Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

December 2019

Love is in the air

Reports say that between a quarter and a third of all long term relationships start at work. In fact, statistically speaking couples are more likely to stay together and have a successful relationship if they meet at work rather than their local pub, a nightclub or even through mutual friends.

Despite this, workplace romances are not always seen in a positive light and are sometimes even frowned upon by colleagues and employers alike.

Whilst most workplace relationships shouldn't cause any problems for the business, there is no doubt that they can, and often do, raise a number of potential issues which need to be managed carefully.

The Risks

Colleagues can feel threatened by a workplace relationship which could lead to preferential treatment or financial gain and might even lead to allegations of misconduct against the employees involved. To keep working relationships intact any allegations should be taken seriously and investigated to weed out instances of unfairness. Where allegations are substantiated, employers will need to consider taking disciplinary action. Clearly this will be a very delicate situation requiring careful handling.

When relationships break down this can create a toxic working environment, likely leading to the employees being unable to continue working together. Can they work in different departments? How do you choose which one to move? If moving them isn't a viable option, and the issues are serious enough, you might need to consider removing one of them from the business entirely. Choosing one employee to dismiss or transfer over the other can lead to claims of sex discrimination and unfair and dismissal.

What about a situation where the feelings are one sided? An employee showing their affections to another employee who does not feel the same way can lead to claims of sexual harassment, which the business can be held liable for. A senior manager who misreads signals from an enthusiastic junior member of staff and makes a move can expose the company to this liability. Deciding whether such conduct is inappropriate will depend on the circumstances but allegations of harassment must be investigated fully and action taken where necessary.

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Welcome

Merry Christmas

Welcome to the latest edition of our workplace newsletter. We very much hope you enjoy reading this and as always, would welcome any feedback you have on the content.

We would also like to take this opportunity to say on behalf of the whole Outset team, it's been great working with you this year and we wish you all a very merry Christmas and a happy, healthy and prosperous new year.

Managing the Risks

In the wake of the #Metoo movement employers have been more alive to misconduct in the workplace of a sexual nature that could amount to discrimination, harassment or even assault. This increased awareness has made employers mindful of any sexual activity between colleagues and workplace relationships generally, even when it appears consensual – how can one be sure the relationship is consensual, without any subtle or direct coercion, where one employee has control or power over the other at work?

To manage this, some companies in the USA adopt workplace relationship policies which apply an outright ban on sexual relationships at work (not just where the employees involved have a direct or indirect reporting line).

Other US employers require employees to enter into "Love Contracts" whereby the employees agree not to sue their employer if the relationship goes sour and they are treated badly at work as a result. A Love Contract might sound tempting, but it's unlikely to carry much weight in our Employment Tribunals.

In November 2019 reports emerged that McDonalds CEO stepped down after it was discovered he had a romantic relationship with an employee. Although the relationship was consensual, it was in breach of company policy, which prevented him from having a relationship with a subordinate under any circumstances.

In the UK outright bans on workplace relationships are rare. The enforceability of a blanket ban is questionable, not to mention the negative impact it may have on employee relations. The Love Contracts used in the US would not work here to avoid liability for the business, as employees can only sign away their statutory rights if certain conditions are met (i.e. a valid settlement agreement).

Clearly there is a balancing act to be had when managing these risks. The need to respect an employee's freedom of choice and right to a private life, against a company's legitimate need to safeguard its employees, maintain performance levels, and prevent conflicts of interest and breaches of confidentiality.

So, you can't (and arguably, wouldn't want to) stop workplace romances blooming or stop them altogether but you can set boundaries on how employees conduct themselves at work. This will help you to protect business interests and manage the situation if things go wrong and the best way to achieve this is forward planning - by putting a workplace relationship policy in place.

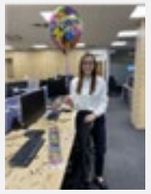
Our top tips - What should you include in your policy?

