Not on the clock but still on the hook? EAT considers employer's liability for sexual harassment.

The EAT's recent decision in *AB v Grafters Group Ltd* reminds HR teams that employer responsibility for harassment may extend beyond the workplace.

What happened in this case?

The Claimant worked for a hospitality recruitment agency. On 1 November 2021, the Claimant mistakenly believed that she was due to work at an event taking place at Hereford Racecourse. She arrived late to her employer's office and thought she had missed the transport to Hereford. A colleague who had just finished work (CD) offered to give her a lift. She agreed.

CD had previously sent sexually suggestive messages to the Claimant, including in the early hours of 1 November 2021 when he was at work. During the journey, the Claimant learnt that she was not, in fact, required to work that day and she asked CD to take her home. However, CD drove her to a golf course, where he subjected her to sexual harassment.

The Claimant claimed that her employer was vicariously liable for the sexual harassment. The Employment Tribunal found that CD *had* sexually harassed the Claimant. However, it held that the employer was not vicariously liable because CD was not

acting “in the course of his employment” at the time of the incident. The Tribunal determined that CD was not working at the time, the incident did not occur in the workplace, nor was the transport arrangement part of his work duties or otherwise approved by the employer. It also concluded that CD’s motive in offering the lift was not linked to his employment.

The Claimant appealed to the EAT.

What was decided?

The appeal focused on whether CD’s actions were “in the course of employment”. The EAT found that the Tribunal was entitled to conclude that the harassment occurred outside of CD’s working hours and not while he was performing his work duties. However, it had failed to consider whether a sufficient nexus or connection with work was present, such that the lift and subsequent conduct could be deemed an extension of his employment. The EAT held that this step was required by case law, and the Tribunal had failed to carry out the necessary “second question” analysis.

The EAT also considered whether the Tribunal had failed to consider three *relevant* factors, namely:

- the sexual messages that CD had been sent during his working hours;

- whether the harassment in the car was part of a continuous course of conduct starting when CD was at work; and

- the connection between CD’s job, previous arrangements for lifts between colleagues, and the reason why the Claimant was in his car.

The EAT concluded that the Tribunal’s failure to address these factors made its legal reasoning incomplete, because they were all directly relevant to the analysis of whether a sufficient nexus or connection with work existed.

The EAT also considered whether the Tribunal had given weight to two *irrelevant* factors, namely:

- CD’s “motive” for giving the lift, asking if it was because of a requirement linked to his employment; and

- whether the employer had knowledge of, or sanctioned, CD giving a lift to the Claimant.

The EAT considered that CD's motive in offering the lift was immaterial to whether the acts were "in the course of employment." However, the question of whether the employer knew or approved of the general arrangement could be relevant to the analysis of whether an act was in the course of employment.

The appeal was upheld, and the case was remitted to the same Tribunal for reconsideration.

What does this mean for employers?

Employers may be held liable for harassment committed by workers in the course of their employment. However, as previous caselaw has made clear, the meaning of "in the course of employment" is wider than just those actions occurring during working hours in the workplace. It is possible that conduct off the premises and out of normal working hours may be considered an "extension of employment", for example, at a colleague's leaving party, or during work-related travel. However, in all cases the decision is for the Tribunal to reach on the particular facts. This decision reminds us of this nuanced approach needed, although it remains to be seen whether the harassment which took place in this case will meet the threshold.

The decision also underlines the need for employers to give careful consideration to the reasonable steps it can take to prevent sexual harassment. If the actions are held to be within the course of employment, the employer may still avoid liability if it can show that it took *all* reasonable steps to prevent sexual harassment occurring. This will include things like having an appropriate policy in place and providing training to staff. In this case, it could potentially include steps like empowering staff to call a taxi at the employer's expense to reach the workplace or return home where they have missed the arranged transport and feel vulnerable.

The taking of reasonable steps is also necessary to discharge the statutory duty on employers to prevent sexual harassment at work. At present, the duty requires employers to take some, but not all, reasonable steps. From October 2026, the duty will be upgraded to require all reasonable steps to be taken (aligning it with the reasonable steps defence). A failure to discharge the duty gives rise to an uplift to compensation in relevant claims of up to 25% and could provoke an investigation by the Equality and Human Rights Commission.

AB v Grafters Group Ltd t/a CSI Catering Services International

BDBF is a leading employment law firm based at Bank in the City of London. 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.

Rise in sexual harassment concerns: how can employers prepare for the Employment Rights Bill?

Recent research shows a 39% increase in sexual harassment concerns since the introduction of the "duty to prevent" sexual harassment in October 2024. With the Employment Rights Bill set to make that duty even more onerous, we explore the steps employers should take to put themselves in the best position to ensure compliance with the enhanced duty. We also consider other changes in the Bill relevant to sexual harassment at work.

As recently published on Law360, the volume of calls to ACAS about sexual harassment concerns has increased by 39% so far this year. According to figures obtained by Nockolds, ACAS received 5,583 calls in the first half of 2025 compared to 4,001 in the first half of 2024.

This increase is significant following the changes made to the legal duties on employers to prevent sexual harassment in October 2024, and gives an important insight into rising employee awareness of their employer's responsibility to protect them.

What has led to this change?

In October 2024, the Equality Act 2010 was amended to introduce a duty on employers to take reasonable steps to prevent sexual harassment of their employees at work. This applies both to potential harassment from other workers and from third parties (such as customers or clients). The change sits alongside the pre-existing prohibitions against sexual harassment and related less favourable treatment, and places a proactive requirement on the employer to prevent their staff being subjected to unwanted conduct of a sexual nature in the course of their employment.

Failure to comply with this duty may lead to enforcement by the Equality and Human Rights Commission (**EHRC**) and/or an uplift of up to 25% to any related Employment Tribunal award made to the employee.

Whilst it is unclear whether the calls being made to ACAS relate directly to alleged failings on the part of employers to comply with this new duty, the significant increase in volume suggests that, at the very least, this legal change has encouraged employees to speak up about workplace harassment.

What is changing now?

As part of the widespread changes planned under the Employment Rights Bill, the employer duty to prevent sexual harassment will change from taking "reasonable steps" to taking "**all** reasonable steps". This is expected to come into force in October 2026, with further clarification of potential "reasonable steps" expected to come via regulations in 2027.

According to current guidance from the EHRC, the existing

preventative duty to take “reasonable steps” requires employers to conduct a tailored risk assessment, anticipating when their workforce may be at risk of sexual harassment and identifying steps that are reasonable for them to take to prevent it. The test of what is ‘reasonable’ will be objective and consider factors such as the size and resources of the employer, the nature of the working environment (including exposure to third parties), and any concerns raised by the workforce or responses to previous incidents.

