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Walls have ears – beware of covert employee recordings

You suspect an employee of misconduct. You conduct an investigation to establish the facts and convene a disciplinary panel to conduct a hearing and decide on a response. They decide on dismissal.

But the employee produced an audio recording of the disciplinary hearing and the panel's deliberations – he'd set his phone to audio record and left it running in his jacket pocket when he left the room. During deliberations the panel discussed legal advice but also said some quite inappropriate things that could suggest unfair or discriminatory motives. Is the employee allowed to use the recording in evidence at an employment tribunal hearing?

There is a significant risk that he will, as illustrated by a recent Employment Appeal Tribunal (EAT) ruling. However, the legal advice should be redacted so it's not disclosed.

The claimant had been ill for 3 years with stress and depression when he failed to attend an arranged occupational health appointment. The employer held a disciplinary hearing to consider whether that amounted to gross misconduct. He recorded that hearing and the deliberations.

The employer argued that none of the recording should be considered by the employment tribunal because:

1. Legal advice from a lawyer is protected by legal professional privilege (LPP). LPP cannot normally be disclosed to a tribunal or court. The reason for this rule is to encourage full and frank discussions with legal advisers.
2. It involved the private deliberations of a disciplinary panel. In general a disciplinary panel should be able to discuss matters freely without fearing they'll have to justify their innermost thoughts. We'll call this 'private deliberations privilege' (PDP). PDP isn't as strong as LPP and is more likely to be overridden by other considerations, particularly the public interest in litigants being able to use any relevant evidence.

It was obvious to the EAT that LPP covered references to the solicitor's advice, but that didn't extend to the rest of the recording.

The EAT decided that PDP didn't protect the rest of the recording. On the facts of this case, because the employee had listened to the recording, been extremely upset, made his views known and refused to engage further in the procedure, the EAT decided that the fairness of the dismissal couldn't properly be considered without considering the recordings.

What this means for you

1. Always make your decisions for fair reasons; ulterior motives may come to light.
2. Be vigilant against the possibility of a covert recording – perhaps tell the employee not to make covert recordings, ask whether they are recording, and relocate for deliberations.

How we can help

We have numerous documents to assist with disciplinary matters, such as our **Employee disciplinary meeting letter**, **Employee disciplinary meeting outcome letter** and our **Employee handbook**.

Don't discriminate against transgender people

This case involves appalling treatment of a transgender employee.

For about 16 years she'd dressed as a woman and gone by the name Alexandra. However, her passport still said Alexander. The employer said she could choose her name for her staff badge, but that payroll had to use her official name. However, when she began her badge said Alexander. She spoke to an HR supervisor who reprinted her badge, though there's no evidence that anything else was done to ensure future sensitive handling of the matter.

Notably, the store's daily core allocation sheets used the name Alexander, which meant that her supervisors and colleagues discovered her older identity.

There were numerous incidents of discrimination. Just a few examples:

1. A supervisor had frequently complimented and high-fived her. But then the supervisor discovered her older identity and asked, 'what's your name again?' and said to another colleague 'Alexander/Alexandra' and laughed. The friendliness and compliments ceased, and she continued calling her Alexander.
2. Another supervisor said to another, 'She is a joke! She became the joke of the shop!'
3. A security guard said, in front of customers, 'she's evil'.
4. Other staff said they'd get rid of her by 'making her life hell'.

The claimant eventually resigned and claimed discrimination and constructive unfair dismissal.

To outline the law:

1. Constructive dismissal is when, as here, an employee resigns in response to a breach of contract that goes to the heart of the agreement. Constructive dismissal is nearly always unfair.
2. It's harassment to engage in unwanted conduct related to a protected characteristic (such as being transgender) with the purpose or effect of violating the person's dignity or creating a horrible environment for them. The colleagues' acts were harassment.
3. Direct discrimination is when someone treats someone worse than they'd treat others because of a 'protected characteristic'. The constructive dismissal was direct discrimination, as was failing to properly investigate the matter and deal with it appropriately.
4. The tribunal found it shocking that the shop couldn't devise a way to keep her legal name off the allocation sheets and out of her supervisors' knowledge. It's indirect discrimination to have a policy or practice that applies to everyone equally but has an adverse effect on transgender employees. There was no finding of indirect discrimination here, however there was definitely a risk.
5. The employer was vicariously liable for the discriminatory acts of its employees.

