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# EMPLOYMENT LAW BULLETIN

OCTOBER 2019

## Welcome to the October edition of our employment law bulletin.

Acas has this month published helpful guidance for employers on supporting staff who are going through the menopause.

As Extinction Rebellion encourages more workers to join climate change protests, we consider what employers need to know.

We cover two interesting cases in the EAT. In ***Raj v Capita Business Services Ltd and another***, the EAT considered whether a shoulder rub in the workplace amounted to sex harassment. While ***Harrison v Aryman Limited*** concerns the issue of protected termination negotiations and when protection will be lost because of improper conduct.

We also report on a recent employment tribunal case considering whether a Christian doctor had been discriminated against because of his beliefs when he refused to refer to transgender people by their chosen pronoun or title.

And our Question of the Month for October is the topical question of whether charity volunteers and trustees might be protected from detriment as whistleblowers.

## Forthcoming events:

- **Northern Education Conference 2019**
  27th November 2019, Principal York, York
  **For more information or to book**

- **Employment Breakfast Briefing: What's new in employment law?**
  3rd December 2019, Radisson Blu, Leeds
  **For more information or to book**

- **SAVE THE DATE: Employment Breakfast Briefing**
  4th of February 2020, Radisson Blu, Leeds
  **For more information or to book**

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*Wherever you see the BAILII logo simply click on it to view more detail about a case*

## Menopause: new guidance for employers

Acas has published guidance for employers on supporting staff who are going through the menopause.

It is estimated that 2 million women over the age of 50 have issues at work because of symptoms of the menopause. Around one in twenty women will go through an early menopause before that age.

The new Acas guidance provides employers with useful information about the impact of the menopause on women and trans men and makes clear that many employees are often reluctant to share their symptoms at work because they feel embarrassed or fear they will be judged to be less capable.

The focus of the guidance is on supporting people to remain at work while experiencing difficult menopausal symptoms by, for example, making changes to the work environment and to working hours. It also suggests ways to encourage a more open culture at work where women feel they can discuss the problems they are experiencing and find workable solutions.

The guidance covers the risks of sex, age and disability discrimination if an employee who is suffering menopausal or peri-menopausal symptoms is treated unfavourably or made to feel humiliated in relation to their condition. While not everyone who goes through the menopause will be disabled for the purposes of the Equality Act 2010, those whose symptoms have a significant negative impact on their ability to do day to day activities will be protected by the Act.

Acas recommends that employers include within their risk assessments features and conditions of the workplace which might worsen menopausal symptoms. It also suggests that employers might develop with their employees a menopause policy and put in place specific training for managers.

## Extinction Rebellion protests and employment law

What do employers and employees need to know about protests?

The Extinction Rebellion group called on activists and the general public to stage large-scale protests in London and other world capitals from 7 October 2019 with the aim of putting pressure on governments to take more definitive action on climate change.

As part of this, Extinction Rebellion asked the public to go on strike and/or take time off work to demonstrate with them. Looking at England and Wales, we consider some key employment law aspects of the planned action.

**Protests and strike action**

Extinction Rebellion called for workers to leave their desks and go out and protest.

Whilst most workers who respond to the call to action will likely use leave (see below), it is possible some may see this as a call to go on strike. In the UK, strike action in this context is unlikely to be lawful. This is because workers who go on strike, and therefore unilaterally deprive their employer of labour, may be in breach of their employment contract. If a strike is organised by a trade union, the union may be liable to the employer for inducing the breach of contract, unless specific steps have been followed to provide the union with immunity. This requires action taken in the ‘contemplation or furtherance’ of a trade union dispute, which seems very unlikely to apply here.

If workers breach their contracts by going on strike (and withdraw their services) the employer may have grounds to discipline (and possibly dismiss) them for a fundamental breach of contract.

**Taking leave**

Workers and employees have no right to take paid or unpaid leave whenever they want - it is subject to an employer's reasonable consent. An employer can reject a leave request if it considers, for example, that the absence would interfere with the operation of its business.

Also, if a worker has used up all of their paid leave entitlement they can, provided their employer consents, request unpaid leave.

If a worker takes unauthorised absence then an employer has the option to withhold pay for the period of unauthorised absence and to consider what disciplinary action is appropriate to take against the employee for misconduct. Employers facing this situation should consult their staff handbook and policies, where available, for guidance.