Under the new legislation, the employer duty is being ‘upgraded’ to mean that employers must show not just that they took reasonable steps, but that they took all of the steps which were reasonable for them to take. On a strict reading, this means that businesses will need to justify why any steps which were not taken would not have been reasonable, and that this ‘reasonableness’ assessment may be more open to challenge by employees.

It remains to be seen how Tribunals will treat this change, in particular the extent to which they will scrutinise commercial decisions made by the employer when determining what is reasonable for their workplace. However, it is expected that the approach will broadly mirror that taken to the existing “all reasonable steps” defence available to employers in response to acts of discrimination by employees, as set out in the factsheet produced by the Department for Business and Trade. Particular attention will therefore be paid to the content and regularity of training, whether the employer had comprehensive policies in place (and whether those policies were enforced, including through disciplinary action), and what actions were taken in response to any complaints of harassment from staff.

What does this mean for employers?

In preparation for this new duty, employers should therefore now be considering what steps they have taken to prevent sexual harassment, if there any additional steps which might be reasonable for them to take, and be ready to defend not taking any steps which are identified but not considered viable.

Whilst employers may understandably feel apprehensive about scrutinising their own approach in this way or highlighting steps that they have chosen not to take, failing to document any learnings or the rationale for business decisions is likely to leave more room for employees to challenge whether all reasonable steps have been taken to protect them.

Practical steps for employers to take now could include:

- Revisiting the existing risk assessment for sexual harassment (or if none has yet been undertaken, doing so promptly).
- Reviewing where employees might be at particular risk of sexual harassment based on the sector, type of work undertaken and level of engagement with both other workers and third parties.
- Assessing the response taken to any incidents that have occurred, including any trends in complaints, appropriateness of any disciplinary actions taken, and

whether any pre-emptive steps might have reduced the possibility of those incidents occurring.

- Engaging with employees or appropriate representatives at regular intervals to identify any concerns or areas of exposure, and obtaining their input on what actions they feel might protect them at work.

- Reiterating anti-harassment policies and ensuring that regular mandatory training is delivered on both policies and reporting procedures.

- Displaying signage to raise both colleague and third party awareness of the workplace not tolerating sexual harassment.

- Documenting any steps which have been identified but which have not been taken, including why those steps would not have been reasonable for their particular business to take.

How does this fit into the wider landscape?

The upgraded employer duty to prevent sexual harassment is one of numerous significant changes planned for UK employment law under the Employment Rights Bill.

Most notably in relation to sexual harassment, the latest draft of the Bill proposes to ban non-disclosure agreements (**NDAs**) which prevent employees from speaking out about

harassment (including sexual harassment) and discrimination. This includes confidentiality provisions in employment agreements and settlement agreements, and is covered in more detail in our latest update here. The Bill also will clarify that raising concerns of sexual harassment can be a protected disclosure for the purposes of whistleblowing protections under the Employment Rights Act 1996.

In addition, employers will become liable under the Bill for harassment of their employees by third parties based on other protected characteristics such as race, disability and religion, under a similar "all reasonable steps" duty. Businesses would therefore be wise to consider these other types of harassment when looking at the reasonable steps they can take to protect their staff from sexual harassment, and ensure that any changes they make comprehensively consider the risks that their employees might be exposed to in the workplace.

For a comprehensive insight into the key changes planned under the Employment Rights Bill, please join our webinar "The Employment Rights Bill: Where are we now?" on 7 October 2025.

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Rose Lim (RoseLim@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact

Botched disciplinary process breached duty of care owed to an employee accused of sexual harassment

The recent case of *Woodhead v WTTV Limited and anor* reminds employers of the importance of handling disciplinary processes with sensitivity, especially when mental health issues are involved. Employers must act transparently, avoid unnecessary urgency, and adapt their approach once informed of an employee's psychiatric vulnerabilities.

What happened in this case?

The Claimant was employed by the Respondent television company as its Managing Director. In November 2019, he was selected for redundancy and his employment was due to terminate in May 2020. On 28 November 2019, the Claimant was asked, without notice, to attend a "fact finding" meeting with the Director of Fair Employment Practices and the Director of Human Resources of NBC Universal International Ltd (**NBC**), being the Respondent's majority shareholder.

At the meeting, the Claimant was informed that a freelance colleague, known as "NPQ", had made complaints of sexual harassment against him. He was not shown NPQ's written complaint during the lengthy meeting. Instead, the complaints were explained to him, and he was asked for his responses. After the meeting, the Claimant was suspended pending further investigation.

At the time of suspension, the Claimant suffered from long-standing psychiatric conditions. He was a recovering alcoholic since 1991 and had been in therapy since 1992. He suffered from compulsive sexual behaviour disorder, anxiety and depression and he had a history of self-harm. After the meeting, the Claimant's mental health rapidly declined. He was signed off work with depression and anxiety from 3 December 2019 and diagnosed with "adjustment disorder" on 11 December 2019. He was admitted to hospital for in-patient treatment on 13 December 2019. He was discharged in January 2020 but treated for a further seven weeks as an out-patient and remained signed off sick until 8 May 2020, when his employment terminated by reason of redundancy. The disciplinary decision was sent to him in September 2020.

The Claimant brought a personal injury claim (alongside other claims) in the High Court, arguing that the Respondent's conduct of the investigatory and disciplinary process between 28 November 2019 and the end of September 2020 breached their duty of care not to expose him to a risk of psychiatric injury.

What was decided?

To succeed, the Claimant needed to show that:

- it was reasonably foreseeable that he could suffer an injury to his health attributable to the conduct of the investigatory and disciplinary process;
- the Respondent breached its duty of care to him by failing to take reasonable care to reduce or prevent the

harm; and

- that breach of duty caused or materially contributed to the harm suffered.

Was the risk of an injury reasonably foreseeable?

The Judge determined that, as of 4 December 2019, it was reasonably foreseeable that the Claimant could suffer harm to his health from stress due to the process. It was on this date that the Respondent received a letter from the Claimant's psychologist stating that the Claimant was a recovering alcoholic and that this traumatic episode had destabilised him, causing a relapse of depression. The letter said it was essential that treatment was effective and ongoing before the Claimant was subjected to further stress. The Judge concluded that upon receipt of this letter, the Respondent was on notice that the Claimant suffered from long-term and serious mental illness and that there was a risk to his health by continuing with the disciplinary process.

If yes, did the Respondent breach its duty of care to the Claimant?

The Judge identified four significant failings in the Respondent's conduct of the process, three of which were found to amount to breaches of the duty of care.

