New law on harassment at work watered down as it nears the final hurdle

The Worker Protection (Amendment of Equality Act 2010) Bill is close to becoming law. As the Bill has progressed through Parliament, its core provisions have been significantly watered down. In this briefing we discuss what was originally promised, what has changed and where this leaves employers.

What is the background to these proposals?

The current position is that sexual harassment in the workplace is unlawful, and employers and individuals can be found liable in claims brought in the employment tribunal. However, employers can avoid being found vicariously liable for harassment committed by their workers if they can show that they have taken “all reasonable steps” to prevent such harassment from occurring. In practice, most employers elect to take such steps, but there is no legal obligation to do so.

Until October 2013, the Equality Act 2010 contained provisions making employers liable for harassment of their staff by third parties (such as contractors or clients), although liability only arose where the worker had been harassed on at least three occasions. These provisions were repealed by the Coalition Government on 1 October 2013.

In July 2021, the Government committed to introduce a new legal duty on employers to take all reasonable steps to protect workers from harassment and introduce employer’s liability for the harassment of workers by third parties. Towards the end of 2022, the Government decided to back a Private Members’ Bill – the Worker Protection (Amendment of Equality Act 2010) Bill – which sought to drive through these promises.

What did the Bill initially promise?

Legal duty to prevent sexual harassment

Originally, the Bill sought to amend the Equality Act 2010 to:

- introduce a mandatory duty on employers to take all reasonable steps to prevent sexual harassment of workers in the course of their employment;

- to require employment tribunals in relevant claims to consider whether, and to what extent, the employer had breached its legal duty to prevent sexual harassment. Where it had been breached, compensation could be uplifted by up to 25%; and

- permit the Equality and Human Rights Commission (**EHRC**) to investigate suspected breaches and take enforcement action against offending employers.

Liability for third party harassment

The original version of the Bill also made employers liable for harassment of workers by third parties. This liability was not confined to instances of third-party sexual harassment but covered all types of harassment under the Equality Act 2010 (e.g. on the grounds of race, sex, age, sexual orientation etc). The intention was that liability would arise the first time that the harassment occurred.

What has changed?

Legal duty to prevent sexual harassment

The proposed duty to prevent sexual harassment has been watered down as the Bill has progressed through Parliament. Instead of having to **take all reasonable steps** to prevent sexual harassment (i.e. to do everything reasonably possible), the obligation is to **take reasonable steps** (i.e. to take some action). This means the duty is less onerous for employers and it will be easier to demonstrate compliance.

It remains the case that where an employer breaches the duty, employment tribunals may uplift compensation in relevant claims by up to 25%. However, since it will be easier to comply with the duty, the risk of an uplift being awarded is reduced. Similarly, the risk of an EHRC investigation or enforcement action is lessened although those possible outcomes have been retained in the Bill.

Liability for third party harassment

The third-party harassment provisions have been dropped from the Bill altogether. There was particular concern about the risk of hospitality workers overhearing comments that they considered be offensive. The obligation to prevent harassment in such circumstances would be burdensome for employers. Either it would be impossible to discharge, or it would jeopardise the ability of third parties to speak freely.

Therefore, the position regarding third party harassment will remain unchanged. There will be no specific legal protection, however, employees who are harassed by third parties may be able to bring certain claims against their employer. For example, an employee could argue that their employer's failure to take steps to protect them from third party harassment amounts to a serious breach of contract entitling them to resign and claim constructive unfair dismissal (provided they have two years' service). In light of this, employers may still wish to take steps to prevent staff from harassment by third parties.

Where does this leave employers?

The Bill has passed through the House of Commons and is due to progress to the Report Stage in the House of Lords on 5 September 2023. This means that it has nearly completed its passage through Parliament and is likely to become law in Autumn 2023. However, the Bill states that its provisions will come into force one year from the day on which the Act is passed. Therefore, the reforms are unlikely to come into force until Autumn 2024. If the Bill passes in its current format, what will it mean for employers?

Where an employer wishes to be in a position to rely on the existing reasonable steps defence in a relevant sexual harassment case, it will still need to show that it has taken all reasonable steps. This requires quite a lot from employers (and is likely to involve all of the steps discussed below). For example, in a [recent case](), an employer's reasonable steps defence failed because its Dignity at Work policy had not been reviewed for over three years and it had failed to deliver comprehensive equality training to staff. In another [case](), an employer's defence failed because its equality training had become stale after 20 months and should have been refreshed.

