Written submission from Roseanne Russell (SHW0011)

Background

My name is Roseanne Russell. I am a Lecturer in Law at the University of Bristol. My research expertise lies in employment law and corporate governance, and I am particularly interested in exploring women’s experiences in the workplace. I am a member of the Law Society’s Employment Law Committee and member of the Employment Lawyer’s Association Publishing Committee. I am a solicitor and prior to entering academia, I was in practice as an employment lawyer (in Scotland and the City) where I acted primarily for employer-clients in the financial services and retail sectors. Between 2005-2007 I was an in-house lawyer at the former Equal Opportunities Commission.

Executive summary/recommendations

- Introduce a separate category of ‘sexual harassment’ in the MOJ’s quarterly reporting of Employment Tribunal receipts to allow the number of claims to be tracked easily.

- Extend gender pay gap reporting information to include complaints of sexual harassment.

- View sexual harassment in its wider context: in highly sexualised/masculine cultures an ‘ecosystem’ approach that ensures women are well-represented in leadership, laddish behaviour is not rewarded, and senior leaders adopt a zero tolerance policy on harassment and wider discrimination can all help to bring about cultural change.

- Consider removing the names of successful claimants from the published record of tribunal hearings.

- Reinstate section 40(2) of the Equality Act 2010 re third party harassment.

- Consider altering section 40(2) if reinstated to impose liability on the employer after only one incident if the employer has not taken reasonable steps to prevent such conduct from happening.

- Restore the questionnaire procedure in harassment cases.

- Allow tribunals to make wider recommendations affecting workplace culture when deciding on remedy.

- Encourage alternative forms of dispute resolution where appropriate. Such action should be underpinned by appropriate disciplinary action where harassment has been found to have occurred.

- Ensure that legal advisers are aware of their responsibilities when advising on confidentiality clauses in settlement agreements.

How widespread sexual harassment in the workplace is, and whether this has increased or decreased over time
1. I am unable to comment on the prevalence of sexual harassment or whether it has increased or decreased over time. It is certainly a topical issue but that does not tell us whether incidents have increased or whether those who have been harassed feel more comfortable in raising concerns.

2. In order to keep track of how widespread a problem this is, **one recommendation is for the MOJ to categorise harassment claims separately in its Employment Tribunal receipt statistics.** At present, it is possible to obtain information on the number of claims brought for discrimination on grounds of protected characteristics (for example sex discrimination or age discrimination) and there is a separate category of ‘suffer a detriment/unfair dismissal – pregnancy’. However, there is no separate category for either harassment or sexual harassment. It is likely that these will fall under the more generic category of ‘sex discrimination’ reported in the statistics but it would help for this to be broken down further.

**Who experiences sexual harassment in the workplace, who perpetrates it and what the impact is on different groups**

3. It is important to be clear that ‘sexual harassment’ is often used loosely but the Equality Act 2010 covers harassment of a sexual nature and harassment that is not of a sexual nature but is related to a relevant protected characteristic, in this case ‘sex’. I have set out below the various ‘types’ of harassment that are unlawful under the Equality Act 2010.

**Type 1: Harassment related to a protected characteristic (section 26 (1) Equality Act 2010)**

4. This is where A engages in unwanted conduct related to a relevant protected characteristic (e.g. sex) and the conduct has the purpose or effect of violating B’s dignity OR creating an intimidating, hostile, degrading or offensive environment for B.

5. Type 1 harassment includes comments or behaviour that are not sexual in nature but relate to sex (e.g. displaying ‘funny’ posters playing on gender stereotypes such as women being incompetent on technical matters or discussing one sex in a disparaging way e.g. ‘typical men...’).

6. There are three points to note re this definition:

   - The conduct needs only to be ‘related to a relevant protected characteristic’. This means that B can complain of harassment even if he/she does not share the characteristic. A man could, for example, find an environment demeaning in which women are often undermined/the object of jokes in discussions. A and B can be of the same sex.

   - ‘Creating’ appears to mean something wider than ‘causing’ an offensive environment and is something that can take place over a period of time and can be contributed to by the acts of third parties. As Langstaff J noted in **Conteh v Parking Partners Limited** [2011] ICR 341:

     “Since the process of creation envisages a positive change in circumstance, can inaction ever be said to create an environment? An example would be where a failure to act where an employee reasonably required that there be action had itself contributed to the atmosphere in which the employee worked…we do not suggest
that such cases will be common...but we can see it as a possibility which is covered by the wording of the statute...”

