lifestyle choice when determining that it did not concern a weighty and substantial aspect of human life and, as vegetarians adopt the practice for many different reasons, it did not have a similar status or cogency to religious beliefs.

The employment judge contrasted vegetarianism with veganism, commenting that the reasons for being vegan appeared to be consistent which suggested a cogency in vegan belief.

As this is only an employment tribunal decision it would not bind other employment tribunals - but could be taken into consideration. This case also provides a clue as to the likely outcome of Casamitjana v League Against Cruel Sports which will consider whether ethical veganism is a protected belief.

The first case referred to: Conisbee v Crossley Farms Ltd

Offensive Facebook post not done in course of employment

An employer whose employee posted an image of a golliwog on Facebook with the message “Let’s see how far he can travel before Facebook takes him off” was held not to be liable when an offended employee pursued a claim against them for harassment because of race.

Under the Equality Act 2010, anything done by an employee in the course of their employment must be treated as done by the employer even where the thing is done without the employer’s approval or knowledge.

In this scenario, an employer can seek to rely on a defence that they took all reasonable steps to prevent the employee from doing the thing for which they may be liable.

In this case, the employment tribunal decided (and the Employment Appeal Tribunal (“EAT”) agreed with the tribunal’s approach and conclusions) that the Facebook post by the employee was not done in the course of employment.

The post was made on a non-work related page and only a few work colleagues were Facebook friends of the employee and could have viewed the post.

The employment tribunal also held that the employer had taken all reasonable steps to prevent the alleged harassment from occurring. The tribunal had taken into account that the employer had treated the matter seriously and given the employee who made the Facebook post a final written warning.

The overall outcome of this case was not particularly surprising as there was little to suggest that the posting of the image was done in the course of employment.

The more interesting point for employers to note was that the employer, in this case, was held to have taken all reasonable steps to prevent the potential discrimination. This is a notoriously difficult argument to succeed with. Employers will increase their prospects of succeeding with this argument if they publicise and ideally train their employees on their equal opportunities policies.

The case referred to: Forbes v LHR Airport Ltd

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Updated guidance on timescale for responding to data subject access requests

The Information Commissioner's Office ("ICO") has provided updated guidance on calculating when a response to a data subject access request is due.

For a normal data subject access request the recipient of the request is required to respond within one month.

The updated guidance states that the day of receipt of the request should be considered "day 1" and therefore the response would be due on the corresponding date of the following month e.g. the due date for a request received on 7 November would be 7 December.

Covertly recording meeting was not a breach of trust and confidence

A decision of an employment tribunal that the covert recording of a meeting with HR did not necessarily amount to a breach of the implied term of trust and confidence, was upheld on appeal by the EAT.

The tribunal found that there had been no attempt by the employee to entrap her employer, had been flustered at the time she made the recording and noted that she had made no use of the recording before her dismissal.

The EAT stated that the making of covert recordings will generally be an act of misconduct but whether it amounted to gross misconduct would be dependent on the circumstances.

Relevant factors could include what was being recorded, why it was being recorded and the employer's to the making of recordings in any applicable policy or procedure.

Given how easy it is for employees to make covert recordings using mobile phones, you should consider having a clear stance on this issue.

For example, the making of covert recordings could be listed as an example of gross misconduct in your disciplinary policy and clear policies could be put in place regarding the recording of internal meetings. If you choose to not allow the recording of internal meetings, such as disciplinary and grievance hearings, it is worth ensuring that managers highlight this rule at the start of the meeting as a matter of course.

The case referred to: Phoenix House Limited v Stockman

Massaging in the office was not conduct of a sexual nature

In a recent case, the EAT in have upheld the decision of an employment tribunal that a female manager massaging a male employee's shoulders did not amount to sexual harassment. Although the tribunal held the conduct was unwanted, they concluded it was not related to sex.

The tribunal found that there was "brief massage type contact, unlikely in that open plan office to have lasted for two or three minutes, but long enough to make the claimant uncomfortable…". In deciding the massage was not related to sex, the tribunal considered the context of the massaging. They found it had been done in a "jokey way" accompanied by praise which, in an open plan office, was inconsistent with sexual behaviour. The tribunal also noted the contact during the massage was with a "gender neutral" part of the body.

It is reassuring that the employment tribunal has appeared to take a common sense approach in this case. However, it is also a stark reminder of the risk of inappropriate touching in the workplace.

The case also highlights that what constitutes sexual harassment contrary to the Equality Act is subtly different to what an ordinary employee might consider sexual harassment to be. *The case referred to: Raj v Capita Business Services Ltd and another.*

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