An employer that *is* able to show that it has taken all reasonable steps to prevent sexual harassment at work, should always be able to demonstrate compliance with the new duty to prevent sexual harassment (given that the threshold for compliance with the duty is going to be lower).

However, all is not lost for employers that find themselves unable to rely on the reasonable steps defence because not every reasonable step was taken. Such employers would still have a shot at demonstrating compliance with the new duty to prevent sexual harassment, providing *some* preventative steps were taken. Not only does this avoid the potential uplift to compensation, it reduces the chances of negative press attention (which we think is likely to arise in breach of duty cases).

We would advise employers to work towards taking *all* reasonable steps to prevent sexual harassment at work (and other forms of harassment). Not only because it is the right thing to do for your staff, but because it puts you in the best possible position in any future litigation. Reasonable steps will include the following things:

- **Have a good suite of policies in place.** The EHRC's existing guidance recommends having separate policies for sexual harassment and other forms of harassment (or having one clearly delineated policy). Ensure that the terminology used in such policies accurately reflects that used in the Equality Act 2010. These policies should also cohere with other relevant policies such as disciplinary and social media polices.

- **Be clear about the standards of behaviour expected from all staff**. This covers the need to treat colleagues with dignity and respect, both in person and in virtual meetings and also in electronic communications. Explain that disciplinary action will follow where staff fail to meet such standards, up to and including dismissal. As far as third parties are concerned, it may be appropriate to put a notice on display to alert them to your expectations around the treatment of staff and the consequences of any harassment.

- **Raise awareness of the anti-harassment policies amongst the workforce.** Consider asking staff to provide a written acknowledgement that they have read and understood them. You could also recirculate copies to staff at regular intervals and before events where harassment has occurred in the past (e.g. Christmas parties). The policies should be adapted and shared with third parties such as clients and contractors as appropriate.

- **Review the anti-harassment policies every year.** Policies should have an annual health check and be updated to reflect any legal changes and trends apparent from internal complaints, staff surveys and/or exit interviews.

- **Put in place methods to detect harassment (including third party harassment).** This could include informal one-to-ones, sickness return to work meetings, exit interviews and external reporting systems which allow anonymous reports. We have previously reported on how some employers are making use of apps which permit real time and anonymous reporting of sexual harassment.

- **Provide high quality and regular equality and anti-harassment training to staff.** Ensure that such training is balanced, thoughtful and clearly presented and also refreshed at regular intervals (and given to all new joiners, even if this is out of the usual training cycle). Such training should also be tailored to the audience, for example, managers should understand their special responsibilities to act as role models in terms of their own behaviour and to tackle any harassing behaviour witnessed.

- **Deal with harassment complaints effectively.** This means taking swift and appropriate disciplinary action against the perpetrator of the harassment. Where the perpetrator is a third party, in some cases this may mean ending the relationship with them.

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Redundancy dismissal was unfair because employer failed to give meaningful consideration to alternatives to dismissal

In the recent case of *Lovingangels Care Ltd v Mhindurwa*, the EAT upheld a decision that a dismissal was unfair because the employer failed to give proper consideration to placing the employee on furlough as an alternative to redundancy.

What happened in this case?

The Claimant, Ms Mhindurwa, worked as a live-in carer for one of the Respondent’s clients. In the early stages of the Covid-19 pandemic, the person she cared for went into hospital and then went to live in a care home. Ordinarily, the Claimant would have moved on to care for another client, however, this was not possible due to the pandemic restrictions.

The Coronavirus Job Retention Scheme – also known as the “furlough scheme” – came into force on 23 March 2020. This was a scheme whereby the Government paid a proportion of the wages of workers who could not work due to the pandemic restrictions. The intention was to enable employers to continue employing such workers and to avoid mass redundancies.

In May 2020, the Claimant asked the Respondent to place her on furlough. The Respondent refused on the basis that there was no job role for her. After a brief redundancy consultation process, the Claimant was given notice of dismissal on 13 July 2020. The Claimant appealed. The appeal officer dismissed the appeal, having given no consideration to the possibility of furlough. The Claimant brought a claim of unfair dismissal.

