Nicknaming an older employee 'Yoda' proved a costly error for one firm

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HR's 10 most expensive mistakes

And how to avoid them

From allowing an older worker to be called 'Yoda', to the everyday procedural errors you need to cut out – urgently

WORDS JO FARAGHER

Most of the time, being an HR professional is a joyous thing. Steering organisations through times of change, helping people overcome insurmountable hurdles, nurturing their careers to keep them motivated and rewarded... little wonder the HR department is so often characterised as "smiley".

But there is a shadow over many HR professionals. Making the wrong call, or allowing damaging behaviour to go unchecked, can prove prohibitively expensive. As our number crunching on page 35 demonstrates, the average cost awarded at an employment tribunal now stands at £12,148. The British Chambers of Commerce has put the average cost of an employer defending themselves at tribunal at £8,500.

Much, if not all, of this outlay is entirely preventable – and it's in HR's hands. As HR consultant and barrister Kate Russell muses: "The road to employment tribunals is paved with good intentions. Nobody really sets out saying 'I want to be really horrible to my staff'."

The right interventions, a proper understanding of procedure and the ability to nip trouble in the bud can be invaluable, which is why *People Management* consulted m'learned friends to compile a list of the most common legal mistakes made in UK workplaces – and how to stay out of the dock by eradicating them.

1 Avoiding difficult performance conversations

Very often, failing to do your job properly lies in the eye of the beholder. And if you can't quantify your gripes with a staff member, it can be best to keep your counsel. Anne Pritam, a partner at Stephenson Harwood, recalls one case where a manager had pulled up an employee "because they looked grumpy all the time". This clearly had no relevance to their job and was difficult to back up with a clear example.

But in other cases, not clearly articulating your concerns is a short cut to a later legal quagmire. "Too often, managers fail to give employees the message early enough and get accurate documentation of underperformance," says Pritam. This is often down to a fear that saying 'too much' will create legal problems of its own – so managers are ambiguous or too subtle and employees don't fully understand what they're trying to say.

Pritam adds: "From a legal perspective, as long as what you're saying is accurate, it can be backed up and is relevant to the job, you can say what you need to say. Managers don't put as much time into these conversations as they would like, and leave it until breaking point for HR to sort things out."

Not having difficult conversations, or not making them clear enough, runs the risk of damaging a claim defence. Dr David Bright, a teacher of HRM and employment law at the University of Hull, adds: "If the employer becomes aware that the procedures have not been properly followed in the early stages, this can be rectified at the appeal stage. For example, a formal written warning which arose from a hearing that was not done properly could be revoked at a later stage." He suggests offering managers training in dealing not just with the early stages of conduct issues, but also in applying procedures if issues get worse.

Svetlana Lokhova was awarded £3.2m for sexual harassment

2 Making assumptions about maternity

So many high-profile tribunal cases involve pregnancy that there's a natural tendency among some bosses to clam up as soon as they first spot a tell-tale bump on a member of staff.

In particular, it's become common wisdom that you can't make someone redundant if they're on maternity leave. Except that's entirely wrong-headed. Beverley Sunderland of Crossland Employment Solicitors says: "You can't choose someone because she's on maternity leave, but you must include that person in the pool for selection if you're making a group of people redundant."

Excluding maternity leavers from the selection pool could result in a sex discrimination claim, as a leading law firm found to its cost in 2010. John de Belin, an associate solicitor, was made redundant in preference to a female colleague, after the firm artificially inflated one aspect of its redundancy points system for the woman on the grounds that she was on maternity leave, which swayed the outcome. This "special treatment", while perhaps well-intentioned at the time, cost £123,000 in damages.

Sunderland points out, however, that women on maternity leave (and men on shared parental leave) who have been made redundant (or if their role has become obvioulsy redundant) do have some enhanced rights over other at-risk workers: there is no obligation for them to interview competively for a suitable vacancy, and can simply be placed into an alternative role.

3 Not calling out harassment

Harassment cases can be costly for employers. While the financial damage is bad enough, it's your reputation that really takes a battering. Where managers tolerate a culture of sexist or racist behaviour, they may not always foresee the potential consequences.

A banker who had been nicknamed 'Crazy Miss Cokehead' by male colleagues was recently awarded £3.2m for sexual harassment. Svetlana Lokhova's workmates claimed she had only been hired because of the size of her breasts, and a tribunal ruled she had suffered 'disgraceful' gender-based harassment.The hearing suggested her manager, who sent her offensive emails and ignored her complaints, should have been sacked for gross misconduct.

Jennifer Nicol, a partner at employment lawyers Doyle Clayton, believes this is a classic case of an employer taking the side of a "heavy hitter"."They deploy a light touch and fail to get to the nub of the issue, which means they don't address complaints properly," she says.

* A full report on this case is available on HR-inform at **bit.ly/Lokhova.**

4 Car-crash consultations

Not consulting properly during redundancy negotiations or after a TUPE transfer has the potential to be one of the costliest errors you can make in the workplace. If you fail to consult at all, or not for long enough, all those affected (not just those in the redundancy or transfer pool) can make a claim.

