

A Day in the Life – Equality at Work

17 July 2018

Workshop Questions

The questions in this series of workshops are based on events taking place in a fictional company called 'Preston Produce Limited' ("PPL").

PPL is an agricultural and manufacturing company. They produce meat and vegetable produce on site and also have a farm shop with a cafe. The meat and vegetables they produce on site is sold in the farm shop, used in the cafe and distributed to other retailers for sale.

PPL has been steadily growing and with the number of orders building they have recently recruited their first large intake of employees with a view to continuing the expansion of the business. Up until this point they had a core group of employees who had been with the business from the beginning and who all worked well together. Along with family members who work on the farm, the current employees are now as follows:

- Victoria Olsen is the Managing Director
- Percy Summers is the Finance Director who also has HR responsibilities
- Billy Wilson is the Operations Director
- Veronica Jones is the PA to the Directors
- Sally Brown is the Operations Manager
- John Vine is the Stock Supervisor
- There are now 16 full-time and 4 part-time employees working in the production area and Jack Atkin is the Line Manager for the employees working in the production area
- There are now 7 full-time and 5 part-time employees working in the farm shop and cafe. Frank Smith is the Farm Shop & Cafe Manager.

Please work through the questions below in your groups. Feedback will be provided by our Employment Solicitors.

Case Study 1 - Harassment

Peter Bell works alongside Fiona Samuels in the Farm Shop. They have worked together for almost 6 months and appear to get along well. Fiona has been employed by PPL for almost 3 years.

One day Fiona was eating her lunch in the staff common room with a few of her colleagues when Peter came in with his lunch and sat down next to Fiona. Peter put his hand on Fiona's knee under the table and asked her if she was going to let him take her out on a date. Fiona felt embarrassed at Peter's behaviour and did not know how to respond. A few of her colleagues at the table were laughing at Peter's comment. A similar incident happened a few days later but on the second occasion none of Fiona's colleagues were present.

Fiona decides to speak with Frank Smith, her manager, about the incidents and how they made her feel. Frank tells her not to worry and that he is sure Peter was just being friendly and perhaps fancied her and she should be flattered by the attention but that he would have a quiet word with him about it if it really bothered her.

About a week later when Peter and Fiona were restocking the supplies in the Farm Shop, Peter put his arm around Fiona and asked her if she had given any further thought to "*that date*". Fiona felt intimidated as they were alone in the stock room and she was uncomfortable at Peter's comments and him putting his arm around her.

The following day Fiona was in the kitchen collecting some food to take to a customer in the Farm Shop when Peter came into the kitchen and said that he really liked her new hairstyle and that she looked "*really sexy*" that day. Fiona was very embarrassed and uncomfortable about the comment. She did not know how to respond. She thought that her colleagues in the kitchen must have overheard the comment and believed it degrading and intimidating environment for her and she did not know when Peter was going to make similar comments.

Percy Summers, Finance Director, has been working on the company's staff handbook but it has not been introduced to staff yet. Fiona feels extremely uncomfortable about Peter's behaviour towards her at work but she does not know how to raise her concerns and who to raise them with. She is also concerned about Frank's response and lack of concern when she raised the issues with him. She decides to raise her concerns about these issues with Billy Wilson, the Operations Director, because when she had raised her concerns with Frank it had not stopped further incidents from occurring. Billy tells Fiona that he will speak with Peter to ask him to stop making any such comments to Fiona and then hopefully they can get back to working well together. Fiona is concerned about whether that will be enough to stop Peter's behaviour but she does not know what else she can do and is feeling unsupported by her employer and vulnerable at work.

- (a) What steps might Fiona take next, particularly if Peter's behaviour towards her does not stop?
- (b) What claim(s) might she consider bringing and who against?
- (c) Would it make any difference if Peter had not been a colleague of Fiona's but had instead been a 3rd party contractor who delivered stock to the Farm Shop?

Case Study 1 – model answer

- (a) Fiona might raise a formal grievance regarding Peter's behaviour towards her (arguably they should already be discussing this with Fiona and clarifying with her whether she wants her complaints addressed as a formal grievance).

