The implications of the law on Sexual harassment, for employers

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Introduction

- Implications
- The law – Equality Act 2010 s. 26
- What it covers
- Liability for third parties
- Reasonable steps
  - Prevention
  - Response
Sexual Harassment

- 52% women experienced sexual harassment at work (TUC & Everyday sexism, 2016)
Taylor v BT Directories Limited

- BT response “Woeful”
- No investigation
- Future loss of earnings £117,000
- Injury to feelings and personal injury £20,000
- Aggravated damages £3,000
- Total £289,879
Equality Act 2010 S. 26 Harassment

(1) Unwanted conduct related to a relevant protected characteristic, and
- b) (i) violating B's dignity, or
- b) ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
- unwanted conduct of a sexual nature, and
- Purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect
Examples

- Sexual comments or jokes
- Displaying sexually graphic pictures, posters or photos
- Suggestive looks, staring or leering
- Propositions and sexual advances
- Making promises in return for sexual favours
- Sexual gestures
- Intrusive questions about a person’s private or sex life, and discussing your own sex life
- Sexual posts or contact on social media
- Spreading sexual rumours about a person
- Sending sexually explicit emails or text messages
- Unwelcome touching, hugging, massaging or kissing
- Criminal behaviour, including sexual assault, stalking, indecent exposure and offensive communications.
Environment

- Comments not directed at employee
- Displaying sexually graphic pictures, posters or photos
Banter

Harper v Housing 21 ET/2408839/2012
- Banter/Joke not a defence

Mrozinski v Q Medical Technologies Ltd ET/1801217/2014
- Tongue-in-cheek comments
- Caused genuine discomfort and embarrassment

Quality Solicitors v Tunstall
- Joke/banter can be harassment
- But need to violated the dignity of the claimant, or created an "intimidating, hostile, degrading, humiliating, or offensive environment".
Liable for employees

- S. 110 Equality Act 2010
- Jones v Tower Boot Co Ltd [1997] IRLR 168 CA
PRESIDENTS CLUB SCANDAL

- Tory aide quits over ‘gropers’ gala
- Minister carpeted by furious PM
- Charity bash axed, cop probe urged

SLEAZE BALL

City rocked by sexism investigation

Financial elite shaken after sting reveals sexual abuse of young women at men-only dinner

Hostesses groped and paraded before room of baying executives
Host David Walliams says he did not witness harassment
Uncomfortable families minister urged to resign – but PM backs him
Bank of England, charities and major firms try to distance themselves
Gala organiser quits the board at Department for Education
No liability for nonemployees?

- S. 40 Equality Act 2010
- Liability for third parties
  - 3 strike rule
- Repealed - Regulatory Reform Act 2013

Hold employers like the Presidents Club to account
Third party harassment protection

- Breach of Contract
- Constructive dismissal
- Negligence (psychiatric injury)
- Protection from Harassment Act 1997

Equality Act 2010:
- Harassment - s. 26
- Direct Detrimental Treatment - s. 39
- Indirect Discrimination - s. 19
All reasonable steps defence

**Section 109(4) Equality Act 2010**

- Defence to claim

- UNITE the Union v Nailard
  - Policy alone not sufficient

Preventative

- Policy on harassment - Covering employees and third party actions
- Notify employees/third parties of policy and harassment will not be tolerated
- Term in all contracts of employment and contracts with third parties
Post incident - Reporting

- Encourage employees to report
- Appropriate reporting procedure
- 80% not reporting (TUC, 2016)
- Barriers to reporting:
  - The view that raising the issue was useless as the organisation did not take the issue seriously
  - A belief that alleged perpetrators, particularly senior staff, would be protected
  - Fear of victimisation
  - A lack of appropriate reporting procedures.

(Equality Human Rights Commission, 2018)
Post incident

- Support the employee
  - Ensure they are not Victimised
- Take appropriate action
  - Action against employee/third party
  - 50% responses little or no action (EHRC, 2018)
  - 7% reporters satisfied with response (TUC, 2016)
Outside of workspace

- Liability even outside of work
- Work socials:
- Chief Constable of the Lincolnshire Police v Stubbs and others [1999]
- Social Media:
- Plant v API Microelectronics Ltd
References

- James Hand, Employer's liability for third-party harassment: an "unworkable" and superfluous provision?, Industrial Law Journal, 2013, 42(1), 75-84
Cases

- Chief Constable of the Lincolnshire Police v Stubbs and others [1999] IRLR 81 EAT
- Harper v Housing 21 ET/2408839/2012
- Mrozinski v Q Medical Technologies Ltd ET/1801217/2014
- Plant v API Microelectronics Ltd ET/3401454/2016
- Quality Solicitors v Tunstall
- Taylor v BT Directories Limited trading as Customer Street Leeds Tribunal March 2011
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