The total award was £47,433. That included approximately £20K for loss of earnings and pension and £25K for injury to feelings, plus some interest.

What this means for you

Obviously, you should treat everyone with respect. You should also try to devise systems to reduce the risk of staff behaving badly. For example, you should have appropriate policies and regularly tell and train staff about these policies – if you're doing everything you can to prevent the discrimination, that will be a defence to a finding of vicarious liability; however, satisfying that defence is notoriously difficult.

How we can help

We have an **Anti-harassment and bullying policy** in our **Employee handbook** – you should also communicate this to your staff and ensure they abide by it.

Can you pay higher maternity pay than shared parental pay?

Do you have a policy of paying mothers 'enhanced maternity pay'? (I.e. a higher rate than the statutory minimum)

If so, must you also pay fathers on shared parental leave (SPL) at the same rate?

The answer's not clear.

No direct discrimination

It's direct sex discrimination to treat a male employee worse than a female employee in a similar position because they're male.

The Employment Appeal Tribunal (EAT) noted that maternity leave and SPL have different purposes in EU law: SPL is for childcare; maternity leave is primarily for the mother's recuperation. Partly for this reason, the EAT ruled that to pay different rates for SPP and maternity leave isn't direct discrimination. To be direct discrimination, the tribunal would have to compare the man on SPL with a woman on SPL, not with a woman on maternity leave. Men on SPL are paid the same as women on SPL.

Possible unlawful indirect discrimination

Indirect sex discrimination of men occurs when an employer's policies apply equally to everyone, but affect male employees disadvantageously relative to women. It requires the comparison of an appropriate group of male employees and female employees. Unlike direct discrimination, it's not unlawful if it can be justified.

The employment tribunal dismissed the indirect discrimination claim because men on SPL couldn't be compared with women on maternity leave, and because men and women on SPL are paid the same. The EAT disagreed with their approach – the correct comparison was with female employees who may be in a position to take SPL. Those female employees may be able to take maternity leave instead, whereas fathers can never take maternity leave. Accordingly, paying lower SPP than maternity pay deters fathers, relative to mothers, from taking leave to look after their children.

However, the EAT only considers legal questions. The case has been sent back to a different employment tribunal, the principal question being whether this different treatment can be justified.

On the one hand, that the reason for maternity leave and SPL are different (recuperation of mother versus childcare) may imply that maternity leave can be paid at a higher rate than SPL. However, that difference might not justify different pay. Perhaps the tribunal will consider SPL's policy objective: encouraging fathers to disrupt their careers for childcare. Perhaps it's also relevant that the EU's legislation only says that 14 weeks' maternity is for recuperation. On yet another hand, if this claim succeeds it may just deter enhanced maternity pay.

What this means for you

It's risky to pay enhanced maternity pay but only statutory SPP. If you do so ensure you have a good justification for your policy, and stay tuned for further rulings on the matter.

How we can help

Our **Employee handbook** has both a **Maternity leave policy** and a **Shared parental leave policy**. Both provide for pay at the statutory rate – though if you wish to pay more you may amend them.

General Data Protection Regulation in force this month

Finally, don't forget that the GDPR comes into force on Friday 25 May. As a result, we've updated around 30 of our employment, business and property documents, most notably:

- Our **Employee handbook** has a new **Data protection policy**
- We've rewritten and renamed our **Privacy and cookie notice for a website**.
- We've created 2 new **Privacy notice** documents for employers and landlords.

Also, the Information Commissioner's Office (ICO) has issued numerous guidance notes, including most recently those on accountability and portability of data.