Rollits LLP

Employment Law Update

October 2019
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I would like to welcome you to our October Newsletter. It has been an extremely busy summer period with the team being involved in some significant Employment Tribunal litigation. In this edition, we will look at what a change in political leadership may lead to in terms of employment law legislation including changes to the working week and minimum wage, we will look at the ever expanding case law on the Equality Act, specifically sexual and racial discrimination and harassment. We will also look at the possibility of adding a further type of discrimination, known as "class discrimination".

Welcome

As some of you will know, at Rollits we have the largest team of dedicated employment lawyers in the area. We are proud to have been recognised in the Legal 500 as being in Tier One for delivering employment law services. We are the only firm to be recognised in Tier One in our area (Hull and Humber region) and we are very proud of the accolade.

We could not achieve these rankings without the continued and valued support from all of our clients, both established and new. I would like to take this opportunity to thank all of our clients for your continued instructions to the team. We thoroughly enjoy working with you.

Ed Jenneson

Our Legal 500 review states:

*"The '**pragmatic**' employment team at Rollits LLP is instructed by clients throughout a range of sectors, and has seen significant growth within the education sphere over the last year. The team is led by Ed Jenneson who deals with all aspects of employment law, with a notable specialism in complex TUPE issues and the Equality Act. Other names to note include recently promoted partner Ed Heppel, who acts for some of the firm's major clients across a range of sectors."*

The LEGAL 500
UNITED KINGDOM
TOP TIER
2020

The employment team has been recognised again in the leading legal directory **Chambers Legal & Partners**. The team has been commended for "***responding very quickly and swiftly with really sound advice***". We are delighted with this as we pride ourselves on our advice and our response times. The team has been ranked alongside other national law firms and is the only team in East Yorkshire to be recognised in the same way.

Ed Jenneson has again been ranked as a notable practitioner, he was praised with for his "***professional and timely with his decisions and responses, and has taken time to get to know our business.***"

Pregnancy and maternity discrimination

The Government has recently released its response to the consultation on pregnancy and maternity discrimination, confirming that it will extend protection from redundancy to apply from the point a pregnant woman informs her employer of her pregnancy until six months after she has returned to work.

The consultation came off the back of research by BEIS (published in 2016) which demonstrated that pregnancy and maternity discrimination is still far too prevalent in the workplace. The same protection will be offered to parents returning after adoption leave and to parents who have returned to work after shared parental leave, for a period proportionate to the amount of leave taken. The Government is also intending to consult on extending the time limit for claims in relation to discrimination, victimisation and harassment including on grounds of pregnancy and maternity.

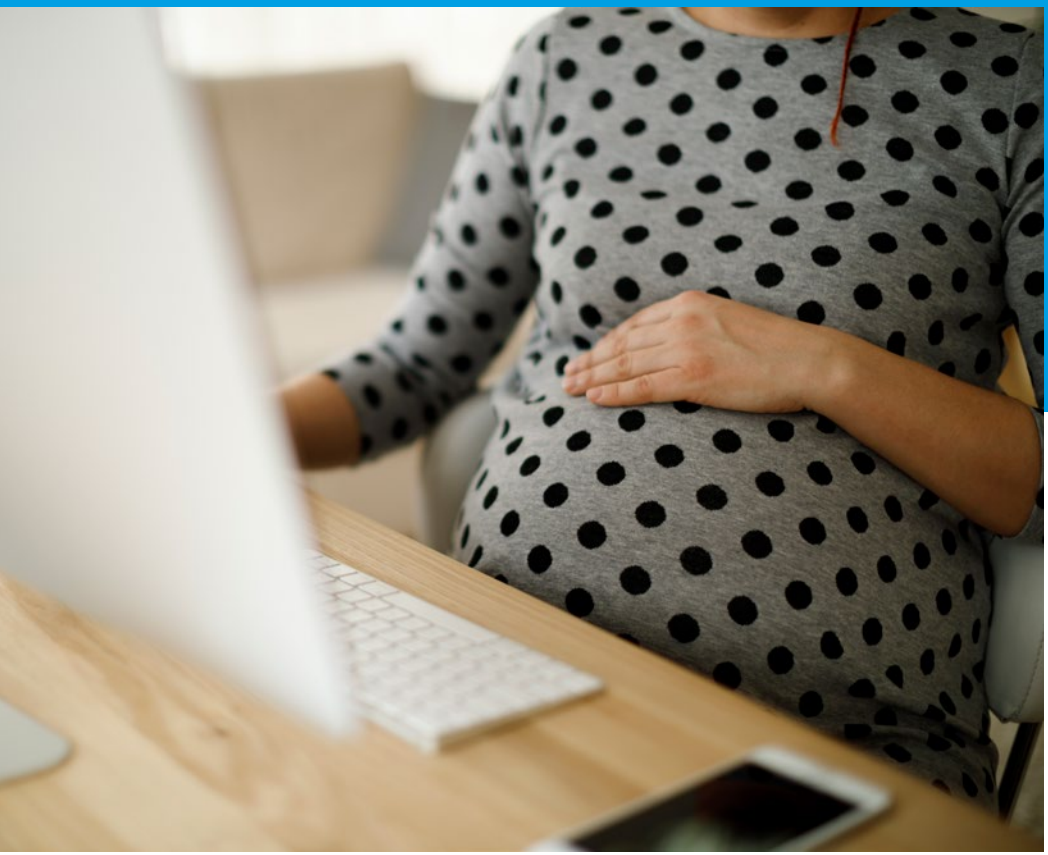
This would have a significant impact on employers with a female dominated workforce when going through the redundancy process. The enhanced rights offered will mean that pregnant women could potentially be protected from redundancy for up to two years. This means for those employers, more employees may have priority for suitable alternative employment within the company upon their return from maternity leave.

