

MOORE BLATCH UPDATE

Employment - March 2018

**SEXUAL HARASSMENT
IN THE WORKPLACE**

**TESCO'S EQUAL PAY
BILL**

**GENDER PAY GAP
REPORTING**



WELCOME TO MARCH'S EMPLOYMENT LAW UPDATE

Welcome to our latest update.

There are a number of hot topics in the press at the moment for us to update you on, not least the upcoming implementation of the GDPR and the looming deadline for gender pay gap reporting.

We also bring you some recent case law updates, including a case of gender reassignment discrimination and the status of "continuing acts" in discrimination claims. Finally we discuss the recent developments in the gig economy saga and Tesco's potential £4bn equal pay liability.

If you have any comments or questions, please do not hesitate to contact me on 023 8071 8094. You can also follow us on Twitter for the latest employment news [@MBEmployment](#).



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SEXUAL HARASSMENT IN THE WORKPLACE

From Westminster to Hollywood and more recently the charity sector, reports of sexual harassment have become a regular feature in headline news.

A study by the Everyday Sexism Project and the Trades Union Congress found that over 50% of women have experienced sexual harassment in the workplace.

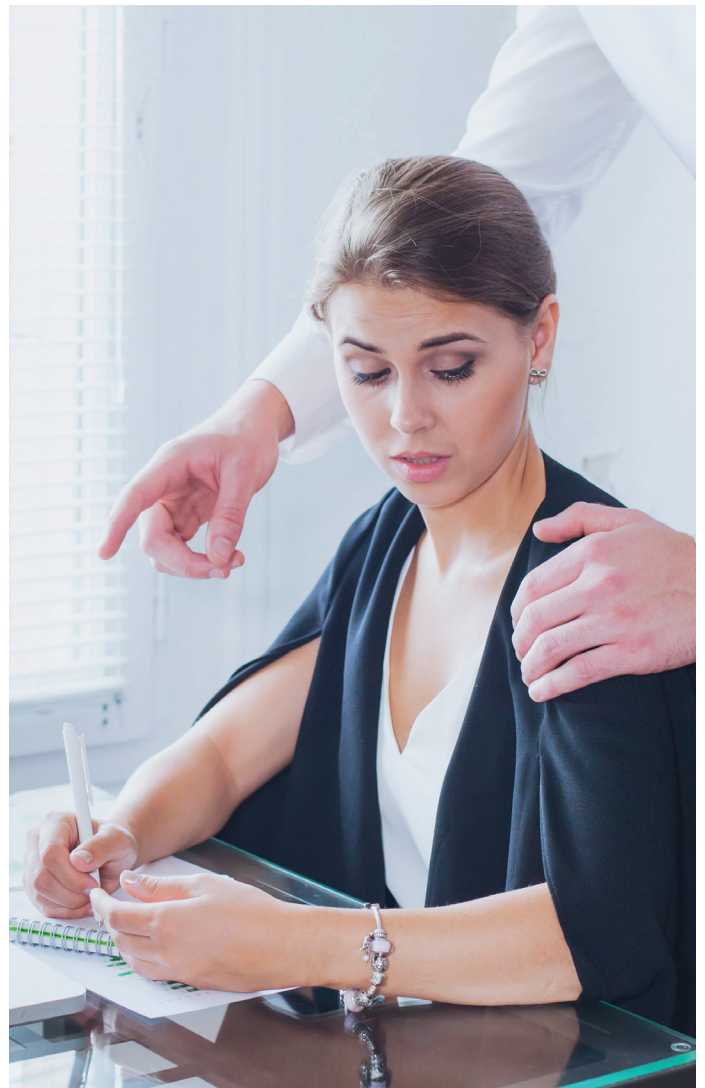
It's not just women that are the victims of sexual harassment, men are too; with 35% of those suffering harassment being male.

Despite laws being in place to prevent sexual harassment, it is still taking place at an astounding rate with over 80% of victims reluctant to report incidents fearing it will impact on their career and reputation.

High profile cases have only highlighted the extent to which sexual harassment is an ongoing problem.

Whether incidents are current or historic, every organisation will need a bespoke approach to addressing sexual harassment. Employers should not only review their policies on sexual harassment in the workplace but also clearly communicate their policies to employees to ensure that incidents do not occur. The key is to not wait until any issues are exposed as the damage can be catastrophic.

If you would like any advice or assistance on preventing and dealing with sexual harassment in the workplace, please let us know.



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WILL THERE BE GREATER STABILITY FOR GIG ECONOMY WORKERS?

Complete clarity on the issues surrounding the gig economy is still some way off, but there have been significant moves to address many of the issues.

Following several legal cases concerning the gig economy, in February 2018 the Government published the “Good Work” plan.

Created in response to the recommendations of the Taylor Review, the plan examines working practices and sheds light on gig economy workers’ lack of rights.