If she believes the company is not properly addressing her grievance, or is subjecting her to a detriment for having raised it, she might decide to resign from her employment and argue that the company's failure to address her grievance has fundamentally breached mutual trust and confidence.

The situation might affect Fiona's health resulting in a period of sick leave from work.

Fiona might decide to pursue employment claims against Peter and/or PPL.

- (b) Fiona might consider bringing a claim of **sexual harassment** against Peter. This claim can be pursued where; the perpetrator (Peter) engages in conduct of a sexual nature, that conduct is unwanted by the victim (Fiona) and the conduct has the purpose or effect of (i) violating the victim's dignity or (ii) creating an environment that is intimidating, hostile, degrading, humiliating or offensive to the victim.

There is evidence within the scenario that Peter has engaged in conduct of a sexual nature towards Fiona, that the conduct is unwanted by Fiona and that it has had the required purpose or effect.

She could also/in the alternative pursue a **standard harassment complaint**, in the event it is found that the conduct is not of a sexual nature, and the elements of a standard harassment complaint are; unwanted conduct related to a protected characteristic (sex) which has the purpose or effect of (i) violating the victim's dignity or (ii) creating an environment that is intimidating, hostile, degrading, humiliating or offensive to the victim.

Fiona might bring also bring the **harassment complaint(s) against PPL** as well as against Peter. PPL could be liable for discriminatory acts committed by one of its employees, Peter in this scenario, provided the thing done which contravenes the Equality Act 2010 is done in the course of that person's employment. Peter's actions were done in the course of his employment (at work and during working hours). PPL would have a defence if they can show they took all reasonable steps to prevent Peter from doing that thing or from doing anything of that description. Relevant issues in deciding whether they could establish that defence would include; what steps PPL took before the event(s) to prevent that type of behaviour from occurring, whether they have a written equal opportunities policy in place, whether managers have been given equal opportunities training and whether PPL had in the past disciplined employees who have been found to have committed acts of discrimination.

Fiona might also consider a complaint of **constructive unfair dismissal** if the company fails to properly deal with her complaint/grievance and she resigns arguing

that there has been a fundamental breach of her employment contract by PPL justifying her resignation.

Fiona might consider bringing complaints regarding the comments made towards her by Frank (*“he is sure Peter was just being friendly and perhaps fancied her and she should be flattered by the attention but that he would have a quiet word with him about it if it really bothered her”*).

- (c) The specific protection that was afforded to employees against repetitive harassment by third parties was repealed with effect from 1 October 2013. As a result, it can often be difficult for an employee to establish that their employer is liable for discriminatory acts against him/her by a third party (not an employee or agent of the employer).

However, an employer can be directly liable for failing to intervene in circumstances where it has an opportunity to step in to stop the discriminatory act by the third party from occurring/continuing but fails to intervene for a reason that is itself discriminatory. All of the facts would need to be considered but there is a risk that PPL could be exposed to a claim in that regard.

Fiona could potentially consider an action in the civil courts against the third party in relation to harassment under the Protection from Harassment Act 1997. This would be an action directly against the third party.

Case Study 2 – Discrimination Arising from Disability

Sam Shield works in the production area. Sam has worked for PPL since the beginning and has now been there for almost 5 years. He has a clean disciplinary record. During the course of his employment Sam has been absent for work on a few intermittent occasions, for approximately 20 days in total, for a range of different ailments including; stomach pains, migraines, stress, sickness and depression.

Sam believes he gets on well with everyone at work but his colleagues have noticed that they do have to be a bit careful around him at times as he can sometimes appear to get a little bit irritated and make quite sharp comments towards them. This has never been addressed with Sam and his colleagues believe this is just his personality.