This is important as turning a blind eye to workplace cultures that are readily accepting of banter, innuendo etc can create an atmosphere that an employee may find degrading, offensive etc.

- When considering whether the conduct has the effect of creating an intimidating etc environment, the tribunal must take into account B’s perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect (section 26(4) EA 2010). In other words, what matters is how B perceives the conduct not whether A intended to harass. That said, an element of objectivity is introduced by the need to consider whether it is reasonable for the conduct to have that effect. Take, for example, a colleague who repeatedly jokes about the men in her team. After joking about ‘if you want something done give it to a busy woman’ a male colleague complains of harassment. The unwanted conduct relates to sex. Whether it violates the man’s dignity or creates an intimidating etc environment depends on his perception, the other circumstances of the case, and whether it is reasonable to regard the conduct as having such an effect. The man in this case may genuinely feel aggrieved. What is less clear is whether it is reasonable for him to feel that his dignity has been violated or that an intimidating, hostile, degrading, humiliating, or offensive environment has been created. There is no requirement for the conduct to amount to a pattern of behaviour (it can be one-off) but clearly the fact that the female colleague has repeatedly made men the butt of jokes would be relevant. This can be contrasted with the case of Heafield v Times Newspaper Limited UKEAT/1305/12. In that case, in the context of a busy evening newsroom where journalists were working on a story involving the Pope, an executive shouted across the room ‘can anyone tell what’s happening to the f***ing Pope?’ The Employment Appeal Tribunal (EAT) held that it was not reasonable for an employee to consider himself to have been the victim of harassment related to religion or belief. Much will therefore turn on the facts of the particular case.

Type 2: Sexual harassment (Section 26(2) Equality Act 2010)

7. This is unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating B’s dignity OR creating an intimidating, hostile, degrading or offensive environment for B.

8. Guidance about what constitutes harassment of a sexual nature can be found in the EHRC’s Sexual Harassment and the Law: Guidance for Employers (December 2017). Examples include making sexual jokes and intrusive questions about a person’s sex life. It can also include displaying lewd screensavers, inappropriate touching, and leering.

9. It is this type of harassment that has been the subject of much recent media commentary and is likely to be particularly prevalent in certain sectors such as financial services and the City (on the sexualised culture in the City see for example Linda McDowell’s 1997 work on Capital Culture and the Fawcett Society’s 2009 report on Sexism and the City).

Type 3: Rejection/Submission (Section 26(3) Equality Act 2010)
10. This applies where there has been unwanted conduct of a sexual nature, or that is related to
gender reassignment or sex; the conduct has the purpose or effect of violating B’s dignity OR
creating an intimidating, hostile, degrading or offensive environment for B; AND because of
B’s rejection of or submission to the conduct A treats B less favourably. In other words, B is
essentially victimised for having rejected or submitted to the unwanted conduct.

Actions that the Government and employers should be taking to change
workplace culture to prevent sexual harassment, give people more
confidence to report sexual harassment, and make this issue a higher priority
for employers

11. Changing workplace culture is not easy. For most people work represents more than a place
where they earn a wage; it is a place to feel part of a team, to contribute to something more
than their individual pursuit, and where friendships are made. This means that it can be
difficult for an individual to speak up against unwanted conduct for fear of being perceived
as unable to take a joke or being disloyal.

12. One way for workplace culture to change is for a clear example to be set by leaders. A zero
tolerance policy on harassment could help transform behaviours in the wider organisation.
In the corporate sector where much of the concern has arisen over sexualised cultures, the
changing nature of our boardrooms (see for example the increase in female directorships –
The Female FTSE Board Report 2017) and the apparent commitment by the FTSE100 to
increase women’s participation further (on the motivations of the FTSE100 see R. Russell,
‘How do FTSE100 companies frame gender equality?’ (2017) 12 (2) International and
Comparative Corporate Law Journal
help temper some of the more ‘macho’ and/or sexualised behaviours displayed in this
sector.

13. In terms of concrete recommendations, one recommendation is for gender pay audits to be
widened so that employers include complaints of sexual harassment in their reporting
information. This has the benefit of acting both as an incentive to tackle the issue given the
risk of reputational damage if the incidents are reported and alerting other employees to
possible patterns of behaviour.

14. To encourage employees to report harassment it is important that employees feel confident
that their concerns are treated sensitively and anonymously where appropriate. Clearly
there is a balance to be struck with the rights of the alleged harasser. Similarly, in tribunal
hearings it is important to balance the interests of justice being seen to be done and the
granting of restricted reporting orders to protect a party. In the case of allegations of sexual
harassment it would be helpful to consider removing the names of successful claimants
from the published record of tribunal hearings.