Failing 1 – The conduct of the investigatory meeting

First, the fact-finding meeting of 28 November 2019 was handled badly. The Claimant was called into a lengthy meeting without notice. He was not given a written copy or summary of the complaints. He was not suspended pending an investigatory meeting (which would have been in line with NBC's Disciplinary Policy). Instead, the meeting was conducted as an investigatory meeting. The Claimant clearly found it intensely distressing – he later said he experienced a *"disassociative episode"* in the meeting and was left *"reeling".*

The Judge observed that there was no reason why matters had to be dealt with in this way. There was nothing that required urgency or a response on that day rather than a few days later. It was not the approach of an employer acting reasonably and it had a particularly severe impact on the Claimant's mental health. However, this could not amount to a breach of the duty of care because it took place *before* the date on which the risk of harm became reasonably foreseeable (i.e. 4 December 2019).

Failing 2 – The conduct immediately following the meeting until 11 December 2019, when the process was suspended

On 29 November 2019, the Claimant's solicitor wrote to the Respondent to ask for all communications to go to him and for the investigatory meeting to be rescheduled, this time with written notice of the questions. He also said that the Claimant was suffering from stress, taking medical advice and may be disabled. On 2 December 2019, the Respondent refused to reschedule the investigatory meeting but gave the Claimant until 4 December 2019 to comment on the investigatory report (a copy of which was sent to him later that day). When the investigatory report was sent to the Claimant,the "findings"

column was left blank – suggesting that all complaints against him were still live. In fact, by the time the report was sent to the Claimant, the Respondent already knew that some of the complaints would *not* be taken forward. It later emerged that this was not an inadvertent error. Rather, the column showing the findings (including the findings favourable to the Claimant) had been deliberately removed.

The Judge criticised the Respondent's imposition of a short deadline for a response; there was no sufficient reason for it and no cause for urgency. Although the Respondent's tactics were worthy of criticism, ultimately, the Judge held that it was not a breach of the duty of care to have continued with the process until 11 December 2019, after which the process was suspended in light of the Claimant's hospitalisation. However, the decision not to tell the Claimant that some of the complaints against him had been dropped *was* a breach of duty. It gave a false impression of the extent of the matters that he had to respond to. It would have been reasonable and appropriate to make clear that only part of the complaints would be going forward.

Failing 3 – Attempting to revive the disciplinary process when the Claimant was still on sick leave in February 2020

The Claimant's sick note at the relevant time stated he was suffering from PTSD, anxiety and acute depression with suicidal ideation and receiving ongoing therapies/psychiatric treatment. Nevertheless, the Respondent sought to revive the disciplinary process on 12 February 2020. The Claimant's solicitor wrote on 13 February 2020 to remind the Respondent that the Claimant was still signed off and not able to engage in the process. The Respondent continued to chase a response.

The Judge found that the Respondent's approach was neither necessary nor reasonable and *was* a breach of duty. It ought to have been clear that he was not fit to participate in the process and if there had been any doubt, the Respondent should have sought clarification from his doctor or referred him to Occupational Health. The Judge discounted the Respondent's suggestion that it needed to resume the process due to NPQ's ongoing distress. This was not borne out by evidence. Emails from the time showed her to be lucid and clear-headed and preoccupied with seeking financial compensation. There was no evidence of distress.

Failing 4 – Pursuing an Occupational Health referral between 16 April 2020 and 8 May 2020

During this period, the Claimant was certified as sick. Covid restrictions meant that any Occupational Health professional would not have been able to meet with the Claimant in person. At best, it would have been a video call, which the Judge said was *"highly unlikely"* to afford any information sufficient to assess the Claimant's state of health. Yet the Respondent's solicitor continued to pursue the point, even when asked to refer to the Claimant's doctor instead. No consideration was given to the Claimant's circumstances, the fact of the lockdown restrictions or the option of getting information from the doctors treating the Claimant.

The Judge remarked the Respondent's solicitor was pursuing an *"entirely pointless"* referral and appeared to be more concerned with form over function. This was not a reasonable course of action and was another breach of duty.

If yes, did the breaches cause the Claimant's injury?

Two of the three breaches were held not to have caused injury.

First, the attempts to revive the disciplinary process when the Claimant was still on sick leave in February 2020 did not materially add to the injury the Claimant suffered either by exacerbating or prolonging it. The issue had been dealt with by the Claimant's solicitor and any distress that the Claimant experienced was not long lasting.

Second, the pursuit of an Occupational Health referral between 16 April 2020 and 8 May 2020 did not materially add to the Claimant's injury. It had been dealt with by solicitors and the requests were not communicated to the Claimant at the time. He was only told when the issue had been dropped. There was no evidence that it had a significant impact on the Claimant.

However, the decision to mislead the Claimant about how much of the complaint against him remained live *did* cause injury. The initial shock and breakdown he suffered was worsened by the perception of not being heard or understood by the Respondent. This contributed to the existence and duration of the psychiatric condition. The failure to inform the Claimant that the scope of the disciplinary proceedings against him had been narrowed materially contributed to his psychiatric injury.

What does this mean for employers?

Although the Claimant's victory was limited to one point, employers should pay close attention to the Judge's scathing comments about the employer's conduct. Importantly, this was

a personal injury claim in the High Court, but the employer's serious failings may have also provided a sufficient basis to claim constructive unfair dismissal and/or disability discrimination in the Employment Tribunal.

- **Remember your duty of care to employees accused of sexual harassment.** Employers often feel under pressure to investigate allegations of sexual harassment promptly and robustly, however, this case reminds us that employers continue to owe a duty of care to the accused as well as to the complainant. Investigatory and disciplinary processes should be approached with compassion, transparency, and fairness, particularly where an employee is known to be vulnerable.

- **Always follow a fair process.** Sudden and lengthy investigatory meetings without prior notice or disclosure of allegations can be highly distressing. Similar issues arose in the case of Weir v Citigroup Global Markets Ltd, which drew criticism from the Employment Tribunal. Employers must follow their owndisciplinary policies, ensuring procedures are fair, consistent, and not unnecessarily urgent or onerous.

- **Make adjustments to processes as needed.** Once on notice of an employee's mental health condition, takereasonable

steps to prevent further harm. Pursuing disciplinary processes despite clear medical advice that an employee is not fit to participate can constitute a breach of the duty of care.

- **Transparency is critical.** Failing to communicate that certain complaints had been dropped was found to be misleading and harmful. Misleading an employee in this way is also likely to amount to a serious breach of the duty of trust and confidence, meaning an employee could constructively dismiss themselves.

- **Use Occupational Health appropriately.** Occupational Health referrals should be meaningful and appropriate to the context. If better information can be obtained from the employee's own doctors, this route should be pursued instead.