Legal obligations

Pregnancy and maternity is one of nine "protected characteristics" covered by the Equality Act 2010. It is unlawful for an employer to discriminate by treating a woman unfavourably during the protected period (currently being from the beginning of pregnancy to the end of maternity leave) because of her pregnancy or because of an illness she has suffered as a result of her pregnancy. It is also unlawful for an employer to discriminate by treating a woman unfavourably because she is on compulsory maternity leave or because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

Employers must ensure that women on maternity leave are informed of any jobs that become available, including opportunities for promotion and transfer, and must enable them to apply. Failure to do so is likely to be direct pregnancy and maternity discrimination in the arrangements made for training and development opportunities.

In the case of redundancies, employers should also take extreme care to ensure their redundancy selection criteria does not discriminate against employees who are pregnant or on maternity



leave. For example, an employee's maternity or pregnancy related absence should not impact the scoring of that individual's attendance.

In addition, there are further legal obligations and duties that employers are bound by in relation to their pregnant or on maternity leave employees. For example, an employer is obliged to comply with certain health and safety obligations to assess workplace risks and revise hours or conditions of work to prevent any significant risk of harm to the health and safety of new or expectant mothers in the workplace.

At Rollits, we have a dedicated employment team with extensive experience in dealing with discrimination related claims. For further information or advice, please contact our employment team.

Nilu Love

Brexit uncertainties

With ongoing uncertainty about the UK's position post 31 October 2019, employers remain unclear in relation to their and their EU national employees' obligations and rights respectively.

Following the UK government's recent announcement in relation to revised immigration arrangements in the event of a no-deal Brexit, EU citizens (including citizens of Iceland, Liechtenstein, Norway and Switzerland, but excluding Irish citizens) and their family members already living in the UK before Brexit will have until 31 December 2020 to apply for a settled or pre-settled status to remain in the UK.

For those arriving after the Brexit date, a transition period from the date of Brexit until 31 December 2020 will apply. During this time, EU citizens who move to the UK for the first time will be able to apply for a 36-month temporary immigration status, called European Temporary Leave to Remain (Euro TLR). Applications to the new Euro TLR scheme will be simple and free and will be made after arrival in the UK. Time spent in the UK with Euro TLR status will count towards settlement.

However, EU citizens who move to the UK for the first time after Brexit and who do not apply for Euro TLR will need to leave the UK by 31 December 2020, unless they have applied for and obtained a UK immigration status under the UK's new points-based immigration system (due to be implemented in January 2021), or otherwise have an alternative right to remain in the UK.

In relation to travel arrangements, under the current regime, Freedom of movement enables relatively smooth business travel throughout the EU and although the government's position throughout the negotiations has been that they do not wish to depart from the current rules, and have transferred EU Regulations into domestic statute in preparation, the other 27 EU countries will need to have enacted reciprocal legislation for the regime to continue.

