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Conduct Unbecoming

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While electronic communications have brought many benefits, there is no doubt that employee email and internet use can expose both the employee and the employer to potential liabilities, as the case on Page 4 shows.

In Gosden v Lifeline Project Ltd, a tribunal held that the employee had been fairly dismissed after he had distributed an offensive email from his home computer to a client's employee which had damaged the company's reputation. The case raises two issues. The first concerns employee conduct outside the workplace. The second relates to email and internet usage policies.

An employer is entitled to take disciplinary arising out of an employee's unacceptable conduct outside the workplace where this impacts on the individual's ability to do his or her job, damages the organisation's reputation or the nature of the misconduct means that colleagues would find his or her presence in the workplace unacceptable. This should be pointed out in the oganisation's disciplinary rules.

An email use policy should set out the employer's rules as to what is permissible and what is unauthorised use of the system, which should include barring the sending inappropriate emails to work colleagues or clients from the employee's home computer when he or she is not at work. The policy should make clear that an email system should not be used for any message that is offensive or harassing or for sending or forwarding jokes because of the wide potential for offending others. The policy should make clear that any breach of the rules is likely to result in disciplinary action which could include summary dismissal.

Unfortunately we live in an age where some people still think it is acceptable to distribute offensive material and 'sick jokes' because "we were only having a laugh". Such material should not be connected with the workplace in anyway and this needs to be made crystal clear to employees.

News in this Edition

Public sector equality duty guidance published by Commission

The Equality and Human Rights Commission has published guidance that explains what public authorities in England and non-devolved bodies in Scotland and Wales have to do to comply with the public sector equality duty.

From 6 April 2011, when the public sector equality duty part of the Equality Act 2010 comes into force, public authorities will need to consider what they are doing to tackle discrimination, harassment or victimisation.

The new duty includes age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation. Public authorities are also expected to advance equality of opportunity as well as fostering good relations between different groups.

The range of non-statutory guidance comprises of: (i) The essential guide to the public sector equality duty; (ii) Equality analysis and the equality duty; (iii) Engagement and the equality duty; (iv) Equality objectives and the equality duty; (v) Equality information and the equality duty. The guidance can be found here or can be requested via The EHRC helpline for England 0845 604 6610.

Specific duty regulations for Welsh and Scottish public bodies are expected to be published by at a later date by their respective governments. EHRC Scotland and EHRC Wales are working closely with the Scottish Government and Welsh Assembly respectively to make non-statutory guidance available following receipt and publication of those regulations.

Addressing the gaps between equality law and good practice

A report published by the Equality and Diversity Forum, highlights that while England has one of the strongest platforms of anti-discrimination law in the world, there are gaps between legislation and good practice and what actually happens in the workplace.

A report by the Equality and Diversity Forum Workplace equality: turning policy into practice suggests that despite having some of the most far-reaching equality legislation in the world, the reality of day-to-day employment experiences in England is that these legislative rights are not being fully translated into practice. The report highlights the perspectives of a selection of employers, employees, employer organisations and, trade unions on the barriers to full realisation of workplace equality rights and possible new solutions to bridge the gap.

The report recommends that policy makers and public bodies increase the availability, accessibility and relevance of equality guidance, as well as 'naming and shaming' persistently non-compliant employers. It recommends that employers: (i) establish a clear picture of their existing diversity strengths and weaknesses and unique workplace culture; (ii) build customised equality action plans that respond to any problems identified; and (iii) create their own bespoke business case setting out their commitment to diversity and the specific benefits of this commitment.

Proving the business value of older workers

Research at 400 of McDonald's restaurants showed that customer satisfaction levels were 20% higher in restaurants that employed people aged 60 and over. Managers said that later-life workers empathise with and connect well with customers and "go the extra mile" to deliver the best possible customer service.

Issue 208 of the Equal Opportunities Review (Michael Rubenstein Publishing Ltd) features the results of research conducted by the Centre for Performance-Led HR at Lancaster University Management School to examine the performance of 400 McDonalds restaurants. The study clearly demonstrated the very real business value of older workers. Levels of customer satisfaction were on average 20% higher in restaurants that employ staff aged 60 and over.