In these circumstances, the tribunal can make a 'protective award' that entitles the employees to pay for a period of up to 90 days, in addition to the employer's requirement to pay any notice and statutory redundancy payment, as occurred during the recent Woolworths consultation case.

But consultation should also be approached with an open mind, argues Christina Tolvas-Vincent, a partner at Bond Dickinson: "There's a perception that everything's already decided before you even begin consultation, but there might be a solution. Don't automatically assume that a senior person won't take a more junior position. Don't assume it's obvious who should go and who should stay and construct your selection matrix to support that."

"There might be a solution. Don't assume that a senior person won't take a more junior position"

Consultation during the TUPE process is a difficult balancing act. "Things tend to happen very quickly during transfer negotiations, and because it's a commercial exercise bosses would often prefer to keep it secret, so they don't leave much time to elect or consult with employee representatives," says Max Winthrop, head of the employment department at Short, Richardson and Forth.

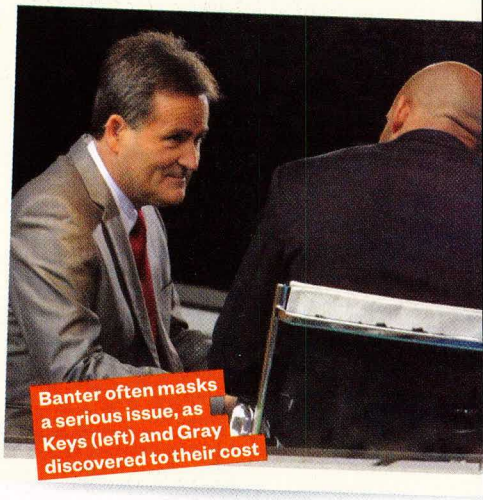
Where employers fail to consult appropriately in a transfer situation, TUPE law provides for a maximum award of 13 weeks' pay, so ensuring there is due time to consult in the short term could save a great deal in the long run.

5 Brushing off 'banter'

It can seem harsh to quash workplace chatter. But sometimes you have to. An employment tribunal in 2012 held that an engineering firm had demonstrated age discrimination against an employee who was close to retirement. Colleagues often referred him to as 'Yoda' and had changed his number plate from 'OAB' to 'OAP'. His manager had not seen a problem with it "if everyone was getting on".

Russell says: "It is a manager's role to set, monitor and enforce standards. Too many employers allow far too informal a workplace culture, including inappropriate banter which comes back to bite." With discrimination claims typically attracting the highest compensation payments, coaching managers on nipping banter in the bud could save a six-figure sum.

And retirement age, says Nicol, is a particular issue: "I still come across employers who think that just because the default retirement age has been scrapped, they can just choose another age and force people to retire then. You cannot do that unless you can objectively justify that age and there's a blanket case to apply it to all workers."



Banter often masks a serious issue, as Keys (left) and Gray discovered to their cost

REX FEATURES

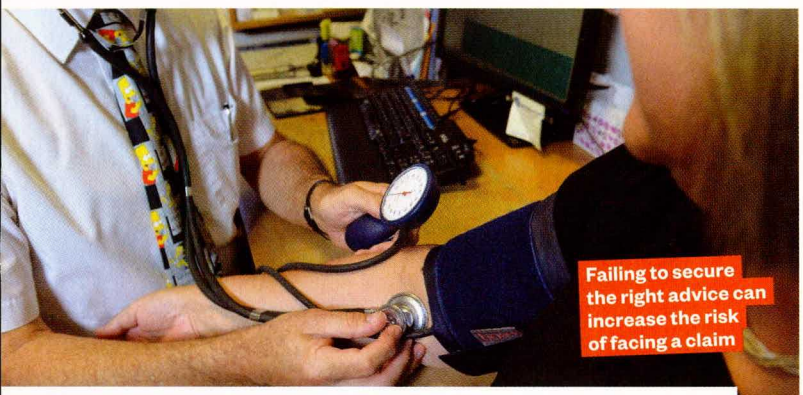
6 Getting investigations wrong

"It's surprising how often things go awry in the disciplinary process, especially at the investigation stage," says Matthew Smith, a partner in the employment team at Blake Morgan. "The investigating officer goes well beyond their brief and decides whether someone did or didn't do something, rather than just setting out the facts and a conclusion."

Best practice in workplace investigations is to keep an open mind and not to "look for corroborating evidence or verification of what the employee and other staff are saying", according to Acas. This means it's better, where possible, to have a separate individual decide on follow-up action.

It's also important to consider all the evidence available, not just what the manager feels is relevant. In a recent case involving a bus driver who was dismissed after testing positive for cocaine in a saliva test, the claimant took a separate follicle test to show he was clear and that the drug had been transmitted via contaminated bank notes. He won his unfair dismissal case because this line of reasonable defence was not followed up.

Smith adds: "Something may look like gross misconduct but the employer doesn't take an explanation into account. Or a manager ignores what another person has said. All of this could flaw a fair dismissal argument."