One particular day, Sam is busy working and one of the pieces of equipment he is using malfunctions which prevents Sam from completing his tasks. Sam becomes very frustrated at this. When one of his colleagues, Debbie, suggests that he calms down and explains that she is sure the problem will be sorted soon as a call had been made to get the equipment fixed, he goes right up to Debbie and shouts the following in her face; “*what the f*** do you know*”, “*you are an annoying woman and always stick your nose in where it isn’t wanted*” and shouts at her to “*f*** off or else*”. One of their colleagues pulls Sam away from Debbie to try and prevent the situation from escalating further. Debbie is shocked at Sam’s outburst and is left extremely upset. She complains to Jack, her line manager, who decides to suspend Sam pending a disciplinary investigation. Although Sam has been known to sometimes get a little bit irritated and make sharp comments to colleagues, he has never been known to act in this manner at work.

During the investigation meeting Sam does not say very much but agrees that he made the comments to Debbie and shouted in her face. Sam is subsequently invited to attend a disciplinary hearing to hear the following allegation; ‘*unacceptable use of obscene or abusive language and threatening behaviour towards a colleague*’.

The disciplining manager believes this is a straightforward case and that Sam should be dismissed for his behaviour towards Debbie. He is clear that this type of behaviour is completely unacceptable and amounts to gross misconduct justifying summary dismissal. Towards the end of the disciplinary hearing Sam informs the disciplining manager that he has been diagnosed with stress and depression and believes this caused him to act in the way he did towards Debbie that day.

- (a) What steps would you recommend the disciplining manager takes in response to Sam’s comments about his health conditions?
- (b) What might be the risks to the company if the disciplining manager decides to ignore Sam’s comments about his health conditions and summarily dismisses him following a finding of gross misconduct?
- (c) If the disciplining manager receives medical evidence which confirms that Sam has been diagnosed with stress and depression and that his conditions were likely to have caused and/or contributed to his behaviour, what advice would you give to the disciplining manager in concluding the disciplinary process?

Case Study 2 – model answer

- (a) In these circumstances it would be sensible for the disciplining manager to investigate the potential impact of any health issues further and seek medical advice regarding the representations Sam has made about his health conditions and how he says they caused and/or contributed to his actions.
- (b) Sam might pursue a claim of **unfair dismissal** against PPL.

If Sam's conditions amount to a disability under the definition within the Equality Act 2010, Sam might pursue a claim of **discrimination arising from disability**. This claim would be well-founded if:

- PPL treats Sam unfavourably because of something arising from, or in consequence of, his disability;
- PPL cannot show that the treatment is a proportionate means of achieving a legitimate aim; and
- PPL knew, or could reasonably have been expected to know, that Sam had the disability.

An example in the EHRC Employment Code of Practice (paragraph 5.9) relates to an employee who is disciplined for losing her temper at work.

An objective approach is taken when determining whether the 'something' arose from, or was in consequence of, the disability and therefore an employment tribunal can rely on relevant evidence connecting the 'something' and the disability regardless of whether or not it was before the employer at the time it took the action about which the claim relates. One example of this is the recent case of *City of York Council v Grosset [2018] EWCA 1105* in which a finding of discrimination was upheld even though it was largely based on detailed medical evidence which was not made available to the employer at the time it reached its decision to dismiss the claimant for gross misconduct. In that case, the unfair dismissal claim had been dismissed and the Court of Appeal found that there was no inconsistency between the tribunal's rejection of the unfair dismissal claim and its upholding of the discrimination arising from disability claim.

- (c) The disciplinary manager would need to consider the outcome of the process, taking into account the potential risk of claims arising.

If the disciplining manager was considering dismissing Sam, the key considerations to take into account when looking at the test in an **unfair dismissal** claim would be:

- Whether PPL can show that there is a potentially fair reason for dismissal (conduct).
- Whether PPL genuinely believed Sam was guilty of the misconduct alleged at the time of dismissal
- Whether there were reasonable grounds for that belief

- Whether PPL carried out as much investigation as was reasonable in all the circumstances before dismissal
- Whether PPL followed a fair procedure
- Whether dismissal fell within the band of reasonable responses

If the disciplining manager was considering dismissing or imposing another type of disciplinary sanction on Sam, the relevant considerations in a claim of **discrimination arising from disability** would be:

- Whether Sam's actions/loss of temper arose from, or was a consequence of, his disability (that appears as though it could be the case from the information provided in the scenario).
- Whether Sam was treated unfavourably because of it (if he was dismissed/disciplined because of it then he would likely be able to show he was treated unfavourably because of it).
- Whether PPL can demonstrate that the treatment (eg. dismissal or disciplinary action) is a proportionate means of achieving a legitimate aim
- Whether PPL knew, or could reasonably have been expected to know, that Sam had a disability.