1. A requirement for the relationship to be disclosed to HR or management – especially one that involves a senior manager and a junior member of staff and/or is likely to lead to a conflict of interest/breach of confidentiality
2. A provision allowing reporting lines to be changed or other arrangements to be made where the relationship involves one employee reporting into the other or in the same team
3. A requirement not to divulge confidential information to the other
4. A ban on inappropriate public displays of affection
5. A requirement that the relationship must not impact negatively on performance or conduct whilst at work
6. Appropriate cross referencing to other relevant policies such as disciplinary and grievance; victimisation, anti-bullying; harassment and dignity at work
7. A requirement for the breakdown of the relationship to be communicated to HR or management

As with any policy, it is essential for a workplace relationship policy to be applied across the business consistently and to all employees equally. It can't be one rule for some, and another for others. If you are seeking to rely on the policy in the event an employee is in breach and particularly if you are looking to consider disciplinary action as a result of the breach, consistency is key.

Outset Newly Qualified Lawyers

Outset has been supporting Rachel Easton and Usman Miah through their training contracts and we were delighted to be able to celebrate them recently becoming fully qualified solicitors. They have worked extremely hard, studying whilst working, and we couldn't be more proud.



Outset Xmas Party

We were very lucky to have been treated to a lovely 3-course meal and live band at a local venue, and we showed our gratitude by getting fully into the fancy dress spirit. With a theme of Hollywood characters/ actors there was a great variety, some costumes were so good we struggled to recognise one another!

Getting employees to work in the face of travel disruption

Whether you see your work commute as an opportunity to reset your mind or as a necessary but unpleasant task, get yourself ready for more time spent in or on your chosen mode of transport. As autumn turns to winter, shorter days and poor weather conditions become commonplace. The desire to cycle or walk to work reduces and commuters are drawn to the roads more.

Travel disruptions caused by inclement weather occur every year and are nothing new. However, issues with commuting seem to be getting worse, with more and more housing developments popping up, planned or unplanned road works and even potential border control issues as a result of Brexit.

Travel disruption is a general term that covers everything from minor inconvenience to travel plans to major disruptions which may result in getting to the office not even being a viable option. In most cases severe travel disruption will last no more than a day or two if that. In some cases this may last a week. In rare cases, the problem could be more long term. Therefore it is prudent to develop plans and set expectations for your workforce in order to minimise disruption to the business, regardless of its nature and duration.

Businesses bear the brunt of attendance issues as a result of adverse weather and travel disruption. Being pro-active in this area and making the employee mindful of what is expected of them ahead of time can pay off.

Think of this in terms of disaster recovery. By doing so, you can put together a set of tools, policies, procedures and contingencies that will aid the continuity of business during these times.

Short term disruption – maintaining attendance at work

An employee is responsible for how they get to and from work. Although this is the case, businesses should be pro-active by informing employees what they should do in the event of any travel disruption. This may start with a contractual clause, policy or procedure that details what an employee must do if they are going to be late to work or are unable to travel due to travel disruptions. This method, however, only deals with the issue 'as it happens'.

However, encouraging employees to be prepared ahead of time enables you to minimise or even avoid unnecessary disruptions to timekeeping and attendance at work. The following are considerations to highlight to employees in order to aid that preparedness:

- Keeping abreast of all travel updates leading up to and during any disruption period. Listen to local radio stations, the police, transport providers and refer to the internet for updates.
- Consider the location that you commute to and from work and look at alternative travel arrangements that you could make if your normal route were to be disrupted.
- Consider public transport, cycling or even walking to work wherever appropriate.
- Be prepared to leave home early in order to arrive at work on time.
- If an employee identifies that they are likely to be affected by the travel disruptions ahead of time, they should discuss this with their line manager to seek out a plan of action or alternative arrangements where necessary.
- The business should look at alternative work environments. Can the employee work from home or remotely at another location?
- Refer to any adverse weather/travel disruption policy and procedure that is currently in place.

Longer term disruption – coping with adverse affects on the business

In some situations travel disruption, for whatever reason, may be endured for a longer period of time or have a longer adverse effect on the business in terms of your trade or custom. In these cases you may experience a long term reduction or cessation of incoming work and a resulting downturn in your turnover. Rather than automatically going down the route of a potential redundancy situation, it is worth exploring all the options that maybe available. Redundancy should always be seen as a last resort. By exploring what flexibility may exist in your employment contracts and by consulting with your employees regarding the issues, you may be able to manage the situation in a more amicable way.

Risks do exist in this area though. For example, if you do not have the right to apply a certain course of action (for example, reducing hours of work), but continue to do so without a suitable agreement in place, you may find yourself dealing with claims for constructive unfair dismissal. Likewise, any failure to approach this situation appropriately that leads to the termination of employment may result in a claim for unfair dismissal.