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BDBF Webinar – Beliefs, backlash, and the workplace: navigating the new culture wars – 29 April 2025

In this 1-hour webinar, BDBF Managing Partner Gareth Brahams and Associate Emma Burroughs explore the legal rights and responsibilities surrounding belief expression in today's complex work environment. This webinar was originally delivered on 29 April 2025 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:

https://youtu.be/85bypaD9MVc

Please contact Gareth Brahams (GarethBrahams@bdbf.co.uk), Emma Burroughs (EmmaBurroughs@bdbf.co.uk) or your usual BDBF contact, for further advice.

Workplace sexual harassment on the big screen: what can we learn from the Bridget Jones movies?

Bridget Jones: Mad About the Boy **has reignited love for the** ***Bridget Jones*** **films, but rewatching the series, you cannot help but notice that the behaviour in Bridget's workplaces has not aged as well as her fondness for Chardonnay. In this article, we consider the examples of workplace sexual harassment in the movies and the learning points for today's employer.**

What conduct are we talking about?

In the *Bridget Jones* films, there are many instances of Bridget's boss, Daniel Cleaver – played by Hugh Grant – engaging in sexually inappropriate behaviour. In the first film in the series (released in 2001), *Bridget Jones's Diary*, Daniel makes a comment on the length of Bridget's skirt when he sends an email to her which says, "*You appear to have forgotten your skirt. Is skirt off sick?*". He also grabs her

bottom in an office lift.

In the sequel (released in 2004), *The Edge of Reason*, despite their relationship having ended, Daniel seeks Bridget out and makes a sexually inappropriate comment to her. Alive to the inappropriate nature of the behaviour, Bridget threatens to report him for sexual harassment. However, Daniel dismisses her rebuff with yet another inappropriate comment, asking, "*Is that your most serious skirt, Jones?*".

By the time we get to the third instalment in the series (released in 2016 in the post #MeToo era), *Bridget Jones's Baby*, the rampant sexual harassment is less prevalent. Nevertheless, in one scene Jack Qwant – played by Patrick Dempsey – chases Bridget through the lobby of her workplace after they spent the night together, demanding to know why she left and did not contact him afterwards.

Finally, in *Bridget Jones: Mad About the Boy* (released in 2025), Bridget's new boss remarks that she "*looks hot*". Bridget points out that *"…that sort of language is a little outmoded in the workplace",* only to find that her boss really meant that she looked like she was having a menopausal hot flush.

What is the law?

Under the **Equality Act 2010,** sexual harassment is defined as any unwanted conduct of a sexual nature that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating, or offensive environment.

Employers may be vicariously liable for the actions of employees, meaning that sexual harassment committed by employees in the course of their employment can lead to claims against the employer as well as in the individual perpetrator.

Since October 2024, employers have also been subject to a duty to take reasonable steps to prevent sexual harassment in the workplace.

The new Employment Rights Bill, expected to come into force in 2026, proposes to make the duty more onerous and require employers to take all reasonable steps to prevent sexual harassment in the workplace. The bill also proposes to extend protection for employees to harassment committed by a third-party (e.g. clients, contractors, conference or event attendees, and building maintenance workers).

Is this conduct sexual harassment?

Sexual harassment, under the Equality Act 2010, requires that the conduct be unwanted. In the first film, while Daniel's comments and actions are of a sexual nature, Bridget seems receptive to them, which means they are unlikely to meet the definition of harassment. However, it is not always possible to know whether a particular comment will be wanted or unwanted before it is made and this is why such comments in a work context can give rise to grievances and claims.

By the time we get to *The Edge of Reason*, the dynamic between the pair has changed. Daniel's repeated inappropriate comments are not welcomed by Bridget. However, the assessment of

whether the behaviour would qualify as harassment is also context-dependent. While the comments certainly have the potential to create an unacceptable environment, Bridget may not feel that her dignity is violated or that the environment is intimidating, hostile, degrading, humiliating or offensive. Yet her threat to report Daniel for sexual harassment is a good indicator that she does feel that her dignity has been violating. And it would probably also count as a "protected act", meaning that any subsequent mistreatment might amount to victimisation.

In *Bridget Jones's Baby*, Jack's actions in pursuing Bridget could be considered unwanted conduct that creates an intimidating or degrading environment. However, Jack is a guest on the TV show not an employee of the TV company. Although employers currently have a duty to take reasonable steps to prevent sexual harassment by third parties, they are not vicariously liable for harassment by third parties, meaning Bridget would struggle to bring a claim. However, under the Employment Rights Bill, as currently drafted, employers will become responsible for harassment by third parties, such as Jack. If they have also failed in their duty to take reasonable steps to prevent such harassment then the compensation in such claims could be uplifted by up to 25%.

The comment from Bridget's boss in *Mad About the Boy* that she "*looks hot*" is quickly clarified to be a non-sexual comment and, therefore, unlikely to amount to sexual harassment. However, humiliating comments about menopause could amount to harassment related to sex, age and/or disability.

What are the takeaways for employers?

Employers should consider the following points:

- **Risk assessment**: conduct a risk assessment to ascertain what the risks are for your specific business and how they might be mitigated. Don’t forget to assess the risks posed by third parties.

- **Training**: ensure that staff receive training on how to recognise and report sexual harassment (and other types of harassment) and victimisation. Managers should be trained separately on their responsibilities to help prevent it.

- **Policies**: have a specific policy on sexual harassment (and other types of harassment) which makes it clear what behaviours are unacceptable and when disciplinary action will be taken. Make sure third parties are aware of your approach to sexual harassment.

- **Reporting**: encourage staff to report incidents of sexual harassment as well as situations where they felt at risk, even if nothing happened.

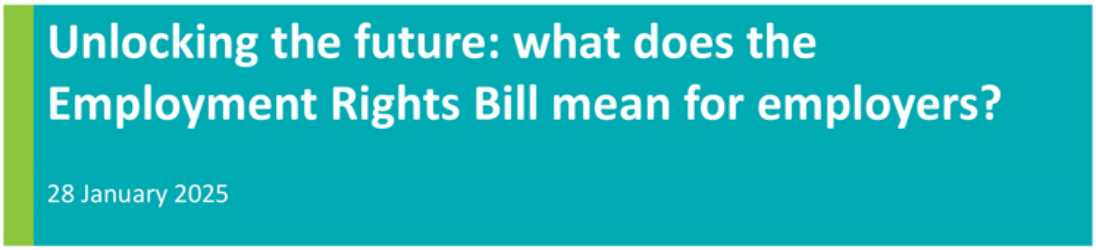
- **Review**: keep your training and policies under review and refresh them as needed.

