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Legal update ——— February 2018

Employment
Sexual Harassment

With headlines dominated by Harvey Weinstein, the rallying cry of #MeToo against sexual assault and harassment, and the spotlight now on the men-only Presidents Club fundraising event, sexual harassment is receiving high levels of attention. This is a serious issue and, as Acas has issued new guidance on the topic, it's perhaps a good time for employers to remind themselves of what constitutes sexual harassment, what employer's obligations are, and the most effective ways of dealing with allegations of harassment at work and in the workplace.

What is sexual harassment?

Sexual harassment is unwanted conduct of a sexual nature. It has the purpose or effect of violating the dignity of a worker, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

The Equality and Human Rights Commission (EHRC) Code of Practice on Employment states that conduct of a sexual nature:

- Can be any unwanted verbal, non-verbal or physical conduct of a sexual nature.
- Can include unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawing or sending emails with material of a sexual nature.

It is possible for there to be less favourable treatment when someone who has been subjected to sexual harassment is treated less favourably than they would have been treated otherwise had they not rejected or submitted to the conduct.

Less favourable treatment can also a rise where the reason for it is the victim's rejection of or submission to sexual harassment from a third party.

An example of less favourable treatment given in the EHRC Code is that of a shopkeeper who propositions one of his shop assistants. She rejects his advances and then is turned down for a promotion which she believes she would have got if she had accepted her boss's advances. The shop assistant would have a claim for harassment.

Conduct of a sexual nature: examples

In the employment tribunal case of Smith v Renrod, Miss Smith, who was employed as a sales executive in a car dealership, claimed that she had been sexually harassed by her manager. She made various allegations, including that he told her he had not heard what she was saying because he was "thinking about picking you up and fucking you on the desk", that he pestered her about her private life and made speculative comments about her sex life, as well as attempting to kiss her.

Although the tribunal found that there was a culture of sexual banter and sexual behaviour in the workplace and that Miss Smith was not shocked by the day to day banter between colleagues, it held that the comments made by her manager went too far. The tribunal found that although Miss Smith was relatively robust, and participated in, and even initiated, sexual banter, the conduct and comments of her manager went beyond what was acceptable to her.

Renrod argued that it had actively taken steps to prevent sexual harassment in the workplace, and sought to rely on the fact that it had anti-harassment and equal opportunities policies in place, as well as the fact that it had sent the manager on a discrimination and employment rights training course. The tribunal was dismissive of this, observing that "simply referring to training and policies is not sufficient", and noting that the evidence showed that Renrod had taken no steps to prevent the culture of sexual banter in the workplace, and had failed to take any steps when Miss Smith made allegations regarding her manager's behaviour in a formal grievance.

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In the pre-Equality Act 2010 (EqA 2010) case of Moonsar v Fiveways Express Transport Ltd UKEAT/0476/04 the claimant was a data entry clerk who worked evening shifts. She gave evidence in tribunal that during her shift she had been aware on three separate occasions of male colleagues downloading pornographic images onto computer screens. She had not been shown the images and had not made any complaint at the time. Although at first instance the tribunal found that there had been no discrimination, the Employment Appeal Tribunal (EAT) found that there had been, holding that this was treatment which would obviously undermine the claimant's dignity.

In another pre-EqA 2010 case, Insitu Cleaning Co v Heads [1995] IRLR 4, the employer argued that a remark made to a woman about her breasts was not sexual harassment because a similar comment could have been made to a man, for example, in relation to a balding head or beard. The EAT dismissed this, holding that a remark made to a woman about her breasts cannot be equated to a remark to a man about a bald head, since one is sexual in nature and the other is not.

Handling a complaint of sexual harassment

As soon as a complaint of sexual harassment has been raised make sure that you respond to it quickly and carry out a full investigation. The investigation should be objective, independent and thorough and there may be circumstances where using an external investigator will be appropriate. The individual raising the complaint should be told that their complaint is being taken seriously, and will be dealt with thoroughly.

The Acas guidance on sexual harassment at work points out that experiencing sexual harassment is often extremely emotional and distressing for the worker involved which means that an employer should make reporting such a matter as stress-free as possible. In most cases this involves simple things like making sure there is plenty of time to discuss the matter and finding a private space to meet.

The guidance also points out that it is likely to be very distressing for a worker to be accused of sexual harassment. It states that while a fair and thorough investigation will need to be carried out, accused workers should also be offered support and sensitivity. It may be that suspending the alleged harasser is a sensible option, but this should only be done after careful consideration and not as a kneejerk reaction.

All complaints of sexual harassment should be handled consistently in line with existing policies and procedures. All those involved in the process need to understand the importance of confidentiality as a breach could have far-reaching consequences.

The decision-maker will have to weigh up all the evidence and the circumstances. Allegations may relate to events that took place a while ago and the evidence may not be available. Sometimes it will just be one person's word against another. If the decision-maker finds that harassment is unlikely to have taken place, this will leave the problem of how the two individuals can work together going forward, and the decision-maker should consider relocation, transfer or mediation.

Sexual harassment and whistleblowing

Will an allegation of sexual harassment amount to a protected disclosure for the purposes of bringing a whistleblowing claim?

In order to gain the protection of the whistleblowing legislation an individual will have to show that their complaint of sexual harassment was made in the public interest as well as in their own reasonable belief. They will also have to show that the detrimental treatment they received was as a result of the allegation of sexual harassment that they brought.

An allegation of sexual harassment is likely to qualify for protection as it will be with reference to an unlawful or potentially criminal act. The question is, is it likely to fall within the public interest?

The Court of Appeal considered what is meant by the term "public interest" (which is not defined in the legislation) last year in the case of Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed.

The Court declined to provide "any general gloss on the phrase "in the public interest". It reasoned that Parliament had chosen not to define it and therefore the intention must have been to leave it to employment tribunals to apply "as a matter of educated impression". However, it did identify four factors which might be useful in weighing up the reasonableness of a worker's belief that a disclosure was in the public interest:

The numbers in the group whose interests the disclosure served.

- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed (disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than disclosure of trivial wrongdoing affecting the same number of people).
- The nature of the wrongdoing disclosed (deliberate wrongdoing is more likely than inadvertent wrongdoing affecting the same number of people to be in the public interest).
- The identity of the alleged wrongdoer (the larger or more prominent the wrongdoer, the more a disclosure about its activities will engage the public interest).

It is likely that the serious nature of a sexual harassment allegation will comply with the public interest requirement, and so employers will have to ensure that allegations of sexual harassment are dealt with effectively to try to avoid successful whistleblowing claims being brought. Ultimately, of course, it's all a matter of ensuring that precautionary steps are taken before any harassment can take place to minimise the chance of any discrimination or whistleblowing claims arising.

Some ground rules
If an employer can show that it took all reasonable steps to prevent harassment from occurring it will be able to avoid liability for workplace harassment.

- Make sure that you have a diversity policy and an anti-harassment and bullying policy in place.
- Ensure that the policies are publicised properly.
- Provide training to managers on their obligations regarding diversity and specifically in how to deal with harassment issues.
- Encourage employees to raise concerns to prevent any issues escalating.
- Deal with complaints effectively and take disciplinary action if required.

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