Browne Jacobson

Watering down workplace harassment proposals

21 July 2023 Sarah Hooton

In July 2021, the Government published its response to a consultation on sexual harassment in the workplace. One of the significant changes proposed was the reintroduction of provisions allowing for employers to be held liable for the harassment of their employees by third parties. Previous third-party-harassment provisions were repealed in 2013.

A private members bill – the Worker Protection (Amendment of Equality Act 2010) Bill - was subsequently introduced in 2022, with the Government confirming it was in support of the same. In the initial draft, the third-party provisions were fairly simple – an employer could be liable where a third party harassed one its employees in the course of their employment and the employer had failed to take all reasonable steps to prevent the third party from harassing the employee. Caveats were then proposed as part of the legislative process to exclude certain conversations expressing opinions on political, moral, religious or social matters where either the employee was not a participant to the conversation or where the speech was not aimed at the employee. These amendments were made due to concerns about the impact that the new provisions could have on free speech.

Whilst the Bill has not yet quite completed its legislative journey, the House of Lords has removed the third-party provisions in their entirety. Reference was made to concerns that the Bill would jeopardise free speech and increase the regulatory burden on employers.

Although the Bill still contains provisions referring to a new duty to prevent sexual harassment (involving unwanted conduct of a sexual nature), this duty has also been adjusted by the House of Lords. Instead of employers having to take all reasonable steps to prevent sexual harassment of employees in the course of their employment, the amendment changes this to “reasonable steps”. Employees will not be able to bring a freestanding claim to assert that employers have breached this duty - this would only be enforceable by the Commission for Equality and Human Rights. Instead, where an employment tribunal has (a) found that there has been harassment involving unwanted conduct of a sexual nature and (b) awarded compensation, the tribunal must then consider whether there has been a breach of the duty to prevent sexual harassment. If such a breach is upheld, compensation can be uplifted by no more than 25% of the original amount awarded.

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