Employment Law Briefing

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Obesity: Implications for the Workplace

By Dan Peyton

It was widely reported last year that the Court of Justice of the European Union (CJEU) decided that obesity may qualify as a disability in circumstances where it severely hinders professional life. The popular media heralded this new development in the protection of obese people from discrimination in the workplace. Then, at the end of last year, a so-called "body-shaming" story was widely reported; a group of evidently unpleasant individuals handed out insulting cards to London commuters they considered to be overweight, causing understandable public outcry.

These stories seem to demonstrate the familiar pattern of social attitudes and the law beginning to work together to render socially and legally unacceptable types of treatment that would previously have been accepted or tolerated

So, what rights do obese people have in the workplace and to what extent do these rights provide adequate protections?

Some protections may render criminal certain conduct aimed at groups singled out for antisocial treatment, including obese people. Therefore, acts which pose a credible threat to a person or property, acts amounting to harassment under the Protection from Harassment Act 1997 and acts breaching a court order will likely amount to criminal offences. Acts which are grossly offensive, indecent, obscene or false may also amount to a criminal offence if considered sufficiently serious.

In terms of employment protection, even prior to the CJEU decision, in practical terms many obese people were already protected under disability discrimination legislation. For example, employees whose obesity caused recognized medical conditions which otherwise satisfied the statutory definition of disability were protected, including by the sometimes onerous obligations on employers to make reasonable adjustments. Furthermore, to dismiss an employee solely by reason of their body size and weight, without more, would likely contravene an employee's right not to be unfairly dismissed. To the extent that size and weight related detriments are based on appearance rather than their impact on a legitimate requirement relevant to the employment in question, a risk of sex discrimination claims might also arise.

Against this background, the CJEU decision that obesity may be treated as a disability seems less profound. In reality, until now employers who rejected job applicants, treated employees detrimentally, failed to consider making reasonable adjustments or dismissed employees solely by reason of their obesity, without other compelling reasons, were always risking an allegation that they were making disability or gender-based decisions, leading to discrimination claims. Certainly best practice has always been to act rationally, fairly and without making unfounded assumptions.

It remains to be seen whether through a statutory amendment, or judicial interpretation, the scope of disability discrimination in this area will be more clearly defined, which would at least create greater certainty.

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Embracing Changes in the Workplace to Create Opportunities

By Andrea Ward

In December the McGuireWoods London Women Lawyers Network held a panel discussion and reception for female clients and contacts on the topic of embracing changes in the workplace. Four guest speakers, from differing commercial backgrounds, gave honest answers and shared thoughts on their own career developments in challenging times and environments, engaging audience members in lively debate.

The issue of confidence was the first topic to be addressed and is often thought of as a particularly female 'problem' at work — show too much and you are likely to be seen as arrogant; not enough and you may be overlooked for key projects or promotions. In the discussions, confidence was looked upon as a much-needed attribute that manifests itself differently in all women. However, women often struggle with how to present themselves at work. The 'imposter syndrome' is recognized by many highly qualified and capable women who constantly feel that they know less than, or are not as good as, colleagues (whether they be male or female) and will one day "get found out." Studies have shown that men are less likely to worry about this and display much more confidence when it comes to securing a new role, for example. It is said that women are more reluctant to apply for a new job, promotion, or ask for a pay rise as they feel they lack the expertise, and therefore confidence, in their abilities, whereas men, with equal experience, would pursue such opportunities based on their future potential. In the discussions, tips to develop confidence included "manufacturing" confidence, observing other role models and copying their attitude and tone of voice. With practice, confidence improves.

Mentoring, sponsorship and coaching are encouraged by many firms as ways to help women advance at work and our guest speakers were asked how they felt about these newer approaches to career development. Experiences differed, with one of the speakers never having been part of such a program and another finding that mentoring can be unnecessary, awkward, or forced in larger organisations, but, if kept on a voluntary basis, could work better in a smaller environment and should be open to male and female staff, at both mentor and mentee level. In trying to address gender issues at work, should you positively discriminate in favour of women by offering additional training, or opportunities? Could such a program constitute an unlawful provision, criterion or practice that discriminates against men?

