

Kemp Little HR Forum

Discrimination Update – 26 November 2009

CASE STUDIES

Case Study 1

Mary works on the IT Helpdesk at Fat Cats plc. After having worked in her role for two years, she develops pain in her back and neck. She finds that this makes it difficult for her to concentrate, and she also has trouble sitting at her desk for prolonged periods.

Mary takes some time off sick, and upon her return, presents the Hugh, the Human Resources Manager with a doctor's note, which refers to "severe back pain". Mary occasionally complains to her manager, Mike, that "*my back is killing me*", and once or twice, her colleagues have found her crying in the ladies' loos because of the pain. Mary also starts to feel very down. Mike notices that she seems listless and unmotivated, which is out of character, as she is usually enthusiastic and outgoing. However, Mary does not formally notify Fat Cats of her medical condition.

After a period of six months or so, Mary is prescribed medication which helps her to manage the pain. However, during the six month period, Mary's performance was not up to its usual standards. In particular, Mary has been resolving fewer IT queries on a daily basis than her colleagues. Mike therefore decides to put Mary on a performance improvement plan.

a) Does Mary have a disability within the meaning of the Disability Discrimination Act?

Probably. Mary has a physical impairment that is affecting her ability to concentrate and to sit at her desk. It can therefore be said to impact her ability to carry out normal day to day activities. We do not have enough information to know whether her condition is likely to last for twelve months or more or whether it is likely to recur, but it seems that this is a strong possibility, particularly given that it has already lasted for six months. Note that under *SCA Packaging v Boyle*, "*likely*" in this context means "*could well happen*", which creates a fairly low threshold.

In addition to her physical impairment, Mary may also be suffering from stress / depression, given her out of character behaviour. In light of this, Fat Cats should proceed as if Mary does have a disability.

b) Hugh thinks that as Mary has not formally notified Fat Cats of her medical condition, no obligations under the DDA arise. Is he right?

No. Fat Cats has a duty to consider making reasonable adjustments if it knew, or ought to have known, that Mary has a disability and that she is substantially disadvantaged by it. Although Mary has not formally notified Fat Cats of her condition, she has a) handed in a sick note referring to her back pain, b) complained to her manager c) been seen crying from the pain and d) been behaving in a way that is out of character, which suggests that something is wrong. Bearing in mind all of these factors, a Tribunal might well find that Fat Cats ought to have known of the disability and the fact that it was substantially disadvantaging Mary. In that case, Fat Cats would be under a duty to consider making reasonable adjustments.

c) What next steps should Fat Cats take?

Fat Cats should arrange an occupational health appointment for Mary to find out more about the condition affecting her neck and back, its prognosis and any reasonable adjustments it may need to make. Depending on the advice given by the occupational health advisor, as well as Mary's views, reasonable adjustments could include providing an orthopaedic chair or other equipment, reallocating some of Mary's duties, reducing her hours of work, and / or allowing Mary to take regular breaks to get up from her desk and walk around.

Fat Cats should also ask the occupational health advisor to consider Mary's mental health and ascertain whether she is in fact suffering from some form of stress, depression or anxiety. If so, it will also be necessary to consider what reasonable adjustments can be made to accommodate this condition.

d) Given that Mary is taking medication to manage her back and neck pain, does this mean that she no longer has a disability?

No. Under the DDA, the test is based on what the effects of Mary's physical impairment would be if she were not receiving treatment for it. If it is "likely" that were she not taking medication, Mary's impairment would have a substantial adverse effect on her ability to perform day to day duties, Mary will be regarded as having a disability within the meaning of the DDA.

e) What issues does commencing a performance improvement plan create?