As it stands, after Brexit, British citizens travelling to the EU will only be exempt from visa requirements for up to 90 days in a 180 day period if the purpose of the travel is for visits only, including for attending business meetings. However, this means British citizens will be unable to undertake any paid work and therefore the employees must understand the purpose and the extent of their proposed activity in advance in order to obtain the required work permissions if these are going to be required. It is also important to ensure the 90 day maximum stay is not exceeded.

Regardless of the outcome of Brexit, deal or no-deal, our advice to your organisation is to undertake a thorough health check of your HR procedures to ensure all your employees' paperwork is up to date. This means whatever the outcome of Brexit is going to be, you are prepared to take action accordingly. With the new guidelines in relation to a transition period in the event of a no-deal Brexit, you should have the required time to ensure the affected employees and your organisation are informed and prepared.

Nilu Love

Class discrimination

We currently have 9 "protected characteristics" under the Equality Act. They are: age, sex, race, disability, gender reassignment, religion or belief, marriage and civil partnership, pregnancy and sexual orientation. Are we about to see number 10? The Trade Union Congress (the "TUC") believe so.

The TUC has called for legal measures to be implemented in order to tackle class discrimination at work. The TUC believe that people from working-class backgrounds are discriminated against at work and that bias and stereotyping based on social status is an ongoing issue which is not currently afforded any protection.

Class discrimination is said to include discriminating against someone based on the way they speak, the school they attended and their family background.

Currently, social class is not a protected characteristic. However, the TUC believe that this needs to change and employers need to do more to prevent inequality in the workplace. Proposals include giving public bodies a legal duty to tackle inequality and requiring companies to report their class pay gaps alongside their gender pay gaps.

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Class discrimination (continued)

Types of discrimination

Direct discrimination

This is where a person is treated less favourably than another because of a protected characteristic under the Equality Act 2010 e.g. race, religion or sex etc. In relation to social class, an example would be not recruiting someone because they are not from a desired background.

Indirect discrimination

This is where there is equal treatment of all groups, but the effect of this is disproportionate on one group. For example, the TUC believe that an unpaid internship as a gateway to a job is indirectly discriminative because people from working-class backgrounds may not be able to afford to do unpaid work, whereas people from more affluent backgrounds may be able to afford this and may subsequently be offered the job.

Problems with legislating against socio-economic disadvantage

The implementation of this could be difficult. The existing protected characteristics are relatively straight-forward to identify, such as race, religion and sex etc. However, class is difficult to define and can be subject to interpretation. It encompasses many factors such as wealth, education, family background, speech; the list is subjective and it would be very difficult to agree on one interpretation.

What can be done?

Despite the issues associated with legislating against social-class discrimination, employers should take it upon themselves to promote a diverse workforce by offering equal opportunities. Ignoring the class and background of a person will have a positive impact on the diversity of a workplace. Equal opportunity monitoring forms can be useful in assessing the diversity of a workforce. Although these should not have any influence on recruitment decisions, they can offer an insight into the existing workforce.

If your organisation would like any advice in relation to any of the matters raised in this article, please contact a member of our Employment Team.

Ed Jenneson

Labour proposal for Ministry for Employment Rights and Workers' Protection Agency

The Labour Party has announced that, if it were to be elected and form a government, it plans to create a Ministry for Employment Rights, along with a Workers' Protection Agency to enforce those rights by entering workplaces and bringing prosecutions on behalf of workers.

Given that a general election this year is highly likely, Jeremy Corbyn's plans should be read and considered by all employers as the impact and reach of these plans would be extremely significant.

The proposals for individual employment rights include:-

- fixing the problem of different categories of workers with different rights by creating a single status of 'worker' for everyone apart from those who are genuinely self-employed;
- giving all workers the right to seek flexible working, and placing a duty on the employer to accommodate the request;

- a statutory Real Living Wage of £10 per hour by 2020 for all workers aged 16 or over;
- banning unpaid internships;
- banning zero hours contracts by requiring employers to give all workers a contract that accurately reflects their fixed and regular hours.

The proposals to simplify and strengthen trade union law include:-

- making it easier for workers to have their say at work, including allowing electronic and workplace ballots;
- giving trade unions the right of entry to workplaces to organise members and to meet and represent their members;
- banning anti-union practices and strengthening the of protection of trade union representatives against unfair dismissal;
- repealing the Trade Union Act 2016 in its entirety.

Significant changes could be on the horizon for employers and their employees as a result of either Brexit and/or a Labour (or Labour-led coalition) Government taking power. Watch this space!