**Could the protests invoke discrimination protection?**

Under the Equality Act 2010 religion or belief is one of the defined protected characteristics upon which individuals are protected from discrimination. 'Religion or belief' includes philosophical belief, which means that this characteristic extends beyond the most obvious examples of organised religion.

Case law has provided that a belief in climate change is capable of amounting to a philosophical belief, and a tribunal case due to be heard in October 2019 is set to consider whether ethical veganism, rather than dietary veganism, is a philosophical belief afforded protection under the Act. A very recent case found that vegetarianism did not meet the requirements of a philosophical belief, because it did not have a similar status or cogency to religious beliefs.

Employers should therefore be mindful when dealing with any worker who wants to attend the Extinction Rebellion event, or any similar event, that any subsequent disciplinary action taken against the worker is not interpreted as discriminatory.

**Arrest and criminal records**

It is worth noting that Extinction Rebellion's own website contains sections giving information about protesters' rights and what action is lawful and unlawful, and notes that certain action could result in arrest and even imprisonment.

Imprisonment and a criminal record will likely have employment consequences. If a worker is arrested and charged with an offence, employers will need to be careful how they respond. Arrest, being charged or being subject to police investigation can be grounds for disciplinary action, for example, where any specific allegation may impact on the employee's suitability to perform their role or may represent a significant reputational risk to the employer.

Where a worker receives a criminal record, it may trigger a statutory restriction on that individual being employed in certain roles.

If a worker is given a prison sentence, this can have the effect of terminating the contract by operation of the law, by way of 'frustration' of the employment contract because the worker is prohibited from performing their job. In any event, it would likely be a fundamental breach, again because the employee (by their own conduct) has ceased to be in a position to provide their services.

**Wrigleys' Comment**

Whilst most employers and their workers will no doubt have little need to concern themselves with the potential employment law implications of taking part in the Extinction Rebellion action, it is worth considering the potential impact.

The surge in climate change activism is likely to continue. In turn, this will likely draw in more members of the public, which will mean an increase in secondary issues such as the impact on the employment relationship. It is also not inconceivable that adherence to environmental activism might establish itself as a personal belief for discrimination law purposes, meaning employers will need to consider how their disciplinary processes are applied to employees who take part in environmental action and how best to prevent discrimination claims.

# Female manager's shoulder massage of male team member was not sexual harassment

EAT upholds tribunal's decision that conduct was unwanted but not related to the claimant's sex

A recent case has provided an interesting review of the central tenets of harassment claims, focusing particularly on what the claimant has to show in order to shift the burden of proof onto the respondent to show a non-discriminatory reason for the conduct. It is also an interesting example of a case where conduct was found not to be sexual in nature, or related to sex.

**The law**

Under the Equality Act 2010 (EqA'10) a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of either violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

A will also harass B if A engages in unwanted conduct of a sexual nature and the conduct has the effect as set out above.

If there are facts from which the court could decide, in the absence of any other explanation, that discrimination occurred (a 'prima facie case'), the burden of proof shifts to the respondent to prove that discrimination did not occur.

[Emphasis added]

**Case details**: ***Raj v Capita Business Services Ltd and anor***

Mr Raj was employed by CBS as a customer service agent and was dismissed in August 2017. He brought claims including sexual harassment, alleging that, on several occasions, his female team leader stood behind him whilst he was sat as his desk and gave him a massage during which she felt his shoulders, neck and back. Mr Raj said this contact was unwanted conduct of either a sexual nature or related to sex.

The Tribunal found that the conduct was unwanted and that it had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Raj. However, the Tribunal rejected his claim that the conduct was sexual in nature because, amongst other things, the Tribunal found that the purpose of the contact, if misguided, was to encourage Mr Raj in the performance of his job.

Crucially, the Tribunal found that the conduct was not sexual in nature or related to sex as there was no evidence that the manager's conduct towards Mr Raj was 'related to' his protected characteristic of sex.

**Appeal and EAT decision**

Mr Raj appealed, arguing that the Tribunal had failed to apply the burden of proof test properly. Mr Raj argued that the Tribunal had found facts which were enough to establish a prima facie case: the Tribunal found the conduct was unwanted and had rejected the manager's assertion that she had not massaged him and in fact only 'tapped him on the shoulder once'. In particular, Mr Raj made reference to the case of ***Birmingham City Council and anor v Millwood*** where the EAT held an inference of discrimination could arise from a finding that the respondent had given an untrue account of events.

