

Discrimination and Harassment:

Recent developments and insurance considerations

Not only is diversity and inclusion a topic that can no longer be ignored by any business, it is increasingly becoming a key risk area for business. The #metoo and #blacklivesmatter movements have highlighted social injustices, with political consequences. Whether stemming from these movements or otherwise, sexual and racial discrimination, and sexual harassment, must now receive significant focus from businesses big and small. Getting things wrong can have reputational, regulatory and legal consequences.

In this bulletin, we highlight some of the recent big stories and claims in this area, with a particular focus on insurance implications and potential solutions. We also give some thought to how things could develop in the coming months and years, and provide some views on mitigating exposure.

The (very) recent history

It is trite to say that allegations of sexual and racial discrimination in the workplace (and beyond) go back many years. There are, undoubtedly, a number of factors leading to the recent resurgence in these issues. The willingness of a brave number of individuals to speak out, an increased focus on Environmental Social and Governance (ESG) generally, shareholder activism putting corporations and boards under greater scrutiny, and the recognition of the financial and social benefits from a diverse workplace, all feed into this broad topic.

A renewed regulator focus has also helped shaped the agenda at organisations big and small. In particular:

- In July 2019, the Financial Reporting Council wrote to firms setting out its expectations on the reporting of non-financial conduct matters (including details of whistle-

blowing and grievance procedures, and incidents that could affect the reputation of the firm).¹

- Over the last year, the Financial Conduct Authority has increasingly highlighted what it refers to as “non-financial misconduct” as a key consideration for regulated firms, with appropriate culture (cultivated by, amongst other things, leadership and governance) seen as important to the financial health of businesses.
- In September 2020, the FCA published a report on conduct round-tables as part of its wholesale banking supervision. The report identified diversity and inclusion, and personal misbehaviour, as factors that are important in a positive culture.²

Companies are clearly taking this very seriously. In August, the Chairman of Australian financial institution AMP, David Murray, resigned over his handling of allegations of sexual harassment allegations made against a senior executive.³ Earlier this month, Insurer QBE announced the departure of its CEO after a complaint from a female employee and an internal investigation.⁴ Whether these are examples of companies putting morality before profit, or whether they fear public opinion could cause irreparable harm if they do not take decisive action, this seems to us an approach that would not have been seen a few short years ago.

Against this background, what does it mean for claims against companies and possible insurance solutions?

Employment Claims and Employment Practices Liability Insurance

The most pertinent, and certainly most personal, claims arising from the issues relate to employment. Earlier this year, Morgan Stanley’s former head of diversity sued the bank alleging that (as a black woman) she was fired for seeking to increase minority staff numbers, and that her and 40 female African-American colleagues received unequal pay. The claim also seeks to shine a light on the ratio of minority employees. It alleges that just 100 of 16,000 financial advisors and 41 of thousands of managing directors are black.⁵

There are numerous other examples of recent employment claims based on alleged race or sex discrimination, and sexual harassment. Matters we have tracked include the following:

- The Supreme Court is due to provide a verdict in the near future on a claim brought by thousands of (mainly) female shop floor workers, who allege their pay was unequal to the comparable role undertaken by (mainly) male distribution centre staff. If the Supreme Court upholds the decision of the lower Court, it could leave Asda and other supermarkets with a bill for £8bn and lead to further similar claims.⁶
- A senior lawyer brought a claim against Insurer Tokio Marine Kiln in the UK regarding his treatment following his whistle-blowing on sexual harassment incidents.⁷
- A young female employee received a settlement of £270,000 from investment management firm IFM Investors following a claim that arose out of unwelcome sexual advances from a senior executive.⁸

¹ <https://www.frc.org.uk/news/july-2019/reporting-of-non-financial-conduct-to-the-financia>

² Financial Conduct Authority ‘Messages from the Engine Room’ – 5 Conduct Questions – Industry Feedback for 2019/20

³ <https://www.ft.com/content/a5fe10a5-e9cf-474e-92e6-1b99a86b3c40>

⁴ <https://www.insurancejournal.com/news/international/2020/09/01/580924.htm>

⁵ <https://citywire.co.uk/wealth-manager/news/morgan-stanley-diversity-champion-sues-for-discrimination/a1369153>

⁶ <https://www.ft.com/content/1812fe22-06bd-46ce-b2ec-0d324bdc7983>

⁷ <https://www.bloomberg.com/news/articles/2019-11-13/sexual-harassment-whistle-blower-sues-lloyd-s-of-london-insurer>

