

Your World First

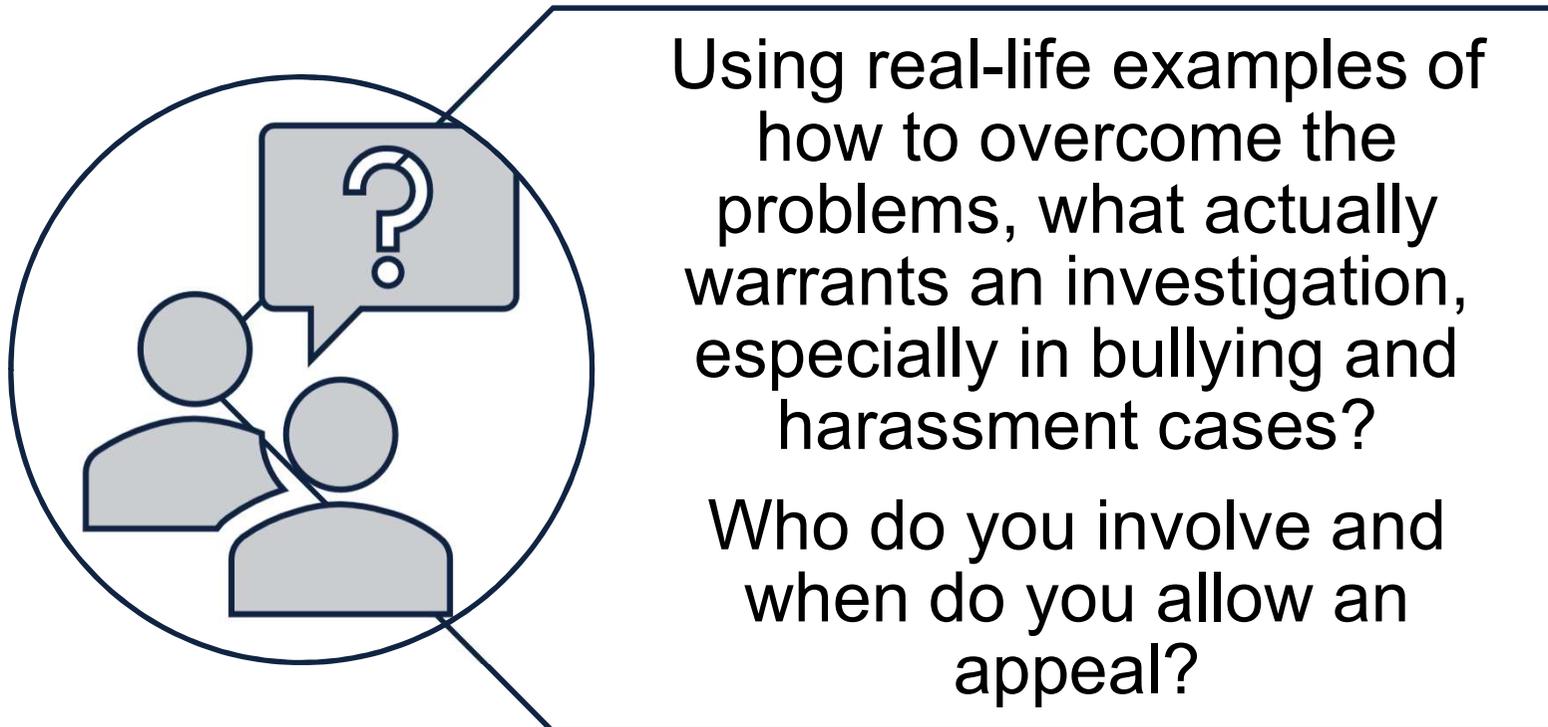


Harassment

White Paper Conference
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The question



Agenda

Context

Risks

Legal definition

Typical harassment scenarios

Some of the tricky issues which arise in investigations

Complaints and appeals

Context – why does this matter?

Employees deserve to work in an environment which is free from bullying and harassment – however the reality is that this does not always happen

#MeToo has led to greater understanding of power imbalances in the workplace

There has been a subtle shift in power from the employer to the employee. The idea is that no one is untouchable

Social media can damage reputations overnight, and there is a wider media interest in these stories

Post-Weinstein harassment now has a higher risk profile in organisations

The proposed changes to the law on sexual harassment are likely to affect all aspects of harassment in the workplace

The importance of getting this right....