The EAT did not agree that these findings were enough to shift the burden of proof. It noted that in Millwood the claimant had established less favourable treatment in comparison to someone who did not have her protected characteristic, so there were obvious inferences a court could take from untruthful evidence from a respondent in this context. This was not the case for Mr Raj because he had not been found to be less favourably treated than someone of a different sex.

**Comment**

This case will be of keen interest to employment lawyers who represent claimants, serving as a reminder that a claimant needs to be very clear about how they meet all the requirements of the relevant section of EqA'10 in order to be successful with a harassment claim, and how they meet the requirement of the burden of proof under the EqA'10.

In addition, the finding will be of interest to readers for the Tribunal's examination of Mr Raj's manager's actions and why they did not amount to conduct of a sexual nature or conduct related to sex. The Tribunal considered a number of factors, including what parts of Mr Raj's body had been touched, the layout of the office and what the manager said during the interactions complained of. It is clear in this case that the Tribunal undertook a careful consideration of the acts complained of in context to decide that the conduct was not of a sexual nature or related to sex. Significantly, just because this interaction was between colleagues of different sexes did not of itself lead the Tribunal to infer that it was of a sexual nature or related to sex.

It will also be interesting for employers to note that, even if the evidence of their witnesses about the facts surrounding the conduct are not believed by a Tribunal, this does not automatically mean the Tribunal will find that a rebuttable case has been established.

## A claimant's mere assertion of improper conduct is not enough to disapply s.111A protection

A tribunal must make findings of fact in regard to improper conduct before disapplying s.111A.

S.111A 'protected conversations' were introduced to help employers approach difficult conversations around the possibility of dismissal. The provision helped to fill a technical gap between correspondence covered by the without prejudice rule (i.e. which covers an active dispute) and the practicalities of approaching an employee to negotiate their termination before a dispute exists. In the latter case, without s.111A, evidence concerning negotiations would be disclosable to a tribunal, with possible detrimental impacts to an employer in regard to its ability to defend a claim for unfair dismissal.
However s.111A has limits. Most employers will know that it specifically does not apply

to situations where there is, on the face of it, a claim for automatically unfair dismissal or discrimination.  However protection can also be lost where there has been ‘improper conduct’. What is ‘improper conduct’ must be considered by a tribunal and, if such conduct is determined to have occurred, the tribunal can limit the s.111A protection to the extent it considers just.

A recent tribunal decision has clarified what a claimant must do to trigger the potential lifting of s.111A protections for ‘improper conduct’.

**Case details**: [***Harrison v Aryman Limited***]

Ms Harrison informed Aryman in 2016 that she was pregnant. Soon afterwards Aryman approached Ms Harrison to outline a number of issues it had with her performance and offered Ms Harrison a settlement agreement. The details of this discussion were documented in a letter (the “2016 evidence”).

Negotiations continued for some time but were unsuccessful. Ms Harrison eventually resigned and submitted claims of unfair constructive dismissal and direct discrimination on the grounds of her sex, pregnancy or maternity. Ms Harrison referred to the 2016 evidence as both discriminatory acts in of themselves and as evidence that she had been unfairly constructively dismissed.

Aryman argued the 2016 evidence could not be considered by the tribunal due to s.111A. Ms Harrison countered that s.111A was disapplied in respect of her discrimination claim and because Aryman had shown improper conduct in their actions, because the 2016 evidence itself detailed an act of fundamental breach.

At a preliminary hearing a tribunal judge found that, without a successful constructive dismissal claim, the claims of discrimination would not be just and equitable to consider due to time limitations. The Judge held that s.111A protection did apply to the 2016 evidence, save as to the claims of discrimination.

**Appeal**

Ms Harrison appealed these findings. Her constructive dismissal and discrimination claims were both bound up in the 2016 evidence and the decision meant that the 2016 evidence could not be referred to in support of the constructive dismissal claim, without which she could not bring the discrimination claim.
The appeal focussed on whether the tribunal judge had properly considered the point of improper conduct in regard to the s.111A issue.

At appeal, the EAT noted that the improper conduct provisions require a tribunal judge to make a finding on whether improper conduct has occurred and then, if it has, to decide to what extent the s.111A protections are lifted. For the judge to do this the issue must be specifically raised in argument for consideration.

In this respect, the EAT found no evidence that improper conduct in relation to the unfair constructive dismissal claim had been raised. However, the EAT viewed that this point went hand in hand with the wider claim submitted by Ms Harrison that the 2016 evidence arose as a result of her informing Aryman of her pregnancy.