The Employment Tribunal held that the dismissal was unfair on the basis that Respondent had failed to consider alternatives to a redundancy dismissal, namely, the possibility of placing the Claimant on furlough. The Tribunal said that in July 2020 a reasonable employer would have given consideration to whether the Claimant should be furloughed while it assessed whether the availability of work would change as the pandemic unfolded. The Tribunal also held the dismissal was procedurally unfair as the appeal was a “rubberstamp” exercise and not a proper appeal.

The Respondent appealed to the EAT.

What was decided?

The Respondent argued that the Claimant had not met the eligibility requirements of the first iteration of the furlough scheme, namely, she was not someone who had been instructed to cease work by them by reason of the circumstances arising as a result of Covid-19. The Respondent said the Claimant had not been instructed not to work, rather it was the case that there was no work available for her.

However, the EAT said it was *"strongly arguable"* that a proper consideration of the purpose of the scheme would have led to the conclusion that it applied to the claimant. In any event, the Tribunal had not said that the dismissal was unfair because the Respondent *should* have furloughed her. Rather, the Respondent had acted unreasonably by not giving proper consideration to the possibility of furloughing her. The Tribunal Judge had been *"…entitled to apply the same approach to furlough as he would to any possible alternative to dismissal that an employer might…be expected the consider if acting reasonably".*

The Respondent also appealed on the ground that the Tribunal had been wrong to say that it had not considered the possibility of furlough. However, the EAT held that the finding was that only cursory consideration had been given to the issue. A reasonable employer would have given proper consideration of the possibility of furloughing the Claimant to allow some time for the situation in respect of the live-in carers to improve, and to obtain new clients.

The appeal was dismissed.

What does this mean for employers?

Although the furlough scheme is long gone, this case reminds employers of the need to give careful consideration to alternatives to redundancy before proceeding to dismiss. A failure to do so may mean the decision falls outside the range of reasonable responses, with the result that the dismissal is unfair.

It is well known that employers have a duty to consider whether there are any suitable alternative roles available for a potentially redundant employee. However, there are other alternatives to redundancy that should be considered including the following:

- **Reducing employee headcount:** there are various options for reducing employee costs including freezing recruitment, withdrawing job offers, deferring start dates, reducing agency or temporary staff, seconding staff to other organisations, redeployment into alternative roles or offering early retirement.

- **Temporary stoppage of work:** this could include things like offering sabbaticals or unpaid leave, requiring staff to take holiday or temporarily laying off staff on reduced pay.

- **Reducing working hours:** the reduction of working hours will, in turn, reduce employee costs. This could include things like short-time working, offering part-time working or banning overtime.

- **Reducing remuneration:** this could include things like introducing salary sacrifice arrangements (which may save the cost of employer National Insurance contributions), freezing pay, reducing pay and/or benefits, reducing or temporarily ceasing employer pension contributions, withdrawing discretionary bonus schemes or tightening up on expenses (e.g. introducing a maximum spending limit).

Not all of these options will be appropriate for all organisations, but employers should be able to demonstrate that they have, at least, given reasonable consideration to whether such options would be achievable and help avoid the need to make redundancies. In this context, consulting with staff about the alternatives will go some way to help demonstrate this (and, indeed, may be required depending on the option under consideration).

Lovingangels Care Ltd v Mhindurwa

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Repeated postponement of dismissal of long-term sick employee was not unreasonable and did not make the eventual dismissal unfair

In *Garcha-Singh v British Airways plc*, the EAT has ruled that an Employment Tribunal was entitled to find that the dismissal of a long-term sick employee was fair. The fact that the dismissal was postponed seven times over the course of a year was to the employee's advantage and the employer had not acted unreasonably.

What happened in this case?

The Claimant worked for British Airways as a member of cabin crew. He went on long-term sick leave in August 2016. In August 2017, he was given notice that his employment would terminate on 5 January 2018. However, the termination date was extended six times to allow him further time to recover and return to work. It was extended for a seventh time to allow settlement discussions to take place. His employment was eventually terminated on 21 December 2018, well over two years after he first went off sick.

The Claimant brought claims for wrongful and unfair dismissal and race and disability discrimination. The Employment Tribunal dismissed all of his claims. He appealed to the EAT. He argued that the repeated extensions to the termination date amounted to a breach of BA's contractual absence management policy and were also unreasonable, meaning his dismissal was unfair. He also argued that failure to allow him to appeal the decision to terminate on 21 December 2018 was a further breach of BA's contractual absence management policy.

