

## UK: EMPLOYMENT UPDATE

This Summer's Briefing reviews the new UK Corporate Governance Code, the Women and Equalities Committee report on sexual harassment in the workplace and a Supreme Court decision on whether employers have a duty of care to conduct litigation in a way that protects employees from economic and reputational harm.

### Revisions to the UK Corporate Governance Code

The Financial Reporting Council (FRC) has now published the revised UK Corporate Governance Code applicable to all companies with a premium listing, whether incorporated in the UK or elsewhere. It will apply to accounting periods beginning on or after 1 January 2019. The Code is made up of high level Principles and more detailed Provisions and is supported by revised Guidance on Board Effectiveness (the Guidance). Below we explore those aspects of the revised Code that relate to and/or impact on the workforce.

#### *Engagement with the workforce*

Provision 5 provides that one or a combination of the following methods should be used to ensure engagement with the workforce:

- a director appointed from the workforce;
- a formal workforce advisory panel;
- a designated non-executive director.

Principle D states: *"In order for the company to meet its responsibilities to shareholders and stakeholders, the board should ensure effective engagement with, and encourage participation from, these parties"*. For these purposes the 'workforce' is regarded as a key stakeholder whose views the board should understand.

What is the 'workforce' for these purposes? The Guidance clarifies that the FRC considers that communication and engagement will involve those with formal contracts of employment (permanent, fixed-term and zero-hours) and, in addition, other members of the workforce who are not 'vanilla' employees but who are affected by the decisions of the board. By way of example, it suggests that companies should consider including individuals engaged under contracts of service, agency workers, and remote workers, regardless of their geographical location.

Companies are not compelled to include atypical workers in their workforce engagement arrangements, however, the Guidance suggests that they should be able to explain who they have included and why.

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What does workforce engagement look like? The Guidance sets out a number of examples of workforce engagement activities including:

- hosting talent breakfast/lunches, town halls and open-door days;
- focus or consultative groups;
- meeting groups of elected workforce representatives;
- social media updates;
- employee AGMs;
- surveys;
- digital sharing platforms.

The Guidance clarifies that the new arrangements are not intended to displace established channels of communication and consultation arrangements such as trade union consultation and works councils where these exist.

If a director is appointed from the workforce it must be made clear to the individual in question that they will have the same duties, responsibilities and liabilities as the other directors. It is important that they understand that their role is not solely to represent the views of the workforce. Companies should give careful consideration to what training and support should be provided to individuals taking up this role, for example, in understanding company finance and business decision-making, and how to work in a collaborative, committee environment.

#### *Whistleblowing policies*

Principle E states that the workforce should be able to raise any matters of concern and the supporting Provision 6 states that there should be a means for the workforce to raise concerns in confidence and – if they wish – anonymously. The Guidance considers that a whistleblowing policy that offers effective protection from retaliation is an essential component of this.

#### *Succession and diversity*

The new Code strengthens the role of the nomination committee on succession planning and establishing a diverse board and senior management (i.e. the executive committee or first layer of management below board level). Principle J requires both appointments and succession plans to be based on merit and objective criteria and to promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths.

The Guidance gives examples of diversity initiatives that the nomination committee might consider including:

- stretching targets to increase board diversity;
- dedicated initiatives with clear objectives and targets; e.g. in areas of the business that lack diversity;
- a focus on middle management;
- mentoring and sponsorship schemes;
- a commitment to more diverse shortlists and interview panels; and
- positive action to encourage more movement of women into non-traditional roles.

The Code does not require reporting on other aspects of diversity in the workforce including ethnicity; the FRC having opted instead to encourage companies to report on a voluntary basis.

#### *Remuneration*

To address public concern over executive remuneration, Provision 33 of the new Code emphasises that remuneration committees should consider workforce remuneration and related policies when setting director remuneration. The Guidance clarifies that the remuneration committee's review of workforce remuneration and related policies is limited to persons engaged under an employment contract or a contract, or other arrangement to do work or provide services personally. Amongst the questions, the Guidance suggests that the RemCo should consider is 'how do the company's pay policies address pay gaps and pay ratios between the different quartiles of the workforce?'

The annual report should describe the work of the nomination committee, including:

- the process used in relation to appointments, its approach to succession planning and how both support developing a diverse pipeline;
- the policy on diversity and inclusion, its objectives and linkage to company strategy, how it has been implemented and progress on achieving the objectives; and
- the gender balance of those in the senior management and their direct reports.

The new Code can be accessed [here](#). The Guidance can be accessed [here](#).

