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New Developments in the Law of Sexual Harassment

Introduction

Over the last 50 years there has been a growing awareness amongst the judiciary and legislators in the United Kingdom of the need to address through legal means sexual inequality in the workplace. Recognition of the requirement to combat sexual harassment at work has been part of this process. Sexual harassment as a distinct area of equality law has been unlawful for around 30 years,¹ and during that time, the law has undergone gradual but continuous improvement.² It is not within the ambit of this article to highlight the development of the law in this area which has been covered elsewhere.³

Despite the existence and application of this legal framework designed to address sexual harassment in the workplace, it is clear that the problem has not disappeared. Indeed, recently there have been widespread allegations of sexual harassment across various sectors of employment that have been broadly reported in the media.⁴ The Me Too movement which

¹ Porcelli v Strathclyde Regional Council (1986) IRLR 340

² The UK's membership of the EU and its necessary compliance with EU equality law has undoubtedly influenced this development.

³ Luzon, G Criminalising sexual harassment (2017) Journal of Criminal Law Vol. 81(5) pp 359-366 Barmes, L Constitutional and conceptual complexities in UK implementation of the EU harassment provisions. (2007) Industrial Law Journal Vol. 36(4) pp 446-467 Jaising, I Eliminating sexual harassment at the workplace: broadening the discourse on gender equality (2014) Commonwealth Law Bulletin Vol. 40 (2) pp375-397.

⁴ E.g. Entertainment, politics, healthcare, education and charities

started in the US in 2017 and has since developed into having an international impact has not only proved itself a supportive forum for women to raise issues of sexual harassment it has also provided a platform for complaint. In doing so, it has underlined the fact that the nature and extent of the problem has been largely underestimated in the past. Against the background of the Me Too movement, this paper will consider evidence of the current extent of the problem, analyse some recent developments in the law relating to sexual harassment, and outline the prospects for the future.

Recent research into sexual harassment

There are many typical harassment and bullying behaviours which can arise in the workplace such as unwelcome remarks or jokes, unwanted physical contact or bullying such as persistent unwarranted criticism. Research has shown that employees who are the recipients of these behaviours are more likely to; be depressed and anxious, suffer stress related illness, be less happy with their work than others and want to leave the organisation. A review of the findings of recent research studies undertaken in the UK indicate the nature and severity of the problem.

In 2016 YouGov undertook a survey⁵ which revealed that 40 per cent of female HR professionals felt their workplace was sexist, compared with just a quarter (24%) of their male counterparts feeling the same. It also found that 12 per cent of young women working for large employers knew that sexual harassment in their companies went unreported. While unremarkable These results are unremarkable except for the difference in perception of the problem between the sexes. More shocking were the results of research into this topic carried

⁵ <https://today.yougov.com/news/2016/07/14/sexual-harassment/>

out in the same year by the TUC. ⁶ According to the researchers around two-thirds of young women (63% of young women between the ages of 18 and 24) faced sexual harassment including unacceptable comments or jokes and unwanted sexual touching or physical advances at their place of work. ⁷ They also found that those on zero-hours contracts, agency workers or casual workers were much more likely to be the object of sexual harassment in the workplace than those working under more established employment arrangements (e.g. employees or full-time workers). They found more than half fifty two per cent of the women polled had experienced some form of sexual harassment. Of them thirty-two per cent had been subjected to unwelcome jokes of a sexual nature and one fifth had experienced unwanted sexual advances. In the vast majority of cases the perpetrator was a male colleague and around one in five reported it was their direct manager or someone else with direct authority over them. Around four out of five women did not report sexual harassment to their employer. Also, amongst the men responding one in five said they had been harassed at work.

The Comes poll for BBC Radio 5 live spoke to more than 2,000 people. ⁸ It found that half of British women and a fifth of men have been sexually harassed at work or a place of study. ⁹ Of the women who said they had been harassed, 63% said they didn't report it to anyone and 79%

⁶ Still just a bit of banter? TUC Sexual harassment report 10 Aug 2016 was the first ever study of its kind, the investigation was conducted by the Trades Union Congress (TUC) in association with feminist activist Laura Bates' Everyday Sexism Project.