Because of this, the EAT found that the tribunal should have specifically considered the s.111A improper conduct point in respect of the unfair constructive dismissal claim, and remitted the point to tribunal for fresh consideration.

**Wrigleys' comment**

This case highlights an interesting combination of issues orbiting s.111A protection and serves as a useful reminder to consider improper conduct issues when contemplating approaching an employee to negotiate their exit.

Although this case did not specifically deal with what amounted to 'improper conduct' in reference to s.111A, the EAT did note that this is a lower requirement than 'unconscionable impropriety' hurdle needed to lift any 'without prejudice' protection.

There is still no clear guidance in case law as to what amounts to improper behaviour, but the ACAS Code of Practice on Settlement Agreements, a copy of which can be found here, provides examples. The examples include harassment, bullying and intimidation, physical assault or threats to assault, discrimination and putting undue pressure on a party, either by limiting the time to consider the offer or saying that if the offer isn't entered into the employee will be dismissed.

## Doctor who refused to use pronoun chosen by transgender patients was not discriminated against

Employment tribunal: Lack of belief in "transgenderism" is incompatible with human dignity

The Equality Act 2010 (the Act) protects employees and workers from discrimination on the basis of their religion or belief (or lack of belief). However, beliefs will not be protected if they are incompatible with human dignity or if they conflict with the fundamental rights of others.

A recent employment tribunal case has explored the potential conflict between the beliefs of an evangelical Christian and the rights and freedoms of transgender people.

**Case details**: ***Mackereth v DWP and another***

Dr Mackereth is a Christian who believes that God created only males and females and that a person cannot choose their gender. He also does not believe that people should be accommodated or encouraged in what he terms their "delusional belief" of being able to change gender. He was engaged for around a month by Advanced Personnel Management Group (UK) Ltd (APM) to work as a health and disability assessor for the Department for Work and Pensions (DWP).

The DWP has a policy of addressing its transgender service users in their presented sex in order to ensure that they are treated with respect and in accordance with their right not to be discriminated against.

While undergoing induction training with APM, Dr Mackereth stated that he could not refer to someone by using a pronoun or title which did not reflect their birth gender. He stated that this was because God assigned people's gender at birth and he could not refer to individuals by a gender that was different to their God-given sex.

After Dr Mackereth began carrying out assessments, he was asked by APM's contract manager whether he would comply with the DWP policy. He made clear that he would not be able to do so. Shortly afterwards, he chose to stop working under the contract. The DWP considered whether there was any alternative role which Dr Mackereth could take to avoid having to deal face to face with transgender people. No alternative role was available. He was asked for a final time whether he would comply with the policy but he refused and this was taken as a resignation.

Dr Mackereth brought claims for harassment, direct discrimination and indirect discrimination against both the DWP and APM.

The tribunal held that Dr Mackereth's beliefs were incompatible with human dignity and conflicted with the fundamental rights of transgender individuals. They were not therefore protected under the Act. It commented that refusing to refer to a transgender person by their presenting gender, or to use relevant pronouns or titles would in itself be unlawful discrimination or harassment under the Act. The tribunal also held that its decision was compatible with the European Convention on Human Rights as the right to manifest a religion or belief is subject to the protection of the rights and freedoms of others.

The tribunal went on to dismiss all of Dr Mackereth's claims. It noted that, if the doctor's beliefs had been protected under the Act, the DWP would have been able to defend the indirect discrimination claim as a proportionate means of achieving a legitimate aim. This was because the harm to vulnerable service users of accepting Dr Mackereth's stance would have outweighed the discriminatory impact on the claimant.

The tribunal noted that transgender service users applying for disability-related benefits were proportionately more likely to be vulnerable and to have mental health conditions than members of society as a whole. It noted that any "triaging" of service users after disclosure of their trans status to avoid them coming into contact with the claimant could have violated their dignity and been detrimental to their mental health.

**Wrigleys' comment**

Balancing the needs of service users against the rights of employees can at times pose significant difficulties for employers. This is particularly the case for those working with vulnerable service users. While employers must ensure they do not discriminate against employees and workers on the basis of religion or belief, it is important that policies designed to protect the rights of others are not compromised in the process. As this case shows, beliefs will not be protected under the Act if they are incompatible with other people's human dignity, rights and freedoms.

Employers are advised to have in place and to communicate regularly to employees clear written policies which set out their aims of protecting people (including service users, employees and third parties) from discrimination and harassment.