And the costs of getting it wrong...

Alex Salmond receives £512,000 costs after 'botched investigation'

Scottish government makes payment after court defeat over sexual misconduct inquiry

Google walkout: global protests after sexual misconduct allegations

Ted Baker under pressure to publish findings of inquiry into founder

New CEO appointed after investigation finds 'areas for improvement' after 'forced hugging' claims

Bullying and harassment: similarities and differences?

Although the two terms are often used interchangeably, from a legal perspective they mean different things and different legal remedies apply

An employer should make an assessment at the outset of receiving an internal complaint to determine whether it is bullying or harassment as it can affect the legal risk profile

Most internal policies on dignity at work/harassment will treat the two issues in the same way, so often the internal process is the same

In both cases the problem can lead to stress and absence from work, so often the outcomes can be similar

The definitions

Bullying is defined by Acas as

- *Offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient*

Harassment is defined in the Equality Act 2010 as

- *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*
- *Harassment claims under the Equality Act can be brought by workers, contractors and employees*

What behaviour amounts to harassment?

Any unwanted verbal, non-verbal or physical conduct

Includes WhatsApp messages, e-mails, rumours

Includes unwelcome sexual advances, jokes, gossip, shutting someone out, excluding them deliberately

A one-off act can be enough, or a course of conduct

Hearing offensive comments about someone else can be sufficient to create an intimidating atmosphere

Let's look at some scenarios....

Do you need to share the characteristic to bring a complaint?

Harassment from customers or clients

Banter

Out of hours behaviour

What happens when an employee participates in the conversation?

Historic complaints

Does the employee need to share the characteristic to bring a claim?

A person can bring a claim for harassment even if they do not share the relevant characteristic. The legal test is wide enough to include situations where there is either a perception that someone shares the characteristic or there is an association with a person who shares the characteristic



For example, the EHRC Code of Practice explains: **“A worker has a son with a severe disfigurement. His work colleagues make offensive remarks to him about his son’s disability. The worker could have a claim for harassment related to disability.”**



“A manager racially abuses a black worker. As a result of the racial abuse, the black worker’s white colleague is offended and could bring a claim of racial harassment.”

What about harassment from customers or clients?

Current position: an employer is not normally liable if the person carrying out the harassment is a client or customer

There used to be provision within s.40 of the Equality Act 2010. In order to bring a claim there had to be 2 previous incidents – known as the 3 strikes rule. This provision was repealed in 2013

The government is considering whether and how to reintroduce liability for acts of third party harassment

Seems likely some protection will be reintroduced and will not involve the 3 strikes rule

From a practical perspective, employers should ensure that they protect their staff where an issue is reported to them and take appropriate steps to prevent further acts

What about banter?

One of the most difficult issues we deal with is banter

Comments which many people find harmless or silly can offend others

Does that amount to harassment in law?

Provided it is not trivial, in most cases it will meet the test since the law is looking at the impact on the victim rather than the intent of the person making the comment

Does being called a “fat ginger pikey” amount to harassment on the grounds of race or disability?

In *Evans v Xactly Corporation Ltd* there was a culture of banter and these comments were not unwanted or have the purpose or effect of violating the claimant’s dignity

What about out of hours' behaviour?

We see a lot of complaints where alcohol and out of hours contact has resulted in a harassment complaint

The hotel room scenario where he is drunk and makes a pass at his female colleague

She then reports this. He says it was consensual. There are no witnesses.

What do you do?

Historic complaints



In 2017 we started to see an increase in employees making historic complaints



While there are obvious challenges with memory and recollection, we would always advise clients to investigate these complaints and support the individual who has come forward



If the alleged harasser is still working for the organisation – what else has happened or could happen?



While an employment tribunal complaint needs to be made within 3 months of the act complained of, if the allegation is serious and amounts to criminal behaviour then there is no time limit or amnesty on criminal behaviour



If an employer fails to carry out an effective investigation this may lay the grounds for a victimisation claim

Unwanted sexual conduct and participation in the behaviour

What happens if an individual participates in the offensive behaviour? Can they say this was unwanted?

