A recent study by Opportunity Now and PricewaterhouseCoopers revealed that 64% of UK women (aged between 28 and 40 years) have been bullied or harassed at work. In a more wide-ranging survey of this kind, 52 of the women questioned said they had experienced bullying or harassment over the last three years.

For example, the Care Quality Commission (CQC) undertook its latest staff survey in February 2014 with troubling results. While 77% of staff members either strongly agreed or agreed they felt proud to work for the CQC, 20% said they had witnessed bullying or harassment at work and 10% claimed to have been bullied or harassed themselves.

Interestingly, Channel 4 has also investigated life at Westminster, where young men were more likely to get harassed than women. Some 40% of young men working at Westminster said that they had received unwanted sexual advances from older and more senior colleagues.

From a legal perspective, there is no specific definition of “bullying.” However, the Equality Act provides a definition of harassment, which says that a person harasses another if that person engages in unwanted behaviour relating to a particular characteristic (in this case, sex), and this conduct has the purpose or effect of violating someone’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Proceedings may be initiated against both the employer and the alleged harasser, with no limit as to the level of compensation which can be awarded by an Employment Tribunal. This may be financially crippling for an individual, and it is surprising that employers do not emphasise this fact when trying to train employees.

The damage to the reputation of organisations which are seen to allow or even tolerate such behaviour can be significant. Social media facilitates rapid spread of information and it can be impossible for an organisation to prevent or contain the damage to its reputation.

To avoid this, employers need to ensure that they have “live” policies in the workplace. It is not enough to have policies stipulating the levels of expected behaviour and then leave these on the shelf to gather dust! The employer should review these policies at least once every year, train employees on the standards expected of them and ensure that breaches are dealt with swiftly. Access to third-party assistance, such as confidential helplines, should be provided where necessary. In this way, issues such as the reputational damage and the financial consequences of Tribunal awards can be avoided.

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Many American businesses are wary of what is often seen as a more restrictive employment environment in the UK. In fact, many employment protections for employees in the two countries can be more similar than we think.

**Protection from Mistreatment**

Both countries offer employees a range of protections against mistreatment, including laws regarding discrimination and “whistleblowing.” UK discrimination law arises mostly from European Union law (which prohibits discrimination on a number of grounds). These protections are implemented through the UK Equality Act 2010.

In the United States, a similar “top-down” approach arises as a result of the country’s federal model, where federal laws provide minimum protections for all citizens. State congresses also are able to legislate on employment in their states to go beyond the federal minimum.

**Protection from Dismissal**

One of the major differences relates to protection from dismissal. Whilst protection from mistreatment is firmly entrenched in the U.S. employment law psyche, it is a cultural norm for employees to serve at the will of the employer, who, in most states, can dismiss them at any time, without notice or with very short notice, for any reason other than one that is discriminatory or detrimental on a protected ground.

This is in contrast to the UK position, where, after two years, an employee is able to bring a claim for “unfair dismissal” resulting in compensation for loss of earnings in the event that the individual is dismissed for any reason except for a “potentially fair” reason, such as misconduct or poor performance, and where a consultative process has not been carried out with the employee in relation to that dismissal.

UK law goes even further in relation to large numbers of redundancies, in which collective consultation rules apply, requiring employers to consult with representatives of employees before any dismissals can be made. Where a business is being sold, similar rules provide for the employer to consult with representatives of the employees of that business in order to transfer their employment to the buyer.

**Benefits and Retirement**

The provision of employment benefits is another area in which the countries differ greatly. In the UK, with state healthcare and pension provided for all, the area of benefits has been much slower to develop, and historically has been a predominantly private-sector matter, although this has changed over recent years with increased regulation of pension schemes, culminating in the introduction of auto-enrolment.

In the United States, in contrast, due to the lack of state healthcare or retirement benefits, employers have become the key providers of both of these benefits. Successive governments have legislated to regulate the way in which employers provide these benefits to employees (usually by making compliance financially beneficial for employers) and to provide employees with some limited protections, which are alien to their UK counterparts.

Worlds Apart

Many of the differences between the U.S. and UK positions result from cultural change in the 20th century. In the UK, the “from the cradle to the grave” philosophy of the post-war consensus resulted in successive governments (regardless of political party) instituting ever-greater protection for employees, on grounds of either social inclusion or paternalism, under the notion of a “job for life.”

In the United States, a much more individualistic philosophy prevails, historically preventing governments from imposing on businesses any more than the minimum acceptable protections for employees.

What’s Next?

Whilst employment protections in both countries have remained relatively static (partly due to the desire to avoid increased costs to businesses during the global recession), recent years have seen something of a shift in terms of provision of benefits in both countries.

In the UK, cash-strapped governments have become increasingly keen to shift the burden of retirement benefits onto employers. The auto-enrolment provisions of the Pensions Act 2008 require employers automatically to enroll all employees into a qualifying pension scheme and to make mandatory contributions into the scheme, a major shift in retirement benefit provision.

In the United States, the focus on employer-sponsored benefits has continued. The employer mandate provisions of the Patient Protection and Affordable Care Act of 2010 (ACA or “Obamacare”), although now delayed until 2015, seek to extend coverage of healthcare benefits by requiring employers with more than 50 full-time employees to provide healthcare benefits to staff.