How workers can be better protected from sexual harassment by clients,
customers and other third parties

15. The most direct way to resolve this concern is to reinstate section 40(2) of the Equality Act
2010. This made the employer liable where an employee, in the course of his employment,
had been harassed by a third party. Liability was only imposed if there had been two previous incidents. The incidents need not involve the same third party.

16. It is understandable that businesses were concerned about being held responsible for the actions of others but this is the nature of vicarious liability and acts as a serious incentive to encourage employers to take care for their employees’ wellbeing. It is recommended that consideration is given to imposing liability after only one incident if the employer has not taken reasonable steps to prevent such conduct from happening. The idea of a reasonable steps defence is not new to equality law and so should be something with which organisations will already be familiar. Section 109 of the Equality Act 2010 provides that anything done by an employee in the course of his employment will be treated as done by the employer. The employer has a defence however if it can show that it took all reasonable steps to prevent the employee from doing the thing complained of (or anything of that description).

The effectiveness and accessibility of tribunals and other legal means of redress and what can be done to improve those processes

17. In addition to considering anonymity in reporting mentioned above, one area that is worth considering further is restoring the questionnaire procedure in harassment cases. Before this was repealed, claimants or potential claimants could serve a questionnaire on an employer seeking further information. It was not obligatory to complete these although tribunals could draw inferences from evasive or no replies. Employers often regarded these questionnaires as a ‘fishing trip’ whereas some employees could be frustrated by what they considered minimal or indirect answers.

18. While practitioners might point to examples in the previous regime where these questionnaires were used ineffectively, when used effectively they can be helpful to both sides. If an employee is concerned that he/she may be the only victim of harassment, he/she can only find out if there is a wider pattern of behaviour by asking for details of previous complaints. Similarly, if there is no pattern of behaviour this may help the parties move towards a position where they seek a mediated solution or the employee may reflect further on whether it is reasonable to consider the alleged behaviour as having the alleged effect. To alleviate the employers’ concerns about questionnaire procedures, in the case where proceedings have already been brought, questionnaires might only be allowed after demonstrating to the tribunal in a case management discussion the relevance of the questions posed and the information sought.

19. It would also be helpful to consider extending the remit of recommendations so that a tribunal has the power not just to make a recommendation to an employer that it takes steps to reduce or obviate the adverse effect on the claimant of any matter to which the proceedings relate, but to extend this to wider organisational initiatives. For example, a tribunal might recommend that within a specified period of time the employer must ensure that harassment training is undertaken by all employees and that a robust anti-harassment policy is developed.

20. It is also important to explore alternative forms of dispute resolution. This will not be appropriate in every case. In some cases it would be entirely inappropriate for an employer to expect an employee to face the alleged harasser particularly in cases involving highly distressing events such as stalking. There may, however, be other cases which might be satisfactorily resolved through mediation or informally in the workplace. The key, however,
is to ensure that in-house resolution is not perceived as an ‘easy way out’. It is important that the employer makes this clear that appropriate disciplinary action is also pursued in cases of alleged harassment.

The advantages and disadvantages of using non-disclosure agreements in sexual harassment cases, including how inappropriate use of such agreements might be tackled

21. It is important to be clear about what is meant by non-disclosure agreements (NDAs). In the recent media coverage, they were used in the Presidents Club scandal in advance of the engagement. In my experience of advising many employer clients on harassment and discrimination issues, I have not seen NDAs such as these used in advance to prevent reporting. I cannot, therefore, comment on how prevalent these are.

22. What is more common, however, is for a confidentiality clause to be included in a settlement agreement after an allegation has been made. The terms of the confidentiality clause will be the subject of negotiation but can include the nature of the allegation in addition to any remedy.

23. The advantage of using confidentiality clauses is that both parties have reassurance that the matter will be kept confidential or certainly limited to only a small number of persons. Both parties may wish the matter to remain confidential and the employee signing a settlement agreement will have the benefit of independent legal advice on its terms. The disadvantage is that they are perceived as ‘gagging’ employees and so patterns of behaviour can remain unchallenged as colleagues are unaware of what has gone on before. There is also the obvious risk that the imbalance of power in the employment relationship may lead to an employee signing a confidentiality clause when he/she is not comfortable with its terms.

24. With regards to ensuring that NDAs are not used inappropriately, there is a role here for legal advisers to ensure that appropriate safeguards are in place for their clients and that confidentiality clauses are not wider than is absolutely necessary to protect against the precise risk identified.

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