



Weightmans

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Protection from Harassment

The Civil Law Approach

Insurance Institute of Manchester
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Some Statistics

- 14% of people in the UK have experienced sexual harassment in work
 - 7% of men
 - 20% of women
- 19% of those aged 18 to 34 have experienced harassment
 - 7% of those aged over 55
- 58% of women do not report it
- 43% of men do not report it
- 54% global reporting rate
- 12% of those who report it say it is not even acknowledged
- 30% believe sexual harassment prevalence has fallen in the last 10 years (26% women, 34% men)
- 6% believe it has increased.

Source – Opinium Poll reported in Daily Telegraph on 2/11/2017

Some Statistics

- **# Me Too**
 - Tarana Burke (2006) – “empowerment through empathy”
 - Women of colour who have suffered sexual abuse
 - 15 October 2017 – Alyssa Milano
 - Encourages women who have been sexually harassed or assaulted to use # Me Too as social media status
 - Tweeted 200,000 times in 24 hours
 - # is used on Facebook by 4.7 million people in 24 hours

Reading

- House of Commons Women and Equalities Committee – Sexual Harassment in the workplace – published 25 July 2018
 - 59 pages
 - P6 – Protection from Harassment Act
 - P19 – Criticism of HSE & regulatory authorities

- Bullying & Harassment of House of Commons Staff – Report of Dame Laura Cox – 15 October 2018
 - 155 pages
 - P56 – Some MPs were alleged to be serial offenders.
 - Widespread and longstanding awareness of their behaviour

Legal Background – Discrimination and Associated Risks

- Anti-discrimination legislation: Equality Act 2010
- Unfair dismissal : Employment Rights Act 1996
- Civil claims for personal injury / breach of health and safety
- Protection from Harassment Act 1997
 - “course of conduct”
 - “knows or ought to know amounts to harassment”
 - criminal offence
 - employer liability for acts of employees.

What is harassment?



Protection from Harassment Act 1997

- Section 1 (1) provides that:
 - The person must not pursue a course of conduct:
 - which amounts to harassment of another
 - which he knows or ought to know amounts to harassment of the other

- Section 1 (2) provides that:
 - A person ought to know that the conduct amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct had this effect

Criminal standard

- Conduct which is simply '*unattractive or unreasonable or regrettable*' is insufficient.
- Behaviour must be '*oppressive and unacceptable*'.
'*To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2.*'

Majrowski v Guys and St Thomas's NHS Trust

Leading case:

- The House of Lords ruled that employers can be vicariously liable under The Protection from Harassment Act 1997 (“PHA”) for acts of harassment committed by their employees in the course of their employment

Majrowski v Guys and St Thomas's NHS Trust

- Lord Nicholls said the courts had to distinguish between conduct which is *"unattractive, even unreasonable, and conduct which is oppressive and unacceptable"*
- Baroness Hale said that all sorts of conduct may amount to harassment and *"a great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour"*.

Banter?

- Wikipedia:
- Good-humoured, playful, typically spontaneous conversation.
- Oxford dictionary definition:
- **An instance of such ridicule, a merry jest. *arch*.**
- **Free dictionary definition**
- **ban · ter**
- (băn'tər)*n.* Good-humoured, playful, or teasing conversation.

Banter?

Philip Green: 'There was banter but I meant no offence'

Topshop boss rejects abuse claims and says he is being used as 'target practice'



The Guardian
28 October 2018

Banter?

