

Sexual harassment at work: Where are we now?

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Agenda

- Policy background
- What is the sexual harassment preventative duty?
- Consequences of breaching the duty
- What are 'reasonable steps'?
- EHRC regulatory approach
- Employment Rights Bill – proposals for reform

Policy background

- S26(2) & s40 Equality Act 2010: sexual harassment in the workplace already unlawful
- Despite this, it remains a persistent problem
- **EHRC's Turning the Tables: Ending sexual harassment at work (2018)**
 - Half of respondents did not report their experience of sexual harassment
 - Half of reported cases – employers took no action
 - Recommendations: mandatory duty to prevent workers from harassment and victimisation and reinstatement of legal protection from third party harassment

Policy background

- **Woman and Equalities Committee Inquiry into Sexual harassment in the workplace (2018)**
 - Supported EHRC recommendation for mandatory duty on employers to prevent harassment and victimisation
 - Also supported the view that workers should be protected from third party harassment and employers should be liable for failing to protect their staff from such harassment
- **Government Equalities Office 2020 Sexual Harassment Survey**
 - 29% of those in employment experienced some form of sexual harassment in their workplace in the last 12 months
 - Only 15% reported their experience formally

Policy background

- **Government consultation on sexual harassment in the workplace (2021)**
 - Commitment to introduce a duty requiring employers to prevent sexual harassment
 - Introduction of explicit protection from third party harassment
- **Impact of sexual harassment**
 - Can have a devastating impact on the mental and physical health of those subjected to it
 - Business case: reduction in sexual harassment should improve employee wellbeing and therefore reduce illness/absence and staff turnover.
 - Improved employer reputation helps attract customers and talent

Policy background

- **Worker Protection (Amendment of Equality Act 2010) Act 2023**
 - Liberal Democrat Private Members' Bill
 - Introduced the sexual harassment preventative duty
 - However: proposed reinstatement of civil liability for third party harassment was removed
 - Concerns raised around freedom of expression and burden on employers
 - The requirement for employers to take 'all reasonable steps' to prevent sexual harassment was changed to 'reasonable steps'

What is the sexual harassment preventative duty?

- Came into force on 26 October 2024
- Preventative duty: positive obligation on employers to prevent sexual harassment
- Requires employers to take positive and proactive ‘reasonable steps’ to prevent sexual harassment of their workers
- Covers all sexual harassment ‘in the course of employment’
- Includes sexual harassment by third parties
- Does not include:
 - Sex harassment
 - Less favourable treatment for rejecting or submitting to sexual harassment

Consequences of breaching the preventative duty

- EHRC enforcement action
 - No requirement for an employment tribunal claim or incident of sexual harassment
- Increase in compensation up to 25%
 - Uplift applies to compensation awarded under s 142(2)(b)
 - Compensation uplift must reflect the extent to which the tribunal considers the respondent has contravened the preventative duty
 - ‘a contravention of section 40 (harassment of employees) which involved, to any extent, harassment of the kind described in section 26(2) (sexual harassment)’
- No stand alone claim for breach of the preventative duty
- No employer liability for third party harassment

What are 'reasonable steps'

- Varies from employer to employer
- Depends on facts and circumstances
- Considers things like:
 - Size and resources
 - Nature of the working environment
 - Risks
 - Nature of contact with third parties
 - Whether alternative steps could be more effective
 - Time, cost and disruption versus benefit
 - Previous concerns of sexual harassment
 - Effectiveness of steps taken

The preventative duty: an anticipatory duty

- Employers must take action to prevent sexual harassment within their organisation before it happens
- If sexual harassment has taken place, the preventative duty means employers should take action to stop it from happening again
- Employers should carry out a risk assessment that considers:
 - What risks are present in the workplace?
 - What steps can be taken to reduce those risks?
 - What steps would it be reasonable to take?
 - Employers should implement reasonable steps

Risk based approach

- Consider all situations where an employee might experience sexual harassment
- Examples of risks:
 - Lone or home working
 - Customer interactions
 - Specific workplace areas
 - Social occasions
 - Male dominated workforce
 - Insecure/casual workforce
- Practical steps: [Employer 8 step guide: Preventing sexual harassment at work](#)