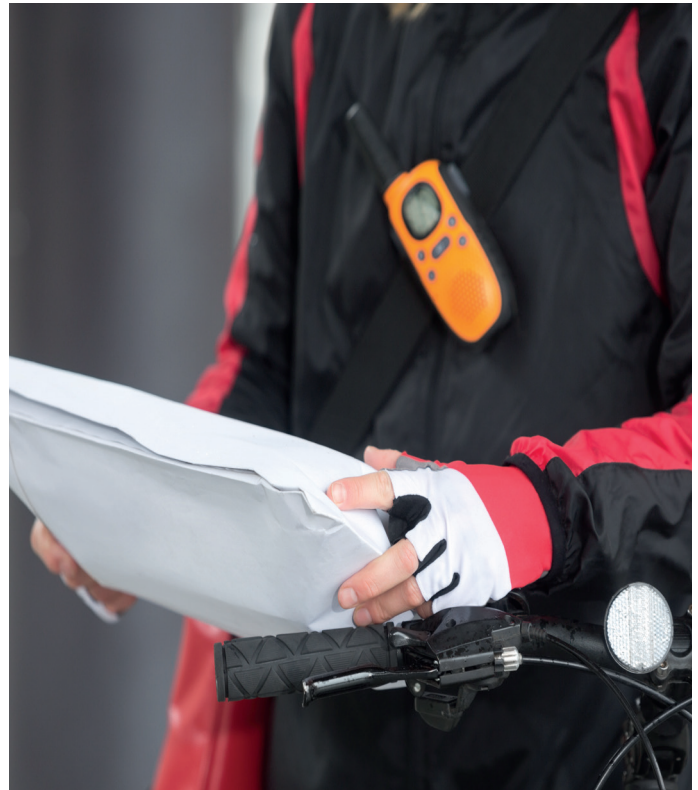
The Government will also launch consultations to address employment status, enforcement of employment rights’ recommendations, agency workers’ recommendations and measures to increase transparency in the labour market.

The government’s goal is to ensure that all gig economy workers are entitled to workers’ rights, by:

- Enforcing vulnerable workers’ holiday and sick pay
- Publishing a list of “day one” rights for workers, including holiday and sick pay entitlements and the right to a payslip
- Giving all workers the right to request a more stable contract to allow greater financial security.

As the results of the consultations are still being decided, the final outcome of the review may be uncertain. However, it could result in much greater stability for those gig economy workers who have previously been exploited and stripped of their basic rights.

The high profile “Pimlico Plumbers” case on worker status is currently making its way through the Supreme Court – so further updates to the gig economy are imminent.



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GDPR - ARE YOU READY?

As you will be aware by now, the GDPR comes into force in the UK on 25th May 2018. If you aren’t already making preparations to ensure that you are compliant with the GDPR, you need to start doing so as soon as possible.



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You should begin by carrying out an audit of all the personal data that you hold on your employees. This will allow you to identify the types of data that you hold and the categories that the data falls into. You will then be able to identify the purpose for which you hold and use this data. You must be able to demonstrate that there is a lawful justification for you retaining this personal data under the GDPR. We can assist you with reviewing the results of your data audit or providing guidance on how to conduct the audit.

Having completed your data audit, to comply with the GDPR requirements you will then need to consider updating your template employment contracts for new employees; updating data protection policies and other policies in your handbook where relevant for example disciplinary policies; and updating or drafting privacy policies. We are able to assist with drafting and updating these documents for you.

WHEN DOES A “CONTINUING ACT” START FOR THE PURPOSES OF DISCRIMINATION LAW?

The case of *Hale v Brighton & Sussex University Hospitals NHS Trust* has held that the start of a disciplinary process can be the start of conduct extending over a period – i.e. a “continuing act” for the purposes of the Equality Act 2010.



Hale v Brighton & Sussex University Hospitals NHS Trust centred around a surgeon, against whom four junior doctors raised grievances concerning racially offensive remarks and harassment. Once the initial claim was underway, further complaints of racial discrimination and harassment were made against the surgeon.

Following disciplinary proceedings, the surgeon was dismissed after which he brought claims before the employment tribunal, including race discrimination.

The Employment Tribunal held that the surgeon’s claim was out of time, because it dated from the start of the disciplinary procedure. The usual time limit for bringing a claim in the employment tribunal for discrimination claims is 3 months from the date of the alleged discriminatory act – unless the claimant can show that there was a “continuing act”. The Employment Appeal Tribunal (EAT) disagreed, saying that there was a state of affairs that had started with the disciplinary procedure and continued until that procedure had been concluded, and therefore there was a continuing act and the surgeon’s claim was not out of time.

This case demonstrates the need for employers to be careful when conducting disciplinary procedures that involve allegations of discrimination or harassment that this does not in fact lead to those alleged perpetrators being treated differently or subject to adverse treatment.



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PECKISH BRITS GO CHICKEN CRAZY

KFC’s raison d’être is chicken. So, one would assume, they would ensure at all costs that it has chicken in stock.

But, in what is now being termed the ‘great fry crisis of 2018’, (somewhat unbelievably) the majority of KFC outlets had to be closed as they did not have enough chicken. So desperate were KFC fans that some turned to their MPs. Others called the police. But behind the array of jokes and puns this crisis has spawned there lies a more serious story.