Philip Green allegations: 'It's not banter, it's a climate of fear,' claim staff

Exclusive: employees allege mogul groped, threatened and humiliated workers



The Guardian
2 November 2018

“To the extent that it is suggested that I have been guilty of unlawful sexual or racist behaviour; I categorically & wholly deny these allegations”



Or as reported in the Metro “Wealthy: Sir Philip Green denies abuse allegations”

Solicitors

Solicitors Regulation Authority

50 ongoing cases up from 23 in March this year

Law Society Gazette – 15 October 2018

Some [un]helpful guidance

- In *Waters v Commissioner of Police* [2000] 4 AER 934 at page 943E Lord Hutton said:–
 - *"It is not every course of victimisation or bullying by fellow employees which would give rise to a cause of action"*

Some [un]helpful guidance

- In *H v Isle of Wight Council* (QBD 23.2.01) Mr Justice Wright said:–
 - *"The criterion for what does or does not amount to bullying in any given circumstances is not to be judged solely by the subjective perception of the victim himself, but involves an objective assessment of the observed behaviour taken in conjunction with any apparent vulnerability in the target of the behaviour complained of."*

Some [un]helpful guidance

- ACAS give the following definition:–
 - *"Bullying may be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure."*
- No specific definition of harassment within the Act.
- Cox Report – Definitions of Bullying & Harassment (P42–45) and at P77 – sexual harassment including – leaving a hand on their knee for an uncomfortably long time!!

In the workplace

- Bullying:
- There is no legal definition of workplace bullying but can involve:
 - ignoring or excluding someone
 - spreading malicious rumours or gossip
 - humiliating someone in public
 - giving someone meaningless tasks
 - constantly undervaluing someone's work performance

A short quiz

- 3 examples
- For each, is the conduct described harassment or not?

1. Conn v Sunderland Council (CA)

- C's manager threatened to punch out windows when C refused to tell him something and on another occasion said he would give C a good hiding.
- Yes or No?

Conn v Sunderland Council (CA)

- The claimant was a paver employed by the defendant local authority at first instance, on two occasions the claimant's foreman had lost his temper and acted in an aggressive manner.
- On the first occasion, the foreman had asked the claimant and two colleagues to name employees who had been leaving work early. When the claimant refused, the foreman became angry and threatened to punch out the windows of the cabin they were in.
- On the second occasion, the foreman asked why the claimant was not speaking to him. On being told by the claimant that he was only prepared to talk to him about work matters, the foreman threatened to give the claimant "a good hiding"

Conn v Sunderland Council (CA)

- The claimant issued proceedings for damages for harassment pursuant to s.3 of The Protection from Harassment Act 1997 (PHA)
- No
- At first instance though – the court held that there had been a breach of the PHA. The foreman’s conduct during each of the two incidents amounted to harassment of the claimant. The two incidents qualified as a course of conduct. The foreman knew or ought to have known that his conduct on those occasions amounted to harassment.
- On appeal – the Judge had been wrong to hold that the two incidents amounted to a course of conduct. Although the second incident crossed the line into oppressive and unacceptable conduct, the first did not: it was not conduct that was unlawful; there was no physical threat, merely a threat to property. Whilst the incident was unpleasant it did not amount to harassment.

2. Rayment v MOD (QBD)

- Unjustified written warnings and subsequent dismissal of C; placing pornographic photos in a restroom after C had previously removed them.
- Yes or No?

Rayment v MOD (QBD)

- Donna Rayment worked for the Ministry of Defence (MoD) at the Honourable Artillery Club, as a driver for the commanding officer. She had a difficult relationship with her line managers and was described by the High Court as a “challenging employee”.
- Rayment brought a claim for harassment based on a number of incidents – allegations included that she had been told that an administrative error meant she had no job and must repay a month’s salary, the decision to discharge her from the Army while on stress-related sick leave; and the re-posting of pornographic pictures in the toilets after she had removed them.
- YES

Rayment v MOD (QBD)

- The behaviour was targeted against C. The meeting which left her without a job and informed her to repay a month's salary, the written warning, the dismissal and the failure to remove the photographs were acts that had the sole purpose of getting rid of C and were therefore oppressive, unacceptable and amounted to harassment

3. Bailey v International Automotive

- Claimant endured a tirade of abuse from manager which included foul language:
- *“What the f*****g hell have they been doing all day!?”* and
- *“There is a f*****g operator walking around doing nothing!”*
- Yes or No?