These are thorny questions which human resources professionals often have to answer. In practice, providing mentoring is an example of general positive action by an employer which might attract the protection of section 158 of the Equality Act 2010. This section provides an exception to the usual rule that discrimination in employment will be unlawful, in certain limited circumstances and applies where persons who share a protected characteristic, suffer a disadvantage, have particular needs or are disproportionately under-represented. Mentoring may well be a proportionate means of achieving the aim of overcoming these issues and employers may therefore rely on this provision to justify any potential discrimination against men who are not part of a mentoring program.

How to Lead

Leadership style was an interesting aspect of the discussions, with speakers offering these thoughts on how to lead:

- **Be firm, but fair** — set clear expectations and hold people to account.
- **Be inclusive of your team** — bring people along on the journey with you.
- **Stand up for yourself** to establish your presence.
- **Become a thought leader** in your own area of expertise.
- **Don't down play your capabilities**, even if others don't like it.
- **Take on risks and new challenges.**
- **Knowledge is power** — learn your trade really well.
- **Be authentic** — strike a balance between your natural style, being heard and 'playing the game.'
- **Adjust your approach**, depending on the workplace/audience — one size does not fit all.

Employment Law Update - 2016

By Sarah Thompson

Below are a few of the key employment law changes coming in to effect during the first half of this year.

EARLY 2016

Each employer employing at least 250 individuals will be required to publish information showing whether or not there are differences in gender pay. The proposed penalty for non-compliance with the new legislation is a fine of up to £5,000, plus negative publicity and potential employee claims.

1 APRIL 2016

- A new minimum national living wage will be introduced for workers aged 25 and over. A 50p premium will be added to the existing national minimum wage.
- National minimum wage will increase to £7.20 per hour for adults aged 25 and over.
- All organisations, regardless of their size, will be required to keep a public register listing persons with significant control (PSC) over the company. Generally, this will include any individual with over a 25 percent share in a business or 25 percent voting rights. Individuals that are identified as PSCs will be required to provide certain relevant information to the company.
- Public sector employees who individually earn £100,000 per annum or more will be required to repay exit payments if they return to work in the same public subsector within one year of leaving.

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- The statutory maternity, paternity, shared parental and adoption pay will be frozen at £139.58 per week. Statutory sick pay will also be frozen at £88.45 per week.

6 APRIL 2016

- Employers will no longer have to pay Class 1 National Insurance Contributions on earnings up to the upper earnings limit for apprentices younger than 25 years old.

Mind the Gender Pay Gap

By Sarah Thompson

The Equal Pay Act 1970 made it a legal requirement for men and women to be paid the same for equal work, like work and work of equal value. Now, 45 years later, a new law is coming into force requiring each employer with over 250 members of staff to publish information showing whether there are differences in gender pay. The regulations must be made by 25 March 2016 at the latest and there will be a period for employers to prepare, before the rules are brought into force.

While female roles in the workplace have moved on greatly over the past four decades, there is still work to be done in terms of equality. It is positive to see that the gender pay gap is at the lowest since records began. However, it is still not close to equal and progress has slowed over recent years.

With the new legislation coming into effect this year, it is hoped there will be more information to properly analyse what is going on and why. The law will not require employers to reduce the pay gap, but should encourage greater transparency, lead to better awareness and enable employers to consider what more can be done. Such information will also make evidence more accessible when addressing legal proceedings, which has historically been difficult to find. Conversley, it may also be helpful for employers in defending such legal claims or dealing with gender equality issues that they may not currently be aware of in the workplace. Employers will need to start to review their pay systems, publish their pay gap figures and develop action plans.