In this case, the DWP was able to show that it had a clear equality and diversity policy in place which was communicated to contract workers during their induction. It was also able to show that it had acted proportionately by considering whether there was any alternative role the claimant could have taken.
Interestingly, the General Medical Council guidance on doctors' "conscientious objection" was found not to be relevant here. For example, the right of doctors to refuse to carry out an abortion was not found to be analogous as the claimant was not being asked to carry out any procedure, simply to refer to service users by their chosen pronoun or title.

Readers should note that this is a first instance decision and it may be appealed.

# Question of the month: Could volunteers and trustees be protected as whistleblowers?

A number of recent developments may extend whistleblowing protection beyond employees and workers.

**New EU protections for whistleblowers**

While the UK has been focused on the technicalities of leaving the European Union, the European Parliament continues business as usual. In April this year, the European Parliament formally adopted a directive which aims to strengthen whistleblowing protections across the EU, acknowledging that such protection is currently patchy. This move comes after scandals triggered by whistleblower disclosures such as the diesel car emissions revelations and "Panama Papers".

UK whistleblowing protection is some of the most comprehensive of all the EU member states. However, the UK legislation expressly protects only workers and employees. The new EU directive will protect from retaliation anyone who discloses information on violations of EU law that they observe in their work-related activities. In addition to workers and employees, the new directive is designed to protect self-employed people such as freelancers, consultants and contractors, suppliers, non-executive directors, trustees, volunteers, unpaid interns and trainees and job applicants. It will also protect those who assist whistleblowers such as colleagues and relatives.

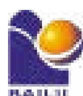
EU directives must be implemented in member state national laws before they have effect. If and when the UK leaves the EU, it will not be required to pass such national legislation to implement the directive (unless a lengthy delay to Brexit means the UK is required to do so in the interim period). However, it is likely that the UK will still have to match these new protections as part of the corporate governance and accountability standards required within a future trade deal with the EU.

**Charity Commission now treats volunteers as whistleblowers**

A recent Charity Commission report on whistleblowing disclosures confirms that the Commission has begun to treat charity volunteers as whistleblowers where appropriate. The Commission comments that this is a significant change which extends its ability to identify and act on serious concerns. It notes that volunteers do not have the same statutory protection as workers and employees but it recognises that they need the same engagement from the Commission as a worker given that volunteers face many of the same challenges and risks when raising concerns.

**Supreme Court: office holders may have whistleblowing protection**

A recent case decided in the Supreme Court suggests that UK whistleblowing protection will already extend in some cases to those acting as office holders such as directors, judges and ministers of religion.




**Case details**: ***Gilham v Ministry of Justice***

District Judge Gilham was appointed as a salaried district judge in October 2005. In 2010 she raised a number of concerns about the impact of cuts to the justice system, increased workload and the lack of secure court room accommodation. She expressed her fears that these could lead to miscarriages of justice and endanger people's health and safety. She later alleged that she had been undermined and bullied by other judges and by court staff as a consequence of her complaints.

She brought a whistleblowing detriment claim in an employment tribunal. The tribunal determined that she was not a worker and so could not benefit from whistleblower protection. On appeal, the EAT and Court of Appeal agreed.

However, on a further appeal, the Supreme Court remitted the case back to the tribunal. It held that denying DJ Gilham protection as a whistleblower was in breach of Article 14 of the European Convention on Human Rights (ECHR) as it impinged on her right to freedom of expression on the ground of her status (in particular her status as a judge). It decided that the definition of a worker within the Employment Rights Act 1996 should be read and given effect so as to extend whistleblowing protection to the holders of judicial office.

Following this case, it is possible that claimants who are not classed as workers or employees could bring legal appeals on the basis that their human rights have been interfered with on the ground of their status as office-holder. It is also possible that this will have as yet unseen consequences beyond whistleblowing protection, extending rights currently limited to employees and workers to volunteers, trustees and the self-employed.

**Wrigleys' comment**

Third sector employers should be alert to the possibility that volunteers and trustees could ultimately be found to have legal protection from detriment if they raise concerns which could be in the public interest. To encourage people to come forward with concerns, it is advisable that whistleblowing policies and procedures apply to employees, workers, self-employed contractors and volunteers. Such policies should make clear that concerns will be taken seriously and that retaliation will not occur following disclosure.

It will be interesting to track the development of whistleblowing protections in the next few years. It seems that the direction of travel will very much be towards extending protection from retaliation to a wider group of individuals working with an organisation.

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