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Emma Burroughs (emmaburroughs@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

BDBF Webinar – Unlocking the future: what the Employment Rights Bill means for employers – 28 January 2025

In this 1-hour webinar, BDBF Managing Associate Tom McLaughlin and Principal Knowledge Lawyer Amanda Steadman discuss the "once-in-a-generation" changes the Employment Rights Bill will bring for UK employers. This webinar was originally delivered on 28 January 2025 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:



https://www.youtube.com/watch?v=dz9obtp5gRQ

Please contact Tom McLaughlin (TomMcLaughlin@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact, for further advice.

What guidance is there for employers on complying with the new duty to prevent sexual harassment at work?

The mandatory duty on employers to take reasonable steps to prevent sexual harassment at work came into force on 26 October 2024. New and updated guidance for employers has recently been published covering both the scope of the new duty and how to manage compliance. In this briefing, we round

up the key points of interest.

EHRC's sexual harassment and harassment at work

The EHRC has updated its detailed technical guidance on **Sexual Harassment and Harassment at Work** (the **Guidance**) to reflect the new duty to prevent sexual harassment at work. It is important to note that the Guidance is just that – it does not have the status of a "Statutory Code". This means that Employment Tribunals are not obliged to take it into account. That said, it may still be used as evidence in legal proceedings. For that reason, employers would be wise to apply the recommendations in the Guidance as far as possible.

It is worth reading the Guidance in full, but here is our quick guide to the key points to note from the new sections of the Guidance:

- **The scope and nature of the duty:** the Guidance explains that all employers now have a positive duty to take reasonable steps to prevent sexual harassment at work perpetrated by co-workers and third parties. The Guidance underlines that this duty is anticipatory, and employers must not wait until a complaint of sexual harassment is made before taking action. Rather, employers must predict scenarios where workers could experience sexual harassment at work and take reasonable steps to prevent it from happening *(see 3.16 – 3.18, 3.21 – 3.26, 3.28 and 4.6).*

- **The special role of managers and senior leaders:** the Guidance stresses that managers and senior leaders play a critical role in creating respectful workplaces. They are expected to model good behaviour, promote positive and inclusive workplaces and take instances of harassment seriously *(see 4.3).*

- **Accounting for third parties:** the Guidance explains that *all* types of third parties are relevant to the duty including, for example, customers, clients, contractors and members of the public. When conducting a risk assessment, employers are expected to build in consideration of the risks that workers might be sexually harassed by third parties *(see 3.33 – 3.34 and 3.85 – 3.86).*

- **Assessing risk in your business:** the Guidance says thatemployers should conduct risk assessments of policies, procedures and working practices. Indeed, it is said that employers are unlikely to comply with the duty without having conducted a risk assessment. Numerous examples of possible risk factors are given, such as lone and out of hours working, power imbalances and the presence of alcohol. Once the risks have been identified, employers must consider what possible steps could be taken to remove or reduce them and an action plan produced *(see 3.27 – 3.31 and 4.10 – 4.15).*

- **Taking reasonable steps:** the Guidance highlights that there is no "one-size-fits-all" and what is reasonable will vary from employer to employer. However, whether or not a step is reasonable will be assessed against an objective standard, rather than just by what the employer thinks. The Guidance sets out a non-exhaustive list of factors which are relevant to reasonableness, including things like the size and resources of the employer, the working environment, the sector the employer operates in, the level of risk present in the workplace, the degree of contact with third parties and the time, cost and benefit of implementing the step weighed against the benefit it could achieve. Examples of steps that are likely to be considered reasonable for most employers are also given, including maintaining effective anti-harassment policies and procedures, delivering training to staff and having measures in place for detecting harassment *(see 3.32 and 4.16 – 4.41).*

- **Penalties for non-compliance:** the Guidance sets out the penalties for failing to comply with the new duty, namely that the EHRC may take different types of enforcement action against the employer, and/or that an Employment Tribunal may uplift compensation by up to 25% in a relevant harassment claim. The amount of any uplift will correspond to the severity of the employer's breach. It is also made clear that workers cannot bring standalone claims in the Employment Tribunal for breach of the preventative duty *(see 3.19-3.20, 3.36-3.43 and 3.45).*

EHRC's employer 8-step guide: preventing sexual harassment at work

To complement the detailed Guidance, the EHRC has also published a more user-friendly **8-step guide for employers** which sets out the steps that will be expected from most employers. These steps should not be viewed as exhaustive, but the EHRC says that implementing them will help employers to discharge the duty. The eight steps are:

- **Step 1 – Develop an effective anti-harassment policy:** the guide sets out in detail what a good policy should contain, including in relation to harassment by third parties. The policy should apply to all areas of the business and be reviewed regularly.

- **Step 2 – Engage with your staff:** employers are encouraged to engage with workers using a variety of methods to identify where the risks lie and whether the steps taken are working. Staff should also be made aware of the anti-harassment policy and understand how it works and the consequences of breaching it.

- **Step 3 – Assess and take steps to reduce risk in your**

workplace (i.e. conduct a risk assessment): as made clear in the Guidance, a risk assessment is central to compliance with the preventative duty. The risk assessment should build in a consideration of typical risk factors.

- **Step 4 – Reporting harassment:** staff should understand how to raise concerns and multiple channels for reporting should be offered, including the option to report anonymously. Centralised and confidential records of all reports should be maintained to allow trends to be spotted.

- **Step 5 – Training:** all staff should receive training on workplace sexual harassment and how to report it. Managers should also be trained on how to deal with such complaints. Training programmes should be reviewed regularly and refresher training should also be offered at regular intervals.

- **Step 6 – What to do when a harassment complaint is made:** employers should take prompt action when a complaint is made, and the matter should be kept confidential. Other factors to consider include protecting the complainant and witnesses from harassment or victimisation and

supporting the complainant to report the matter to the police in appropriate cases.

- **Step 7 – Dealing with harassment by third parties:** it is underlined that harassment by third parties should be taken just as seriously as harassment by a colleague. Employers need to build in third party risks into their risk assessments and have appropriate reporting mechanisms in place.

- **Step 8 – Monitor and evaluate your actions:** employers must keep the steps taken under review and take further preventative steps as needed. The guide sets out different ways of evaluating the steps taken including reviewing reported complaints, conducting anonymous staff surveys and reviewing policies and training regularly.

What other guidance is available?

In addition, the EHRC has published brief guidance on **three templates** that may be used to help employers discharge the duty. Although originally designed for employers in the hospitality sector (where the risk of sexual harassment is

particularly high), the EHRC says that these templates may be adapted to suit other types of workplace. The recommended templates are:

- A **checklist of questions** designed to span what happens during the working day to assist employers spot and tackle the risks of sexual harassment within their workplace.

- An **action plan** which notes the actions points emerging from the answers to the checklist questions (as well as any additional actions that the employer considers would be reasonable to prevent sexual harassment).