EHRC resources

Technical guidance on sexual harassment and harassment at work

<https://www.equalityhumanrights.com/guidance/sexual-harassment-and-harassment-work-technical-guidance>

Employer 8 step guide

<https://www.equalityhumanrights.com/employer-8-step-guide-preventing-sexual-harassment-work>

EHRC resources

Hospitality sector checklist and action plan

<https://www.equalityhumanrights.com/guidance/preventing-sexual-harassment-work-checklist-and-action-plan-employers>

Toolkit for orchestras

<https://www.equalityhumanrights.com/guidance/preventing-sexual-harassment-work-toolkit-orchestras>

EHRC Regulatory approach

- Workers and representatives can report concerns directly to us via our [whistleblowing channels](#)
- Workers can use an [online form](#), email (whistleblowing@equalityhumanrights.com) or we can arrange a telephone call.
- We encourage workers to try and resolve issues with employer first
- Advice / support available from [EASS](#) (Equality Advisory and Support Service - 0808 800 0082), trade union or employee reps/staff forums

EHRC Regulatory approach

- All concerns will be considered in accordance with our litigation and enforcement policy. We will consider matters such as:
 - The scale of the problem
 - Whether the likely impact justifies the resources
 - Whether there are more effective ways of achieving the desired outcome
- Enforcement powers include the power to investigate and enter into legal agreements and action plans
 - Agreements: EHRC must think an organisation has breached Equality Act 2010. Usually contain an action plan
 - Investigation: EHRC must suspect an unlawful act. Resource intensive

EHRC Regulatory approach

- Keeping situation under review
- Do employers need more support?
- Risk assessment / more prescriptive guidance on reasonable steps?
- Employment Rights Bill – ability to specify reasonable steps.
- Call for evidence expected
- Industry changes
 - CIISA standards

Legal agreement with Welsh Rugby Union

- 28 November 2024 – EHRC announced legal agreement with WRU
- EHRC enforcement action instigated after a 2023 BBC investigation uncovered allegations of sexism and misogyny at WRU
- Sexual harassment preventative duty taken into account in agreement
- Requirements of preventative duty incorporated into mandatory EDI training and harassment training
- Other actions include:
 - Review and amend workplace policies with external adviser
 - Introduce standardised system to record and monitor discrimination and harassment complaints
 - Review use of NDAs
- Agreement will be monitored

Employment Rights Bill

- Clause 15: adds 'all' to the sexual harassment preventative duty so that employers are required to take all reasonable steps (rather than reasonable steps)
 - Aligns statutory wording with employer defence to discrimination claim under s109(4)
 - Greater clarity and consistency for employers
- Clause 17: power for ministers to specify reasonable steps through regulations (such as carrying out assessments, publishing action plans or policies).
 - Could provide greater clarity and certainty for employers
 - Prescribed steps will not be exhaustive
 - Uncertainty for employers as regulations subject to consultation

Employment Rights Bill

- Clause 18: workplace sexual harassment disclosures qualify for whistleblower protection
 - Workers can report concerns to EHRC in our capacity as prescribed person
 - Supports culture change
 - Combats use of NDAs

Employment Rights Bill – third party harassment

- Clause 16: protection from third party harassment
 - Applies to all protected characteristics
 - An employer must not permit a third party to harass an employee.
 - An employer permits a third party to harass an employee where an employee is harassed in the course of their employment, and the employer failed to take all reasonable steps to prevent the harassment.
 - Re-introduces civil liability of the employer for harassment by a third party

Employment Rights Bill – third party harassment

- Evidence of the prevalence of third party harassment in the workplace, aside from sexual harassment, is more limited and sector specific
- However – based on available evidence we know it is a problem
- Impact assessment does not refer to freedom of expression challenges raised in parliamentary debate on the Worker Protection (Amendment of Equality Act 2010) Act 2023
- Limited government analysis of balance between worker protection from harassment, and third parties' rights to freedom of expression under Article 10 ECHR and the proportionality of any interference with Article 10 rights
- Additional complexity if third party expressing a philosophical belief under the Equality Act 2010

Questions?