## Sexual harassment in the workplace: #employers too?

The #MeToo movement has propelled sexual harassment into the public eye and onto the parliamentary agenda. The Women and Equalities Committee (a parliamentary committee) has published an extensive report on Sexual Harassment in the Workplace (the Report) with various recommendations including:

- the introduction of a mandatory duty on employers to protect employees from sexual harassment in the workplace, enforceable by the EHRC and punishable by fines;
- a new statutory code of practice that would outline the steps employers should take to prevent and respond to harassment (as called for by the Equality and Human Rights Commission earlier this year);
- reintroducing liability for third party harassment, so that employers are liable if they have failed to take reasonable steps to prevent customers, clients, contractors and others harassing their staff;
- requiring all regulators (including the FCA, PRA and Health and Safety Executive) to:
  - put in place an action plan setting out what they will do to ensure that the employers they regulate take action to protect workers from sexual harassment in the workplace; and
  - make it clear that sexual harassment is a breach of professional standards and a reportable offence with sanctions;
- extending sexual harassment protection to interns and volunteers;
- extending the time limit for bringing a harassment claim to six months, with the clock paused while any internal grievance process is ongoing;
- enabling tribunals to award punitive damages in sexual harassment cases creating a presumption of costs, so that an employer will ordinarily have to pay the employee's legal costs if it loses a sexual harassment case;
- cleaning up the use of non disclosure agreements.

### **Senior Manager and Certified Persons Regime (SMCR)**

The Report recommends that regulators (such as the FCA/PRA) must make it clear that sexual harassment by regulated persons is a breach of regulatory requirements by the individual and their organisation, that such breaches must be reported to the appropriate regulator, and that such breaches must be taken into account when considering the fitness and propriety (or equivalent) of regulated individuals and their employers. The Report emphasises that perpetration of, or failure to address, sexual harassment in the workplace must be recognised as grounds for failing a 'fit and proper person' test or having professional credentials removed and that regulators should also set out the sanctions for perpetrators of sexual harassment in their sectors.

Regardless of whether this aspect of the Report is acted upon, SMCR firms (and those that will come within the scope of the extended regime in due course) should be mindful of the views expressed to the Women and Equalities Committee by Megan Butler of the FCA that although the SMCR 'fit and proper' test does not expressly require a history of sexual harassment issues to be considered the FCA expects firms to take sexual harassment and other forms of behavioural misconduct into account when assessing fitness and propriety for roles.

### **Confidentiality clauses/ non-disclosure agreements**

Confidentiality clauses are a common feature of settlement agreements, however, the Report suggest that their use must be better controlled and regulated to ensure that they are not used unethically in cases where sexual harassment is alleged.

To this end, it is suggested that the Government should legislate to require the use of standard, approved confidentiality clauses. These should include clear, plain English wording setting out the meaning, effect and limits of confidentiality clauses, including a clear explanation of what disclosures are protected under whistleblowing laws and cannot be prohibited or restricted.

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In addition, it is suggested that the Government should make it an offence for an employer or their professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence.

**Action points**

At this stage it is not known whether any, or all, of the Report's recommendations will be taken forward; however, it is likely that a new statutory code will be implemented at some point in the future and the use of non-disclosure agreements refined.

Although the future landscape is not yet clear, employers would be advised to audit existing policies and practices in relation to harassment (of all types not just sexual harassment) to assess what changes may be appropriate:

- What [sexual] harassment training is currently provided?
- Who is it provided to?
- How frequently is it provided; is there any refresher training?
- Does the training help equip staff to identify and 'call out' inappropriate behaviours of colleagues and/or clients and customers?
- Is there a standalone [sexual] harassment policy or is harassment dealt with as part of a grievance or whistleblowing policy?
- Do current procedures for assessing whether an individual continues to meet regulatory standards take into account disciplinary action for harassment or similarly inappropriate behaviour?
- Are non-disclosure provisions routinely used in termination agreements? If so is there a risk that their use could be regarded as unethical in circumstances where the employee has alleged sexual or other harassment?

The Report on Sexual Harassment in the Workplace can be found [here](#).

**Do employers have a duty of care to conduct litigation in a way that protects employees from economic and reputational harm?**

This was the question considered by the Supreme Court in proceedings brought by police officers who argued that they had suffered reputational, economic and psychiatric damage because of the way in which legal proceedings has been prepared and defended by the Commissioner of Police prior to the case being settled.

Although the relationship of police officer and commissioner is not strictly that of employee/employer, the Court proceeded on the basis that they should be treated as such. The Court's decision is therefore relevant to 'traditional' employment relationships.

The Court acknowledged that employer and employee are likely to have very different interests driving their decisions in relation to the litigation process; an employer has to take into account the importance of successfully defending a claim, the time, costs and effort involved in doing so and balance this against the pragmatism of settling the claim; an employee by contrast is likely to be focussing on vindicating their reputation.

The Supreme Court considered that an employer who wishes to defend a claim based on vicarious liability for the alleged conduct of his employees is entitled to defend the claim in the way it sees fit, even if its employees will or may as a result be subjected to public criticism during the trial process. Decisions in the conduct of the case, such as which inquiries/investigation to undertake, which experts to instruct, which witnesses to call or which resources to devote to resist the claim, are essentially matters for the employer.

The Court held that it would not be fair, just or reasonable to impose a duty of care on an employer to defend legal proceedings so as to protect the economic or reputational interests of his employee.

In spite of this decision employers should still be mindful of the way in which they conduct proceedings and consider whether their actions could give rise to an argument that the implied term of trust and confidence has been breached; for example if a press release is going to be made in relation to sexual harassment proceedings consider whether it would be appropriate to give the employee who is the subject of the allegations advance notice, and possibly the opportunity to comment on it depending on the circumstances.

*[James-Bowen and others (Respondents) v Commissioner of Police of the Metropolis]*

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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