Significant reforms ahead for the law on harassment at work

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The Government has backed a Private Members' Bill aimed at extending the obligations on employers under the Equality Act 2010. Under the proposals, employers will have a new duty to take all reasonable steps to prevent sexual harassment at work and may be found liable for all forms of harassment (not just sexual harassment) committed by third parties.

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 this context, reasonable steps include things like implementing an anti-harassment policy; providing good quality and regular training to staff; and dealing with complaints effectively. 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 These provisions were repealed by the Coalition Government on 1 October 2013.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 proactively to take all reasonable steps to protect workers from harassment; and
- reinstate employer's liability for the harassment of workers by third parties.

A new statutory Code of Practice and guidance was also promised, which would explain the steps that employers needed to take to prevent harassment. This would supplement the detailed technical guidance on sexual harassment published by the Equality and Human Rights Commission (the EHRC) in January 2020 (you can read our briefing on that guidance **here**).

Nearly 18 months later, the Government has taken no action to meet these commitments. However, the Liberal Democrat MP, Wera Hobhouse, has sponsored a Private Members' Bill – the Worker Protection (Amendment of Equality Act 2010) Bill – which seeks to drive through these promises. The Government is backing the new Bill, meaning it has a good chance of getting onto the statute books even though it is a Private Members' Bill.

What changes would the Bill make to the law on harassment?

Legal duty to prevent sexual harassment

First, the Bill would 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". This would cover sexual harassment occurring in the workplace, but also at work-related events such as work Christmas parties or leaving drinks.

The Bill proposal appears narrower than the Government's original commitment in that it applies to the prevention of sexual harassment only, and not harassment related to the other protected characteristics in the Equality Act 2010, such as race, sex or age.

The Bill provides that where an individual succeeds in a claim of sexual harassment against their employer, the employment tribunal must consider whether, and to what extent, the employer has breached the legal duty to prevent sexual harassment. Where a tribunal concludes that the employer has breached the duty, it may award an uplift to the compensation

award. Any uplift must correlate to the extent of the employer's breach but may not exceed 25%.

Where there is no claim before an employment tribunal of sexual harassment by a worker, the employment tribunal will not have jurisdiction to rule on whether an employer has breached its duty. In this situation, the employer's duty may only be enforced by the EHRC.

Liability for third party harassment

Second, the Bill would make employers liable for the harassment of a worker by a third party. This liability is not confined to instances of third-party sexual harassment but covers all types of harassment under the Equality Act 2010 (e.g. on the grounds of race, sex, age, sexual orientation etc). Liability may also arise the first time that the harassment occurs. This represents an extension of the previous iteration of third-party harassment protection, where an employer was only liable after three instances of harassment.

The current "reasonable steps" defence will be extended to cover third-party harassment claims, meaning that where an employer can show that it had taken reasonable steps to prevent the third-party harassment from occurring it will not be liable. However, if the third-party harassment is sexual harassment, then the legal duty to prevent sexual harassment discussed above will also apply. If the employer has breached this duty, then compensation may be uplifted by up to 25%.

What will the changes mean for employers?

With the Government's support, the Bill passed its second reading in the House of Commons on 21 October 2022. It will now progress to the Committee stage, which will allow detailed scrutiny of the Bill. After that, it would move to the Report stage and third reading and then to the House of Lords to start the process all over again. So, there is still some way

to go before this becomes law. Further, 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 2024, meaning that there are no immediate changes for employers to make. However, it would be sensible to work on the assumption that the Bill will pass given that it has the Government's backing, and it reflects the Government's previous commitments.

If the Bill passes, employers will need to be able to demonstrate that they (i) are doing enough to discharge the new duty to prevent sexual harassment at work; and (ii) have taken all reasonable steps to prevent all forms of third-party harassment. In practice, we suspect that this will translate to taking the following steps:

- **Having 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). These policies should also cohere with other relevant policies such as disciplinary and social media polices.
- **Raising awareness of the anti-harassment policies amongst the workforce.** This could mean requiring employers to provide 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 as appropriate and also shared with third parties such as clients and contractors. In certain workplaces, it may be appropriate to put a notice on display to alert third parties to the employer's expectations around the treatment of staff and the consequences of any harassment (e.g. a retailer could state that a customer who harasses a worker will be removed from the store).
- **Reviewing 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.

- **Putting 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.
- **Providing high quality and regular training to staff.** As a recent **decision** highlighted, an employer won't have taken reasonable steps if the training it provides to staff does not pass muster. Such training should also be tailored to the audience.
- **Dealing with harassment complaints effectively.** This includes taking 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.

While there will probably be work for all employers to do, in many cases it should not require doing anything radically different to what is already in place. That said, getting the groundwork done now will mean you are on the front foot if and when these changes come into force.

We will keep you updated on the progress of the Bill.

Worker Protection (Amendment of Equality Act 2010) Bill 2022 – 23

Brahams Dutt Badrick French LLP are a leading specialist employment law firm based at Bank in the City. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

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