

SEXUAL HARASSMENT

The Duty to Prevent – what's new?

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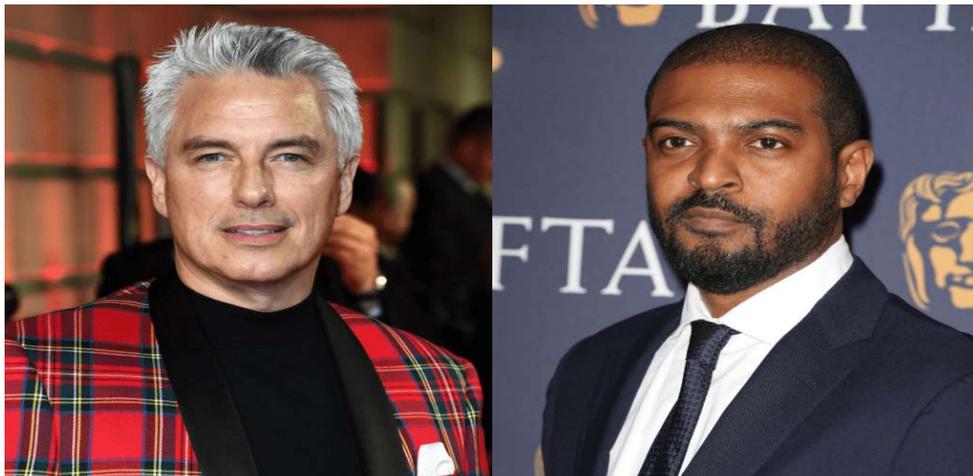
Brodies LLP

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ENLIGHTENED THINKING

SEXUAL HARASSMENT IN THE NEWS



SEXUAL HARASSMENT IN THE NEWS

Not just celebrities....

**Chef awarded £80k
after being sexually
harassed by boss
singing him Victoria
Wood song**



**Police officer forced
to strip down to her
underwear wins
£800,000 in
discrimination case**

HARASSMENT

Non-legal consequences and why preventing sexual harassment is important

Low staff morale
Loss of respect for managers

Poor
Performance
and lack of
productivity

Negative
impact on
health and
wellbeing
and
increased
absence

More
grievances
and/or
whistleblowing
complaints

Resignations and
impact on
recruitment

More disciplinary
proceedings and
potentially
dismissals

Reputational
damage - to
business and
personally



HARASSMENT – LEGAL RISKS

- Complaints under the Equality Act 2010 – in the employment tribunal for harassment and victimisation
- Whistleblowing – detriment/dismissal
- Under health and safety at work regulations
- Protection from Harassment Act 1997
- Criminal prosecution: Sexual Offences (Scotland) Act 2009
- Constructive unfair dismissal: breach of trust and confidence
- Personal injury: arising from reasonably foreseeable harm

WHAT ARE EMPLOYERS RESPONSIBLE FOR?

Workplace banter v sexual harassment

- Starting point is the definition of sexual harassment in the workplace...
- Unwanted (read unwelcome) behaviour
- Of a sexual nature
- Which conduct has the purpose or effect of violating the subject's dignity; or
- Which creates an intimidating, hostile, degrading, humiliating or offensive environment for the subject
- The Equality Act also proscribes less favourable treatment for rejecting or submitting to harassment.



EXAMPLES OF SEXUAL HARASSMENT

Unwanted physical contact or conduct

- Patting, pinching, hugging, inappropriate touching, pushing, grabbing, sexual assault, indecent exposure

Verbal conduct

- Jokes or 'banter' of a sexual nature (even if not directed at a particular individual), sexual advances, promises in return for sexual favours, spreading sexual rumours, intrusive questions about a person's sex life or discussing your own sex life

Non-verbal conduct

- Emails or texts with material of a sexual nature, posting something of a sexual nature on social media, displaying sexually explicit or suggestive images in the workplace (including computers, desks, mobile phones), sexually-suggestive gestures, whistling / leering, basing a decision about someone (e.g. turning someone down for a promotion) on the fact that they rejected or submitted to sexual advances

SEXUAL HARASSMENT

Banter or sexual harassment?

I didn't mean to offend them! How is that sexual harassment?

I only said it once as a joke – it's not like I am always making jokes like that

Why is he complaining about sexual harassment – he's not a woman?