Mary may well argue that her performance was affected by the pain she was in. If Mary does have a disability, proceeding with the performance improvement plan in these circumstances may constitute disability-related discrimination (although note that the scope of this is currently very limited, because of the *Malcolm* decision) or a failure to make reasonable adjustments (the reasonable adjustment being to allow extra time for Mary to complete her duties). Mary could bring a claim for disability discrimination, and / or resign and claim constructive unfair dismissal. If Mary is suffering from stress and / or depression, this may also be affecting her performance, which would give rise to the same considerations.

It would be better for Mike or Hugh to have an informal conversation with Mary about her performance and ways in which they may be able to help her to manage her duties. If they subsequently have good reason to believe that the performance issues are not being caused by Mary's disability, it may then be appropriate to start a performance management process, although this would need to be managed carefully.

f) If Mary's performance issues are caused by her back pain, does this mean the Company can never take action in relation to her performance?

Whether Fat Cats can take action without falling foul of the disability discrimination legislation will depend on a number of factors, including how poor Mary's performance actually is, whether her medical condition is getting better or worse, the prognosis, the effect her performance is having on the business, etc. Depending on the circumstances, it may be possible to fairly dismiss Mary on the grounds of capability, and to argue that it is not reasonable to expect the Company to tolerate her performance levels. However, dismissals in these circumstances are tricky and inevitably carry some level of risk. Therefore Fat Cats would need to proceed carefully after having taken legal advice.

Case Study 2

Utah plc, a profitable software company, is planning its annual non-denominational celebration. It has had a few issues in the past with employees getting carried away and the company is also inviting a few of its key clients again, so it is keen to ensure that everyone enjoys themselves – but not too much!

To this end the company has set up a planning committee consisting of its HR Director, Carrie, the Head of Software Development, Spence, and the Head of Marketing and Sales, Deacon.

At the planning committee's first meeting, Carrie and Spence get into a heated argument about whether alcohol should be served at the party. Carrie thinks it's a bad idea because it will make the environment uncomfortable for female employees, and anyway says that her husband, Doug, won't let her go if alcohol is served as it conflicts with his religious beliefs. In response, Spence tells Carrie that she's being ridiculous and starts swearing at her. At this point, Deacon joins in and says that if alcohol is banned, meat and fish should be as well as otherwise his wife, Kelly (who is an ardent vegetarian), won't let him go.

The party eventually gets organised, with alcoholic drinks, meat and fish all on the menu.

The day after the party, Holly, an employee from the accounts department and Spence both come to see Carrie. Holly tells Carrie that one of the company's top clients got drunk and tried to kiss her at the party and she wants to make a complaint and is thinking of resigning. Spence complains that Arthur, a software developer, insulted and embarrassed him at the party simply because Spence brought his partner Danny to the party – Arthur says that same sex relationships are against his religious beliefs.

- a) Can Carrie complain about the fact that the company decided to serve alcohol at the party or about the fact that Spence swore at her and said she was being “ridiculous”? If so, what would be the grounds for her complaint and how much compensation would she expect to receive?**

Carrie may be able to complain that a decision to serve alcohol at the party amounts to indirect sex discrimination on the grounds that this decision will put women at a particular disadvantage compared to men (because it will make the environment uncomfortable for female employees). To defend this complaint, the company would need to argue that the decision amounts to a proportionate means of achieving a legitimate aim (eg the aim of entertaining clients/ensuring that everyone has a good time at the party). The fact that the company has had issues in the past may help support Carrie's complaint. Conversely, if the company can show that it has taken steps to control the amount of alcohol consumed at the party this should help it defend any such complaint.

Carrie may also be able to rely on the fact that the decision to serve alcohol amounts to indirect religious discrimination. Although the serving of alcohol does not conflict with Carrie's own religious beliefs, she may be able to rely on the fact that it conflicts with the beliefs of a person who she is associated with (i.e. her husband) – see *Saini v All Saints Haque Centre*. Again, to defend this complaint, the company would need to argue that the decision amounts to a proportionate means of achieving a legitimate aim (which may be easier to do in this context).

