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Sexual harassment - changes ahead?

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Following #MeToo, a consultation was launched by the Government in July 2019 on Sexual Harassment in the Workplace, considering a number of potential areas for reform. The Government has now published its response to this consultation, indicating that a number of changes will be introduced relating to sexual harassment in the workplace "when parliamentary time allows".

A pro-active approach

One of the areas consulted upon was whether a new duty should be placed on employers to take proactive steps to prevent harassment in the workplace. Although employers are already liable for any harassment carried out by their employees at work (unless they have taken all reasonable steps to prevent it), sexual harassment is still widespread. A proactive duty was therefore proposed which would oblige employers to take more steps to prevent harassment from happening in the first place.

The consultation included consideration of how such a duty would operate in practice – including who should be able to enforce the duty (an individual, the EHRC or both), and whether an act of harassment would be required before a claim could be brought, or whether a challenge could be brought on the basis of a breach of the duty alone.

The Government's response confirms that it intends to go ahead with the introduction of a new duty obliging employers to take all reasonable steps to prevent harassment. However, the response states that an incident of harassment will still need to have taken place before a claim can be brought by an individual. This new duty would therefore seem to entirely stand or fall with the primary harassment claim – unless it will be possible for a tribunal to find that there was no harassment on the facts of the claim, but that the employer had nevertheless not taken steps to prevent harassment more generally.

No detail has been provided at this stage about the "compensation model" – and in particular whether this will be a fixed "penalty" that will apply nor how it will fit with the current method for calculating compensation in harassment claims.

The extent of EHRC's involvement is also unclear at this stage, with the response indicating that discussions will be held on this point. However, a new statutory code of practice is to be introduced which will supplement the technical guidance introduced in January 2020.

Third-party harassment

When the Equality Act 2010 (the Act) was introduced, it contained provisions in relation to third-party harassment. These provisions meant that employers could be held liable if employees were harassed by third parties during their employment, where harassment had taken place on at least two previous occasions that the employer knew (or ought reasonably to have known) about (the "three strikes" rule) and where the employer had failed to take all reasonably practicable steps to prevent the harassment.

These provisions were repealed in 2013; the consultation states that the reason for the repeal was that they were believed to be "confusing and unnecessary". The consultation also commented on there being criticism of the "three strikes" rule. However, the 2012 Government response to the proposed repeal of these provisions paints a slightly different picture. In that response, it was confirmed that 71% of respondents were against the repeal; only 20% were in favour, although the response points out that all business representative organisations supported repeal. Whilst there was criticism of the "three strikes" rule, the criticism was, there should be greater protection

for employees, with some respondents seeking a strengthening of the Act; the Government's response was "But imposing additional liabilities on employers would go against our commitments to support growth and economic recovery."

The Government is now indicating that new provisions will be introduced to counter third-party harassment. It remains unclear at this stage whether a previous incident of harassment will be required before the provisions will bite (although no respondents were in favour of reinstating the "three strikes" rule). The proposals would also allow employers to rely on having taken all reasonable steps as a defence to such claims.

Interns and volunteers

The consultation considered whether interns and volunteers should be covered by the sexual harassment provisions of the Act. Whilst 80% of respondents were in agreement with this approach, the Government's response is a little unclear as to whether any further steps will be taken here.

Regarding interns, the Government's approach appears to assume that interns would be protected either as employees or as workers and so no further change is required. For volunteers, the Government sought to distinguish between those volunteering in a formal capacity and those volunteering in a more ad hoc way, for example for a one-off event. However, whilst the response indicates that extending protection from harassment for formal volunteers may seem "proportionate", the response does not go on to indicate that such protections will be introduced and instead may simply form part of any wider future review of the Act. In the meantime, employers are encouraged to have anti-harassment policies which cover all "staff" as a matter of good practice.

Time limits

The consultation looked at whether the current three-month time limit (subject to any applicable ACAS-conciliation extension) for bringing claims of sexual harassment was too short. 59% of respondents thought that it was.

The Government's response confirms that it will be "looking closely" at this issue. However, this doesn't seem to be something that will be happening any time soon, given the pressures currently being faced by the employment tribunal service. The Government has indicated that "restoring its existing levels of service" need to be prioritised before any "additional loading" is added to employment tribunals, particularly as any increase in time limits would be highly likely to be applied to all claims under the Act, not just sexual harassment claims. Should an increase in time limits be introduced in the future, the response indicates that a 6-month limit, rather than a 12-month limit, would be favoured.

Additional considerations

Lastly, the response appears to rule out a number of other suggested changes – there is no current Government appetite for "naming and shaming" (in the context of sexual harassment complaints at least), introducing a new body to which employees could raise anonymous complaints, or reinstating the ability of Employment Tribunals to make wider recommendations to employers.

Based on the response, it appears that some changes are going ahead to attempt to address sexual harassment in the workplace. Quite when parliamentary time will allow this, or what the fine details will be, remains to be seen.

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