



Presentation — 14 June 2018

# Complaints for sexual harassment

## How to respond to complaints

Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester — Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Private equity — Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — Team v — Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — Governance — IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance — Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Communication

# What we'll cover

- What is sexual harassment
- What happens if you get a claim
- Bigger organisational issues
- The future?

Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester — Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Private equity — Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — Team v — Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — Governance — IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance — Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Communication

# 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.

# Who is involved?

- Anyone can harass or be a victim
  - employees or workers
  - board members
  - service users
- Anyone can complain
  - complaints on behalf of another
  - anonymous complaints

# What should you do?

- Take it seriously
- Treat it like a normal grievance/WB complaint
- Investigate, have a hearing, reasonable belief in outcome
- Normal sanctions apply

# Sexual Harassment

- Is it a criminal issue?
  - Can be sexual assault, indecent exposure, stalking and use of offensive communications
  - For the victim to report the offence to the police
- Is it whistleblowing?
  - If complaint was made in the public interest, in their own reasonable belief and detriment as a result of the allegation of sexual harassment
  - In which case, WB procedure
  - Interim relief applications

# Issues to consider on receiving a claim

- The investigation
- Suspension
- Confidentiality and GDPR
- Who do you tell?

# Historic claims

- Treat in the same way
- While time limits may apply to the original complaint, they will not to your dealing of the complaint
- Issues with historic claims
  - Witness evidence
  - Difficult to address
- Learning points from historic claims

# The investigation

- Follow your procedure but be careful
- Hyper sensitive issue
- Confidentiality key – think of using external investigator
- Make the notification as stress-free as possible
- Offer accused worker support
- Choose a good investigator

# Suspension is possible but be careful

- Consider whether required
  - Risk to business/colleagues/service users
  - Prejudice to investigation
- Inform employee of nominated contact during suspension
- Consider suspension at each stage of the process
- Keep suspension period as short as practicable
- Keep in contact with employee

# Confidentiality and GDPR

- You owe a duty of confidentiality to all employees
- Information likely to include SCD
- Need consent from all witnesses to use their evidence
- Bear in mind DSARs in future
- Practically,
  - Ensure all correspondence is anonymous or pseudonymised
  - Consider confidential steps such as anonymous witnesses, redacted evidence

# What happens then?

- Accused faces disciplinary action
  - May be dismissed
  - Matters can be made public
- Accused faces disciplinary action
  - A deal is done
  - Timing is all
  - Obligation to give a reference
  - Confidentiality clauses

# Should you use “gagging clauses”/NDAs?

- Legal position
- NHS position
- EHRC position
- Other regulators’ position
  
- In practice
  - Standard in settlement agreements
  - Can be beneficial to both parties

# Should you do a deal?

- A moral issue for many employers
- A deal with the harasser?
  - Once investigation completed – disciplinary, or a deal?
  - What is in the interests of your employer?
  - How should you document the deal?
  - A reference
- A deal with the victim?
  - Could be discriminatory to insist

# What legal action do you need consider?

- By complainant
  - Sex discrimination
  - Constructive dismissal
  - Detriment due to whistleblowing
  - Protection from Harassment claim
- By accused
  - Sex discrimination
  - Constructive/unfair dismissal
  - Contractual claims
- How to defend claims?

# How to defend SH claims

- Vicarious liability means you may be liable
- Practically
  - Make sure you know about relationships in the office – self declaration
  - Take reasonable steps to prevent such claims arising
  - Consider whether you want to stand behind an employee in litigation

# Effect on the workplace

- Policies aren't enough!
- Consider cultural risk assessments
- Check policies are clear and robust
- Provide training
- Consider your recruitment policies

# Changes to the law

- Time limits – 3 to 6 months
- Employers must take reasonable steps to prevent harassment
- A statutory code of practice
- Other strengthening of employees' legal position

# Will #metoo change things?

- Raised profile of issues
- EHRC report
- More claims and more awareness
  
- BUT.....

**Possibly not.....**

## Contact

Emma Burrows  
Partner

**d** 020 7423 8347  
**e** eburrows@trowers.com

© Trowers & Hamlins LLP 2018

Trowers & Hamlins LLP is a limited liability partnership registered in England and Wales with registered number OC 337852 whose registered office is at 3 Bunhill Row, London EC1Y 8YZ. Trowers & Hamlins LLP is authorised and regulated by the Solicitors Regulation Authority. The word “partner” is used to refer to a member of Trowers & Hamlins LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamlins LLP’s affiliated undertakings. A list of the members of Trowers & Hamlins LLP together with those non-members who are designated as partners is open to inspection at the registered office.

Trowers & Hamlins LLP has taken all reasonable precautions to ensure that information contained in this document is accurate, but stresses that the content is not intended to be legally comprehensive. Trowers & Hamlins LLP recommends that no action be taken on matters covered in this document without taking full legal advice.

(c) Copyright Trowers & Hamlins – May 2018 – All Rights Reserved. This document remains the property of Trowers & Hamlins LLP. No part of this document may be reproduced in any format without the express written consent of Trowers & Hamlins LLP.

