Your Employment Settlement Service is a legal charity which provides mediation services and (at present) provides affordable advice to employees and employers to resolve workplace conflict without litigation. The strapline is ‘Life’s too short to litigate.’

Introduction

The main problem is harassment of women by men, particularly men in positions of power. These submissions focus on this and practical problems around prevention and enforcement, rather than legal analysis. The same principles apply irrespective of the gender or sexual orientation of the parties.

Many women experience discrimination throughout their working lives. Young women are more likely to suffer sexual harassment. Women are disadvantaged for pregnancy/maternity reasons (54,000 lose their jobs per annum). Older women may be disadvantaged compared to older men particularly in the media industries.

Background: from my 24 years’ experience as an employment solicitor

While working for law firms (Bindmans, Palmer Wade (my firm) and Leigh Day) I have advised and represented many female employees who have suffered sexual harassment at work. I refer to those accused of harassment ‘the harasser’ and those alleging harassment as the ‘victim’. This is not to say that every allegation of harassment will inevitably be upheld; investigation is key.

My experience over 24 years is that:

1. In only one case (in which I acted) was the employee’s grievance about sexual harassment upheld and that was when the investigation was carried out by an independent barrister who specialised in discrimination. In most cases (relating to harassment or other discrimination) the grievance is not upheld – because to do so would result in the employer being liable to pay compensation. Grievances cement disputes rather than resolve them. Early mediation is a better alternative.

2. Many women know that if they raise concerns about sexual harassment there is a high risk they will lose their job – or be given less work and marginalised. Sometimes they are forced to continue working with the perpetrator. They may fear being seen as’ trouble makers’ which can be career-damaging, particularly in small industries. A culture of fear is common.

3. It is often the case that the perpetrator, who commonly is a serial offender (according to victims), remains in his post enabling him to harass again. The harassment is covered up with a ‘non-disclosure’ clause in a settlement agreement. My experience is that men that harass usually do it repeatedly and, in one case, the man felt confident enough of his position to do so in a pub in the view of others. The woman left – with compensation.

4. Employers may have good policies but are often reluctant to act against those in power (who may be bringing in clients and money) for fear that this will impact on their business – or because there is a cosy (often male) elite at the top. One lawyer said to me: ‘How can we
dismiss him as he brings in so much money’. Sometimes it is inertia making it is easier to pay off (and ‘gag’) the employee, who is vulnerable and often seen as a trouble maker.

5. Most employees do not want to litigate. It is therefore important that employers and employees are able to resolve matters quickly and confidentially (which employers always require) and banning NDAs (or making them unenforceable) may undermine this. The importance of early settlement to victims should not be underestimated. The fact that the NDA ‘may’ be contrary to public policy or is non-enforceable if there has been a criminal offence will not be sufficient reassurance to employees who may risk having to re-pay the compensation if it transpires that the NDA does not come within these categories. There needs to be certainty.

6. There is still a culture of entertaining clients in ‘inappropriate’ places such as lap dancing or strip clubs. Women may be forced to attend or be excluded. This type of ‘entertainment’ creates a culture in which harassment is seen as acceptable in the workplace. There should be ACAS/EHRC guidance stating that this type of entertainment is inappropriate and should not be allowed or tolerated by the employer.

Main issues and proposals for consideration

NDAs

There are two types of NDAs. The first is an agreement between employer and employee, entered into at the start of employment, which requires complete confidentiality of all matters during the employee’s employment. The second is the usual confidentiality clause contained in most settlement agreements, entered into as a requirement for an exit package.

It is difficult to ban NDAs completely as it would deter settlements and most employees want compensation and confidentiality to enable them to move on. However, repeat perpetrators need to know they may be exposed and be dismissed (as has happened recently with #MeToo). Most women who said they had suffered historic sexual harassment were not, at the time of the disclosure, in a vulnerable situation where they feared losing their job.

Consideration should be given to, for example:

a. Requiring employers to keep records on and report on NDAs covering harassment, particularly where there is more than one allegation against an individual. This could be monitored by the EHRC. Victims could record harassment with the EHRC;

b. Making the second NDA in relation to the same individual non-binding;

c. Naming the principal harasser(s) in the NDA and make it a condition of the agreement that the harasser is not cited in future harassment complaints and/or that the organisation does not settle another claim relating in any way to the harasser’s conduct;

d. Limiting the length of time the NDA is binding. At present there is no limit;

e. Making it clear that NDAs are not binding where there has been a criminal offence, such as where it has been reported to the police;

f. Applying to a Tribunal/court for an order that the NDA is not binding. However, this puts too much onus on the individual employee who may need a lawyer – and there is a dearth of affordable employment lawyers;
g. Treating sexual harassment in the same way as whistleblowing. A confidentiality agreement cannot stop an employee making a protected disclosure about serious wrongdoing. A protected disclosure must be about commission of a criminal offence, breach of a legal obligation, danger to health and safety or covering up these acts. However, it is not without risk because the employer may sue the employee for breach of the agreement and the employee then has to show she disclosed information she reasonably believed to come within one of the specified categories. The EHRC could have a role in supporting an employee in this situation.

Reintroduction of Questionnaires

The Questionnaire process was undermined by the fact that many employees (& their lawyers) ask too many irrelevant questions which are unnecessarily onerous for employers. One possibility would be to draft a questionnaire aimed specifically at sexual harassment. It would include questions such as:

- Have there been any other allegations against .... (the individual)
- If so, provide details of the complainant, the nature of the allegations,

There is no reason why it could not be drafted so that it is restricted to specific questions which include a summary of the allegations, dates, witnesses.