The disciplining manager should take into account the medical evidence when coming to a decision in the process. In particular, when looking at the risk of a discrimination arising from disability claim, if there is a decision made to dismiss then PPL would need to be confident that they could establish that dismissal was a proportionate means of achieving a legitimate aim. The potentially applicable legitimate aim(s) might be to uphold the disciplinary rules and provide a safe environment for employees. The test of proportionality would likely be a more difficult hurdle for PPL to overcome and they would need to be able to establish why dismissal was a proportionate response in the circumstances as opposed to, for example, a lesser sanction or alternative means of addressing the situation such as a capability process regarding his health conditions and mediation with Debbie (along with other safety precautions). The details provided in the medical evidence could be particularly relevant.

Case Study 3 – Pregnancy/Maternity Discrimination

Janice Jones works in the production area and is pregnant.

The company operates a bonus scheme for those who work in the production area and a significant part of the bonus is determined by the team's performance. Jack Atkin is Janice's line manager.

Jack is concerned about the team's current performance figures and feels Janice's performance has dropped since becoming pregnant and that this is detrimentally affecting the performance of the team. Jack is saving up for a house deposit and has said that he is becoming increasingly frustrated that Janice's performance might affect the ability of the team to achieve a bonus.

Janice has been on the receiving end of a number of negative comments from Jack about what he considers to be a significant drop in her performance and how he says this has affected the team's targets. Some of the comments Jack has made to Janice include that she is "*useless to the team in her condition*" and is "*bringing down the team's performance*". Janice has been extremely upset about the comments Jack has made towards her and she feels singled out because she is pregnant when other members of the team have not been performing well but have not received the same type of comments as she has. Although Janice accepts she has felt more tired at times during her pregnancy and has suffered from morning sickness at work she has tried to maintain her performance at work as best she can.

Janice decides to bring a grievance against Jack for the comments he has made towards her and the way he has been treating her which she believes is because of her pregnancy. Janice is signed off from work with stress.

- (a) How should the company deal with Janice's grievance?
- (b) What claims might Janice consider pursuing?

Case Study 3 – model answer

- (a) PPL should follow their own internal grievance procedure and the Acas Code of Practice on Disciplinary and Grievance Procedures. The process would involve; meeting with Janice to establish the details of her grievance (after asking for details of the grievance to be provided in writing), investigating the issues, decide on appropriate action and provide a right of appeal if the situation is not resolved. It may also involve disciplinary action against Jack depending on the findings of the grievance process.

If there were genuine concerns regarding Janice's performance that were unrelated to her pregnancy then PPL would not be prevented from addressing them with her appropriately. However, in this situation Jack's comments appear to be entirely influenced and related to Janice's pregnancy and that creates a significant risk for PPL in this scenario.

- (b) PPL and/or Jack might face claims of:

- **Unfavourable treatment because of pregnancy or pregnancy-related illness** under section 18 Equality Act 2010 (against PPL and/or Jack). Janice would be in the 'protected period' which begins when her pregnancy begins and ends after the end of the additional maternity leave period or when she returns to work after the pregnancy (if that is earlier) or two weeks after the end of the pregnancy if she does not have the right to ordinary and additional maternity leave.

A person discriminates against a woman if, in the protected period in relation to her pregnancy, he treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of it. Janice could argue that she was treated unfavourably in relation to her pregnancy in the following ways; the comments made towards her by Jack, the environment Jack has created and being singled out when it appears others had not been performing well.

- **Harassment because of sex** in accordance with sections 26 and 109 of the Equality Act 2010 (against PPL and/or Jack).
- **Constructive unfair dismissal** (against PPL) if Janice resigns arguing that PPL has fundamentally breached the implied term of trust and confidence entitling her to resign.

©Jacksons Law Firm

July 2018