⁷ The study was conducted across 1500 participants from the UK. It also found that black and minority ethnic women were most likely to face a combination of racial and sexual harassment

⁸ 'BBC News 25 October 2017 Half of women' sexually harassed at work, says BBC survey <https://www.bbc.co.uk/news/uk-41741615>

⁹ The Radio 5 live survey found that 37% of all those asked - 53% of women and 20% of men - said they had experienced sexual harassment, ranging from inappropriate comments to actual sexual assaults, at work or a place of study.

of the male victims kept it to themselves. More than a quarter of people surveyed had suffered harassment in the form of inappropriate jokes or "banter" and nearly one in seven had suffered inappropriate touching. Of those who had been harassed, 5 Live's survey suggests one in 10 women had been sexually assaulted. More women than men were targeted by a boss or senior manager - 30% compared with 12% - and one in 10 women who had experienced harassment said it led to them leaving their job or place of study. These statistics underline the widespread nature of the behaviour explain the characteristics of its victims its negative impact and underreporting of complaints to employers

Another survey undertaken by the Equalities & Human Rights Commission ¹⁰ into sexual harassment in the workplace obtained responses from around 1,000 individuals and employers between December 2017 and February 2018. The survey examined how sexual harassment is dealt with by employers and used the evidence from individuals who have experienced sexual harassment at work to recommend improvements about how to end sexual harassment at work. Surprisingly it identified widespread failures by employers to set out sufficiently detailed policies on sexual harassment, provide adequate support to victims, offer complainants fair and effective grievance processes and protect complainants from victimisation.

In one of the largest surveys undertaken in the UK into sexual harassment around 6000 UK adults were questioned about their attitude towards sexual harassment in the workplace. ¹¹ An important finding was that those who work flexibly are more likely to encounter this type of

¹⁰ Turning the tables: ending sexual harassment at work Equalities & Human Rights Commission Report first published on 27 Mar 2018

¹¹ BBC – sexual harassment in the workplace 11/12/2017. On behalf of the BBC ComRes surveyed 6,206 British adults aged 18+ between 15th and 24th November 2017.

behaviour.¹² Also, two in five women in the UK reported they had experienced unwanted sexual behaviour at work and only a quarter of them had reported it. Also women aged 18-34 were most at risk of sexual harassment at work with 43% reporting they had experienced it. The connection between casual or unsecure employment and sexual harassment is an interesting one but hardly surprising given that the behaviour often arises from a power imbalance between the harasser and his victim. The lack of reporting of the behaviour internally to the organisation has always been a problem which can only be overcome where employees feel they are likely to be supported by their employer when they complain.

This recent research has supported the view that sexual harassment at work is still widespread and has identified categories of workers that are particularly at risk. While these research studies are important and shed light on the nature of this workplace problem there is undoubtedly a need for a national survey to fully understand the nature and extent of the problem.¹³

Law on Sexual Harassment

Section 26 of the Equality Act 2010 provides a legal definition of harassment which is: “unwanted conduct of a sexual nature which has the purpose or effect of violating someone’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.” Sexual harassment is unwanted conduct of a sexual nature. It covers amongst other things; indecent or suggestive remarks, unwanted touching, requests or demands for sex and

¹² Amongst people who rely on flexible working patterns 42% had faced sexual harassment at work.

¹³ Australia undertake an annual national survey which is in its fourth year of operation although in 2018 only 10,000 people were surveyed. Everyone’s Business: Sexual Harassment Survey 2018 <https://www.humanrights.gov.au/news/stories/everyone-s-business-2018-sexual-harassment-survey>

the dissemination of pornography. Something can still be considered sexual harassment even if the alleged harasser didn't intend it to be and it doesn't have to be intentionally directed at a specific person.