Obligations on employers to prevent discrimination and harassment

An employer is liable for any discriminatory action (including harassment) carried out by one employee against another provided it is carried out in the course of employment (it is an example of vicarious liability). The employer is responsible regardless of whether they knew of the harassment unless they 'took all reasonable steps' to prevent the discriminator from discriminating. This is about preventative action. Employers who take appropriate steps to prevent harassment (training, zero tolerance approach etc) can avoid liability. My experience is that employers do not often argue this. It would be helpful to have very clear, concise guidance on what employers must do. The EHRC Code of Practice covers this but it is not widely used. [https://www.equalityhumanrights.com/sites/default/files/employercode.pdf chapter 7](https://www.equalityhumanrights.com/sites/default/files/employercode.pdf chapter 7)

There needs to be tailored guidance on what employers must do to avoid harassment occurring. This should include an accessible policy, training for all staff particularly managers on their responsibilities. Good practice (particularly in larger organisations) could include:

- Employment contracts should state that there will be zero tolerance of sexual (and other) harassment and that managers have an obligation to report it;
- Identifying a senior person within the organisation whose role it is to monitor harassment and be supportive to employees suffering harassment;
- Employers adapting the whistleblowing model that some employers adopt, such as a confidential helpline, where it is presumed that there is something that warrants investigation without the complainant having to jump through legal hoops and making it more of an investigation (followed by mediation) than legal process;
- Increased use of independent investigators. Larger organisations could afford them. This could include a government service for SMEs;
- Guidance could include carrying out a risk assessment with input from employees;
- Employers could have posters saying there will be ‘zero tolerance’ of sexual harassment.
Consideration could be given to allowing employees to be anonymous when they report harassment to enable the employer to ask other employees whether they have suffered any harassment at work. This would give an indication if it is a widespread issue. However, the specific allegations do have to be put to the alleged perpetrator. It will rarely be a fair process if an employee is told there are allegations but not told the nature of them – unless there are exceptional circumstances.

**Enforcement and grievances**

Traditional grievance procedures are not necessarily appropriate for dealing with sensitive allegations and are often approached with a presumption of innocence on the part of the alleged perpetrator. Many lawyers, myself included, consider that grievances often do more harm than good as they entrench rather than resolve disputes.

Employees must file with ACAS within 3 months of the act of harassment (or last act if there is continuing harassment) and this usually gives the employee days/weeks longer to lodge a claim with the tribunal (depending on the length of the early conciliation period and when the filing occurs).

If the employee does not raise a grievance, the tribunal can reduce compensation by 25%. This means that the timescales are very short. Grievances should be replaced by a greater focus on early resolution through which the employee can raise concerns with a view to resolving them and, in some cases, keeping her job. The earlier the employer engages with the problem the more likely it will be resolved. This can apply to some harassment cases (not sexual assault cases) if the harasser is told at an early stage that his behaviour is unacceptable and will not be tolerated.

Extending the time limit for making a claim may enable the parties to resolve it and to give the employee time to consider pursing a claim, which may not be worthwhile if they have found another job. Short time limits push employees to litigate and lawyers are (understandably) cautious about not missing the time limit. Time limits are particularly difficult to assess where there are allegations of continuing discrimination.

Although employees should be able to lodge a claim with the tribunal without understanding the law (and many do) in practice access to advice is critical. Some employers (and their lawyers) regularly threaten employees with costs warnings which are only appropriate if there is clearly no case (eg a claim for unfair dismissal when the employee has been employed for less than 2 years). Even if the warning has no merit, it often has the effect of frightening an employee, particularly those on low incomes. Threatening costs in an inappropriate way should attract some sanction.

It has to be recognised that tribunal proceedings are by their nature uncertain. They are time consuming, stressful, expensive, career damaging. At present, claimants may have to wait over a year to get a hearing. Most employees want to avoid litigation.

**Remedies**

Compensation and awards for injury to feelings can be ordered where the tribunal finds there has been unlawful harassment.

Exemplary or punitive damages should be available where there is harassment and the employer has failed to take preventative measures. The onus should be on the employer to ensure, as far as possible, that harassment does not happen in working time or during work events.

Tribunals can no longer make recommendations, for employers to implement, which protect other employees. This power should be reintroduced.
**Third party harassment**

This should be reintroduced but modified so that liability is not dependant on the three strikes rule. Once an employer is aware that a third party has harassed a member of staff, action should be taken to protect the employee.

**Regulation and ethics**

There are two ways of settling possible claims. The first is through ACAS by a COT3 when there is no need for a lawyer to advise the employee. The second is a settlement agreement which must be signed off by a ‘relevant independent adviser’ (lawyer, qualified certified trade union adviser or worker from an advice centre authorised and certified as qualified to give advice)

Settlement agreements are only valid if a lawyer or defined independent adviser has signed a certificate stating that they have advised the employee about the agreement. Most agreements include clauses which prohibit the employee:

- Making derogatory comments about the employee
- Talking about the circumstances surrounding the termination except in accordance with the agreed message, which may be the employee decided to ‘move on’.

**Legal advice**

Access to affordable advice is diminishing as solicitors, particularly in London, cannot afford to work for advice services when they leave college with big debts. The EHRC should provide a specialist advice line and this should be widely published.

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