Employment

A fine balance

Chris Bryden & **Michael Salter** warn against the dangers of office gossip

IN BRIEF

- *Nixon v Ross Coates Solicitors* provides a timely reminder of the fine line between office banter and conduct that amounts to harassment and actionable discrimination.

In *Nixon v Ross Coates Solicitors* [2010] UKEAT/0108/10/ZT HHJ McMullen with typical robustness noted the "injudicious behaviour by young professionals at the Christmas party of a solicitor's firm and its consequences for employment relations". The Employment Appeal Tribunal (EAT) was considering an appeal by the claimant, Miss Nixon, and a cross-appeal by the respondent, arising out of Miss Nixon's claim for unfair dismissal, sex discrimination, and discrimination on the grounds of pregnancy and harassment.

The claim arose out of the pregnancy of Miss Nixon by a colleague in the firm, Mr Perrin, with whom she was in a relationship. At a staff Christmas party held on 22 December 2007, however, Miss Nixon was, in the words of HHJ McMullen, "involved flirtatiously [in] kissing the IT manager"; the pair later obtained a room and had intercourse. In the New Year, Miss Nixon informed the principal of the firm, Mr Coates, of the fact of her pregnancy. However, within an hour the HR manager, Ms Debbie O'Hara, had become aware and had, Miss Nixon alleged, led gossip as to the paternity of the child. The IT manager, Mr Wright, also came to be aware of the pregnancy and expressed his alarm to Miss Nixon in a series of text messages. Miss Nixon took time off work as a result of her upset at this gossip, and suggested a return to work at a different office, meaning that she would have no contact with Ms O'Hara.

In February 2008 Miss Nixon entered a grievance on the basis that the respondent had failed to prevent Ms O'Hara spreading rumours or to chastise her; and that by this stage she had been told that there was "no room" at the alternative office. On 15 March 2008 Miss Nixon resigned.

The employment tribunal dismissed the harassment and discrimination claims. It found that while Ms O'Hara might have been indiscreet in a minor way, there was nothing by her conduct "which could possibly be regarded as intimidating, hostile, degrading or humiliating". It also found that the rejection of the suggestion of work at the alternative office was not sex discrimination, however it did find that Miss Nixon had been constructively unfairly dismissed.

Appeal & rebuke

The EAT, when considering the appeal of the claimant, accepted her contentions that the gossip about the paternity of the child was connected with pregnancy; the claimant was uncomfortable following the spreading of the gossip (this evidence was not challenged) and it amounted to a course of unwanted conduct, meeting the definition of harassment. The EAT found therefore that the tribunal was wrong "not to see this", and that the tribunal's disapproval of the claimant's conduct "leaked into its judgment on the law". Thus, while the evidence given by the claimant was unreliable, the "extrinsic evidence" of Ms O'Hara's conduct (she not having given evidence herself) was available, and "should have been accepted". The tribunal thus erred in law [at 51].

The EAT further found that the failure to allow the claimant to work at the alternative office did amount to discrimination on the grounds of pregnancy, as it was related. The tribunal was wrong to simply find that this issue was not related to her sex or pregnancy, as it was related to Ms O'Hara and "the content of her gossip was unarguably related to pregnancy and pregnancy is related to her sex" [at 52]. Again, therefore, the tribunal erred in law.

Further, the EAT upheld the appeal of the claimant that her compensatory award had been reduced on the grounds of her conduct, as the tribunal, it appeared, took into account conduct subsequent to the date of resignation. HHJ McMullen made clear that such conduct could not be taken into account; only conduct up to that date was relevant.

The EAT also noted that while the tribunal took a "very dim view" of the conduct of Miss Nixon at the Christmas party, that could not be taken into account in considering an award of just and equitable compensation; that had to be in accordance with the loss sustained [at 56].

The judgment of the EAT consists of a significant rebuke to the tribunal below. In effect, HHJ McMullen finds that the tribunal allowed their disapproval of the behaviour of Miss Nixon to cloud their conclusions, based on their findings of fact.

Whatever the view of the judgment of the EAT (and it is the view of the authors that the approach of the EAT is open to criticism) it amounts to a clear reminder of the dangers of allowing office gossip to spread unchecked. NLJ

Chris Bryden, 4 King's Bench Walk. Website: *www.4kbw.co.uk.*
Michael Salter, Ely Place Chambers. Website: *www.elyplace.com*