What was decided?

The EAT dismissed the appeal.

First, the EAT said the repeated extensions to the termination date did not breach the absence management policy. The policy set out the minimum standards required from BA in absence management cases. Provided BA did not act contrary to those standards, it had leeway to adapt its approach to a particular case, including postponing the termination date where appropriate. In any event, the Claimant had agreed to each extension of the termination date.

Second, it was clear that the extensions *advantaged* the Claimant as they afforded him more time to recover and return to work and avoid termination of his employment. BA's actions in this respect were reasonable. It was not unreasonable to not extend the termination date again. By that point, it had already been extended seven times over the course of a year. Further, BA had made reasonable efforts to understand the Claimant's condition and prognosis. The Claimant failed to provide any new information which would have suggested a further extension might be appropriate. In the circumstances, BA had reasonable grounds for believing that the Claimant would continue to remain off sick.

Finally, the EAT said that BA had not breached its absence management policy by not permitting an appeal of the final decision to terminate. It was true that the policy did provide for an appeal, and an appeal was heard in relation to the original decision to terminate taken in 2017. The decision to proceed with termination on 21 December 2018 was not the termination decision – rather it was a decision to go ahead and not postpone for an eighth time.

Overall, the Tribunal was entitled to decide that BA had acted within the range of reasonable responses and the dismissal was fair.

What does this mean for employers?

Had the employee been dismissed in January 2018 as originally planned, it seems likely that BA would have faced criticism from him for dismissing too swiftly and not allowing a further opportunity to recover and return to work.

Here, the employee was given more time, but complained that the postponements were unreasonable and left him living under the shadow of dismissal. It is true that employers seeking to dismiss on capability grounds typically allow time for recovery *before* serving notice of dismissal. However, as the EAT recognised, the extensions were to the advantage of the employee and he was essentially in the same position as any employee being managed under a capability procedure who knew that termination was the ultimate outcome.

Employers considering dismissal of a long-term sick employee should ensure that they complete the following steps to limit the risk of unfair dismissal and disability discrimination claims:

- Ascertain the up-to-date medical position.

- Consult with the employee.
- Consider making reasonable adjustments to the employee's role.
- Consider the availability of alternative roles.
- Consider how long you can keep their role open – this may involve consideration of the availability and cost of temporary cover, the administrative costs involved in keeping the employee on the books and the size of the organisation.
- Consider whether the ill-health was caused at work. If it was, then the general rule is that the employer should go further and keep the job open for longer than would usually be the case.
- Consider alternatives to dismissal, for example, applying for permanent health insurance cover or ill-health retirement where these options are available.

Employers should also ensure they abide by their own absence management policies, but as the EAT noted here, these do not constrain you from taking additional reasonable steps in any particular case.

Garcha-Singh v British Airways plc

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Tribunal able to hear very late disability discrimination claim from candidate whose job offer was pulled because she was on antidepressants

An Employment Tribunal has ruled that a claimant may proceed with a disability discrimination claim which is over two years out of time, because she was unaware of the time limit and lacked confidence to pursue her claim without advice. The claim concerns the withdrawal of a job offer made to the claimant because she was taking anti-depressants at the time.

What happened in this case?

In June 2019, the Claimant, Ms Mackenzie, applied to the Police Scotland to become a police officer. She received a provisional offer of appointment as a probationary police constable, which was subject to six conditions. One of the conditions was that she was certified as physically and mentally fit to perform the duties of a police officer. The offer letter stated that a failure to meet any of the six conditions may result in her start date being deferred or the provisional offer being withdrawn altogether.

In December 2019, the Claimant was medically assessed by an occupational health nurse. The Claimant disclosed that she was taking anti-depressants. The Claimant was told that applicants for the role of probationary police officer had to be free of anti-depressants for a period of two years before they could be considered for appointment (the “two-year rule”). As a result, the nurse told the Claimant that she could not be passed as fit and that she would need to be free of anti-depressants for two years before she could reapply.

A few days later, Inspector Davidson from the Police Scotland telephoned the Claimant and he apologised for the decision and said that he hoped she would reapply in two years. He wrote to her a few days later, confirming that she had not passed the medical assessment and withdrawing the provisional offer of appointment.