Always ensure that you take appropriate specialist advice when looking for creative, commercial ways to manage your workforce and protect your business.

Right to Work checks in a post Brexit Era

With the EU Settlement Scheme in full swing and there being at least short-term certainty for EU nationals in the UK, we're taking a look at changes employers will likely need to make to their right to work check procedures.

Employers are not required to carry out any additional right to work checks in respect of EU nationals until 1 January 2021. In other words, you can continue to accept an EU passport or identity card as evidence of that individual's right to work in the UK up to and including 31 December 2020.

Whilst you can also accept evidence of settled status if you wish, this is not something employers can insist on employees providing until 1 January 2021. Even then, employers can only insist on the provision of additional right to work evidence in respect of new employees joining on or after 1 January 2021.

There will be no requirement to obtain retrospective evidence of settled status or otherwise in respect of your existing EU workforce – which will come as welcome news to many employers dreading the additional administrative burden.

Of course, all EU nationals will be required to obtain additional permission in order to be able to remain living and/or working in the UK beyond 31 December 2020. This will be one of three options:

- Settled status;
- European Temporary Leave to Remain, or Euro TLR (a short-term, one-off permission lasting only 3 years and available for application only up to 31 December 2020); or
- Permission under the new Australian points based immigration system (yet to be finalised and announced by the Government)

For an employee to provide evidence of settled status, they will need to log into their online account and follow the relevant link for providing evidence to an employer. This will provide them with a one-time code, which they can pass to you, and you will then be able to enter online to check their details. You will be able to print/download a copy of that confirmation to keep on file.

We would still recommend providing reassurance, information and support to your EU workforce to enable them to apply for settled status.

For example, to complete their application simply and online they need access to a suitable android or apple device, in order to avoid having to post their ID documents.

We are in uncertain political times and with the Brexit goalposts moving frequently it can be difficult to know what the right thing to do is. Currently, applications under the settled status scheme must be made by 31 December 2020, so there is still plenty of time – but there is no time like the present and we would always encourage pro-active steps.

Believe it or not...

If you think that UK employment laws can be a minefield to navigate, spare a thought for these employers around the world:

It can be difficult to get work as a cleaner in India if you're a man as discovered by one gentleman who was rejected house cleaning jobs. Needing to earn money to support his elderly parents, he dressed as a woman and was then able to secure cleaning work. Whilst this sounds like something that would never happen in the UK, only last month a Welsh business advertised for an apprentice as "preferably a boy".

How does 43 days holiday a year sound? You only need to move to Kuwait to get it. Full-time workers in Kuwait are entitled to 30 days holiday per year, plus 13 paid public holidays. No wonder 70% of the population are expats…

Recent Case Decisions

Nadia Otshudi v Base Childrenswear Ltd

A lesson in honesty

Ms Otshudi, who is of black African ethnicity, was employed for three months before being dismissed as redundant.

The employer's initial defence to Ms Otshudi's claim of race discrimination was that the redundancy was purely for 'financial/economic reasons'. However, as the proceedings progressed, the response was amended to state that the dismissal was for suspected theft. No investigation was carried out and the employer decided they would tell Ms Otshudi her dismissal was for redundancy in order to minimise the risk of confrontation.

The Court of Appeal held that the company had established Ms Otshudi's guilt so readily, on such little evidence, that it was likely to have been tainted by racial stereotypes. They upheld the Employment Tribunal's decision to award Nadia £27,505.29, plus interest and a 25% uplift.

Redundancy doesn't reflect on the employee as an individual – it's almost a neutral dismissal. It can be tempting therefore for employers to lean toward that as a reason to dismiss if they want to avoid a potentially difficult situation. However, mislabelling the reason for dismissal can be costly, especially where it leads a tribunal to infer the decision must have been tainted by discrimination.

NH v Associazione Avvocatura per i diritti LGBTI

Be careful what you say

Words spoken on television, via social media or, as in this case, in a radio interview, can be disseminated quickly with serious consequences. So learnt the senior lawyer in this case when he stated unequivocally that he would never hire a homosexual person to work in his law firm, nor would he wish to use the services of such persons.

An association for LGBT lawyers in Italy brought a claim which was upheld and the lawyer was ordered to formulate an action plan to eliminate discrimination, and pay damages of EUR10,000. The case was then referred to the ECJ to address whether the Equal Treatment Framework Directive, which prohibits discrimination in access to employment, would apply given that no recruitment process was in fact underway and, in the absence of an identifiable victim, whether an association can seek a remedy.

