New law on harassment at work watered down as it nears the final hurdle

The Worker Protection (Amendment of Equality Act 2010) Bill is close to becoming law. As the Bill has progressed through Parliament, its core provisions have been significantly watered down. In this briefing we discuss what was originally promised, what has changed and where this leaves employers.

What is the background to these proposals?

The current position is that sexual harassment in the workplace is unlawful, and employers and individuals can be found liable in claims brought in the employment tribunal. However, employers can avoid being found vicariously liable for harassment committed by their workers if they can show that they have taken "all reasonable steps" to prevent such harassment from occurring. In practice, most employers elect to take such steps, but there is no legal obligation to do so.

Until October 2013, the Equality Act 2010 contained provisions making employers liable for harassment of their staff by third parties (such as contractors or clients), although liability only arose where the worker had been harassed on at least three occasions. These provisions were repealed by the Coalition Government on 1 October 2013.

In July 2021, the Government committed to introduce a new legal duty on employers to take all reasonable steps to protect workers from harassment and introduce employer's liability for the harassment of workers by third

parties. Towards the end of 2022, the Government decided to back a Private Members' Bill – the Worker Protection (Amendment of Equality Act 2010) Bill – which sought to drive through these promises.

What did the Bill initially promise?

Legal duty to prevent sexual harassment

Originally, the Bill sought to amend the Equality Act 2010 to:

- introduce a mandatory duty on employers to take all reasonable steps to prevent sexual harassment of workers in the course of their employment;

- to require employment tribunals in relevant claims to consider whether, and to what extent, the employer had breached its legal duty to prevent sexual harassment. Where it had been breached, compensation could be uplifted by up to 25%; and

- permit the Equality and Human Rights Commission (**EHRC**) to investigate suspected breaches and take enforcement action against offending employers.

Liability for third party harassment

The original version of the Bill also made employers liable for harassment of workers by third parties. This liability was not confined to instances of third-party sexual harassment but covered all types of harassment under the Equality Act 2010 (e.g. on the grounds of race, sex, age, sexual orientation etc). The intention was that liability would arise the first time that the harassment occurred.

What has changed?

Legal duty to prevent sexual harassment

The proposed duty to prevent sexual harassment has been watered down as the Bill has progressed through Parliament. Instead of having to **take all reasonable steps** to prevent sexual harassment (i.e. to do everything reasonably possible), the obligation is to **take reasonable steps** (i.e. to take some action). This means the duty is less onerous for employers and it will be easier to demonstrate compliance.

It remains the case that where an employer breaches the duty, employment tribunals may uplift compensation in relevant claims by up to 25%. However, since it will be easier to comply with the duty, the risk of an uplift being awarded is reduced. Similarly, the risk of an EHRC investigation or enforcement action is lessened although those possible outcomes have been retained in the Bill.

Liability for third party harassment

The third-party harassment provisions have been dropped from

the Bill altogether. There was particular concern about the risk of hospitality workers overhearing comments that they considered be offensive. The obligation to prevent harassment in such circumstances would be burdensome for employers. Either it would be impossible to discharge, or it would jeopardise the ability of third parties to speak freely.

Therefore, the position regarding third party harassment will remain unchanged. There will be no specific legal protection, however, employees who are harassed by third parties may be able to bring certain claims against their employer. For example, an employee could argue that their employer's failure to take steps to protect them from third party harassment amounts to a serious breach of contract entitling them to resign and claim constructive unfair dismissal (provided they have two years' service). In light of this, employers may still wish to take steps to prevent staff from harassment by third parties.

Where does this leave employers?

The Bill has passed through the House of Commons and is due to progress to the Report Stage in the House of Lords on 5 September 2023. This means that it has nearly completed its passage through Parliament and is likely to become law in Autumn 2023. However, the Bill states that its provisions will come into force one year from the day on which the Act is passed. Therefore, the reforms are unlikely to come into force until Autumn 2024. If the Bill passes in its current format, what will it mean for employers?

Where an employer wishes to be in a position to rely on the existing reasonable steps defence in a relevant sexual harassment case, it will still need to show that it has taken all reasonable steps. This requires quite a lot from

employers (and is likely to involve all of the steps discussed below). For example, in a recent case, an employer's reasonable steps defence failed because its Dignity at Work policy had not been reviewed for over three years and it had failed to deliver comprehensive equality training to staff. In another case, an employer's defence failed because its equality training had become stale after 20 months and should have been refreshed.

An employer that *is* able to show that it has taken all reasonable steps to prevent sexual harassment at work, should always be able to demonstrate compliance with the new duty to prevent sexual harassment (given that the threshold for compliance with the duty is going to be lower).

However, all is not lost for employers that find themselves unable to rely on the reasonable steps defence because not every reasonable step was taken. Such employers would still have a shot at demonstrating compliance with the new duty to prevent sexual harassment, providing *some* preventative steps were taken. Not only does this avoid the potential uplift to compensation, it reduces the chances of negative press attention (which we think is likely to arise in breach of duty cases).

We would advise employers to work towards taking *all* reasonable steps to prevent sexual harassment at work (and other forms of harassment). Not only because it is the right thing to do for your staff, but because it puts you in the best possible position in any future litigation. Reasonable steps will include the following things:

- **Have a good suite of policies in place.** The EHRC's existing guidance recommends having separate policies for sexual harassment and other forms of harassment (or having one clearly delineated policy). Ensure that the terminology used in such policies accurately reflects that used in the Equality Act 2010. These policies should also cohere with other relevant policies such as disciplinary and social media polices.

- **Be clear about the standards of behaviour expected from all staff**. This covers the need to treat colleagues with dignity and respect, both in person and in virtual meetings and also in electronic communications. Explain that disciplinary action will follow where staff fail to meet such standards, up to and including dismissal. As far as third parties are concerned, it may be appropriate to put a notice on display to alert them to your expectations around the treatment of staff and the consequences of any harassment.

- **Raise awareness of the anti-harassment policies amongst the workforce.** Consider asking staff to provide a written acknowledgement that they have read and understood them. You could also recirculate copies to staff at regular intervals and before events where harassment has occurred in the past (e.g. Christmas parties). The policies should be adapted and shared with third parties such as clients and contractors as appropriate.

- **Review the anti-harassment policies every year.** Policies should have an annual health check and be updated to reflect any legal changes and trends apparent from internal complaints, staff surveys and/or exit interviews.

- **Put in place methods to detect harassment (including third party harassment).** This could include informal one-to-ones, sickness return to work meetings, exit interviews and external reporting systems which allow anonymous reports. We have previously reported on how some employers are making use of apps which permit real time and anonymous reporting of sexual harassment.

- **Provide high quality and regular equality and anti-harassment training to staff.** Ensure that such training is balanced, thoughtful and clearly presented and also refreshed at regular intervals (and given to all new joiners, even if this is out of the usual training cycle). Such training should also be tailored to the audience, for example, managers should understand their special responsibilities to act as role models in terms of their own behaviour and to tackle any harassing behaviour witnessed.

- **Deal with harassment complaints effectively.** This means taking swift and appropriate disciplinary action against the perpetrator of the harassment. Where the perpetrator is a third party, in some cases this may mean ending the relationship with them.

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