2015 Key Results

The Office for National Statistics' Annual Survey of Hours and Earnings Report shows the following results for 2015:

- The gap between men and women's pay for full-time workers was 9.4 percent in 2015, compared with 9.6 percent in 2014. While that was the smallest difference since the figures were first published in 1997, there has been little change overall.
- The gap between male and female part-time workers remained at 19.2 percent.
- The gap between men and women's earnings has remained consistent between 1997 and 2015, at around £100 per week.
- In the 22-to-29 age group, women are paid on average slightly more than men.
- Women over the age of 40 suffer the biggest pay discrimination: Over-50s have a pay gap of 27 percent compared with men the same age.

Transferring Data to the U.S. – Safe Harbor Invalidation

By Sarah Thompson

6 October 2015 marked a major date for the data privacy world. It was the day the Court of Justice of the European Union (CJEU) invalidated Safe Harbor. As a result, EU companies have had to find alternative legal routes to transfer personal data, including employee data, to the U.S.

Background and judgment

Safe Harbor is a self-certification scheme enabling companies to transfer personal data from the EU to the U.S. The framework was designed to guarantee that when personal data was transferred outside the EU it was subject to the same protections as under EU law. This enabled EU subsidiaries legitimately to transfer their employee data to U.S.-based parent companies. It was also used by U.S.-based cloud computing and HR software system providers.

In ***Schrems v Facebook***, Schrems claimed that the U.S. did not sufficiently safeguard the privacy of his personal data when it was transferred from the EU. Schrems' personal data was passed from Facebook Ireland to Facebook servers in the U.S. relying on Safe Harbor. His argument was based on the 2013 Snowden revelations regarding U.S. surveillance programmes accessing EU citizens' data.

The CJEU found that the Safe Harbor framework was invalid because the U.S. did not offer the required level of protection for EU citizens' data. This was because, whilst it applied to corporate entities, it did not apply to public authorities and EU protections were therefore overridden by the requirements of U.S. national security, public interest and law enforcement. This meant that the U.S. intelligence services could access and conduct surveillance of personal data transferred to the U.S. from the EU.

The way forward

Since the ruling, companies have been left in limbo trying to find alternative legal avenues to transfer data across the Atlantic. The EU and U.S. authorities have been trying to agree to a new framework – "Safe Harbor 2.0". There has been great pressure on both sides to reach an agreement, with EU data protection authorities (DPAs) issuing a joint statement that, if no solution is found by the end of January 2016, they will start to take enforcement action against companies relying on the Safe Harbor framework. In mid-November Commissioner Jourová reaffirmed her commitment to reach resolution on a new agreement before 31 January 2016.

In the meantime, companies that previously relied on the Safe Harbor framework have looked to other mechanisms for transatlantic data transfers available under EU law. Jourová made it clear that such mechanisms are a "short-term solution" and that a new Safe Harbor agreement with strong privacy safeguards would be the best way to achieve effective protection of EU citizens' data.

What should companies be doing now?

Safe Harbor can no longer be used as a legal mechanism for data transfers to the U.S. Therefore, companies that rely on, or use outsourced service providers (i.e. a U.S. cloud) that rely on, Safe Harbor will need to implement a "Plan B". Companies have been given a grace period, but that comes to an end on 31 January 2016, if a new Safe Harbor framework has not been adopted. Companies should therefore be considering the following questions and taking necessary steps:

1. **Are you sending personal data to the U.S. under Safe Harbor?**
2. **If so, is it necessary to transfer personal data outside the EU, or can it be stored within the EU? If you use a cloud service provider, can the cloud storage be located, and only accessed, in the EU?**
3. **If you need to transfer data outside the EU, can you limit the amount of data that must be transferred and/or convert it into a non-identifiable format?**
4. **Can you implement any short term emergency measures:**
   - For service provider transfers – can the provider enter into EU-approved model clauses?
   - For intra-group transfers – can you put in place Binding Corporate Rules or rely on data subject consent etc.?
5. **Are you keeping up to date with developments and guidance from the EU and national DPAs?**
6. **Should you obtain legal and compliance advice on how best to implement alternative methods of transfer to the U.S.?**