In one case the employer argued that the conduct was not unwelcome because the claimants had also engaged in talk of a sexual nature (*Munchkins Restaurant Ltd and another v Karmazyn & ors*)

The EAT ruled that in this case that the claimants had been sexually harassed and had only engaged in the discussions with the owner of the business to distract him. They were vulnerable employees who were scared of losing their jobs

Trends with harassment investigations

Overall we are seeing an increase in harassment investigations

With high profile complaints, we are seeing employers conducting the investigation under privilege to protect their position, particularly where a tribunal claim has already been raised

More requests for independent support/third party involvement

More complex, layering of data protection issues, regulatory issues, litigation, PR and social media

More and more money on legal fees

Investigating bullying and harassment

Investigations should be balanced and include evidence both for and against the person at the centre of the allegations

The investigator should

- consider who are the key people who need to be interviewed - there are limits with an investigation, there is no obligation to carry out an excessive number of interviews
- approach investigations free from bias and on a neutral basis
- not be looking to “disprove” the allegations or prove them; they should investigate what happened and make findings of fact

Harassment investigations involve a more sensitive approach than misconduct investigations - employers are dealing with emotions, perceptions and facts

That involves asking the individual – how did that make you feel?

Tricky issues in harassment investigations

It is common for some of the incidents in harassment investigations to take place in private without a witness

It is therefore common to have **directly disputed evidence** - “He said, she said”

Decision makers often fail to appreciate the civil standard of proof which is the balance of probabilities. Was it more likely than not that the conduct complained of took place?

We often see harassment complaints not being upheld because people wrongly conclude that they require corroboration to make a decision to uphold the complaint

Corroboration is a criminal law concept where the standard of proof is higher – in these cases the test is beyond reasonable doubt. This test is not applied in a civil case

Making a decision where evidence is directly disputed

In some cases it may not be possible to make a decision where the issues are in dispute

But often a decision can be made based on preferring one person's evidence over the other on account of their credibility and reliability

If that is the case the decision maker will need to say why they found the person more credible than the other

This may involve the inconsistency of one person's evidence in contrast to the consistency of the other person

Interviews and witnesses

Interviews with witnesses will form the main evidence base of any harassment investigation

Normally investigators will interview the person making the complaint first, then the alleged harasser and then witnesses. It may be necessary to have follow up conversations depending on what is said

With key incidents, it is important to put the allegation to the witness and ask them to recount it

The investigator should ask the follow up questions to try to establish the context and impact of behaviour/language:

- was this normal behaviour/language?
- did this behaviour/language happen with other people, or on other occasions with this person?

The investigation report



The investigation report is a critical document in capturing all the key facts in one document. It should contain findings of fact and not conclusions on guilt or innocence

Where an investigator overstepped the mark in a draft report by including conclusions, it was appropriate for the lawyer to remove those conclusions, to ensure that the decision was left to the disciplinary panel *Dronsfield v The University of Reading*

In *Tywyn Primary School Governing Body v Aplin* the EAT ruled that the investigation process was tainted with unconscious bias.

Complaints and appeals

If a harassment complaint is upheld then there will normally be disciplinary consequences to face by the person accused of the harassment

It can be challenging where the person who is accused then tries to appeal a finding made under the harassment procedure

There is normally no right of appeal for the person who is named in the complaint – unless the policy provides this

What normally happens if a complaint is upheld that a disciplinary process is then started against the individual

If sanctions are applied under the disciplinary policy then an appeal against the outcome can be raised at that stage

Returning to our question



Using real-life examples of how to overcome the problems, what actually warrants an investigation, especially in bullying and harassment cases?

Who do you involve and when do you allow an appeal?

Questions?



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Gillian MacLellan is a partner in the CMS UK Employment Team working with clients in varied sectors across the UK advising on both contentious employment matters and transactional work; the common thread in both areas is her ability and determination to get a great result for her client. Gillian does a huge amount in the financial services and energy sectors and key current areas of focus include advising on whistleblowing, harassment and business change exercises, as well as on sector specific issues such as the SMCR.

Gillian currently chairs CBI Scotland's People & Skills Forum and is a regular speaker at conferences and an author for LexisNexis and XpertHR.

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