Finally, Carrie may be able to argue that she has been harassed on the grounds of her sex, or her husband's religion, by virtue of the decision to serve alcohol at the party or by virtue of the fact that Spence swore at her and called her ridiculous when discussing the issue. Remember, though, that there is an objective element in deciding whether an employee has been harassed – was it reasonable for the employee to feel harassment.

If Carrie brings a claim then, unless she resigns, the only amount she would be entitled to would be an injury to feelings award. Given that this is a one-off incident/decision, it seems likely that such an award would be in the lower band (up to £6,000).

b) Similarly, can Deacon complain about the fact that the company decided to serve meat at the party?

Deacon may be able to rely on the fact that the decision to serve meat at the party amounts to indirect discrimination in breach of the religion or belief regulations. Although the serving of meat does not conflict with his own beliefs, he may be able to rely on the fact that it conflicts with the beliefs of a person who he is associated with (i.e. his wife). To do this, he will need to show that vegetarianism is a belief covered by the religion or belief regulations. There is some support for this proposition in the *Grainger v Nicholson* case.

Again, to defend this complaint, the company need to argue that the decision (to serve meat) amounts to a proportionate means of achieving a legitimate aim.

Alternatively, Deacon may be able to argue that he has been harassed on the grounds of his wife's belief by virtue of the decision to serve meat at the party. The fact that there is an objective element in deciding whether an employee has been harassed – was it reasonable for the employee to feel harassment – will probably make it difficult for him to succeed in this argument.

c) Should the company take disciplinary action against Spence for having sworn at Carrie? Does your answer differ if Spence says that his swearing is caused by a verbal tic?

Unless it appears that Spence was severely provoked by Carrie, it will probably be appropriate to take disciplinary action against him for having sworn at her.

In relation to his verbal tic, the company will probably need to obtain medical evidence to check the truth of Spence's claim, and to determine whether this amounts to a disability for the purposes of the disability discrimination act. If Spence's verbal tic does amount to a disability, the company will need to decide whether it would be a reasonable adjustment to either not take disciplinary action against Spence, or to impose a lesser sanction than it otherwise would have done.

d) Can Holly bring a claims against the company as a result of the client trying to kiss her? Would your answer differ if it had been a fellow employee who had tried to kiss her?

An employer is not automatically liable for the acts of other third parties (eg clients) if they subject its employees to harassment or discrimination so Holly may not be able to bring a claim against the company as a result of the client trying to kiss her. However, there is an exception to the general rule if an employer has failed to take reasonable steps to prevent a third party from harassing an employee in the course of her employment, but only where the employer knows the employee has been harassed in the course of her employment on at least two previous occasions by a third party. Therefore, if Holly has been harassed by third parties (eg clients) on at least two previous occasions and the company knows of this, it may be liable for the client's actions at the party.

If it had been an employee who had tried to kiss Holly, it is more likely that the company will be liable for this. Employers will ordinarily be liable for the acts of their employees unless they can show that they took such steps as were reasonably practicable to prevent the employee from doing the act in question. These steps might include equal opportunities training, or instructions given to employees before the party regarding what is/is not acceptable behaviour and how employees should conduct themselves at the party, how much alcohol was available and so on.

e) Can Spence bring a claim against the company in relation to Arthur's conduct? Should the company discipline Arthur?

In principle, Spence can argue that he has been subject to harassment by Arthur on the grounds of his sexual orientation. The fact that Arthur was expressing his religious views does not automatically provide a defence to this claim.

Deciding whether to discipline Arthur – given that he was apparently expressing his religious views – is slightly more difficult however. Arthur might argue that disciplinary action would amount to discrimination on the grounds of his religion. The decision that the company takes is likely to depend on factors such as (i) the extent to which Arthur's views are mandated by his religion and (ii) the manner in which he was expressing them to Spence – was it done in a factual manner or a more bullying manner.

f) Would it have been simpler just to cancel the party?

Probably!