The perception of the victim of harassment is very important and harassment can be deemed to have occurred even if the intention to harass on the part of the employer was not present provided the recipient felt they were being harassed.¹⁴ An employer is generally vicariously liable for the actions of its employees carried out in the course of their employment. So if a member of staff is found to have harassed a colleague the employer could be held responsible. However, there is an important exception. If the employer can show that they took all reasonable steps to prevent harassment then they will escape liability.¹⁵ As will be seen there are still gaps in equality legislation in the UK which adversely impact on victims of sexual harassment. However, given various recommendations made by different bodies recently recommending to the Government changes in the law these might be addressed in the not too distant future.

Other Developments

The EHRC recently set out ten recommendations in a call to the Government to take action.¹⁶ These include the introduction of a statutory code of practice and the discretion of employment tribunals to increase compensation by up to 25% where the code is not followed. This would be a welcome development but might prove difficult to enforce. It may rely on employees or workers informing enforcement bodies which seems unlikely. Another recommendation is that legislation is introduced to render void contractual clauses prohibiting disclosure of future acts

¹⁴ Section 26 (4) (a)

¹⁵ Section 109 of the Equality Act 2010

¹⁶ Turning the tables: ending sexual harassment at work Equalities & Human Rights Commission Report first published on 27 Mar 2018

of discrimination, harassment or victimisation. (non-disclosure agreements or also referred to as gagging clauses) This could be easily achieved by amending the Equality Act 2010 and would overcome gaps in the legislative protection.¹⁷ Another recommendation is that safeguards are introduced to restrict the use of confidentiality clauses to prevent disclosure of past acts of harassment. These types of arrangements are not uncommon and do act as a deterrent to prospective litigants. Restoration of the power of the Employment Tribunals to make recommendations to employers¹⁸ and reintroduction of the statutory questionnaire in discrimination claims.¹⁹ Both these steps would make it more difficult for employers to conceal or continue discriminatory practices unchallenged. The reinstatement of protection from third party harassment without the requirement to show two previous incidents of harassment is an important proposed development.²⁰ Some of these recommendations have also been made by the Women and Equalities Committee of the House of Commons. They recently undertook a full inquiry into sexual harassment in the workplace over a period of six months. As well as assessing the extent of the problem and identifying who the perpetrators are and why it happens (considered earlier) the inquiry also focused on what should be done to tackle harassment more effectively.²¹ A number of recommendations were made by them to

¹⁷ Middlemiss, S Is a claim for post-employment victimisation currently permissible under the Equality Act 2010? *International Journal of Discrimination and the Law* Vol. 14 Issue 2 2014 pp 117-125

¹⁸ EHRC wants to give the power back to Tribunals to make recommendations aimed at reducing the adverse effects of discrimination on the wider workforce, rather than just the individual concerned.

¹⁹ As of 6 April 2014, the statutory questionnaire procedure which was set out in section 138 of the Equality Act 2010 was repealed.

²⁰ Other recommendations are extension of the limitation period for bringing a sexual harassment claim from three to six months from the latest of (i) the act; (ii) the last in a series of acts; or (iii) exhaustion of any internal complaints procedure; a shift of burden to the employer to show why time should not be extended for any out of time claim where the claimant establishes the reason for the delay. Introduction of interim relief protection similar to that for protected disclosure dismissals. EHRC has suggested a form of interim relief for employees who have been dismissed, to allow the victim to make an application to have their employment reinstated pending the outcome of any claim.

²¹ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/news-parliament-2017/sexual-harassment-workplace-tor-launch-17-19/>

the UK Government to change the law. A mandatory duty should be placed on employers to protect employees from sexual harassment in the workplace. This duty should be enforceable by the EHRC and breach of it punishable by a fine. A proposal for reintroducing third party harassment so that employers are liable if they have failed to take reasonable steps to prevent persons from outside the organisation (third parties) from harassing their staff.²² Other interesting proposed measures are extending sexual harassment protection to interns and volunteers and extension of the time limit for bringing a claim from three to six months.²³

In the legal profession in England and Wales there has been a steady increase in reports of sexual harassment.²⁴ In consequence the Solicitors Regulation Authority (SRA) has updated its guidance for people making allegations of harassment.²⁵

