

THE
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Valentine's Day - a Retrospective Guide for Employers (UK)

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So did Valentine's Day bring you everything you expected from it? Cards? Roses? Notice of Early Conciliation?

Every year we are asked by anxious employers whether it is sensible to prohibit employees sending each other Valentine's Day cards and so now we must finally and definitively make it clear, without a shadow of further doubt or any room for uncertainty, that it all depends.

The employment relations answer is that even though it is unquestionably legally the safest course, actually prohibiting Valentine's Day cards across the board is about as King-Canute feasible as instructing staff not to catch each other's eye. Some vast proportion of us meet our intended at work because that is where we spend most of our time, and nothing in a policy is going to change that.

However, not prohibiting Valentine's Day cards does not mean that they can be sent with a Purge-style lack of legal consequences. Harassment is harassment whether or not it takes place on Valentine's Day.

As always, though, it is necessary to have regard to context in determining if an unsolicited card constitutes harassment or not. By section 26 Equality Act, A harasses B if A engages in unwanted conduct of a sexual nature and that conduct has the effect (i.e. no intention necessary) of violating B's dignity or creating an intimidating, hostile, humiliating or offensive environment for B. In considering whether A's conduct had that effect, the Tribunal must take into account B's perceptions, the other circumstances of the case and whether it is reasonable for A's conduct to have that effect.

No one has a right not to be found attractive by a colleague, so those questions of reasonableness and "other circumstances" must depend not on the fact of the attraction but upon who expresses it and (in particular) how it is done. Remember that by their very nature, almost all Valentine's Day cards come with emotional or sexual overtones very different from a first casual invitation for a drink, whatever its ulterior purpose. This leaves us with these tips in good time for 14 February 2020:

- Just as in real life (the other 364 days of the year), consider how you want to come across – genuine but entirely platonic affection, yearning Romeo or overt sex-pest – and choose your cards and words carefully. The shop next to our office had a rack of Valentine's Day trifles prominently labelled "The cards your mother warned you about", so if you give one of those you have only yourself to blame if it is poorly received. At the other end of the spectrum you can have ickle pastel bunny rabbits holding hands over "Together forever" or something equally loathsome. Show a bit of class, for Heaven's sake, and remember when buying and writing your card that you will potentially next see it as evidence against you in the Employment Tribunal.
- The more overt your Valentine's Day overture, the more embarrassing it is for the recipient and the greater his or her ability to claim that necessary violation of dignity or humiliating environment. Decades ago one of my then colleagues made the proverbial grand romantic gesture and filled another's room to the rafters with those heart balloons on legs. She was apoplectic.
- Remember the risk of being seen to abuse your position. Cards from senior employees to those much younger and/or junior to them will inevitably carry with them (whether intended or not) a most regrettable

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degree of implied obligation on the part of the recipient.

- You can create an argument that the careful expression of attraction is not necessarily harassment, but you cannot defend continued pursuit of the point if it is not reciprocated. I think it was Einstein who defined insanity as doing the same thing over and over again while hoping for different results, and the Tribunal will inevitably take a similar view.
- If your card did not land as you had hoped but was met instead by an icy silence, derisive laughter or a grievance, then apologise immediately and do your best to carry on as if nothing had happened. If you retreat wounded and cut off contact with the other party or – especially if you are their senior – otherwise treat them less favourably, then that will be a clear-cut case of discrimination.
- And last, if you are hearing a grievance round about now concerning an unwelcome Valentine’s Day card, do keep an eye on those issues of context in determining the appropriate outcome. A mortifyingly crude and public Valentine’s Day overture from senior employee to junior, plus unsolicited follow-up, is a very different practical and legal proposition from a discreet and respectful card from a peer who is entirely willing to take no for an answer without letting it spoil the relationship. One is a serious disciplinary matter while the other, realistically, is not.

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