In the Advocate General's opinion, the remarks were capable of falling within the scope of unlawful discrimination under the Directive, on the basis that the remarks would be capable of hindering access to employment. Further, the Directive permits national legislation giving associations with a legitimate interest the right to bring proceedings to enforce the Directive in such circumstances.

The case highlights that discriminatory public statements can attract serious consequences, even where there is no identifiable victim. As a matter of good practice, employers should have a suitable equal opportunities policy in place and provide regular training to ensure the policy is understood and adhered to by all employees.

Royal Mail v Jhuti

You need to find out what you don't know

Ms Jhuti blew the whistle to her manager about alleged Ofcom breaches. Her manager didn't take too kindly to this, and pursued a campaign of performance management which eventually led to Ms Jhuti being signed off work sick with stress. A different, more senior manager was tasked with the escalation of the performance management process and dismissed Ms Jhuti based on the reports of incompetence.

Ms Jhuti claimed she was dismissed because she blew the whistle and it appears that is what motivated her manager's actions, although the dismissing manager had no idea.

The Supreme Court said that the line manager's knowledge of Ms Jhuti's whistleblowing, which motivated the performance management process, were all imputed to the dismissing manager. In other words, the immediate line manager may as well have dismissed Ms Jhuti - trying to conceal the real reason for forcing her out of the business by involving another level of manager didn't avoid liability.

This highlights for employers the need to carry out a thorough investigation and always consider the possibility that there could be more to the story than the facts selected and presented to a decision-maker.

Whistleblower protection is wide, it applies from day one of employment and the scope for compensation is unlimited.

Solomon v University of Hertfordshire

Settlement Agreement Fees

For a settlement agreement to be enforceable an employee must take legal advice on the terms and effect of the agreement. Although there is no strict obligation to, employers generally offer a contribution towards legal fees as part of the package.

Ms Solomon brought complex discrimination and unfair dismissal claims against the University. Prior to the hearing, she rejected a settlement offer of £50,000 and £500 plus VAT for her to take legal advice on that offer. Ultimately, the majority of her claims were dismissed and the Tribunal made a costs order of £20,000 against her.

One question on appeal was whether rejection of the settlement offer constituted unreasonable conduct that justified a costs order. Answer: not necessarily.

The EAT commented that £500 would have been enough to take advice on the terms and effect of the proposed settlement agreement. However, it was unrealistic to expect she could also have obtained legal advice on the merits of her complex claims for that sum.

This does not mean employers must now bend to demands to pay more than £500 towards legal fees. The amount of any contribution remains a commercial decision, based on the circumstances of each case. One key point to note is the view that £500 would be perfectly realistic for advice in a straight-forward situation.

Employment Law Do's and Don'ts

Incase you missed it, we've recently started sharing a series of do's and don'ts on our social media which will cover various employment law topics. The first instalment focused on Sex Discrimination in the workplace and aims to give you a helpful reference point to avoid the danger of a potential claim.

Make sure you're following our LinkedIn page @Outset_UK to see the whole series.

Do

- Do have up to date policies and procedures in place including: equal opportunities, grievance, disciplinary, bullying & harassment.
- Do ensure your employees are aware of the standards of behaviour expected from them and that you carry out regular equal opportunities/awareness training for them.
- Do recruit, incentivise and reward all employees regardless of sex (or any other protected characteristic for that matter).
- Do consider whether an action/policy/provision you're planning to introduce will put groups of people protected by a shared characteristic (like sex) at a particular disadvantage. For example, will a certain bonus scheme not work as well for part-timers (a large majority of which are women).
- Do bear in mind that there could be occasions where discrimination is justified. It's a fine line though and you should always take specialist advice.
- Do remember that there is only one characteristic for which direct discrimination might attract the objective justification defence: age.

Don't

- Don't ignore what some may class as "harmless banter". Someone could be offended and you could find yourself facing a Tribunal claim.
- Don't go too far the other way and engage in positive discrimination, which is not permitted (although very limited positive action might be – confusing right!?)
- Don't make the mistake of assuming that only women can or will complain about sex discrimination, it affects men too.
- Don't forget that the Equality Act 2010 protects nine different characteristics from unlawful discrimination: Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.