Failing to secure the right advice can increase the risk of facing a claim

7 Not minding your language

"One of the things we deal with a lot is managers not really knowing what they're doing and saying something they shouldn't," says Tolvas-Vincent. "They say things like 'pull yourself together' and brush off a complaint, or they laugh at a request to work part-time from a man. Sometimes they just don't think."

In delicate situations such as letting someone go or discussing redundancy, not sticking to a script or a pre-determined list of bullet points can have unintended consequences, according to Bev White, managing director of career services at HR consultancy Penna. She says: "Remember that it's OK to say to someone 'I'll get back to you', rather than winging it. If you're flustered, it's easy to fall into a trap of saying something. Then later you play it back in your mind and think 'what was I thinking?'"

She adds: "The script goes out of the window and they start making it up – especially if someone is asking a lot of questions." Texts and emails can also convey different meanings to different people, with the added consideration that these conversations leave a ready-made audit trail, which could be used as evidence. Using mediators, or training up managers in coaching skills, can help mitigate those head-in-hand moments.

8 Missing out on advice

If your computer stopped working, you wouldn't hesitate to call IT. But when it comes to far more important matters, we're still reluctant to reach out. Failing to secure the right HR, legal or medical advice at the right point can increase the risk of facing a tribunal claim. In a disability discrimination case, for example, judges will scrutinise any expert opinions (or lack of) to ensure they're both accurate and objective.

"There are still employers who are reluctant to get advice in long-term sickness absence cases," says Smith. "Either they're not taking it from someone sufficiently qualified or they're not updating that advice at a time when they're making a decision about an employee's future." This could mean relying on records from the employee's GP rather than an independent specialist, or not seeking advice on reasonable adjustments if someone returns to work. Making the wrong call could lead to a disability discrimination claim if someone is later dismissed.

In one case, involving a branch manager for a builders' merchants in Wales, the claimant had suffered a stroke and his doctor said he would need to avoid stress if he was to return to employment. His company decided that no role would be without stress, so dismissed him. The claimant made a full recovery 11 months later, and received almost £400,000 in a disability discrimination payout because the employer failed to make reasonable adjustments based on the doctor's advice.

It's crucial to ensure managers know what advice is available from HR, rather than letting policies languish on the intranet. Lunch-and-learn sessions or clinics can make managers more aware of the practical application of rules and regulations. "In a discrimination claim, lack of consistency is the most obvious line of attack," says Pritam. "That's why there are central policies and decision-making – for legal risk management."

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The disciplinary process doesn't have to be an inquisition – but following a proper process will ensure you get to the truth

ALAMY

9 Doing dodgy disciplinaries

Getting the disciplinary process wrong crops up again and again in unfair dismissal claims, and an employment tribunal will typically take into account whether managers in charge of the proceedings have followed the Acas code of practice.

Simple things such as not warning the employee of the possible consequences of disciplinary action so they can defend an allegation properly can unintentionally lead to legal action.

In the case of *Gurnett v ASOS.com*, the company accused Ms Gurnett of abusing its staff discount code and processing her own refunds. A tribunal found that she had not been made aware she was contravening any policy, nor had she previously been challenged on her behaviour, so had continued to act on that understanding. Her award for unfair dismissal was increased by 10 per cent because the employer breached the Acas code.

Making managers aware of the key points of this process, such as the right to be accompanied, or the employee's right to see the evidence presented against them – while not eliminating the risk of a tribunal altogether – could reduce the size of the legal bill and potential award.

10 Failing to renew contracts

Reviewing the terms and conditions for everyone in the organisation can be time-consuming and expensive. But ending up dealing with unfair dismissal claims can be a lot worse. A contract of employment is typically the first point of reference in a tribunal, and if it is out of date or there are clumsy omissions, this could result in a higher compensation award.

One simple thing employers must get right is to issue a written statement of terms and conditions within two months of someone starting work. If an employee later makes a successful application for unfair dismissal, or some other claim, there will be a mandatory award for not providing this, which can be as much as a month's pay.

"If someone gets a pay rise, or their work arrangements change but a new contract is not reissued, this could dent your credibility at tribunal," says Winthrop. "If you forget about renewing contracts or don't bother because of the cost, you could end up spending thousands defending an unfair dismissal claim."

A key failing is not including a suitably watertight confidentiality clause, making it hard to challenge an employee who has taken customer information to a new business. "It's not making a difficult assessment on complex legislation that'll trip you up. It's the day-to-day stuff," Winthrop says. PM

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The cost of getting it wrong

Average compensation awarded in employment tribunal rulings, 2013-14

Unfair dismissal	£11,813
Race discrimination	£11,203
Sex discrimination	£14,336
Disability discrimination	£14,502
Religious discrimination	£8,131
Sexual orientation discrimination	£8,701
Age discrimination	£18,801
Average of all awards	£12,148.30
Average cost of defending claim	£8,500
AVERAGE COST OF TRIBUNAL	£20,648.30

SOURCE: MINISTRY OF JUSTICE/BRITISH CHAMBERS OF COMMERCE