They haven't complained before – they can't have felt harassed!

It had nothing to do with them – I was speaking to someone else

This has nothing to do with work – we were just in the pub

They join in the banter – now they are complaining?



HARASSMENT

The employee's perception

- The victim's reaction is relevant (“hypersensitivity provisions”).
- Something can be considered as harassment even if the alleged harasser didn't mean for it to be. From their perspective, was it *reasonable* for the victim to be offended?

BUT

- Even if the victim participates, there may be a point beyond which they stop and raise a flag indicating that it has gone beyond what is acceptable.
- A ‘resilient’ character does not equate to an excuse for the conduct.



HARASSMENT

What about harassment by employees outside of work?

Anything done by an employee in the course of their employment is treated as also done by the employer

It does not matter whether that thing is done with the employer's knowledge or approval

There must be a meaningful link to employment and includes situations which are an "extension of the workplace" e.g. work related social events

BANTER V SEXUAL HARASSMENT

Context is everything!

- How do you decide whether conduct is unwanted and/or whether it has created a hostile environment?
- Context is everything and all circumstances must be considered
- Factors that are relevant?
 - Is the conduct complained of directed at the complainant
 - The timing of the complaint
 - One off acts and seriousness?
 - Repeated – more likely to create the proscribed effect
 - Relationship dynamics – senior to junior
 - Instigation or passive?



HARASSMENT

The reasonable steps defence to Equality Act claims

- Recognised difficulty in relying on the defence...
- Hot off the press: EHRC published its statutory Code of Practice on Sexual Harassment and Harassment at Work on 26 September

[Sexual harassment and harassment at work: technical guidance | EHRC \(equalityhumanrights.com\)](https://www.equalityhumanrights.com)

- Defence of taking all reasonable steps to prevent harassment – see paragraphs 3.49 – 3.58 and chapter 4
- What steps have you taken: are there others you could reasonably take?
- What are the effects of the steps taken? Are there others which might be more effective?



HARASSMENT

The reasonable steps defence to Equality Act claims

Think about:

- What is done to assess risks of harassment?
- Are there effective policies and procedure in place?
- Are these up-to-date and reviewed regularly/effectiveness monitored?
- Are all employees made aware of them and how?
- Do employees understand the potential consequences of breaching these policies?
- What steps are taken to detect harassment (exits interviews; 1:1s....)?
- Are complaints handled effectively and is appropriate disciplinary action taken in response to a breach of relevant policies?
- Are employees regularly trained on the policies and what they mean?
- Is there a zero-tolerance approach to objectionable language/behaviour?



PREVENTING SEXUAL HARASSMENT

- Duty to take reasonable steps to prevent sexual harassment is a positive legal duty (Workers Protection (Amendment of Equality Act 2010) Act 2023)
- The sexual harassment preventative duty is separate from the defence available to employers on other kinds of harassment claims
- Again, hot off the press...
 - EHRC Technical Guidance paragraphs 3.16 – 3.43 – what is reasonable?
 - Chapter 4 of the Guidance sets out some of the steps employers are recommended to take to prevent harassment and sexual harassment
- Also: [Employer 8-step guide: Preventing sexual harassment at work | EHRC \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/en/employment-law/employer-8-step-guide-preventing-sexual-harassment-at-work)



EIGHT STEPS....

To prevent sexual harassment

- **Step 1:** Develop effective anti-harassment policies
- **Step 2:** Engage staff – 1:1s, staff surveys; exit interviews
- **Step 3:** Assess risk and take steps to reduce it
- **Step 4:** Reporting – how are concerns reported and record keeping
- **Step 5:** Training what it is, what to do if you see it; how complaints can be made
- **Step 6:** Be clear about how complaints will be responded to
- **Step 7:** Consider 3rd party harassment eg from visitors
- **Step 8:** Monitor and evaluate effectiveness of steps



- Employees cannot bring a standalone claim that the duty has been breached but
- Tribunals can uplift compensation by up to 25% if an employee brings a successful sexual harassment claim; and
- Enforcement action by the Equality and Human Rights Commission - this can happen even if there has not been an incident of sexual harassment
- Future reform?
 - Duty to take **all** reasonable steps to prevent
 - Duty to prevent third party harassment (see EHRC Technical Guidance)