

2 JULY 2019

**One man's banter - another
woman's harassment?**

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Harassment



- We're talking about....



Harassment



Harassment

1. *Going beyond the well-known guidance, how do you call out banter and tackle it?*
2. *At what point does it become harassment?*
3. *What if both parties have participated?*

Banter



- *Banter*, n. The playful and friendly **exchange** of teasing remarks.
 - repartee, raillery, ripostes, sallies, swordplay, quips, wisecracks, crosstalk, wordplay
 - Late 17th century of unknown origin.
- *bants* (also *bantz*), pl. n.: (Brit. informal) playfully teasing or mocking remarks **exchanged** with another person or group; banter.
 - @bants; lolbantz

Let's not feel too smug...



We're talking about...Section 26 Equality Act 2010



- Three types:
 - Unwanted conduct related to [protected characteristic]
 - Unwanted conduct of a sexual nature
 - Less favourable treatment of a worker because they submit to or reject sexual harassment or harassment related to sex or gender reassignment
- Conduct has purpose or effect of
 - violating victim's dignity, or
 - creating intimidating, hostile, degrading, humiliating or offensive environment for victim
- Views of victim override perpetrator's motives
- Victim need not have the characteristic
- One-strike principle for extreme offence

#Them too other protected characteristics



- Age
- Disability
- Gender reassignment
- Marriage & civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

“Just a bit of harmless banter”



- Sexual Orientation
 - *Thomas Sanderson Blinds v English*
- Sexual harassment
 - *Unite the Union v Nailard*
 - *Reed v CF Fertilisers Ltd*
 - *Winspear & Laws v RNLI*
 - *Minto v Wernick Event Hire Ltd*
- Race/ethnicity
 - *Georges v Pobl Group Ltd*
 - *Basi v Snows Business Forms Ltd*
 - *Harper v Housing 21*
 - *Evans v Xactly Corporation Ltd*

The #metoo revolution



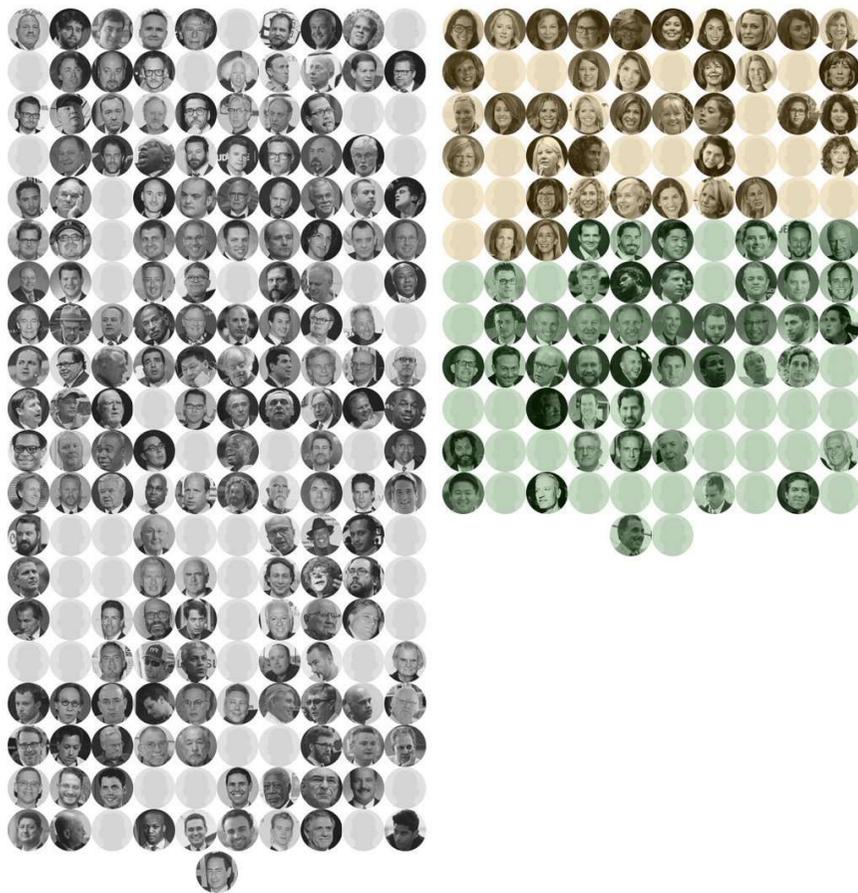
- Distinctions are important:
 - Harassment on grounds of sex may not be sexual harassment
 - But may still be discriminatory, subject to factual scenario



Why LA gossip matters in London boardrooms



201 lost jobs or major roles 122 replacements: **53 women**
and **69 men**



- Changing the face of, and faces in, our businesses
- Raising awareness and confidence to speak out
- Expectation of being taken seriously
- Reputational issues now more complex
- But only for gender equality?

When the gag's ripped off ...



June 2018



House of Commons
Women and Equalities
Committee

**Sexual harassment in
the workplace**

Recommendations



- Mandatory duty on employers + statutory code (enforced by EHRC)
- Early duties for public sector
- Public sector risk assessments
- Third party harassment – reinstatement
- Include interns & volunteers
- Awareness raising
- Sector regulators to take action

- Punitive ET damages
- One way costs awards
- 6 month limitation, paused for processes
- ET processes to reflect criminal trials
- Statutory questionnaires reinstated
- ET recommendations

Recommendations



- Plain English confidentiality clauses
- PIDA to encompass sexual harassment complaint to police/regulator
- Offence to propose a confidentiality clause preventing or limiting protected/criminal disclosure
- Professional breach to use potentially unenforceable NDA

- Collect robust data
 - ET claims
 - Tri-annual national workplace surveys
 - Evaluations
 - Action plans

The #metoo avalanche



How to touch the untouchable

- Positive reporting obligations
 - *Bell v Lever Bros*
 - Fiduciary Duties
 - Duty of Fidelity
- Regulatory constraints
- Blow the whistle/raise a grievance/start a claim?
- Curb widespread use of inappropriate NDAs
- BUT trial by public opinion in an age of social media

Calling it out? Or just another "Feminazi"?



It's all in the small print (for now at least)

