

## Kemp Little HR Forum

Dignity at Work – 18 September 2007

### CASE STUDIES

#### Case Study 1

Richard Martino is a senior trader at Big Money Bank plc. Recently, he asked a secretary from a different department at the bank, Rose, if she'd like to go out with him for a drink.

A couple of days later, Rose brings a grievance. She claims that she went to the drink because she thought that as Richard is so senior it would be a bad idea to say no. However, when they got there Richard invaded her personal space, made inappropriate comments to her, tried to kiss her and tried to touch her in an inappropriate way.

Richard thinks that this may just be a cultural misunderstanding – he is Italian, whilst Rose is English. He says that they were flirting and that they kissed but this was mutual.

(a) What steps would you take in relation to Rose's complaint?

Rose should be invited to a meeting to investigate her grievance. Following the meeting you should (assuming Rose is happy for you to do so) meet Richard to get his version of events. You should also think about what other evidence you may be able to get. For example – (i) would anyone else have seen Richard and Rose in the pub, (ii) would anyone have seen Richard and Rose interacting at the bank (either before or after the drink), (iii) are there any relevant emails?

(b) If you broadly believe Rose's version of events, what action would you take against Richard? Would it be fair to dismiss Richard?

If you believe Rose's version of events, you're likely to want to initiate a disciplinary process against Richard. At the outcome of the process, you may well want to impose a disciplinary sanction on Richard – that sanction could range from a verbal warning to dismissal, or something in between. In deciding what sanction to impose,

you're likely to want to take account of the fact that (a) this was apparently a one-off event, (b) Richard is more senior than Rose, although (c) they work in different departments (see below re. points (b) and (c)). You will also need to decide just how much this was a misunderstanding and how much it was a case of, for example, Richard trying to take advantage of his seniority.

As to whether it would be fair to dismiss Richard, as this was a one-off event, you would need to have fairly clear-cut grounds for believing that Rose's allegations are true and you would also need to have concluded that Richard's behaviour was significantly inappropriate. It may be easier to justify dismissing him if the company has a policy advising staff on appropriate personal conduct and cautioning them against personal relationships amongst staff.

- (c) What is the relevance of the fact that (i) Richard is a lot more senior than Rose and (ii) Rose works in a different department to him?

The fact that Richard is a lot more senior than Rose may make it more appropriate to take disciplinary action against him, as there was effectively an 'imbalance of power' between them. Richard might argue that this should not be a factor as they work in different departments. However, if Rose still perceives Richard as being someone who has influence over her position at work, this should probably not carry a huge amount of weight.

- (d) What potential legal exposure does Big Money Bank have as a result of this situation?

If the bank doesn't investigate the grievance properly, or if it unreasonably finds in favour of Richard or doesn't take appropriate action against him, Rose might resign and claim constructive unfair dismissal and sex discrimination. Equally, however, if the bank dismissed Richard without (i) believing that he is guilty of the misconduct, (ii) having reasonable grounds for that belief and (iii) having undertaken a reasonable investigation, Richard is likely to be able to bring an unfair dismissal claim against the bank (assuming he has the requisite period of service). Given Richard's job as a trader, it would be worth considering what impact his dismissal would have on matters such as his entitlement to a bonus and/or share options.

## Case Study 2

Owen Micheals is a senior manager at Big Money Bank plc. His PA, Barry Smith, has been working for Owen for around 6 months and Owen isn't happy with the quality of his work. He says that Barry is always making mistakes and that he spends too much time chatting to the other PAs.

Owen wants the company to take disciplinary action against Barry, but before they can do this, Barry brings a grievance. He says that Owen is too demanding, has got unreasonably high standards and always wants everything immediately. Barry also says that Owen seems to have it in for him and makes a point of criticising him in front of other staff. Owen's take on this is that his style of management is robust but fair. He says that this is part of the culture at the Big Money Bank. He points out that the bank pays its staff very well.

- (a) What would you do in response to the above situation? Would you proceed with disciplinary action or investigate the grievance or do something else?

As the company didn't get a chance to start its disciplinary procedure, it should investigate Barry's grievance first. If it finds that there is a proper basis for Barry's grievance, this will make it more difficult to then take disciplinary action against him.

However, if the bank does not uphold Barry's grievance it may still proceed with disciplinary action. In doing so, however, it would be advisable to make clear that the decision to take disciplinary action is unrelated to the fact that Barry raised a grievance and that the decision had, in fact, been taken before Barry's grievance was raised. It would also be helpful to be able to produce independent/objective evidence to support the complaints about Barry's performance, for instance written examples of work that he's done poorly.