Ruth Everitt

MoD guilty of racial harassment

Two former British paratroopers recently won a racial discrimination claim against their employer, the Ministry of Defence. During their employment, the complainants were the victims of racist abuse, including graffiti which the tribunal deemed highly offensive. Although the perpetrator was unknown and no motivation had been established, the Employment Tribunal still found the Ministry of Defence vicariously liable for the actions of their employees. This decision emphasises the strong stance that the Tribunal takes in relation to these types of claims and the fact that an employer is liable for the acts of its employees.

Despite not knowing the perpetrator, it was found that the conduct had the purpose or effect of violating the complainants' dignity and/or created an intimidating, hostile, degrading, humiliating or offensive environment for the complainant. Although it was not the MoD who committed the offending acts, it was their employees and employers are vicariously liable for the acts of their employees if these acts are committed in the course of employment, unless they can demonstrate that they took reasonable steps to stop the discrimination.

As an employer how can I protect myself from being vicariously liable for the actions of my employees?

An employer would have to establish that reasonable steps were taken to prevent an employee doing the act complained of. This needs to be more than just a written policy. Instead the policy must be implemented by being communicated to employees and training should be given where appropriate.

This case is a timely reminder that harassment must be dealt with; employers must have clear policies in place and employees must be educated about harassment in order to give an employer any chance of defending a claim.

Ed Jenneson

Sexual harrassment

A Tribunal has found that a pub manager, Ms Prewett was sexually harassed after a senior co-worker engaged in "poor taste humour" by making sexual innuendos towards her. This was found even without any "malicious intent" on the part of the perpetrator.

Facts

The facts of the case are that Prewett's line manager and the company's risk manager arranged to meet Prewett at the pub to discuss and review the measures on kitchen standards in place.

When Prewett joined them with her paperwork, she overheard one of the managers asking the other "Do you know what a growler is?"

Prewett was told "If you know don't tell him," before being told a joke about a "bloke saying when I ask for a growler, I don't want a pork pie".

The tribunal heard that "growler" was a Yorkshire term for a pork pie in addition to a slang word.

Prewett went on to ask some of her colleagues what the term meant before her deputy chef at the time explained its slang meaning. She said when she fully understood the joke, she felt unhappy about it.

The Company's risk manager visited the pub again shortly after this incident and when Prewett asked him what he wanted to see first, he responded: "depends on what's on offer" and touched her on the back of her shoulder.

A month later, Prewett phoned her line manager and told him she was resigning because of harassment by the company's risk manager. She confirmed her stance in an email the next day.

Prewett subsequently raised a formal grievance which was investigated but not upheld.

Findings

Upon bringing a claim of sexual harassment to the Sheffield ET it was found that she had been the victim of sexual harassment by her former employer, Green King Services Limited, who was ordered to pay £5,000 by way of compensation which fell within the lower band of vento for injury to feelings; being £900 – £8,800.

Considerations for employers

This case is a reminder for employers to ensure they provide training to staff on what is and is not acceptable behaviour in the workplace, and that staff should err on the side of caution if they are not sure.

Much of what is sometimes described as 'banter' may in reality amount to harassment. It is not only the intention behind a comment that matters, but also the effect on the complainant – intending a comment as a 'joke' does not make it okay.

Ruth Everitt

Holiday leave and pay update

In recent years the legal landscape regarding holiday leave and holiday pay has changed dramatically. These are still relatively fluid areas of law, as indicated by the following cases:

Holiday leave

An Advocate General to the European Court of Justice has given an opinion that the relevant European law relating to holidays does not prevent a member state's national law from limiting the carry over of holiday in the event of sickness to the four weeks' leave required by European law.

Under the European Working Time Directive, all workers and employees are entitled to a minimum of four weeks' annual leave. The domestic Working Time Regulations go further by entitling employees and workers to an additional 1.6 weeks' leave (a total of 5.6 weeks or 28 days for an employee working 5 days per week).

It is now established law that the four weeks' European leave can be carried over to the next leave year if the worker has been prevented from taking it due to sickness absence, although our domestic courts have previously stated that carry over does not apply to the additional 1.6 weeks' leave.

An Advocate General has given an opinion in respect of the recent case of *TSN v Hyvinvointialan liitto ry (C609/17)*. The opinion supports the position that carry over only applies to the four weeks European leave and not any additional leave provided in accordance with the member state's law. Although opinions given by the Advocate General are merely advisory and do not bind the European Court of Justice, they are usually followed.