⁸ <https://www.infrastructureinvestor.com/ifm-investors-settles-sexual-harassment-case-270000/>

- In the US, JP Morgan Chase settled a class-action lawsuit alleging racial discrimination for \$19.5m.⁹ The allegations included that white advisors were sent to wealthier places, with similar opportunities denied to black employees.
- A female worker at BNP Paribas was found to have been paid a salary that was at least £40,000 per annum lower than male colleagues for a similar role (over an eight year period) and to have lost out on £200,000 in bonuses.¹⁰

From an insurance perspective, these are claims to which an Employment Practice Liability policy (or similar coverage contained within an appropriate Management Liability or other policy) may respond.

We are also seeing discrimination and harassment as a feature of a greater number of Employment Practices suits generally, even if the central claims appear to stem from something else. In the UK, discrimination and harassment claims are not subject to the compensation cap that applies to other forms of unfair dismissal claim, which may explain this trend (coupled with an increased focus on the topic).

Directors and Officers Insurance

A recent development in the US has seen shareholders launch legal proceedings against directors, seeking to force publicly listed companies to appoint black and other minority individuals to the board. These proceedings take the form of shareholder derivative actions (whereby shareholders bring a claim on behalf of the company), and so could be covered under a Directors and Officers Insurance policy. Facebook is

the most well-known of the companies subject to these actions, but it does not stand alone.¹¹

These actions follow a string of claims (with a varying degree of success) arising from the #metoo movement. In these claims, shareholders typically sued the company alleging misrepresentations regarding, for example, the robustness of policies and procedures in place to prevent sexual harassment and, in some cases, allegations and ongoing litigation involving sexual harassment. The shareholders claim to have lost money due to a fall in share price when the misrepresentations were revealed.

Whilst these claims are targeted at larger, publicly listed companies in the US, they do highlight directors' duties in this area. These are matters that directors of all companies should consider. Breach of duty (or failure to discharge senior management functions adequately) are also items that may attract the attention of a regulator. We discuss regulatory action in more detail, below.

Professional Indemnity Insurance

To date, we have not seen claims in this area that could fall to a professional indemnity policy. However, the regulator intervention and financial consequences of reputational damage mean that these claims are likely not far away.

Regulators highlighting an issue usually leads, in due course, to supervisory intervention in businesses considered as non-compliant, and formal investigations often follow thereafter. The (often extensive) costs of regulatory investigations may be covered under a Professional Indemnity policy. From a more traditional claims perspective, if a business does suffer significant reputational

⁹ <https://www.chicagotribune.com/business/ct-biz-jpmorgan-chase-discrimination-allegations-20180905-story.html>

¹⁰ <https://www.personneltoday.com/hr/city-banker-wins-sexism-case-for-unequal-pay-and-victimisation/>

¹¹ <https://www.dandodiary.com/2020/07/articles/shareholders-derivative-litigation/facebook-board-hit-with-derivative-lawsuit-on-board-diversity-and-other-race-related-issues/>

damage leading to financial loss, anyone that has invested in that business will be asking questions of its financial advisors, which could lead to professional indemnity claims.

Concluding thoughts

Quite rightly (and not before time), discrimination and harassment have become high profile matters. Failures can have significant consequences for directors and businesses. Employment claims, director claims and regulatory investigations are all items that can be covered under insurance policies. However, the significant reputational consequences of incidents (and of the failure to deal decisively with incidents) could be fatal to an organisation and no amount of insurance can prevent that.

So what should companies be thinking about?

Here are a few of our suggestions:

- 1. Lead by example – the FCA has consistently stated that a positive culture comes from the top. Ensure the subject is high on the agenda at board and management level.**
- 2. Review policies and procedures – do you have appropriate harassment and whistleblowing procedures in place? Have these been reviewed recently? Have you taken staff feedback on whether they work?**
- 3. Think about whether any training would be appropriate, whether at a senior level or on a firm-wide basis.**
- 4. Consider recruitment strategy, and interview and promotion criteria.**
- 5. In advisory work (particularly around investment), take a look at the extent to which these issues could affect the financial health and performance of companies.**

This article was authored by members of Howden's Legal, Technical & Claims team. The Legal, Technical & Claims team is made up of senior insurance lawyers and experienced claims professionals, and provides support on insurance claims, policy wordings and legal and regulatory developments as they impact your business. If you have any queries on the issues raised, please feel free to contact a member of the team directly.

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