UK employment tribunal cases relating to ‘banter’ up 45% in a year

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The number of employment tribunals claims relating to ‘banter’ in the workplace saw a 45% increase, from 67 in 2020 to 97 in 2021, shows research by GQ|Littler, the specialist employment law firm.

“Banter” has increasingly been invoked in employment tribunals as a justification for alleged discrimination and harassment.

What one employee might claim is “banter” might actually be bullying or harassment, particularly if someone is subjected to discriminatory jokes on the basis of race, gender, nationality or sexual identity.

Harassment claims are particularly relevant territory for “banter” cases. Under the Equality Act 2010, unlawful harassment occurs where a person engages in unwanted conduct related to a relevant protected characteristic, and this has the purpose or effect of—

(i)violating their dignity, or (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Examples of cases where other cases in which employers have unsuccessfully tried to plead that bullying or harassment was merely "banter" include:

1. An employee of Indian origin who was called a *"cheeky monkey"*, during a business-related round of golf
2. An employee who was teased that if he didn't like football he must be *"gay then"*.
3. An employee called *"half-dead Dave"* due to his age.
4. An employee who was called *"menopausal"* or a *"dinosaur"* due to her age and sex.

Sometimes, the banter defence has worked, for example, a sales rep who was taunted as a *"fat, ginger pikey"* in respect of his weight and Traveller background failed in his claim partly because the tribunal ruled that the office culture normalised banter, and the claimant had himself engaged in similar behaviour himself.

Employers can use "banter" as a justification to help them argue:

1. That the conduct wasn't unwanted i.e. if the employee also engaged in similar behaviour and jokes, such as in the "fat ginger pikey" case
2. That the behaviour was not connected to a protected characteristic
3. That the conduct didn't violate their dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for them. Basically, that either the employee wasn't offended by the conduct, or it wasn't reasonable for them to have been offended.

GQ|Littler explains that the individual bringing the complaint does not need to have the 'protected characteristic' relevant to the conduct in order to be offended though. For example, if you are wrongly assumed to have a certain characteristic, you can be harassed on that ground: such as a turban-wearing Sikh man subjected to Islamaphobic "banter". He could be harassed on religious grounds despite the wrong assumption having been made about his faith. Additionally, someone could be subject to harassment by insensitive comments about a particular person or group other than themselves, if it satisfies the test above. Therefore, employees should be careful about making such jokes to others at all, even if not in front of the individuals concerned.

Employers can be found to be vicariously liable for any discriminatory comments made by employees provided these were made "in the course of employment", even if this falls outside of working hours.

GQ|Littler says the the overall, long-term increase in cases may be due to employees communicating with one another more through informal instant messaging services such as WhatsApp or Slack which are nevertheless often preserved and can be used as evidence. Messages or memes are often amusing to one person but can be offensive to others and the nuances of tone are often lost in written communication.

GQ|Littler says the majority of employers are aware of the protections afforded to employees under the Equality Act relating to issues of discrimination and harassment, and do have up-to-date and comprehensive policies on equality, diversity and inclusion. However, employers should keep an eye on their workplace culture generally to make sure it is professional and appropriate, as well as fun. Up to date training, relevant to communicating in a modern-day workplace should also be provided to employees regularly to ensure all workers know what is and what is not appropriate workplace behaviour.

Lisa Rix, Senior Associate at GQ|Littler says: "Humour in the workplace is important – it can help boost morale and reduce stress. However, employees should be wary of making jokes that stray into offensive territory, especially ones which relate to protected characteristics."

"People should think about how that joke would sound being repeated back to them and whether they would feel uncomfortable trying to justify the comments if questioned about them. If that would feel awkward or embarassing, best not to say it in the first place."

"But this doesn't mean the end of workplace fun: it is possible to make jokes which don't constitute harassment!"

Employment tribunals about banter* reach record high

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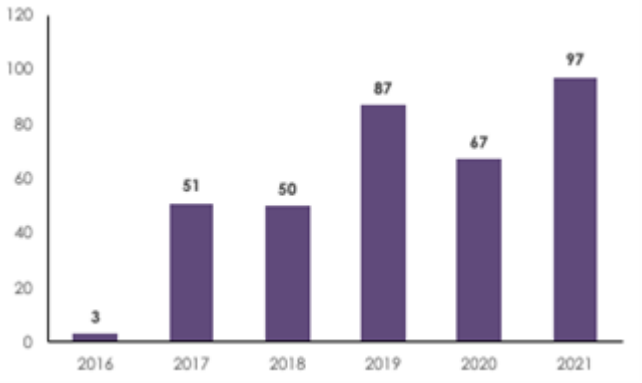

*Employment tribunals in which 'banter' played an integral part to the respondent's defence

About GQ|Littler

GQ|Littler is a leading specialist employment law firm and the London office of Littler, the largest global employment and labour law practice devoted exclusively to representing management. With more than 1,600 lawyers in over 100 offices worldwide, Littler provides workplace solutions that are local, everywhere.

Offering risk-based contentious and non-contentious advice, our legal expertise includes employment, immigration, data privacy and employee tax and incentives. Our client base spans a wide range of sectors including financial services, technology, healthcare, professional services and luxury goods, in the UK and internationally.

GQ|Littler is recognised as a leader in its field by both Chambers & Partners and Legal 500. The firm is noted for "carving out a reputation in the employment sphere" and offering the "experience, technical expertise and quality of advice of a magic circle law firm, but with the personal touch and client-focus of a boutique firm".

To better understand the myriad forces transforming the European workplace and the actions employers are taking in response, see Littler's 2021 European Employer Survey Report. Littler surveyed more than 530 human resources executives, in-house attorneys and business leaders based mainly across Western and Southern Europe.

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