- **Monitoring logs** to be used on a regular basis to track how the checklist is being used. These logs can be completed on a daily basis, with more in-depth logs completed every quarter.

Acas has also updated its **sexual harassment guidance** to cover the preventative duty.

For a refresher on all aspects of the duty and how to comply,

you can watch BDBF's **recent webinar** on the topic led by Partner **Nick Wilcox** and Associate **Julia Gargan**.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

The Employment Rights Bill: a closer look at the equality law provisions

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the third article in our series analysing the Bill, we consider the proposals for equality law reform.

Running to more than 150 pages, the **Employment Rights Bill** (**the Bill**)puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the third in our series of articles explaining the Bill, we consider all the proposals in the equality sphere.

Sexual harassment

From 26 October 2024, all employers must take reasonable steps to prevent sexual harassment at work. Where this duty is breached, an uplift of 25% may be applied to compensation in relevant claims, and the Equality and Human Rights Commission (the **EHRC**) will have the power to investigate and take enforcement action. Initially, the plan was for this duty to require employers to take *all* reasonable steps, however, the word "all" was eventually dropped on the basis that it would be too onerous for employers. You can find out more about the duty in our recent webinar **here**.

The Bill provides that the word "all" will be reintroduced, meaning that employers will be required to take every possible reasonable step to prevent sexual harassment, or risk a compensation uplift and EHRC action. Separately, the Bill provides that regulations may be introduced specifying the steps that are to be regarded as reasonable for the purposes of both the new duty to prevent sexual harassment and the existing reasonable steps defence. The Bill states that this may include steps such as carrying out risk assessments, publishing plans or policies, and steps relating to the reporting and handling of complaints. Currently, the recommended steps to prevent sexual harassment are set out in the EHRC's non-statutory **Technical Guidance on Sexual Harassment and Harassment at Work** and its **8-step Guide to Preventing Sexual Harassment at Work**.

In addition, the Bill provides that disclosures about actual or likely sexual harassment will be listed as one of the types of malpractice about which a whistleblowing disclosure may be made.

What will these changes mean for employers in practice?

- It will be harder for employers to discharge the duty to prevent sexual harassment once it has been enhanced in this way. In particular, a lot will be expected from large and well-resourced employers and from employers where sexual harassment is especially prevalent. That said, the proposal to set out a list of reasonable steps in regulations will be helpful in that it gives employers legal certainty about the steps required.

- Although it will be some time before these changes to come into force (the Government has suggested not until 2026), employers would be wise to begin working towards taking all reasonable steps now. Not only will this help employers be ready for the raised requirement in good time, it opens up the possibility of pleading the "all reasonable steps defence" in relevant sexual harassment claims.

- We are likely to see an increase in employers pleading the "all reasonable steps defence" in relevant cases. Given that the work that will have gone in to take steps to discharge the duty, employers are likely to want the added benefit of avoiding liability for a sexual harassment claim.

- Making it clear that disclosures about sexual harassment may amount to whistleblowing disclosures is helpful, although arguably unnecessary. The Tribunals have already made it clear that disclosures about sexual harassment are capable of amounting to whistleblowing disclosures, since they represent breaches of the Equality Act 2010 (see for example Mysakowski v Broxborn Bottlers Ltd). Nonetheless, it is a helpful sign to those wishing to report sexual harassment that they may be protected as whistleblowers.

Discriminatory harassment by third parties

Until October 2013, the Equality Act 2010 contained provisions making employers liable for harassment of staff by third parties, albeit that liability only arose where the worker had been harassed more than once. These provisions were repealed by the Coalition Government on 1 October 2013, with the result that it became much more difficult for workers to bring claims against their employer where they had been harassed by a third party. Currently, the only way in which an employer attracts liability is in respect of its *own* actions.

The Bill will reintroduce employer's liability for third party harassment. Importantly, this will extend to harassment for *all* protected characteristics under the Equality Act, not just sexual harassment, and liability will arise from the first instance of harassment. For example if a shopworker was racially abused by a customer, the employer would potentially

be liable. However, employers will be able to avoid liability where they can show they took “all reasonable steps” to prevent the harassment.

What will these changes mean for employers in practice?

- The reintroduction of liability for third party harassment is one of the most important reforms in the Bill, significantly widening an employer’s exposure to claims of discriminatory harassment. For employers operating in sectors where staff frequently come into contact with third parties (such as the transport, retail and hospitality sectors), that risk is heightened further. While the “all reasonable steps” defence remains open to an employer to defend such a claim, it will be an onerous task to discharge every possible reasonable step and many employers are likely to fall short. For this reason, employers may wish to begin work on scoping out how it might meet this standard sooner rather than later.

- As far as sexual harassment is concerned, employers who are found liable for third party sexual harassment may also face the prospect of an uplift to compensation of up to 25%. A Tribunal may award this where it finds that the employer has breached the duty to prevent sexual harassment.

Gender pay gap reporting and the menopause

Currently, employers with 250 or more employees are required to publish gender pay information on an annual basis. However, in-scope employers must report their pay gap figures and nothing else – they are not required to explain the figures nor how they intend to close their gender pay gap (and, in fact, they are not required to close it all). The hope was simply that "what gets measured gets managed" and reporting alone would drive employers to take steps to close their gaps. However, progress in closing gender pay gaps remains slow.

The Bill provides that regulations may be published requiring employers with 250 or more employees to develop and publish "equality actions plans" on an annual basis. The equality actions plans must set out the steps the employer is taking in relation to addressing its gender pay gap and to supporting employees going through the menopause. The action plan will have to meet the minimum standards to be set out in regulations. There will be consequences for failure to comply, but, again, this will be dealt with in regulations.

Further, when reporting their gender pay gaps, employers will be required to set out the identity of any person it contracts with for the supply of outsourced workers. Such workers are not employees of the employer and, therefore, do not need to be included in the gender pay gap figures. It seems that the intention here is to allow a fuller understanding of an organisation's gender pay gap. For example, if an organisation's outsourced roles were typically fulfilled by low-paid female workers, this would have the effect of improving the gender pay gap figures since this pay data would not need to be factored in.

What will these changes mean for employers in practice?

- Gender pay gap reporting will become more onerous for in-scope employers. Although some employers already publish sophisticated narratives and actions plans, many do not. All will need to publish an annual plan setting out what action is being taken to close the gap. A failure to do so will have consequences, but what is not clear is whether there will be consequences for publishing a compliant plan and then not implementing it, or attempting to implement it but failing to make a dent in the gender pay gap.