Holiday pay

The Court of Appeal case of *England Ambulance Service NHS Trust v Flowers (2019)* concerned the question of whether holiday pay must include regular voluntary overtime. This case is one in a series of cases determining the elements that should be included in the calculation of holiday pay.

In the 2013 case of *Bear Scotland v Fulton and Others, the Employment Appeal Tribunal (EAT)* decided that non-guaranteed overtime (overtime that is compulsory for the employee if the employer requires it) must be included in the calculation of holiday pay. However, it did not definitively deal with voluntary overtime.

In the 2016 case of *Dudley Metropolitan Borough Council v Willetts and Others*, the EAT confirmed that European law required that holiday pay should correspond to "normal remuneration". The EAT determined that the sums must have been paid over a sufficient period of time on a regular or reoccurring basis, in order to be considered normal remuneration.

In the above case, Mr Flowers and the other claimants sometimes took both non-guaranteed and voluntary overtime, although the Ambulance Service did not include any overtime in the calculation of holiday pay. The Employment Tribunal decided that the non-guaranteed overtime should be included in the calculation of the claimants' holiday pay. However, it rejected the claims to include voluntary overtime.

The claimants' appeal to the EAT succeeded. The EAT determined that voluntary overtime should be included on the basis that it formed part of normal remuneration. The Ambulance Service appealed to the Court of Appeal and its appeal was dismissed.

In summary, the position is therefore that employers should include voluntary overtime if it meets the threshold of regularity in order to be considered normal remuneration. This is a question of fact and degree and whilst there will be cases at each end of the spectrum, there will most likely be large grey areas and further litigation is therefore expected.

Ed Heppel

Vegetarianism does not qualify for protection under the Equality Act 2010

Conisbee v Crossley Farms Limited and Others. **Mr Conisbee worked as a waiter at a hotel. He is a vegetarian. He resigned after five months of employment and alleged discrimination on the grounds of religion or belief contrary to the Equality Act 2010. He stated that his belief was vegetarianism and that he had been ridiculed at work for not eating meat. His colleagues also give him snacks which he later discovered had been contaminated with meat based products.**

It was not disputed that Mr Conisbee was a vegetarian and that he had a genuine belief in vegetarianism which was worthy of respect in a democratic society; however he failed to meet the necessary legal hurdles for protection. Applying the established tests from Grainger and Nicholson 2019, it was held that:

- Vegetarianism did not concern a weighty and substantial aspect of human life and behaviour. It is a lifestyle choice and vegetarianism is not about human life and behaviour.

  The employer had argued that Mr Conisbee's belief that the world would be a better place if animals were not killed for food was simply an opinion and viewpoint.

- Vegetarianism did not achieve a certain level of cogency, seriousness, cohesion and importance. This was on the basis that the reasons for being a vegetarian can differ greatly, for example; lifestyle, health, diet, concerns about the way animals are reared for food and personal taste.

- Vegetarianism did not have a similar status or cogency to religious beliefs.

Conclusion

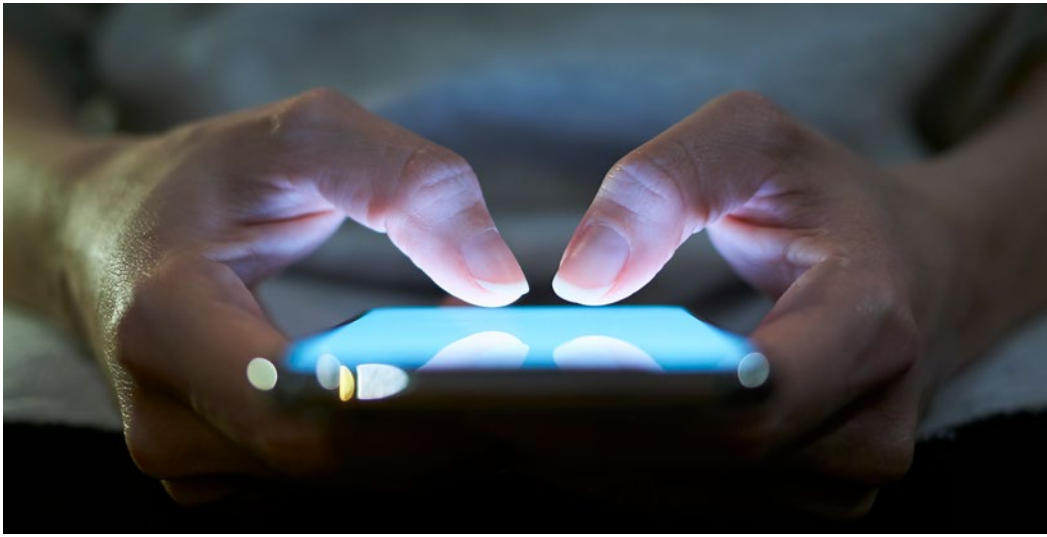
Whilst this case applied the established legal tests used to determine what can qualify as a religion or belief, what is of interest is that it appears to have opened the door to argue that veganism could qualify as a belief protected by the Equality Act 2010.