By Rob Washington
Changes to TUPE – What Do They Mean?

By Dan Peyton

A number of significant amendments to Transfer of Undertakings (Protection of Employment) Regulations (TUPE) came into force in January 2014; the majority of these are designed to assist employers in an area that has always been complex and dogged by uncertainty.

1 Changes to terms and conditions

One of the greatest practical difficulties for employers was the effect of TUPE on the ability to make post-transfer changes to the contracts of employment for transferring employees. The recent amendments broaden the circumstances in which such changes can be made.

Now, changes will be void only if the transfer is the sole or principal reason for making the changes. Changes made for a reason merely connected to the transfer will not be void. Where the sole or principal reason for a change is the transfer, the changes will not be void if:

(a) The reason for the change is an economic, technical or organisational (ETO) reason entailing changes to the workforce, and the employees agree to the change.
(b) The terms of the contract permit the employer to make a change (e.g. mobility clauses).
(c) Terms and conditions are incorporated from a collective agreement (subject to certain conditions).

There is also now a specific provision that expressly provides that a change in workplace will be an ETO reason.

However, there remains uncertainty as to the difference in practice between situations where the transfer is the sole or principal reason, and situations where the reason is merely connected to the transfer. Further, TUPE continues to render void changes that were made to contracts simply for the purpose of effecting the harmonisation of contracts following a TUPE transfer.

2 Service provision change

Originally, it was intended that the Service Provision Change provisions in TUPE would be removed, as they went further than required under the EU Acquired Rights Directive. However, they have been retained but modified in an attempt to clarify their application.

The principal change has been to confirm existing developing case law, that in order for these provisions to apply, the service provided after the change must be the same as that carried out prior to the transfer. The issue now will be to establish whether this is the case.

3 Dismissals

As in the case of post-transfer changes to terms and conditions, the application of the automatic unfair dismissal provisions has been limited to those cases where the transfer is the sole or main reason for the dismissal, and not where the dismissal is for a reason connected with the transfer. Even where the transfer is the sole or principal reason, the dismissal will not be automatically unfair if there is an ETO reason entailing changes in the workforce (e.g. redundancy and now, expressly, relocation).

The inclusion of an express provision relating to relocation means that employees will no longer be able to rely on Regulation 4(9), which provides that employees who are subject to substantial detrimental changes to their working conditions can treat themselves as automatically unfairly dismissed.

It remains to be seen what effect these changes have in practice, but it seems likely that in most instances TUPE will remain a difficult area for employers.
Effective 6 May 2014, it is a legal requirement for prospective claimants to follow a process of early conciliation through the UK Advisory Conciliation and Arbitration Service (Acas) before they may issue a claim in the employment tribunal.

**Background**

The early conciliation provisions of the Enterprise and Regulatory Reform Act 2013 reflect the government’s attempt to encourage discussions and, ultimately, settlement between the parties to a potential employment tribunal claim without the need to commence legal proceedings.

Some limited exceptions to this obligation include cases where another claimant has complied with the process in respect of the same matter or where a claim form contains issues that are not “relevant proceedings” (e.g., claims against certain government agencies, such as the Secret Intelligence Service). Even if proceedings are exempt, a claimant may still request early conciliation. Similarly, a prospective respondent can request early conciliation regarding a matter which, if not settled, may give rise to proceedings against the respondent.

**The early conciliation process**

The early conciliation process requires claimants to notify Acas before issuing a claim to the employment tribunal. The tribunal will not accept a claim unless Acas has confirmed that this process has been followed. Once notified, Acas will contact the claimant to see if the individual is interested in attempting early conciliation with the employer. If so, Acas aims to contact the employer the following working day to initiate the process, which can last up to one month (unless the parties agree to a further 14-day extension).

If Acas cannot contact the claimant, either party does not wish to commence conciliation discussions, or the early conciliation period ends, Acas will issue an early conciliation certificate confirming that the early conciliation requirements have been met. This certificate is then sent to the employment tribunal and the claimant may issue a claim as before.

**Key points to note**

The obligation on the claimant is merely to notify Acas of a potential claim and not to commence a conciliation process with the employer. As such, neither party is required to enter into discussions.

Although the statutory limitation period in which a claimant may bring a claim in the employment tribunal is three or six months (depending on the complaint), the clock stops running as soon as the claimant notifies Acas of the potential claim.

The clock restarts once Acas issues the certificate, meaning that, effectively, the limitation period can be extended for a maximum of six weeks.

**What it means for employers**

If a claimant wants to proceed with early conciliation, Acas will contact employers to initiate the process. It is therefore possible that the first indication of a potential claim is via Acas rather than the employment tribunal. Accordingly, businesses should consider who should communicate with Acas in such cases and if they would like to appoint representatives to act on their behalf.

Employers are not legally required to participate in early conciliation. However, because early conciliation will be suggested to the employer only if the claimant is open to settlement, employers should consider this option before a claim is issued in the employment tribunal.

Because the early conciliation process can stay the limitation period, employers can no longer rely on the statutory time limits, as potential claimants may use the early conciliation process as an attempt to buy themselves more time to prepare their claims.

If the early conciliation process proves successful, it could eliminate for both parties the time and expense of following the employment tribunal process.