The updated guidance covers the use of unfair contract terms, using clear language in settlement agreements and the requirement to balance duties in litigation. Raising awareness about sexual harassment and combatting the inappropriate use of Non-Disclosure Agreements. In Scotland the Law Society have produced their own guidance for dealing with both bullying and harassment and it includes the provision of model policies.²⁶ While the guidance provided is useful the advice for individuals places an emphasis on the victim of harassment to take action. The guidance for firms etc. does offer some examples of good practice e.g. asking about bullying and harassment at exit interviews but is perhaps lacking in a commitment to eradicate the problem. For example in its guidance it states that what is needed is a "clear statement from

²² The Enterprise and Regulatory Reform Act 2013 repealed the third-party harassment provisions in section 40 of the Equality Act 2010 from 1 October 2013 making it much more difficult to bring a claim.

²³ Other proposals enabling employment tribunals to award punitive damages in sexual harassment cases and less helpfully creating a presumption of costs so that employers will ordinarily have to pay the employee's legal costs if it loses a sexual harassment case

²⁴ A letter from SRA chief executive Paul Philip to the House of Commons women and equalities committee has revealed that the regulator now has 50 ongoing cases up from 23 in March 2018.

²⁵ <https://www.sra.org.uk/solicitors/diversity-toolkit/sexual-harassment.page>

²⁶ Law Society of Scotland Preventing Bullying and Harassment Guide for individuals, firms and organisations March 2017 <https://www.lawscot.org.uk/research-and-policy/equality-and-diversity/guides/preventing-bullying-and-harassment-guide/>

senior management that bullying and harassment will not be tolerated.” What would be more effective is a zero tolerance policy in respect of harassment and bullying by managers colleagues or third parties e.g. clients. Also the consequences of substantiated claims should be clearly outlined. An interesting development is Lawscot Wellbeing which is a dedicated online resource ²⁷ that the Law Society has set up which provides help and guidance for members and employers who are suffering from the effects of stress or other mental health issues (including victims of harassment and bullying).. It works in collaboration with NHS Scotland, LawCare, SeeMe, Scottish Association for Mental Health (SAMH) and other mental health charities which provide the support.

These are just a selection of the important developments which could have an impact on the coverage of the legal rules dealing with sexual harassment at work in the future.

Comments

The following quote summarises well the invidious nature of the behaviour and a general lacking in the employers’ response to the problem: “the shocking and stark reality of individuals whose careers and mental and physical health have been damaged by corrosive cultures which silence individuals and normalise harassment. We also found a lack of consistent, effective action on the part of too many employers.” ²⁸

The response to the media coverage of sexual harassment has been the development of movements to tackle sexual harassment which are now worldwide. In the United States the most sensational and significant movement to combat sexual harassment has come out of the

²⁷ <https://www.lawscot.org.uk/members/wellbeing/>

²⁸ EHRC Turning Tables: Ending Sexual Harassment at Work

movie business where various high-profile individuals have been accused of sexual harassment. What developed from this was the #MeToo and #Times Up movements which have created platforms for disclosure²⁹ and have enabled women to come forward and voice their concerns about sexual harassment and abuse.³⁰ The #MeToo movement has also become a vehicle and a call for change in the way sexually inappropriate behaviour is dealt with.³¹ An example of the widespread influence of Time's Up and MeToo is the creation of UK versions of them.

Bringing the issue of sexual misconduct in a multitude of industries has placed pressure on organisations to investigate allegations in earnest and to place greater effort into changing their policies and work environments to facilitate disclosure and discourage such behaviour in the workplace. The Law Society of Scotland is one example of this where guidance and practical advice has been given to members of a profession in an effort to try and change their behaviour.

A lack of awareness of this issue in the past has not been helped by a general failure to undertake large scale research into the problem. Also, the failure of successive Governments to specifically identify cases of sexual harassment brought against employers in the annual national statistics for employment tribunals has helped disguise the extent of the problem. Cases of sexual harassment have simply been counted under sexual discrimination in the statistics.³² This needs to be addressed quickly. The Women and Equalities Commission has

²⁹ TIME'S UP was founded on 1 January 2018 in response to #MeToo and the TIME'S UP Legal Defense Fund was created, which "provides subsidised legal support to those who have experienced sexual harassment, assault, or abuse in the workplace."

