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Preventing sexual harassment at work – the new law

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Today's webinar



Context and an overview of the current legal framework



The duty to take reasonable steps to prevent sexual harassment



EHRC Guidance and what employers should do

Workplace sexual harassment – the context

"Me Too" & "Time's Up" movements

Continuing prevalence of sexual harassment in the workplace

2020 Sexual Harassment Survey – Government Equalities Office

Experiences of Harassment in England & Wales: December 2023 – Office for National Statistics

Risks and impact

Poor morale and
poor employee
relations

Poor
performance

Lost productivity

Absence

Resignations

Damage to
company
reputation

Tribunal claims
and other court
cases

Recap: Equality Act 2010

The Act makes three types of harassment unlawful. These are:

- Harassment related to a 'relevant protected characteristic' (s.26(1))
- Sexual harassment (s.26(2))
- Less favourable treatment of a worker because they submit to, or reject, sexual harassment or harassment related to sex or gender reassignment (s.26(3))

What is harassment related to sex?

“Unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.”

- Conduct does not have to be directed at the individual
- Claimant does not have to have the protected characteristic themselves
- *Nolan v Fairfield and another (2022)*
- *KJ v British Council (2024)*

What is sexual harassment?

- s.26(2) - Unwanted conduct of a sexual nature, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment
- s.26(3) - Less favourable treatment towards an individual for rejecting or submitting to unwanted conduct
- *Munchkins Restaurant Ltd and another v Karmazyn and others (2010)*
- *Reed & Another v Stedman (1999)*

What is victimisation?

- S27 - A person (A) victimises another person (B) if A subjects person B to a detriment because B:
 - a) brings proceedings under the Act;
 - b) gives evidence or information in connection with proceedings;
 - c) does any other thing for the purpose of or in connection with the Act;
 - d) makes an allegation (whether expressly or not) that another person has contravened the Act.

Claims and Compensation

An update

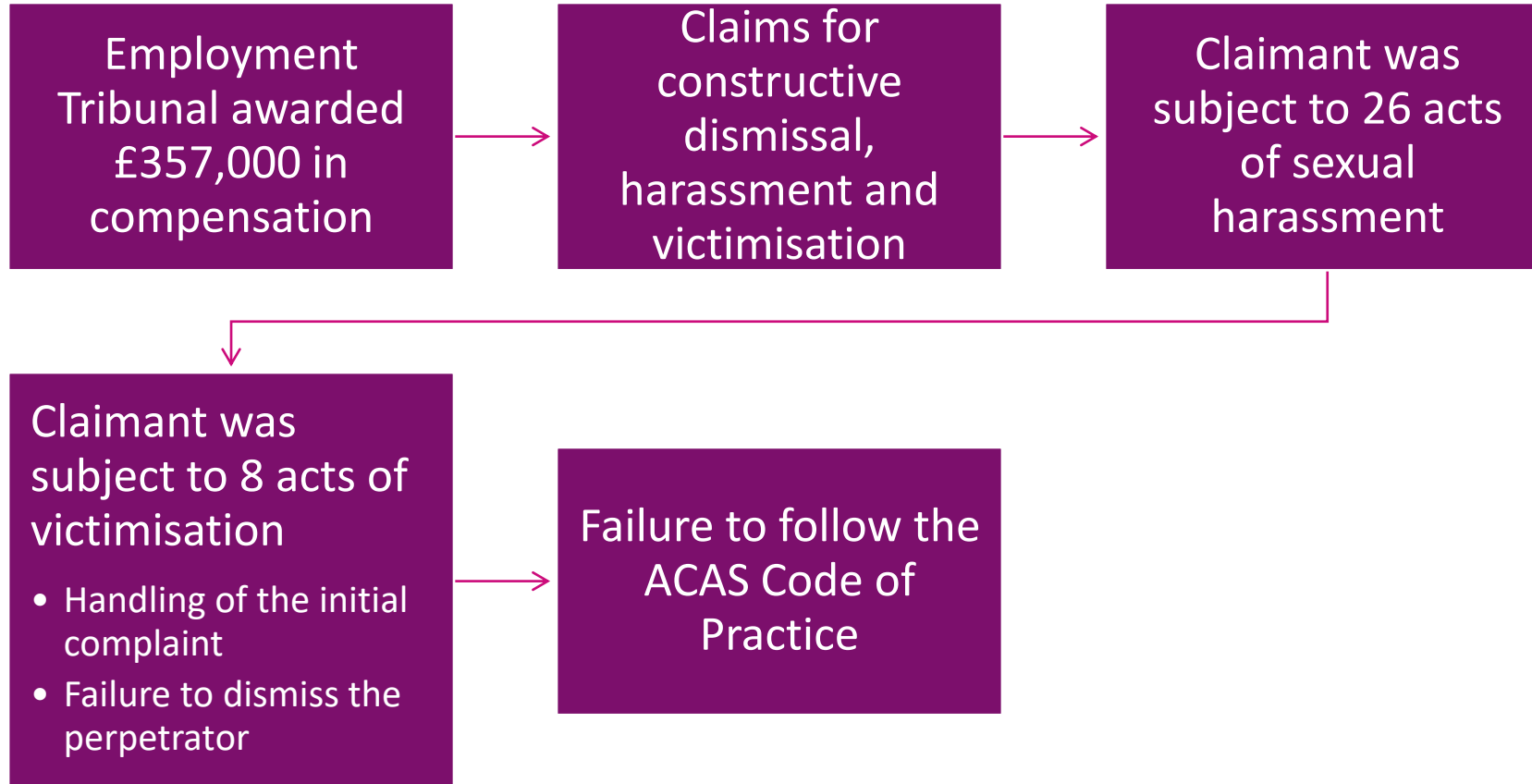
Compensation and Injury to Feelings*:

- Lower band (£1,200 - £11,700)
- Middle band (£11,700 - £35,200)
- Upper band (£35,200 - £58,700)

Factors to consider:

- The degree of distress/upset caused
- How any grievance is dealt with
- Seriousness of the conduct
- Impact on the Claimant
- How senior the discriminator was

Tahir v National Grid UK Ltd (2023)



So... what is changing?

- In force 26 October 2024
- Duty on employers to take reasonable steps to prevent sexual harassment of their employees
- If employers do not take reasonable steps, and if an employee then brings a harassment claim, compensation can be increased by up to 25% depending on extent of failure
- **NOT** a freestanding claim
- Enforcement action by Equality and Human Rights Commission (EHRC)

EHRC powers and technical guidance

- EHRC said it “will establish a mechanism for employees and employee representatives to notify us of breaches or potential breaches of the preventative duty”
- Enforcement powers under Equality Act 2006
- Issue updated Technical Guidance based on 2020 version
- To assist employers to prevent and respond to sexual harassment in order to comply with the duty
- Guide tribunals to have regard to the size of the organisation and the resources of employers when considering whether steps taken to prevent sexual harassment were reasonable in all the circumstances

Harassment by third parties

- Third parties will include customers, service users, suppliers, visitors
- Employers not liable for third party harassment, but
- EHRC draft update to Technical Guidance makes clear preventative duty includes third party harassment and they will take enforcement action if an employer fails to prevent it
- Risk of sex discrimination claim if employer's failure to tackle third party harassment amounts to less favourable treatment on grounds of sex
- Possible victimisation claim too
- Potential for future reform to introduce direct liability

What are reasonable steps?

- Varies from employer to employer
- Objective test
- Factors that may be relevant are:
 - the size of the employer
 - the nature of the workplace
 - the risks present in that workplace
 - the types of third parties workers may have contact with
 - the likelihood of workers coming into contact with such third parties

Top tips for compliance

1. Conduct risk assessments to identify potential areas where harassment may occur (incl by third parties)

2. Audit your procedures - do they cover harassment and 3rd party harassment? Have timetable for review/refresh.

3. Provide thorough training on harassment and discrimination – timetable for refresher training

4. Ensure third parties are aware of the business' anti-harassment stance

Top tips for compliance

5. Promote an open culture where employees feel safe to report issues

6. Setup reporting systems for employees to easily report instances of harassment

7. Undertake timely investigations and responses to complaints

8. Deal with issues not subject to formal complaint

9. Regular reviews of any harassment complaints to assess the effectiveness of policies

Responding to harassment

- Does policy align with other policies like discipline and grievance
 - Do the examples of misconduct/gross misconduct in the disciplinary policy match the anti-harassment policy?
 - How will managers deal with complaints of harassment, when to intervene?
 - How does the complaints procedure operate e.g. can you disclose on an anonymous basis?
 - Do names have to be named? Can other action be taken?

Responding to harassment

- Complaints should be dealt with:
 - Promptly
 - Efficiently
 - Sensitively
- Having a range of approaches for dealing with harassment
- Could an informal approach be more effective?
- Do employees feel supported to report? Do they know how to?
- Providing external contact details/sources for support outside of work

Responding to harassment

- Confidentiality
- What to do if an employee makes a report but asks you not to take action?
- Risk assessment – is there evidence of an unreported issue, are there particular risk factors that could be tackled?
- Criminal behaviour
 - Consider possibility of reporting to police
 - If not, make sure that an assessment of the decision is recorded
 - Consider the risk and danger to the employee

Preventing further issues

What if complaint is not upheld or action short of dismissal?

Ensure no victimisation of complainant

Arranging support and counselling for the parties

Mediation or offer of redeployment where any relationship breakdown cannot be resolved through other means

Further training for the harasser

Permanent redeployment of the harasser to another role (or permanent redeployment of the complainant if that is their preference)

Measures to keep the two parties separate

Asking the harasser to apologise to the complainant

“Reasonable steps” defence

- Compliance with new duty should help to establish defence, will also need to show steps taken regarding specific perpetrator
- Anything done by an employee in the course of their employment is treated as having been done by the employer
- Applies whether or not the harassment is done with the employer's knowledge or approval
- Defence if employer took "**all reasonable steps**" to prevent the employee from doing the discriminatory act or from doing anything of that description



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