Further research was then commissioned to investigate the benefits that older workers brought to the business. A survey of 148 restaurant managers showed that: (i) over two-thirds (69%) of managers said later-life workers empathise with and connect well with customers;(ii) almost half (47%) cited later-life workers' ability to "go the extra mile" to deliver the best possible customer service; and (iii) 44% believed later-life workers brought mentoring skills to the workplace, helping younger colleagues develop and mature.

Volunteers not covered by equality legislation

In X v Mid Sussex Citizens Advice Bureau the Court of Appeal has decided that an unpaid volunteer was not covered by the Disability Discrimination Act 1995. The volunteer was not in 'employment', since she had no contract of service or a contract personally to do any work.

X was a voluntary adviser at the Citizens Advice Bureau (CAB). She provided her services under a written agreement that described itself as 'binding in honour only and not a contract of employment or legally binding'. When the CAB asked X to cease attending as a volunteer she suspected that it was because of her disability and brought a claim of disability discrimination.

The tribunal found that X was not covered by the Disability Discrimination Act 1995. The volunteering arrangements did not amount to 'employment' within the meaning of S.68, there being no employment under a contract of service or a contract personally to do any work (the same principles apply under the Equality Act 2010). The EAT endorsed the tribunal's reasoning.

The Court of Appeal rejected X's appeal. The tribunal and the EAT had been correct in determining that as a volunteer, X was not in 'employment' with the CAB. In addition, contrary to X's argument, the Court did not find it evident that it is intended to include volunteers within the scope of EU discrimination legislation. When the European Commission proposed an amendment to the Directive specifically covering volunteers, the European Council chose not to introduce it. This gave no scope for a purposive interpretation of EU law and indicated an accepted view that volunteers are not covered.

Home Office tops Stonewall's 2011 list of gay-friendly employers

Stonewall has announced its Top 100 Employers 2011, showcasing Britain's best employers for gay staff. It names the Home Office as the best place to work for lesbian, gay and bisexual people. In second place is Lloyds Banking Group and Ernst & Young comes third.

The Index is based on a range of key indicators which this year included the largest ever confidential survey of lesbian, gay and bisexual employees, with over 9,000 participants. This consistently revealed that the satisfaction levels of gay staff were highest at the top-ranking organisations in the Index.

The Top Ten are: 1 Home Office, 2 Lloyds Banking Group, 3 Ernst & Young, 4 Hampshire Constabulary, 5 IBM, 6 Goldman Sachs, 7 East Sussex County Council, 8 = Brighton & Hove City Council, 8 = HM Revenue & Customs, 10 Barclays. Barclays also won the award for Employee Network Group of the Year and Baker & McKenzie LLP was named Most Improved Employer.

Fair dismissal for forwarding offensive email to client's employee

In Gosden v Lifeline Project Ltd, a tribunal held that the employee had been fairly dismissed after he had distributed an offensive email from his home computer to a client's employee which had damaged the company's reputation.

Mr Gosden worked at Moorland Prison for Lifeline Project Ltd, a charity that helps to rehabilitate drug users. He received an email on his home computer saying:

" *Apparently, it is a sin for an Islamic male to see any woman other than his wife naked and that he must commit suicide if he does. So next Sunday at 4.00pm, all British women are asked to walk out of their house completely naked to help weed out neighbourhood terrorists*."

The email also contained numerous images of naked women.

Mr Gosden forwarded this email on to the private home computer of a Prison Service employee, Mr Yates. Mr Yates forwarded it on to another employee of the Prison Service and so it entered its intranet. Yorkshire and Humberside Prison Service said that it did not want Mr Gosden back on any of its sites.

Although the email was sent outside working hours and on a private computer, the decision was made to dismiss Mr Gosden because he had damaged Lifeline Project Ltd's reputation and his actions made further assignments for him within the prison community impossible.

The employment tribunal decided that a reasonable employer would be entitled to conclude that Mr Gosden had committed an act of gross misconduct that could damage the company's reputation or integrity. One of Lifeline Project Ltd's largest customers had formed the view that it had been content to employ a person who held discriminatory views that were contrary to its objectives and values. The dismissal was within the band of reasonable responses.