- (b) Is it acceptable for Owen to have a 'robust' management style? Is the fact that this is part of the culture at the bank a relevant consideration? What about the fact that staff are well-paid at the bank?

In principle, Owen can have a 'robust' management style. It would be helpful if he can show that this is necessary given the demands of the job eg the bank's own clients are very demanding/have very high standards. However, there is a clearly a point where a management style ceases to be robust and becomes bullying.

Criticising Barry in front of other staff is likely to be an example of this – even if the bank requires high standards, this does not mean that Barry should be criticised publicly for (allegedly) failing to achieve these.

The fact that the culture of the organisation is demanding, and that staff are well paid in consequence may be a partial justification for having a tough management style, but no more than that. The courts have made clear that employers are expected to adhere to certain standards of behaviour regardless of how well people are paid etc (see *Horkulak v Cantor Fitzgerald*).

- (c) Assuming you don't uphold Barry's grievance or do anything to address his concerns, what claims might he have against the bank?

Barry might be entitled to resign and claim constructive dismissal on the basis that Owen's behaviour's breaches the implied trust and confidence duty. If the bank has failed to investigate his grievance properly, he may be able to rely on this fact in support of his claim (see *Gab Robbins (UK) Ltd v Triggs and W A Goold Pearmak Ltd v McConnell*).

Barry may also be able to bring a claim under the Protection from Harassment Act 1997 if he can point to a course of conduct by Owen amounting to harassment. The bank would be vicariously liable for such acts – unlike under the discrimination legislation, it is not open to the bank to argue that it is not liable for Owen's behaviour because it has taken such steps as were reasonably practicable to prevent the unlawful behaviour.

### Case Study 3

John Peters works in the accounts department at Big Money Bank plc. He's been with the bank for around 5 years, although a couple of years ago he had a period of around 3 months off work with stress. John has recently been signed off work again, this time for depression. He has written to the company saying that he can't face coming back to work full-time. He has blamed his working hours – he says he has regularly been working 60+ hours a week – and the fact that his manager is a bully.

- (a) What should you do in response to John's letter? Would it make any difference if the complaint had only been made verbally?

The letter should be treated as a grievance – the fact that it contains a complaint in writing will make it a grievance for the purposes of the statutory procedures.

If the complaint had only been verbally, it wouldn't be a grievance for the purposes of the statutory procedures. However, given the serious nature of the complaint, it would still be advisable to treat it as a grievance.

In either case, therefore, the company should give John the opportunity to attend a meeting to discuss his concerns. Following the meeting, the company should investigate the component parts of John's complaint (the bullying and the long hours). If it looks like there may be something in the bullying allegation, the company may wish to consider disciplinary action against John's manager.

- (b) Does John have any potential claims against the company? What is the relevance of the fact that (i) he has had a previous period off work with stress and (ii) that he has been working long hours?

John might be able to resign and claim constructive dismissal. Such a claim would probably be on the ground that the bullying by his manager and/or the long hours have breached the implied trust and confidence duty.

In addition, if the company failed to investigate his grievance properly, this might also give him a constructive dismissal claim – see *Gab Robbins (UK) Ltd v Triggs* and *W A Gould Pearmak Ltd v McConnell*.

The fact that John has had a previous period off work with stress will make it easier for him to claim that his subsequent illness was reasonably foreseeable to the bank. This is because the bank is effectively on notice that John has a 'vulnerability' to conditions of this nature. (See, for example, *Sutherland v Hatton*). In turn, this will make it easier for him to bring a personal injury claim against the bank in relation to his depression.

We're not told whether John has (willingly) opted-out of the limit on weekly working hours set out in the Working Time Regulations 1998. However, if he has not, he is likely to be able to rely on the fact that he has consistently been working more than 48 hours per week in support of any personal injury claim he brings (see *Hone v Six Continents Retail*).

- (c) How would you respond to John's statement that he can't face coming back to work full-time? Are you under any obligation to look at alternatives?

It is possible that John's depression may amount to a disability for the purposes of the Disability Discrimination Act 1995 if it has a substantial and long-term adverse impact on his ability to carry out normal day to day activities. If that is the case, then the bank will be under a formal duty to make reasonable adjustments to prevent its working practices putting him at a disadvantage. Allowing John to return to work part-time, at least on an interim basis, is likely to be one example of such a reasonable adjustment.

Even if John's depression doesn't amount to a disability, the bank should be prepared to be flexible with regard to his return to work. This is particularly so given that the bank appears to have caused John's illness – see *Royal Bank of Scotland plc v McAdie*. Again, therefore, the bank should consider allowing John to return to work part-time, at least on an interim basis.

The bank would also be advised to consider getting a medical/psychological report on John and should also consult him about the options regarding his return to work.