Bailey v International Automotive

- No
- “Unpleasant and unattractive conduct – certainly (and laced with high octane expletives as well); but this was not bullying behaviour or harassment

Advantages for claimants

- Six year limitation period rather than three!
- Not having to establish foreseeability
- No need to establish injury – it is sufficient for anxiety caused by the harassment to be proven.

How to avoid successful B&H Claims

- Devise and implement a bullying and harassment policy.
- Promote a culture where bullying and harassment is not tolerated
- Be aware of the organisational factors that are associated with bullying, and take steps to address them.

Devise and implement a bullying and harassment policy

- This should summarise your organisation's approach to tackling bullying and harassment, and could include:
- a statement from senior management endorsing the policy
- definitions of what constitutes unacceptable behaviour
- a statement about responsibilities regarding the elimination of bullying behaviour
- information about how individuals can initially raise their concerns about bullying
- information about sources of emotional support
- the procedures that the organisation will follow for both the complainant and alleged bully
- information about the potential outcomes and rehabilitation

Promote a culture where bullying and harassment is not tolerated

This can include:

- Accept that bullying can occur in any organisation
- Understand what bullying and harassment are and what the consequences can be
- Consult and discuss with your staff
- Devise a policy and ensure that managers and harassment advisors are trained to implement it
- Promote the policy within the organisation and enforce against the policy

A policy is only as good as its implementation...

- Highly visible
- Regular promotion
- Posters in office/lift/canteen
- Anti harassment week
- Targeted training

!!! *Tucking them away in another policy or on the intranet is no good!*

!!! *Merely publishing policies & guidance and asking everyone to read them is not enough!*

Be aware of the organisational factors that are associated with bullying, and take steps to address them

- Responsibility for dealing with bullying and harassment rests with the organisation, and prevention strategies must be organisation-wide. Many organisations adopt a zero tolerance approach. Some factors associated with bullying include:
 - perceived imbalance of power; few consequences perceived by perpetrator
 - internal competition; reward systems focused solely on outputs
 - Organisational change

- As an organisation, to tackle these factors, you might, for example:
 - encourage a more collaborative, less autocratic management style in your managers
 - encourage staff to attend diversity training
 - publicise your bullying and harassment policy, and explaining the consequences of bullying within the organisation

- encourage control and choice for staff, as far as possible
- explore levels of competition between individuals and teams
- consider alternative incentives to achieving high performance
- ensure you are confident and comfortable in managing poor performance
- consult staff regularly and keep them informed during times of change
- ensure your managers have sufficient support to help them implement the policy

Training

- High quality training
- At the most senior levels
- High quality induction
- Continuation training
- Rolling programmes of senior leadership & line management development training
- + time consuming and resource intensive
- + “we are all much too busy”
- + “no more money in the budget”

How to avoid successful B&H claims

- Early investigation is key. Obtain statements from the key witnesses

- Obtain the key documents. You will always want to see:
 - Personnel file
 - Occupation Health file
 - GP record and Hospital records
 - Counselling records

Trends

- New duty on employers to prevent harassment & a statutory code of practice suggested by House of Commons Sexual Harassment in Workplace Committee – 25 July 2018
- E Disclosure
- Employment type claims brought as civil claims
- QOCS producing more speculative claims?
- Role of HR

Claims under the Protection from Harassment Act 1997

– Factsheet and Case Law Summary

Weightmans Casualty Claims Team

General principles and factors to be considered

- The Act came into force on 16 June 1997 and applies to events after this date.
- A person must not pursue a course of conduct which amounts to harassment of another or which he knows or ought to know amounts to harassment of another (section 1).
- Originally intended to regulate behaviour between individuals and provide a criminal remedy for stalking.

- But following the House of Lords decision in *Majrowski v Guy's and St Thomas' NHS Trust* [2006] employers can be vicariously liable for acts of harassment by employees. Therefore potential for strict liability on the part of employers; no defence of taking all reasonably practicable steps to prevent the harassment.
- For defendant to be vicariously liable the alleged harassment must satisfy the “close connection” test; for employers the close connection must be between the alleged harassment and what the wrongdoer was employed to do.