- The Government had promised to introduce both ethnicity and disability payreporting which would mirror the gender pay gap reporting regime. These proposals are not included in the Bill. However, in the separately-published Next Steps to Make Work Pay it is stated that this commitment will be delivered via the Equality (Race and Disability) Bill. The Government says it will begin consulting on that in due course, with a draft Bill to be published during this Parliamentary session for pre-legislative scrutiny. Further consultation will also take place prior to the making of regulations implementing these reforms. In other words, it is going to be some time before either of these promises come to pass.

- The forthcoming requirement to publish information about the steps taken to support menopausal workers means employers will need to give thought to what it is able to say in this regard. Some employers are well advanced in terms of support offered. Others will need to start work on providing appropriate support measures in order to be able to populate the action plan. That said, most employers will already have some things to say here, for example, the provision of flexible working options and relevant benefits such as discounted gym memberships or employee assistance programmes. However, more is likely to be needed.

What are the next steps?

The Bill has just started its passage through Parliament, which will take time. Even when passed, the various equality provisions will not come in straight away. For example, regulations are needed for the reforms to the duty to prevent sexual harassment and to the gender pay gap reporting regime. And it is likely that there will be consultations on some of the proposals, although it is not yet clear which ones.

Separately, the Next Steps to Make Work Pay document promises to deliver ethnicity and disability pay reporting by way of a different Bill, which will also extend the current equal pay regime to claims based on ethnicity and disability and also provide for a new regulatory enforcement unit for equal pay. The Government also says it will produce new menopause guidance for employers.

Interestingly, no mention is made of the pre-election promise to enact the dual discrimination provisions in the Equality Act 2010, which would allow employees to claim discrimination on the basis of the particular combination of two protected characteristics. It remains to be seen whether this will be taken forward.

Stay tuned for our fourth article in the series, where we will consider the provisions of the Bill affecting contracts and pay.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

BDBF Webinar – Complying with the new duty to prevent sexual harassment at work – 8 October, 2024

In this 1-hour webinar, BDBF Partner Nick Wilcox and Associate Julia Gargan explore the steps employers need to take in order to be ready for the new legal duty to prevent sexual harassment at work, coming into force on 26 October 2024. This webinar was originally delivered on 8 October 2024 and reflects our understanding as of that date. Do get in contact

with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:

https://youtu.be/84GYF9DtWA8

Please contact Nick Wilcox (NickWilcox@bdbf.co.uk), Julia Gargan (JuliaGargan@bdbf.co.uk) or your usual BDBF contact, for further advice.

New duty to prevent sexual harassment at work coming

into force on 26 October 2024

The Equality and Human Rights Commission (EHRC) has confirmed that the new duty for employers to take reasonable steps to prevent sexual harassment at work will come into force on 26 October 2024. The EHRC has opened a consultation on new guidance which will govern how the duty will operate in practice. In this briefing, we explain the duty in full and consider the recommendations set out in the guidance.

Do employers currently have to take steps to prevent sexual harassment?

The current position is that sexual harassment in the workplace is unlawful, and employers and individual perpetrators may 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 took *all* reasonable steps to prevent such harassment from occurring – this is known as the "reasonable steps defence". 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. However, from 26 October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 (**the Act**) will introduce a mandatory duty on all employers to prevent sexual harassment, regardless of whether they wish to be able to rely on the reasonable steps defence.

What is the new duty to prevent sexual harassment?

The new duty to prevent will require all employers to take reasonable steps to prevent sexual harassment of workers in the course of their employment. In this context, "sexual harassment" means unwanted conduct of a sexual nature which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Importantly, the duty does *not* extend to either:

- less favourable treatment of an individual because they had either rejected or submitted to sexual harassment; or

- harassment related to any protected characteristic, including sex-based harassment (i.e. where an individual suffers harassment related to the fact that they are a man or women, but the unwanted conduct in question is not of a sexual nature).

The new duty extends to sexual harassment occurring "in the course of employment". Naturally, this covers sexual harassment occurring within the workplace, but it also covers harassment occurring at work-related events such as conferences, off-sites, parties or leaving drinks. Importantly, the duty requires employers to

anticipate the situations when workers might be exposed to sexual harassment and take action *in advance* to prevent it from happening. Employers must not wait until an incident has occurred before taking action.

In one respect, the new duty is less stringent than the reasonable steps defence, in that it only requires employers to "take reasonable steps" rather than to "take *all* reasonable steps". When the Act was on its passage through Parliament, it was envisaged that it would require employers to take all reasonable steps. However, this was watered down due to fears that it would be too onerous for employers. Yet the new Labour Government has promised to strengthen the duty by reinstating the requirement for all reasonable steps to be taken. However, this would need an amendment to the Act, and it is not yet known when this change will be made (but it seems unlikely that it will be made before the duty comes into force).

Will the new duty cover sexual harassment committed by third parties?

Until October 2013, the Equality Act 2010 contained express provisions making employers liable for harassment of their staff by third parties (e.g. contractors, clients, delegates at a conference or members of the public), 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, with the result that it became much more difficult for workers to bring claims against their employer where they had been harassed by a third party.

When the Act was on its passage through Parliament, it was envisaged that it would make employers directly liable for the sexual harassment of workers by third parties, from the first time that the harassment occurred. However, the third-party harassment provisions were dropped, again, out of a concern that they would be too onerous for employers, particularly those in the hospitality sector.

Therefore, the position regarding employer's liability for third party harassment will remain unchanged. There is no specific legal protection, however, workers who are sexually harassed by third parties may be able to bring other claims against their employer in certain circumstances. For example, individuals could argue that their employer's failure to take reasonable steps to protect them from third party sexual harassment amounts to:

- a serious breach of contract entitling them to resign and claim constructive unfair dismissal (currently, an employee would need two years' service to bring this claim); or

- direct or indirect discrimination on the grounds of a protected characteristic such as sex, sexual orientation or disability (there is evidence to show that women, LGBT and disabled people are more likely to suffer sexual harassment at work).

Putting aside the risk of direct claims against the employer, the EHRC makes it clear that the new duty to prevent requires employers to take steps to prevent sexual harassment committed by third parties. A failure to do so would give rise to a breach of duty, which could lead to enforcement action by the EHRC (this is discussed further below).

It should also be noted that the new Labour Government has promised to introduce direct legal protection from third party harassment. Again, this would need an amendment to the Act, and it is not yet known when this change will be made (and, again, it seems unlikely that it will be made before the duty comes into force).

What information is there for employers on how to comply with the new duty?

On 9 July 2024, the EHRC opened a consultation on changes to its Technical Guidance on Sexual Harassment and Harassment (the **Guidance**) to reflect the new duty. The consultation will run for four weeks, closing on 6 August 2024. The Guidance explains the new duty and, crucially, sets out the steps that employers are expected to take to discharge the duty.

