

Allen & Overy horizon scans to the workplace of the future

A Q&A with Sarah Henchoz, head of employment at Allen & Overy

Sarah Henchoz is a partner and head of Allen & Overy's London employment team. In this interview, she draws on her experience to explain how the massive shift in workplace culture will define the future world of work.

1. What do you think the workplace of the future will look like and what trends in litigation do you predict?

The workplace of the future, and the not-too-distant future, will be more balanced in terms of the balance of employee/employer power. The original relationship was characterised as master and servant, highlighting that it was the employer that held all the power. Not any more. There are employer review sites where former and current employees can comment anonymously on their companies: the culture, the pay and whether it lives up to what it says on its website. Not only that, job candidates now have information about the gender pay gap, and what percentage of women and men are in the top and bottom salary quartiles. The job interview these days is not just the employer seeing if the individual is an ideal candidate; the jobseeker is scrutinising the employer, asking all sorts of difficult questions. This will drive change if you want to attract and retain the best talent. Once in the workplace, the views of employees

are being taken more seriously and we are already starting to see employee representation on various management forums so that the voice of employees as a stakeholder is taken into account.

I also think that workplaces will look at the entire employee offering, not just pay. The mental wellness of employees will become more and more important too, with companies offering all sorts of things that contribute to good mental health.

In relation to trends in litigation, I do not expect to see the volume of whistleblowing claims decrease, particularly where this relates to terminations or where retaliatory action has been taken against the

whistleblower. Gender is in the spotlight at the moment, but the other protected characteristics will catch up, starting with race and ethnicity. There is already consultation about whether companies should be required to report on their ethnicity pay gap, for example.

Employers want to manage the risks created by the mental health of employees. Beyond personal injury claims arising from lack of support or pressure that employees have been put under, there is the risk of somebody resigning and claiming that the employer has broken trust and confidence, and not provided a safe working environment. There is potential risk to a company's brand image, which is bigger than the claims an individual can

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bring. It's not just about the litigation risk, it's about a franchise risk – damage to the brand if companies do not deal with it or anticipate the problems and adjust accordingly.

I am very optimistic about the workplaces of the future. I think they will be fairer for all employees and atypical workers. This is good news for employers too because valued employees are more engaged and more productive. It's a win-win.

2. How has the employment landscape changed over the last ten years?

We have seen a major shift in the employment landscape where we operate, which is due to two principal reasons:

■ **Financial sector and corporate and individual accountability**

Five to ten years ago, if there was an issue with a recalcitrant employee with a regulatory dimension, we would seek advice from our regulatory team. Today, we have a much greater understanding of regulatory issues, and how these need to go hand in glove with HR considerations and processes. The advice we give in this space involves working closely with our regulatory colleagues: we train and advise clients in tandem to ensure we are joined up in our approach in the same way that the client needs to be. Typically, a case with both dimensions would involve determining whether a regulated individual has breached a regulatory obligation, which at the same time may amount to a breach of an employment obligation. Considerations of whether an individual is fit and proper are not always clear cut and there will often be multiple layers to it. The regulatory work as an employment lawyer used to be fairly minimal, whereas now, every time I advise in financial services, I've got my regulatory hat on and I bring my regulatory colleagues in when needed, and vice versa. Many of the tools and the strategy we deploy are a joint effort.

■ **Workplace culture**

More recently, there has been a seismic shift towards focusing on the culture of the workforce. This means the values and priorities of an organisation, which when translated into real life, is about how an employer treats its workforce. Whistleblowers are always one of the litmus tests – are they encouraged to speak up or are they afraid that they may be subjected to retaliation? You can also tell what the workplace culture is like by the voice given to employees, pay parity,

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and diversity and inclusion. Even the regulators, like the Financial Conduct Authority, are all over a firm's culture because they rightly take the view that the drivers of good and poor conduct start with culture. One of the areas that is indicative of the culture is how #MeToo-type misconduct is managed and the steps an employer takes to make all employees feel able to call out inappropriate conduct in the knowledge that complaints will be taken seriously. Feeding into a culture where women feel respected and valued has been the legislative requirement to report on the gender pay gap. It

is issues like these that are shining a very bright spotlight on how companies behave, what cultures they are promoting and how they deal with wrongdoers. It's not just employers who are assessing their culture; employees are holding their employers to account too. We have seen an enormous spike in advisory work relating to claims for sexual harassment or sexual misconduct. The last 18 months has been significant in terms of changing culture and increasing the level of accountability, with companies taking a very different view on issues around diversity and sexual misconduct, particularly in how they investigate allegations of wrongdoing; more incidents are being reported, notably in the UK and the US, albeit the approach to investigation and resolution can often vary greatly depending on jurisdiction.