- Unlike a common law stress or bullying claim there is no requirement for the claimant to prove foreseeability of harm or knowledge on the part of the defendant that the harassment was taking place.
- Six year limitation period (not extendable).
- No definition of harassment.
- A “course of conduct” must involve conduct on at least two occasions. Individual but linked acts by separate individuals may be sufficient.

- Objective test – the conduct must be of the requisite gravity to constitute harassment; crossing the boundary from unattractive and unreasonable to oppressive and unacceptable.
- The conduct should be such that if there was a criminal prosecution liability might attach to it; the conduct must be grave/severe.
- A sensible line must be drawn between “the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour” (Baroness Hale, *Majrowski*).

- When considering whether the alleged conduct constitutes harassment regard will be had to the nature of the working environment, the context of the acts, the individual circumstances, the working relationship between the claimant and the wrongdoer (e.g. line manager, supervisor etc.) and the individual characteristics of the claimant.
- The conduct must generally be targeted at the claimant and calculated to cause alarm and distress (assessed objectively so irrelevant if no actual distress). However, there can be collateral victims as well as the primary target; provided the conduct is targeted at someone, any person foreseeably alarmed or distressed may be able to sue. Note, alarm or distress suffered out of nothing more than sympathy for the targeted victim is insufficient to found a claim.

- Damages can be awarded for simple anxiety (section 3). The Claimant does not necessarily have to prove a recognised psychiatric condition.
- Special damages are recoverable in the same way as for general personal injury claims.

Case Law

Date	Case	Conduct/alleged conduct	Liability	Reason/Comment
22.12.05	Johnstone v East Lancashire NHS Trust (CC)	Difficult working relationship between C and her manager with incidents involving outbursts of bad temper.	No	Demonstrations of annoyance, occasions of bad temper and a somewhat frosty attitude on the part of C's manager did not amount to what a reasonable person would regard as harassment. Further, they could not be seen as targeting C or calculated to cause alarm or distress.
12/07/06	Majrowski v St Guys (HL)	Alleged bullying, intimidation and harassment by C's manager.	See comment	An employer could be vicariously liable under the Act for an employee's harassment so long as there was a close connection between the offending conduct and the employment. The Claimant therefore had an arguable claim that should not have been struck out.
01.08.06	Green v DB Services (QBD)	Low level incidents of ignoring, teasing and undermining C over a period of time by a collection of colleagues.	Yes	Whilst in isolation the acts might be termed trivial and childish, cumulatively they amounted to a campaign of mean and spiteful behaviour which was oppressive and targeted to cause C distress.

Case Law

07.11.07	Conn v Sunderland Council (CA)	C's manager threatened to punch out windows when C refused to tell him something and on another occasion said he would give C a good hiding.	No	The judge had been wrong to hold that the two incidents amounted to a course of conduct. Although the second incident crossed the line into oppressive and unacceptable conduct, the first did not: it was not conduct that was unlawful; there was no physical threat, merely a threat to property. While the incident was unpleasant it did not amount to harassment.
10.02.09	Ferguson v British Gas (CA)	C was a former customer of D which repeatedly sent C unjustified bills and letters chasing payment.	Arguable	It was, at the very least, strongly arguable that D's conduct in repeatedly unjustified bills and threatening letters was of sufficient gravity to constitute harassment. C did not have to prove actual knowledge on the part of D; it was enough if D ought to have known.
02.12.09	Veakins v Kier Islington Ltd (CA)	C singled out for different treatment, working practices being changed to adversely affect C, manager ripping up C's letter of complaint in front of her.	Yes	In deciding whether there was harassment the primary focus was on whether the conduct complained of was oppressive and unacceptable. The unchallenged evidence was of victimisation, demoralisation and the reduction of a substantially reasonable and usually robust woman to a state of clinical depression, and it was clear that it crossed the line into conduct that was oppressive and unreasonable.

Any Questions?



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