

#TimesUp – Preventing harassment in the workplace

Employers need to be aware of their obligations to protect their employees from harassment, and the consequences of failing to do so.

On 22nd June 1969, at the age of 47, Judy Garland died after taking a large overdose of prescription drugs in her hotel room in London. Her story was one of constant threats and sexual harassment from senior figures within the major film studios starting from the age of sixteen, as a result of which she turned to drugs and alcohol.

Following the revelations thousands of people have shared their experiences of sexual harassment as part of the #MeToo movement, dominating the headlines following the 2018 Golden Globe awards. The #TimesUP campaign has raised over \$19million to provide legal assistance to victims of sexual harassment in US workplaces. Such campaigns are likely to lead to more allegations of harassment, with victims feeling empowered to come forward. With this in mind, employers need to be aware of their obligations to protect their employees from harassment, and the consequences of failing to do so.

What are the legal obligations for employers regarding harassment?

In UK employment law the main protection from harassment is found in the Equality Act 2010. This prohibits any individual from harassing another in relation to a protected characteristic (age, gender, race, religion, sexual orientation, disability, gender reassignment or pregnancy and maternity). And employers are obliged to ensure that none of their employees, prospective employees, customers, or suppliers are subjected to harassment. Employers also need to be aware that they can be held liable for acts of harassment committed by their employees and may be required to pay victims uncapped compensation. Even if such behaviour does not give rise to legal claims, the consequences of harassment can be incredibly damaging for businesses, leading to reduced productivity, high levels of absenteeism and staff turnover rates; not to mention severe reputational damage.

Under the Equality Act “a person (A) harasses another (B), if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

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‘Locker-room Banter’ can seriously hurt employers

If an employee commits an offence, the employer may be held liable, even if that employee states that they did not ‘intend’ the action – this depends on the impact of the conduct on the victim. As such, alleged harassers cannot rely on excuses such as ‘it was a joke’ or ‘I didn’t mean anything by it’ to escape liability, and much of the so-called ‘locker room banter’ that has received widespread press coverage over the past year could also constitute harassment.

To determine whether an offence was committed, the Tribunal will assess a number of factors, including the nature of the conduct, the personal circumstances of the claimant, the culture of the organisation and the identity and status of the alleged harasser, to determine if what happened amounted to harassment. It is not therefore possible for employers to rely on a list of what does or does not amount to harassment. It should be noted that a Tribunal will generally not award compensation to employees who are deemed 'hypersensitive'.

A potential danger for employers is that they are often held liable for acts of harassment committed by their employees *'in the course of employment'*. Determining whether an act was committed in the course of employment can be problematic as legal liability is not confined to the office. For example, it may include work-related social events such as Christmas parties and leaving drinks.

In addition, it is not sufficient for an employer to avoid liability on the basis that such conduct is prohibited under a workplace policy, as it must demonstrate that it took *'all reasonable steps'* to prevent the alleged harasser from engaging in conduct amounting to harassment in order to have a defence. For example, permitting a 'boys club' atmosphere in the office could lead to liability for sexual harassment if women find the environment to be *'intimidating, hostile, degrading, humiliating or offensive'*.

How employers should deal with allegations of harassment

- **Creating a no tolerance culture** - It is important that employers create a culture in which harassment in any form is deemed unacceptable and will not be tolerated by any member of staff. Ideally, this would mean that there are no acts of harassment at all. If, however, such incidents do occur then employees need to be fully aware how to make a report and have the confidence that it will be taken very seriously and dealt with sensitively. Having clear and accessible anti-bullying and harassment and disciplinary policies is a good first step, however they are practically worthless unless employees trust that they will be followed, regardless of the identity of the alleged harasser. This requires a visible and trustworthy HR department and/or another nominated individual with the authority to commence appropriate action following a report of harassment.
- **Consider appointing an external investigator to ensure objectivity** - In many cases it will be immediately obvious that harassment has occurred, but in others it will require an investigation. In such situations, the investigator should take care not to substitute their own view for that of the victim, or let their relationship with the alleged harasser cloud their judgment. Just because the alleged harasser would not treat the investigator in a particular way does not necessarily mean that he/she did not harass the person making the complaint. Similarly, the same conduct can amount to harassment if directed towards one employee but not if directed towards another, depending on their personal circumstances.

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Employers should, therefore, consider appointing an external investigator such as a HR consultant or a law firm who will be able to carry out the investigation on an 'arms length' basis, free of unconscious bias. In cases where oral testimony is important to determine whether harassment has occurred, it could be that other employees will feel more comfortable speaking to an external investigator than another employee, leading to a fuller account of events. Further, as has been in the Hollywood revelations, one report of harassment can empower other victims to come forwards, greatly expanding the scope of the investigation beyond the capacity of an internal HR department. A truly independent investigation conducted by an external third party will also place the employer in a stronger position to defend itself from any allegations of unfairness from the alleged harasser should he/she be subjected to disciplinary action or dismissal.

- **Avoid detrimental effects at all costs** - Employers need to be aware that the law preventing harassment protects not only the victims themselves but anyone else who takes action in relation to harassment and

subsequently suffers a detriment. For example, this would include employees who give evidence in support of a colleague's allegations, and managers who take action to discipline or dismiss employees found guilty of harassment. Subjecting any employee to a detriment if they take action under the Equality Act, may amount to unlawful victimisation, giving rise to a further claim for compensation. And furthermore, failing to investigate allegations appropriately or to deal with a grievance in a timely manner can amount to victimisation, depending on the circumstances.

- **Remember that termination is not a prerequisite for compensation** - Although employees should exhaust an employer's internal processes before issuing legal proceedings, their employment does not need to have terminated for them to be eligible for compensation. This could be in the form of an injury to feelings award, calculated based on the effect that the conduct has on the individual. Employees have three months from the date of the last act of harassment to start the Tribunal process, so it is important for employers to diarise these dates.

Our top tips for employers to prevent and manage allegations of harassment

Given the potentially serious consequences of getting it wrong, here are some top tips for employers to prevent harassment and deal with allegations:

- Have a clear, written, anti-bullying and harassment policy, and provide regular training to all employees on its contents and the types of behaviour that are not acceptable;
- Ensure that the disciplinary procedure makes it clear that harassing a colleague will be a disciplinary offence that may, depending on the circumstances, result in dismissal;
- Implement a reporting structure so that employees who feel that they are being harassed can report it in confidence and without fear of retribution;
- Monitor the workforce, including the culture and atmosphere in the office and levels of absenteeism (as employees who are being harassed often have higher levels of sick leave) and take swift action if harassment is found to be taking place, even if the relevant employee does not make a complaint;
- Investigate all allegations of harassment quickly and impartially and consider instructing an external investigator to ensure it is truly independent;
- Follow up on any subsequent allegations that arise during the investigation, either from the original complainant or their colleagues, ensuring that those are investigated thoroughly;
- During the investigation, give the alleged harasser the opportunity to defend themselves against the allegations and, if disciplinary action is deemed appropriate ensure that the process complies with the disciplinary policy;
- If the allegations of harassment are proven discuss any follow actions with the victim prior to implementing them to ensure that they are appropriate, especially if the perpetrator will remain within the organisation; and
- If the decision is to dismiss the perpetrator, ensure that the reason for the dismissal is clear and that it is done in accordance with the terms of his/her employment contract.

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