King & Spalding

Client Alert

Global Human Capital and Compliance

JANUARY 22, 2025

For more information, contact:

Tessa Cranfield
+44 20 7551 7567
tcranfield@kslaw.com

Marie Hoolihan
+44 20 7551 7587
mhoolihan@kslaw.com

Matt Sharples
+44 20 3929 5317
msharples@kslaw.com

King & Spalding

London
8 Bishopsgate
London, EC2N 4BQ
United Kingdom
T. +44 20 7551 7500

January Employment Law Update: Sounds Like Harassment?

Happy New Year! In our first monthly alert for 2025, we report on whether comments on an employee's accent are unlawful harassment, on 'gig economy' worker rights – plus guidance on employers' duties to prevent sexual harassment, and AI tools in recruitment.

Our 2025 employment law preview will follow shortly.

ACCENT REMARKS CAN AMOUNT TO RACIAL HARASSMENT

The Employment Appeal Tribunal (EAT) overturned an Employment Tribunal's ruling that comments about accents did not amount to harassment because they were not motivated by the claimant's race or nationality but were about her comprehensibility when communicating.

The EAT found that harassment does not depend on the motivation on the employee committing the harassment in order to amount to harassment. Even a genuine concern about communication could be harassment depending how it is received. The test is simply that it is *unwanted behaviour related to a protected characteristic which has the purpose or effect of violating an employee's dignity*. There is no requirement for a mental element equivalent to that in a claim of direct discrimination (which requires treatment to be 'because of' the protected characteristic). Harassment can occur inadvertently.

Although the motivation for commenting on someone's accent is irrelevant, the context will still be important as to whether it was unwanted and did in practice violate an employee's dignity.

Miss E Carozzi v (1) University of Hertfordshire (2) Ms A Lucas: [2024] EAT 169

EHRC PUBLISHES CHECKLIST TO COMBAT SEXUAL HARASSMENT

Since 26 October 2024, employers have had a legal obligation to take "reasonable steps" to prevent sexual harassment of their workers. The

UK equalities body – the EHRC - has now issued detailed guidance for employers. Following this guidance gives employers a potential defence – where otherwise they face a potential uplift of 25% in compensation awarded.

The EHRC has provided templates to be completed by employers to help comply with their duty: a checklist to be covered before, during and after a shift, action plan and monitoring logs. Recommendations include ensuring that staff have more than one 'trusted person' they can go to other than their line manager, having policies on what to do if a customer or client harasses member of staff and considering changes to the work environment, such as lighting and access to secluded areas.

The guidance also suggests that a monitoring log be completed after each shift, and any changes needed – with the suggestion that a more in-depth log be completed every quarter reflecting on any learnings and priorities for the next quarter. The templates demonstrate the expectation for employers to be taking daily steps to prevent sexual harassment, in particular in higher risk environments such as hospitality.

Sexual harassment and harassment at work: technical guidance | EHRC

Preventing sexual harassment at work: checklist and action plan for employers | EHRC

USE OF ARTIFICIAL INTELLIGENCE TOOLS IN RECRUITMENT – NEW GUIDANCE

A recent report by the UK's privacy regulator, the ICO, assesses risks and provides recommendations for UK employers who use AI tools for recruitment. This follows audits the ICO has carried out with AI providers of sourcing, screening, and selection recruitment tools. The ICO recommends that employers ask six key questions when using AI in recruitment, to comply with UK privacy legislation:

- Have you completed a Data Protection Impact Assessment? This should be done when putting the AI tool in place and updated as the AI develops.
- What is your lawful basis for processing personal information?
- Have you documented responsibilities, such as who is a controller and processor of information, and set clear processing instructions?
- Have you checked the AI provider has mitigated bias?
- Is the AI tool being used transparently (i.e. with full disclosure to candidates)?
- How will you limit unnecessary processing?

Several of these questions require employers to scrutinize the AI's tools and test them on both their training dataset and use of candidate data rather than relying on general assurances. The report reminds employers that as data controller they remain responsible for personal data when using AI tools for recruitment and for ensuring the tools are used lawfully. They cannot rely solely on the AI provider.

The AI reviewed in the report allowed employers to filter out employees based on protected characteristics and to infer characteristics such as ethnicity or gender from an employee's name – which could create both discrimination and privacy risks.

For employers, understanding how AI is used is both privacy compliant and helps to defend employment law claims. There is a clear message that employers should not simply rely on the AI providers to ensure compliance.

AI in Recruitment Outcomes Report

UPLIFTED PROTECTIVE AWARDS FOR FIRE AND REHIRE

As part of the new government's commitment to curtail the practice of 'fire and rehire', from 20 January 2025, Employment Tribunals will have the power to uplift or reduce protective awards by up to 25% for failure to follow the statutory Code of Practice on Dismissal and Re-engagement. This means employers could be ordered to pay a protective award of up to 112.5 days' pay per affected employee for failures to collectively consult in fire and rehire scenarios.

Under the new Employment Rights Bill it will be automatically unfair to dismiss an employee for refusing to agree to a variation of their terms and conditions of employment unless the employer can show they were acting in response to financial difficulties affecting their ability to carry on business. These changes are expected to take effect until 2026.

VICTORY LAP FOR ADDISON LEE DRIVERS

In the latest ruling on 'worker status', the Employment Tribunal has classified Addison Lee drivers as workers rather than independent contractors, giving them rights to backdated minimum wage and holiday pay. The Tribunal is reported to have ruled that passenger and courier drivers are considered workers at times they are logged into the ride allocation system, and owner drivers are classified as workers from job acceptance to completion. This decision reinforces the trend of courts recognising individuals in the gig economy as workers rather than independent contractors, potentially leading to workers in similar roles seeking recognition and rights. As of the date of this alert, the judgment has not yet been published. Gig economy companies will scrutinize it for any scope to keep contractors the 'right side of the line'

TUPE TRANSFERS – WHOSE TERMINATION?

The EAT has recently considered the issue of the overlap between the right to object to a TUPE transfer (which leads to a termination with no pay) and the right to resign when there is a substantial change in working conditions to the material detriment of the employee (which is an unfair dismissal).

The case concerned a bus driver whose commute increased by 45 minutes when his employer lost their contract to a new provider. His request to be treated as redundant was rejected by his original employer, which maintained that he was objecting to the transfer. He brought unfair dismissal claims against both the old and new employers. The old employer was held liable - by objecting to the transfer, the employee stopped his employment from transferring to the new employer. The case is a reminder of the liability that an outgoing employer can face under TUPE for changes by the new employer over which it as no control - and the importance of negotiating indemnities.