It is important to note that the Guidance is just that – it does not have the status of a "Statutory Code". This means that Employment Tribunals are not obliged to take it into account in relevant cases. That said, it may still be used as evidence in legal proceedings. For that reason, employers would be wise to apply the recommendations in the Guidance as far as possible. Separately, the EHRC has said it intends to update its existing Employment Statutory Code of Practice "in due course" to reflect the new duty.

When will a preventative step be “reasonable”?

The Guidance explains that employers are required to take reasonable steps and what is reasonable will vary from employer to employer and will depend on factors including, but not limited to, the following things:

- the employer’s size;
- the sector it operates in;
- the working environment;
- particular risks present in the workplace; and
- the likelihood of workers coming into contact with third parties, and the types of third parties that they might come into contact with.

Taking these factors into account, an employer must consider

the risks of sexual harassment arising in the course of employment and the different steps that it could take to prevent it from happening. It must then assess which of those steps would be reasonable for it to take and implement them. When making this assessment, the time, cost, potential disruption and likely effectiveness of the proposed steps are all relevant considerations. However, it is important to remember that it may still be reasonable to take a step even if might *not* be effective in preventing the harassment.

What kinds of steps should employers consider taking in order to discharge the duty?

The Guidance recommends that employers should take the following types of preventative steps:

- **Have a good suite of policies in place.** Employers should have separate policies for sexual harassment and other forms of harassment (or have one clearly delineated policy). Such policies should also cohere with other relevant policies such as disciplinary, social media and health and safety policies.

- **Raise awareness of the anti-harassment policies amongst the workforce and third parties.** 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. Third parties should be alerted to the employer's expectations around the treatment of staff and the consequences of any harassment (e.g. in any contractual terms with the third party, or by way of a sign visible in the workplace).

- **Review the anti-harassment policies on a regular basis.** 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. Policies should also be reviewed after any significant incident of sexual harassment occurs.

- **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 harassment training to staff.** As an important EAT decision highlighted, an employer will not have taken reasonable steps if the training it provides to staff does not pass muster. This training should cover both prohibited conduct and encourage staff to engage in respectful and safe behaviours at work. Such training should also be tailored to the sector and audience, with more

comprehensive training provided to those in leadership and HR roles.

- **Assess the risk of sexual harassment.** Employers must interrogate the risk of sexual harassment in their organisation and the steps that could be taken to eliminate or minimise such risks. Common risk factors include: job insecurity, lone working, the presence of alcohol, customer-facing duties, gender imbalanced workforces and workers being placed on secondment.

- **Take steps to address power imbalances.** Harassment often takes place and goes unreported where there are power imbalances in the workplace. For example, between senior and junior workers, where workers with particular protected characteristics are in a minority in the workplace or where workers are in insecure employment. Employers should consider what actions they can take to reduce such power imbalances.

- **Deal with harassment complaints effectively.** This includes taking appropriate and consistent disciplinary action against the perpetrators of harassment. Those who engage in unlawful conduct should not be protected, rewarded or promoted, regardless of their importance to the organisation. Where the perpetrator is a third party, in some cases this may mean ending the relationship with them.

What other steps could employers consider taking?

There are, of course, many other steps that employers could consider taking to help discharge the new duty. Australia has had a similar duty to prevent in place since 2022 and the Australian Human Rights Commission has issued extensive guidelines on the steps needed to discharge that duty. Some of the most interesting suggestions are set out below.

- Require senior leaders to be involved in the development and oversight of a compliance plan, including regular reviews of whether the chosen steps have been effective.

- Require senior leaders to lead on workplace communications about the duty, to act as role models and to be responsible and accountable for compliance with the duty (with consequences for failure built into their employment contracts and remuneration packages).

- Consult with staff to obtain their views on where the risks lie and what measures would be effective to prevent sexual harassment.

- Encourage staff to call out both positive and unacceptable behaviour and recognise those who do so, for example, in appraisal and promotion processes.

- Make support options available for staff. This can include both internal support options (e.g. a named member of HR or a mental health champion) and external support options (e.g. an Employee Assistance Programme or free advice line).

- Have multiple reporting pathways (e.g. online, in person, anonymously, externally) and ensuring that these are communicated to staff in a variety of ways.

What are the consequences of breaching the duty?

Enforcement action by the EHRC

Where an employer fails to comply with the duty (or there is a suspicion that this is the case), the EHRC will be able to take enforcement action against them. This includes powers to:

- investigate the employer;

- issue an “unlawful act notice” which confirms that the employer has breached the duty and requires it to prepare an action plan setting out how it will remedy the breach and prevent future breaches;

- enter into a legally binding agreement with the employer to prevent future unlawful acts; and/or

- ask the court for an injunction to restrain an unlawful act.

The EHRC’s enforcement action is in the public domain, with details of their current and past investigations held on their website. This raises an important point for employers to note when it comes to settling claims of sexual harassment. Employers are not allowed to use settlement agreements to gag workers from blowing the whistle about various forms of malpractice. The EHRC is a “prescribed body” for whistleblowing about breaches of equality law, which means that workers are entitled to make whistleblowing disclosures to them about such breaches. Therefore, even after a settlement agreement has been signed, a worker will remain entitled to blow the whistle to the EHRC about a breach of the duty which, in turn, could lead to enforcement action attracting negative publicity.

Uplift to compensation

Where an individual brings a claim against their employer and the Employment Tribunal finds that they were subjected to sexual harassment it 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, it will not have jurisdiction to rule on whether an employer has breached the duty to prevent. In this situation, the employer's duty may only be enforced by the EHRC as discussed above.

Next steps for employers?

Employers wishing to respond to the EHRC's consultation can do so here before 6 August 2024. The final Guidance should be published in good time before the duty comes into force on 26 October 2024. In the meantime, employers should consider how to address the risk of sexual harassment of staff and assess which steps would be reasonable for it to take. A good starting point – and one almost all employers will need to take – would be to review and update internal policies and refresh training for all staff.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please

contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

EHRC – Consultation on changes to the Technical Guidance on Sexual Harassment and Harassment at Work (9 July 2024)

EHRC – Technical Guidance on Sexual Harassment and Harassment at Work (January 2020)

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.

BDBF is a leading employment law firm based at Bank in the City of London. 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.

Sexual harassment at work: What employers need to know? – Lunchtime Webinar – Tuesday, 25 April 2023

In this 50-minute webinar, BDBF's Managing Associate Emily Plosker and Associate Rebecca Rubin examine the legal framework and consider the steps employers need to take when faced with allegations of sexual harassment at work. This webinar was originally delivered on 25 April 2023 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:

Please contact Emily Plosker (EmilyPlosker@bdbf.co.uk), Rebecca Rubin (RebeccaRubin@bdbf.co.uk) or your usual BDBF contact, for further advice.