3. What are the typical employment matters you advise your clients on?

There is no typical day, which is why it is such an exciting and dynamic area in which to work. Our client roster ranges from financial institutions, alternative investment fund managers, FTSE 250 organisations, corporates operating in the TMT and life sciences sector, through to start-ups. Our work falls into three categories:

- **Contentious work** – here the focus is on 'big risk' litigation matters, namely reputational risk, compensation risk and business risk issues. Often, these are claims arising out of whistleblowing and/or discrimination, or team moves and restraints of trade.
- **Advisory** – this includes executive hires and fires, M&A issues, complicated disciplinary and grievance matters, business restructures and consultation, and disputes concerning remuneration and compensation.
- **Global issues** – this can include cross-border projects, such as advising on the legal obligations across a number of

countries and on a particular topic ranging from working conditions, labour risk prevention, employee relations, HR policies and privacy, to relationship breakdowns and dispute resolution.

Our litigation practice is growing, so in any given week, members of the team will be advising clients on employment tribunal and High Court matters. Most often, this is in relation to issues coming out of a termination, such as breach of confidentiality and restrictive covenant provisions, team moves, whistleblowing, restraint-of-trade matters and a wide range of discrimination issues. Recently, we have seen

a significant increase in the number of whistleblowing claims, as people can blow the whistle about anything that has a public interest element and that is given a very broad interpretation by the tribunals. We see a variety of issues coming through; the ones that tend to get the most attention are those

where there are regulatory or potentially criminal aspects to them. Because they are subject to more scrutiny from different sources, there is often a greater risk attached to them.

On top of that, we spend a significant percentage of our time training clients in areas such as respect at work, but we also upskill clients in many legal areas so they are better equipped to tackle day-to-day employment issues themselves.

4. How are your clients responding to the increased scrutiny on workplace culture?

There are many companies out there who want to do the right thing, be the employer of choice, and want to ensure that their procedures and practices are fit for today's workplace. Add to that pressure from the regulators, social media, shareholders and employee activism, and this gives a very strong incentive to examine what kind of culture they want and how they will get there. Organisations are now becoming genuinely proactive instead of being simply reactive.

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Clients are not just waiting for the complaints to come in and rather than saying ‘we have had a complaint raised – how do we deal with it?’, it’s much more focused on: ‘We have had a complaint raised – how does it change the way that we operate as a business? What did we do wrong and how can we do it better next time?’ There is a much more positive attitude and approach towards these issues.

5. *Is the #MeToo movement resulting in more litigation?*

Yes, there is a very broad mix of claims, both historic and current, deriving from the fact that this movement has led to a greater sense of security in speaking out following an incident of sexual assault or harassment. This is not just from the victims of bad behaviour, but by others who have witnessed it and are calling it out. Linked to that, we are seeing many more clients instructing us to undertake global training of their teams on appropriate behaviours, inclusivity, wider diversity issues and treating people fairly. There is that real sense of encouraging people through training to take ownership for their own conduct and that of others by calling out bad behaviour. Most of our clients have global standards when it comes to culture: they are aiming for the highest denominator on how the company behaves and how it will be judged.

There is also the other side to sexual misconduct claims. A claim brought by a man whose employment is terminated due to an allegation made against him may bring a claim to say his dismissal is unfair, that he did not do what allegedly happened. The argument may be that there is a predisposition towards believing the woman because companies are so worried about not being seen to uphold such allegations and this could give rise to a discrimination claim for the male employee. We are starting to see such complaints, particularly in the regulated financial services sector where the reason for your termination will follow you through a regulatory reference throughout your career. Regulators such as the FCA are taking a much greater interest in such matters, so there is a lot to fight for.

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6. *Do you expect #MeToo will impact other aspects of workplace culture?*

#MeToo has done more to escalate women’s issues into the boardroom than any other piece of legislation in my career as a lawyer. You see it with equal pay, the legislation for which has been around for more than 40 years, but progress has been slow. This issue is exemplified by the current litigation involving the major UK supermarkets. These claims involve people feeling they have not been paid fairly in comparison to their colleagues. It will have a significant impact because whatever happens in one supermarket case will have an impact on the others, since they all pay in a similar way and have similar structures. In tandem, the second year of gender pay gap reporting will create some difficult messages for employers. We need to remind ourselves that the gender pay gap is not the same as an equal pay gap. More employers are beginning to undertake pay audits to see whether there are equal pay issues within the company. By itself, reporting a gender pay gap is not going to make a difference to improving diversity within a company, but this isn’t happening in isolation and I do think we are in a new world. Gender pay gap reporting, combined with all the other things we are seeing, will motivate change. You can see it happening.

Sarah joined the firm in 2005 after spending several years working in-house with the Barclays employment team and roles in other Magic Circle firms. She regularly advises on boardroom matters whether that be in the context of departing executives, restraints of trade or strategic issues affecting the whole workforce. Most recently she has been advising on significant sexual harassment matters, advising clients on investigations, changing culture and workforce training. She is a regular media commentator and panel speaker on issues ranging from women in law and diversity to mental health in the workplace.