



## Would you tell HR about your office fling?

By **Caroline Baker** - 28 June 2018

If you were having a relationship with a colleague, would you tell HR? Should you?

This is the question being faced by a growing number of employees as their employers revisit the line between work and personal life that office romances blur. #MeToo, and the general zeitgeist around sexual harassment, means employers are increasingly expected to be more proactive in dealing with these issues before they occur. Love Contracts have become one of the many reactions to this.

But progress comes with pitfalls. The law of unintended consequences can play havoc with your employee relations if you are not careful in how you structure your office romance policy. Below are some of the trickier legal issues that Love Contracts throw up, and how best you can manage the risk.

### What is a Love Contract?

In general terms, it is a policy whereby employees must inform HR (or management) if they are engaged in a relationship with a colleague (usually an ongoing one). Most policies put emphasis on the type of relationship they are concerned about – ones involving parties of different seniority in the organisation where one has, or potentially has, decision making power over the other's career. The overt purpose of the policy is to manage conflicts of interest and potential favouritism, however many employers are mindful that they are also a way to manage the risk of sexual harassment claims. Love Contracts started in the US but have become far more prominent on this side of the pond in recent years.

### How should the policy be drafted?

There is no set formula in how these policies work. And therein lies the first issue to be wary of. A weak policy will be ineffectual. If there is no hard obligation to inform the company of a relationship, and no consequences if one doesn't, there is little reason for employees to follow it.

Therefore, some 'teeth' are needed, which requires tricky decision making up front:

- Will employees be reprimanded for failure to inform?
- To what extent, up to dismissal?
- At what point does an office fling become a reportable relationship?
- Once a relationship has been declared, what can the company be expected to do?
- Will the company relocate one party, and how will they choose which party to relocate?

Although there is no clear answer to these questions, it should be borne in mind that a policy is a living document and can be updated and tweaked, considering the latest guidance and employee feedback. Nonetheless, the more of these questions you grapple with up front, the more at ease employees will be in knowing where they stand. The policy should also be drafted with the sexual harassment policy in mind so there is no conflicting guidance between the two.

### **How should the policy be enforced?**

Whatever way you choose to phrase the policy, enforcing the policy should also be treated with caution. For example, using the Love Contract to justify relocating three women in succession, who happen to be the junior employee, is dangerous territory for a sex discrimination claim. A good policy will be clear about how it will operate in practice, and enforced sensibly. A senior member of HR/management should have general oversight of how the policy is being imposed, ensuring unfortunate patterns are spotted early. Decisions taken under the policy, or as a result of information gleaned from a disclosure, should be clearly documented to stave off any suggestions of impropriety.

Employers should also remember the scope and purpose of the policy. It is not a tool to delve into employees' private lives, but to manage the very real and professional problems that workplace relationships cause. Therefore, those who are responsible for the policy should be senior and experienced enough to take a sensible approach to its implementation. For example, using the policy as a 'stick' against a generally disruptive employee may have a chilling effect on other employees coming forward in future.

This will be a sensitive area for many people and HR/management need to react to the issues it throws up accordingly.

### **Data protection**

How Love Contracts interact with data protection laws remains uncharted territory. As the information processed under a Love Contract will be personal data, companies should keep a record of the legal basis on which this data is processed and flag this up in their data privacy notice.

A trickier issue is whether information regarding relationships is 'special categories of personal data'. Processing of this information is prohibited unless you have an additional legal basis under GDPR, and here in the UK you require additional documentation to do so. Special categories of personal data includes information about a person's sexual orientation and sex life. Whether your Love Contract includes details of someone's sex life (query whether a non-sexual relationship would need to be declared in the first place), you will be certainly processing information regarding their sexual orientation. If someone's sexual orientation is manifestly public, this shouldn't pose a problem. It is where employees are not open about their sexuality that your data protection obligations should be considered carefully.

There is no clear guidance on how Love Contracts and data protection interact, but it is likely to become contentious should you try discipline, or dismiss, an employee for not complying with the policy. To manage this risk, the best advice is to document your legal basis for processing this information as early as possible and even consider a Privacy Impact Assessment.

In keeping with your data protection obligations, you should also be mindful in how the information will be stored, who has access to it and how long it will be retained for. Pseudonymisation should be considered with limited access to the 'key'.

### **The right to private and family life**

Another unresolved issue is how a Love Contract imposes on an employee's right to private and family life under Article 8 of the European Convention on Human Rights. However, even leaving aside Brexit arguments, it would be a rare set of circumstances that the ECHR would be invoked in a workplace dispute.

Nonetheless, as a general policy consideration the increasing prevalence of Love Contracts may start more general conversations about the ability of employers to collect such personal information about employees. It would be worth keeping track of such public discussions to ensure your own policy is aligned to market practice and generally accepted standards.

**LGBT+ issues**

Love Contracts pose a particular risk for LGBT+ employees for two reasons. First, your business may be operating in locations which are hostile to the LGBT+ community. Your policy should be mindful of who holds the information and who has access to it. You should also be conscious of the reporting line, as the direct line manager or local HR person may not be best placed to deal with this information appropriately. You may also have to consider your legal obligations in countries where homosexuality is explicitly illegal. In most cases, having your policy not applicable in these countries may be the most sensible option.

You should also be mindful of employees who may not wish to reveal their sexuality to their employer. Regardless of the sensitive nature in which this information will be handled, some employees may feel strongly about having to 'come out' to their employer if they are in relationship with a colleague. Therefore, how your policy is enforced should be sensitive of such issues, perhaps by providing that these hard cases are mitigating circumstances.