The Tribunal hinted that veganism could qualify as a belief potentially capable of protection on the basis that there was a clear cogency and cohesion in vegan belief on the basis that the beliefs held by vegans, and the underlying motivation for veganism, are fundamentally the same. Vegans do not accept the practice, under any circumstances, of eating meat, fish or dairy products and have clear and distinct concerns about the way animals are reared. They also hold the clear belief that killing and eating animals is contrary to a civilised society and is against climate control.

Case law is likely to continue to develop in this area.

Caroline Neadley

Sharing Facebook images in the course of employment?



The case of *Forbes v LHR Airports Limited (2019)* considered whether the sharing of an offensive Facebook image was done in the course of employment and whether it amounted to an act of harassment under the Equality Act.

In this case an employee shared an image of a golliwog on her personal Facebook page, accompanied by the caption "*lets see how far he can travel before Facebook takes him off*". The image was shared with the employee's Facebook friends, including a colleague. This colleague showed the image to another employee, who complained to his Line Manager. His grievance was upheld by the company and the employee who shared the image was subsequently subject to a disciplinary investigation. The employee appeared remorseful during the disciplinary investigation, offered an apology and received a final written warning.

The employee who made the complaint eventually brought a claim of harassment against the employer and the Employment Tribunal dismissed the claim. It found that the act of sharing the image on Facebook was not done "in the course of employment", as the employee who made the post was not at work at the time and she did not mention any colleagues or the company in the post.

The Tribunal also concluded that the sharing of the image did not constitute harassment under the Equality Act.

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Sharing Facebook images in the course of employment? (continued)

While it agreed that the image was offensive and that it did cause offence to the claimant, applying the legal test, it found that the "purpose" of the post was not to cause offence to the claimant and, taking into account the individual's willingness to apologise, it found that it was not reasonable for the act to have the effect of causing offence. The claimant appealed to the Employment Appeal Tribunal.

The Employment Appeal Tribunal dismissed the appeal. It stated that the question of whether the Facebook post was done "in the course of employment", which is necessary in order for the employer to be vicariously liable, is a question of fact. It did not believe that the sharing of an image on a private non-work related Facebook page, with a list of friends that largely did not include colleagues, was an act done in the course of employment. The EAT commented that it was not possible or desirable to lay down any hard and fast guidance as to when such conduct could incur employer liability and reiterated that this is a question of fact for the Tribunal. It accepted that there may be many circumstances in which sharing a Facebook image could be found to be done in the course of employment.

The EAT also concluded that it was appropriate to take into account the individual's apology in determining whether it was reasonable for the act to have the effect of causing offence when applying the legal test of harassment under the Equality Act.

This case does offer some comfort for employers, although social media cases involving harassment and vicarious liability will always turn on their facts. To reduce the risk of becoming vicariously liable, employers should ensure that they have a social media policy in place.

Ed Heppel

Information

If you have any queries on any issues raised in this newsletter, or any employment matters in general please contact:

Ed Jenneson on 01482 337341 or email ed.jenneson@rollits.com

This newsletter is for general guidance only and provides information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful, but if you do not wish to receive further mailings from us please write to Pat Coyle, Rollits, Citadel House, 58 High Street, Hull HU1 1QE or email pat.coyle@rollits.com. For details of how we use your personal information please refer to our Privacy Policy by writing to the same address or accessing our website at rollits.com

The law is stated as at 1 October 2019.

Hull Office
Citadel House, 58 High Street,
Hull HU1 1QE
Tel +44 (0)1482 323239

York Office
Forsyth House, Alpha Court,
Monks Cross, York YO32 9WN
Tel +44 (0)1904 625790

rollits.com