³⁰ The Producers Guild of America has published guidelines to combat sexual harassment on film_sets etc.

³¹ The platform for disclosure allowed many victims of sexually inappropriate behaviour to name their assailants while receiving support from others who have experienced similar violations;

³² <https://www.gov.uk/government/collections/tribunals-statistics>

produced its report on Sexual Harassment in the Workplace.³³ Its recommendations are that a number of steps identified above are taken to improve and increase the enforcement aspect of this issue. The EHRC have also produced guidance aimed at improving the law on sexual harassment. Only time will tell if their recommendations are acted upon by the UK legislature.

Since the revelations in various sectors of UK society have been made about the prevalence of this behaviour there has been some discussion about criminalising sexual harassment.³⁴

However, it is questionable whether there is a need for a specific criminal offence to be introduced to deal with it. Mainly because there are existing statutory offences both north and south of the border which can apply to serious forms of the behaviour. The most obvious is the Protection from Harassment Act 1997 which introduced the offence of harassment. Other public order offences of harassment could also apply.³⁵ For serious forms of verbal or physical harassment which represent misogyny there is the possibility of increased protection in Scotland. Lord Bracadale was appointed by the Scottish Government to review hate crime legislation. He recently published his review report and recommendations which included consolidation of hate crime legislation and the addition of gender and age hostility aggravations.³⁶ A number of organisations have called for the development of a standalone offence for misogyny to tackle the unique features of violence and harassment against women.

³⁷ However, the Scottish Government has accepted Lord Bracadale's recommendation to

³³ <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>

³⁴ Luzon, G Criminalising sexual harassment (2017) *Journal of Criminal Law* Vol. 81(5) pp 359-366

³⁵ Offence of intentional harassment, alarm or distress under s4A of the Public Order Act 1986

³⁶ Threatening or abusive behaviour is made a criminal offence by Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010

³⁷ Current hate crime legislation in Scotland allows any existing offence to be aggravated by prejudice in respect of one or more of the protected characteristics of race, religion, disability, sexual orientation and transgender identity. Where a person is convicted of an offence with a statutory aggravation in respect of a protected characteristic it will be recorded and taken into account in sentencing.

consolidate all Scottish hate crime legislation into one new hate crime statute. Ministers will consult on how the criminal law might be strengthened as part of efforts to tackle misogynistic behaviour. ³⁸ Mr Humza Yousaf ³⁹ said a forthcoming consultation focusing on updating and consolidating Scotland's hate crime laws will include consideration as to what measures may be needed to better tackle gender-based violence, including misogyny

The International Bar Association recently undertook research into sexual harassment and bullying in the legal profession. It has produced a 130-page landmark report on data collected from nearly 7,000 legal professionals surveyed across 135 countries. ⁴⁰ The report highlighted widespread incidents of both types of behaviour across the board. They found approximately one in two female respondents and one in three male respondents had been bullied in connection with their employment. Also one in three female respondents had been sexually harassed in a workplace context as had one in 14 male respondents. The report contained various recommendations. ⁴¹

So clearly sexual harassment remains a significant workplace issue despite increasing awareness of this problem as recognised by Maria Miller the chair of Women and Equalities Committee: “It is utterly shameful that in 2018 unwanted sexual comments touching groping and assault are seen as everyday occurrences and part of the culture in many workplaces. “

³⁸ Tackling Misogyny Legislative option to form part of forthcoming public consultation Scottish Government Publication 07/10/18

³⁹ Scottish Government Cabinet Secretary for Justice

⁴⁰ The International Bar Association's Legal Policy & Research Unit (LPRU) in collaboration with consultancy firm Acritas. IBA) produced a research report in May 2019 'Us Too? Bullying and Harassment in the Legal Profession' <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>

⁴¹ The report made 10 recommendations which were as follows: Raise awareness of issues; Revise and implement policies and standards to reflect best practice; Introduce regular, customised training; Increase dialogue and best-practice sharing; Take ownership of the issues; Gather data and improve transparency; Explore flexible reporting models; Engage with younger members of the profession; Appreciate the wider context and Maintain momentum.