On 19 February 2020, the Claimant registered a complaint with Police Scotland. She was redirected to Optima Health, the occupational health service provider to Police Scotland. On 8 April 2020, Optima responded, stating that the two-year rule represented the opinion of several Force Medical Advisers and was needed to *“…demonstrate a period of ongoing stability prior to starting what is recognised to be a psychologically and emotionally draining job”.*

The Claimant made multiple attempts at seeking legal advice, with no success. In November 2021, she read a newspaper article about another candidate who had had a provisional offer withdrawn by Police Scotland because of the two-year rule. She made contact with the solicitor representing the other candidate and she eventually submitted a disability discrimination claim on 31 October 2022 – over two years after the time limit for doing so had expired.

A hearing was held to decide whether the time limit should be extended in order to allow her claim to proceed.

What was decided?

The Claimant argued that the delay in lodging her claim was caused by multiple factors including:

- the fact she was not aware of the time limit;
- the impact of the withdrawal of the job offer on her health;
- the delay in dealing with her complaint;
- the coronavirus pandemic;
- her lack of financial resources; and
- her struggle to obtain legal advice.

The Tribunal did not accept that the Claimant's mental health or financial resources had played any real part in the delay. Further, there was no delay on the part of Police Scotland or Optima Health after 8 April 2020. It was accepted that she had struggled to get legal advice, but it was clear that by late 2021 she had understood that she had the right to bring a discrimination claim and that she could present the claim herself. The pandemic created some difficulties for the Claimant at home, but this was still not a reason not to have brought her claim earlier.

The Tribunal concluded that the real reasons for the delay in presenting the claim were that the Claimant was unaware of the time limit and that she lacked confidence to bring a claim without being advised that it had merit. The Tribunal accepted that it was reasonable for the Claimant not to have been aware of the time limit, in circumstances where her efforts to obtain advice had been unsuccessful. As soon as the Claimant had seen the newspaper article, her confidence was bolstered, and she immediately contacted the solicitor named in the article and presented her claim.

Although there had been a very long delay, the Tribunal did not consider Police Scotland would suffer prejudice, given that the kernel of the case was the operation of the two-year rule and its application to the Claimant. The Tribunal held that the contemporaneous documentation should provide a *“reliable point of reference”* for any witnesses giving evidence. The Tribunal also weighed the overall merits of the claim into the balance, noting that its *“tentative view”* was that there was at least a *“triable issue”* in the case.

Police Scotland later sought a reconsideration of the Tribunal’s decision but was unsuccessful. The claim will now proceed to a Preliminary Hearing to determine whether the Claimant was disabled at the relevant time.

What does this mean for employers?

This decision highlights the latitude that Employment Tribunals have to extend time in discrimination claims. In many employment claims, such as unfair dismissal claims, time limits may only be extended where it can be shown that it was "not reasonably practicable" to have presented the claim in time. This is high bar, and it is difficult for claimants to secure extensions. In contrast, in discrimination claims (and some other types of claim), Employment Judges have a wide discretion to extend claims provided it is "just and equitable" to do so.

It remains to be seen whether the Claimant will succeed with her substantive claim. Assuming she is found to have been disabled at the relevant time (which seems quite likely), the claim will proceed to a full hearing either later this year or next year. The Claimant has claimed both direct and indirect disability discrimination, as well as discrimination arising from disability. As far as the latter two claims are concerned, Police Scotland would need to be ready to show that the two-year rule was a proportionate means of achieving a legitimate aim.

While it may be legitimate to require a sustained period of stability before starting such a demanding role, the question of whether a blanket rule refusing employment to those taking antidepressants (and for two years afterwards) is a proportionate means of achieving that aim is questionable. Particularly given that one of the reasons for taking antidepressants is to facilitate sustained mental stability. The two-year rule effectively shuts people with depression or anxiety out of the role, or forces them to forego medication and thereby *jeopardise* their mental stability in order to meet the requirement of the rule. There may be less discriminatory ways of achieving the aim such as providing counselling or mentoring to new recruits and/or having regular occupational health assessments once in post to test stability. Most employers would be unable to justify such a rule but the particular demands on probationary police constables are likely to be key when analysing justification in this case.

Mackenzie v The Chief Constable of the Police Service of Scotland

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