



## Employment Law Newsletter - October 2019

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### Merry (litigation-free) Christmas

Yes, it's that time of year. Christmas means parties. Parties (can) mean harassment, offensive jokes and fighting that ends in expensive litigation. But they need not. So how can you reward your employees for their hard work, allow them to let their hair down but protect your business?

#### Risks

If a social event is an extension of employment, you can be held vicariously liable for acts of discrimination or acts of negligence committed by your employees. There needs to be a clear link between the employment relationship and the conduct for you to be legitimately concerned. Colleagues meeting for a drink at the weekend would not be covered but a Christmas party organised, announced and funded by your business would be sufficiently linked to employment.

#### Protection

The Equality Act 2010 (EqA) provides you with a defence to liability for your employees' discriminatory acts. You must prove that you took all reasonable steps to prevent your employee from committing the particular act. Employees can be named as individual respondents in discrimination claims but your pockets will be deeper so a tribunal may look to you to compensate a successful claimant.

#### Policy

Provide clear written guidelines describing how you expect people to behave at social events. Give examples of what conduct you consider inappropriate and warn about the consequences of breaching the policy.

#### Reminder

Remember employees will need to get home safely after your event. Most will be unfit to drive so

consider whether you will remind them to make appropriate arrangements or take it upon yourself to organise taxis and designate drivers.

## Monitoring

Appoint managers to monitor staff members' behaviour and how much they drink. Speak to serving staff before the event to ensure that people who have had enough alcohol are no longer served. Pick appropriate managers so that you don't have to monitor the monitors.

## Cater for all

Offering alcohol and actively celebrating Christmas should not offend religious sensibilities. But ensure that there's a selection of soft drinks and suitable food available for all religious groups represented in your workforce.

## Jobseekers advised to hide their depression

Someone seeking work in Dorset has posted a leaflet online from his local job centre that advised 'You may wish to avoid terms such as depression, ME or low back pain and use more general terms such as low mood or a mental health condition, a fatigue-related condition, an ongoing pain condition etc.'

The Department of Work and Pensions described it as 'well-intentioned advice' that has now been removed.

But what if you wish to make a conditional offer subject to health requirements or ask candidates to complete a medical questionnaire? Where do you stand?

## The law

Section 60 (1) of the EqA provides that, save for questions relating to functions that are 'intrinsic to the work concerned', you must not question a job applicant about their health before offering employment. Even that exception only applies after you have made reasonable adjustments, so it has practical difficulties.

### Can you offer a job subject to health requirements?

You can offer a job that is subject to a medical check. But if you find that a candidate has a health condition that may constitute a disability pursuant to the EqA, be careful about withdrawing the offer. Investigate the nature of the condition and how it affects the person's ability to do the job. Consider what adjustments would enable them to take up the post to avoid the risk of disability discrimination.

### Can you ask a candidate to complete a medical questionnaire?

Yes, but as above, only if you have already offered them a job and you will need to comply with data protection requirements. You must have a legal basis for processing their personal data and as this data concerns a person's health, it constitutes the special category of personal data under the General Data Protection Regulations (GDPR). You have two bases: one is to establish their fitness to do the work and the other is to comply with your health and safety obligations. Your privacy notice will explain how you comply with GDPR and your rules on retaining and erasing data.

## Managing gender reassignment

In [Dr David Mackereth v The Department for Work and Pensions and Advanced Personnel Management Group \(UK\) Ltd](#) (Mackereth) Birmingham employment tribunal found that a Christian doctor who refused to address patients by their chosen pronoun was not entitled to have his beliefs protected under the EqA. His Christianity was protected but his particular beliefs that God only created males and females and that a person cannot choose their gender was incompatible with human dignity.

His beliefs also conflicted with the fundamental rights of others. The EqA protects employees against less favourable treatment because they are proposing to undergo, are undergoing, or

have undergone a process for the purpose of reassigning their sex.

So how should you manage employees who are undergoing gender reassignment?

## GDPR

The sensitive nature of information about an employee's gender reassignment requires you to take care to comply with GDPR. Restrict access to personal data strictly to those who need to know and keep records securely.

## Contact person

Appoint someone as your transitioning employee's principal contact and record an action plan on how their transition at work will be managed.

## Time off

Your employee may need time off for medical appointments or before returning to work in their acquired gender. You should treat this time off no less favourably than time off for illness or other medical appointments.

## Communication

Discuss with your employee when they plan to start presenting in their acquired gender at work as well as how and when they wish people to be informed. Ask colleagues to use their new name and the appropriate pronoun.

## Dress codes

If your employee wears a uniform, provide the new uniform early in the process so that they can become comfortable. Discuss whether and how you may need to be flexible while they transition.

## Single sex facilities

Agree when they will start using single sex facilities and changing rooms of their acquired gender. Don't require them to use a disabled toilet as an alternative.

## Records

Discuss what changes you will need to make to records, systems and work-related social media. Only keep records for as long as required. Any records that relate to your employee's previous gender should be kept confidential.

## Should an investigation report contain conclusions?

No said the EAT in [Dr J Dronsfield v The University of Reading](#) (Dronsfield). The employer's in-house solicitor advised an investigator and HR to alter a draft investigation report to remove their evaluative conclusions on whether an employee had committed sanctionable conduct. This didn't render the dismissal unfair because it was appropriate for the solicitor to advise that the investigation report should be restricted to factual findings and a conclusion whether there was case to answer. This case reminds us that it is for the disciplinary officer to evaluate whether the conduct merited sanction.

Here is [Watershed's template investigation report](#). Please speak to us before using it.

## Discrimination and harassment

The latest in our series of short seminars is Discrimination and harassment. These sessions, which will be held in Manchester and London, complement our annual employment law updates in June. I do hope you will be able to join us.

You all know the benefits of a diverse workforce. You also understand the protection afforded by the EqA. But how do you resolve complaints without litigation or paying people off? You may pay

dearly in money, resources and emotion.

Our team of experienced employment lawyers will answer:

- When does workplace banter become unlawful discrimination or harassment?
- How can you prevent complaints of discrimination or harassment?
- How can you better manage complaints of discrimination or harassment?
- Do traditional grievance procedures work?

### To register

Click on your preferred date and location and fill in the registration form. We shall acknowledge your booking promptly and will send you more details on the event. If you have any questions or queries, please contact us on [+44 161 703 5611](tel:+441617035611).

#### Tuesday 3rd December

Novotel London City South  
Southwark Bridge Road, London, SE1 9HH

#### Wednesday 4th December

Holiday Inn Manchester City Centre  
25 Aytoun Street, Manchester, M1 3AE

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on [+44 161 703 5611](tel:+441617035611)

[watershedhr.com](http://watershedhr.com)

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