Problems began when DHL (best known for parcel deliveries) took over the delivery service from specialist food distribution group Bidvest. GMB, the union that represents Bidvest workers, had already warned DHL were undercutting them and KFC were likely to suffer distribution problems as a result. By the time KFC realised the scale of their mistake, it was too late.

The impact for Bidvest, who suffered 255 job losses and had to close a distribution warehouse, and KFC Staff, who were

‘encouraged’ to take holiday, has been huge. KFC said staff on short-term contracts working in restaurants owned by the chain would be paid the average hours worked per day over the past 12 weeks, while those on salaries would be paid as normal. Franchisees (80% of KFC outlets are franchises) were left seeking independent advice as to what they should do. If staff of franchisees were on zero hour contracts then the contract would not guarantee them work and there would be no obligation for them to be paid. As a result of this, it was reported that some workers had started looking for new jobs.



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ARE YOU READY FOR GENDER PAY GAP REPORTING?

While gender pay reporting currently only applies to organisations employing over 250 people, it's advisable that any organisation employing over 100 people take a keen interest in the legislation as the rules could be rolled out more broadly over time.

Although organisations employing less than 250 people aren't obliged to report, they can do so if they wish. Reporting deadlines are now just days away. The 31 March and 5 April each year are the "snapshot" dates for reporting for public bodies and private entities/charities respectively.

Organisations must publish their gender pay gap data within one year of these snapshot dates.

[Click here](#) to find out how you need to report on the gender pay gap.

You should also consider adding a narrative to your report to explain your figures. We are on hand to assist you with this or any other queries you may have on the gender pay gap rules.

Even if the rules don't currently apply to your business, consider how any repercussions from the reporting impacts those businesses affected and how a similar scenario could apply to you. Prevention is always better than cure.



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£47,000 FOR TRANSGENDER PRIMARK EMPLOYEE FOLLOWING DISCRIMINATION

Gender reassignment is a protected characteristic under the Equality Act 2010. Yet a case recently emerged in which a female Primark employee received £47,000 in compensation after suffering gender reassignment discrimination.

The woman at the centre of the claim alleged she had suffered an array of derogatory comments about her gender status from fellow employees.

She alleged she was sprayed with men's perfume, told she "had a man's voice", and was called "evil".

It also transpired that Primark's IT system and daily allocation sheets had used her legal name, Alexander, as opposed to her chosen name, Alexandra which in turned spawned comments from staff.

The employee had informed Primark of her preferred name at her interview and the start of her employment.

This all contributed to a judge finding she had been constructively dismissed, stating that Primark had failed to devise a system whereby only a select few people in HR and payroll were aware of the employee's status and finding it 'shocking' that Primark had been unable to accommodate the woman's chosen name.

This case demonstrates the need for employers to educate all staff on different types of discrimination and how it can manifest itself within the workplace.

Employers are advised to consider separate policies for each type of discrimination to ensure that no issues arise on the grounds of discrimination at all.



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ARE YOUR EMPLOYEES MAKING THE MOST OF SHARED PARENTAL LEAVE?

Despite shared parental leave being introduced in 2015, only 2% of those couples eligible for the leave have chosen to use it. In a bid to boost take up, the government has launched a £1.5 million “Share the Joy” campaign.



Essentially, shared parental leave enables parents to share up to 50 weeks of leave between them or up to six months together. By encouraging flexible working, shared parental leave can contribute to a more productive workforce thereby increasing the chances of long-term retention of employees.

With take up so low, and only 25% of fathers aware of the leave, there's still much that needs to be done to promote this right. One way employers can promote shared parental leave to their employees is by having a specific policy. We can assist you with drafting such a policy and advise on the practicalities of the shared parental leave programme.

The charity Working Families suggests that the leave can still be improved as they believe fathers should have the right to take the leave from day one, (as maternity leave is a right from day one for mothers), and that self-employed parents should be eligible for shared parental leave too. If any changes are made to the shared parental leave regulations in due course we will of course update you.



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TESCO'S \$4BN EQUAL PAY BILL

Tesco is facing an £4 billion equal pay claim from thousands of female shop workers. If this claim is successful, it could result in the UK's largest ever claim for equal pay, potentially opening the floodgates for other similar claims.

Tesco claims that they pay all staff “fairly and equally” but recent figures suggest otherwise. Female shop workers have alleged that they earn as much as £3 less per hour than their male co-workers which is a substantial difference, especially when put into perspective – equating to £20,000 per worker over a six-year period.

This case is of particular interest given the upcoming gender pay gap reporting deadlines.

Employers are advised to review their pay structures thoroughly and, if they are required to report their gender pay gap information, that they give a narrative of their figures to identify how the gap (if any) has occurred and what steps are going to be taken to rectify it.

We would suggest that companies begin by reviewing pay scales or grades and if there are major discrepancies or concerns, please contact us so that we can assist you with taking steps to address the gap.



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