# Sexual Harassment in the Workplace

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**Alyssa Milano's tweet in October 2017 responding to the Harvey Weinstein allegations galvanised the #MeToo movement and gave rise to a greater confidence on the part of victims of sexual abuse and harassment to report impropriety. In the past three years, a number of high profile cases have come to light and various bodies including the Equality and Human Rights Commission (EHRC) and the Women and Equalities Select Committee (WESC) have conducted research on sexual harassment in the workplace, while the Government is currently consulting on legislative reform.**

Despite the increased focus and media attention, sexual harassment remains prevalent in the workplace. A survey in the Times in August 2020 found that 20% of respondents in the legal profession had suffered sexual harassment or bullying at work, while 67% of affected respondents to the ComRes survey for the BBC stated that they did not report sexual harassment to their employer.

In the City, two recent high profile cases in the legal industry show that no organisation is immune from the issue and employers need to be aware that a lack of complaints is not necessarily determinative as to whether there are inherent problems. Employers are responding by tightening up in house rules and policies. In September, Blackrock announced it was cracking down on clandestine office romances by requiring staff to disclose office relationships in a bid to counter harassment and related issues, having sacked two male executives in December for failing to disclose relationships with two subordinates. Other employers are taking similar measures.

This article considers what constitutes sexual harassment, the preventative steps that employers can take, how they should respond to an allegation and the additional regulatory considerations.

## What constitutes sexual harassment?

The Equality Act 2010 defines sexual harassment as *"unwanted conduct of a sexual nature which has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person."* Conduct of a sexual nature includes unwelcome sexual advances, physical contact or touching, forms of sexual assault, sexual jokes, sexual posts or contact on social media or sending sexually explicit emails or texts. Case examples of sexual harassment include being required to wear short skirts or a low-cut top when going to see a customer or continual unwelcome advances of a sexual nature. A single incident is enough to constitute harassment (in one case a remark about a female employee's body was enough), the fact that an employee has put up with conduct for years does not mean that it is not unwanted and nor does the fact that the employee has

initiated “banter” as a coping strategy. Sexual conduct that has been welcome in the past can also become unwanted

Men can be victims of sexual harassment as well as women, although a slightly surprising recent decision from the Employment Appeal Tribunal found that a male employee whose shoulders were massaged by his female manager had not been sexually harassed as the conduct was not sexual in nature but *“misguided encouragement”* and that the shoulder was a *“neutral”* body part. It seems unlikely that this would have been the result if the victim had been a woman in the same circumstances. The victim can be the same or the opposite sex as the perpetrator and the perpetrator does not have to be motivated by sexual desire for the victim.

The employee must show that the unwanted conduct has the *purpose* or *effect* of violating their dignity or creating a hostile environment. It does not matter that there is no intention to upset the employee, if the effect of the conduct creates a hostile or humiliating environment. For example, where male members of staff download pornographic images onto their computers for their amusement; if this upsets a female member of staff then this has the effect of creating a degrading or humiliating environment for her even though it was not directed at her. A tribunal will take into account the perception of the worker (a subjective test), the other circumstances of the case (including the environment in which the conduct takes place) and whether it is reasonable for the conduct to have that effect (an objective test). If the worker is particularly sensitive and the tribunal considers another person subjected to the same conduct would not have been offended, it is unlikely to find there has been sexual harassment.

## Repercussions of a failure to tackle the issue

The most obvious consequence is a claim by an employee for sexual harassment brought in the employment tribunal against the perpetrator as well as the employer. The claim should be made within three months of the act complained of but there is a discretion for tribunals to extend time if it is “just and equitable”. If an employee is successful, the main remedy is compensation calculated on the employee’s loss with no upper limit on the amount depending on whether they have lost their job and is likely to include an amount for injury to feelings with the level dependent on the seriousness and nature of the harassment suffered.

An employer who does nothing could be liable for significant sums of compensation if that failure results in a successful claim. There is a risk of serious reputational damage if the media report the details of a claim and complaints can also result in high profile departures, a reduction in productivity, issues with recruitment and retention and can seriously harm client relations.

## Regulatory issues

Where professionals are involved, there is also scope for the professional regulator to bring disciplinary proceedings against the individual and, in many cases, the employer too. In recent years, regulators across the professions have stepped up the rhetoric and action against these sort of conduct issues. The Financial Conduct Authority's Megan Butter's letter to the Chair of the WESC in 2018 made it clear that this sort of conduct goes to culture and the "fit and proper test" when assessing bankers' behaviour and regulatory standing. While the Law Society Gazette recently reported that the SRA currently has double the number of unresolved complaints of misconduct concerning sexual harassment waiting to be investigated and determined, compared to 2018.

Two recent high profile cases against solicitors are particularly interesting, not only because of the nature of the sexual misconduct, but also because in both cases, the firms they worked for were large City firms. The allegations related to events which had occurred several years earlier; the cases involved senior lawyers acting inappropriately with junior colleagues, there has been a great deal of press interest, and the internal investigations carried out by each firm have come under intense scrutiny. In one of the cases, this scrutiny led to the Solicitors Regulation Authority (the SRA) bringing disciplinary proceedings not only against the individual solicitor concerned in the misconduct, but in addition, the solicitor who headed up the firm's internal investigation; the firm's HR Director, and the firm itself.

**Ryan Beckwith**

The first case involved a solicitor called Ryan Beckwith, who was a partner at Freshfields Bruckhaus Deringer LLP, and related to events which had occurred three years earlier after a night out with colleagues. At the end of the evening Beckwith, who was married, went back to a junior lawyer's flat where there was a sexual encounter. The junior lawyer subsequently complained to Freshfields and the SRA, and disciplinary proceedings were brought against Beckwith by the SRA on the basis that his conduct was "*an abuse of his position of seniority and/or inappropriate*". Importantly, the SRA did not allege that there had been an absence of consent to the sexual activity. The Solicitors Disciplinary Tribunal, which heard the proceedings in 2019, concluded that Beckwith was guilty of misconduct as he knew that the junior lawyer's decision-making and judgment were impaired as a result of the quantity of alcohol she had consumed and ruled that his conduct had been inappropriate and that he lacked integrity. He was ordered to pay a fine of £35,000 and £200,000 in legal costs to the SRA. Beckwith has since submitted an appeal against this decision due to be heard later this month

**Gary Senior**

The second involved a senior partner called Gary Senior at the firm Baker McKenzie who was alleged to have behaved in an inappropriate manner towards a junior lawyer by being alone with her in a hotel room, and trying to kiss her, despite the junior lawyer making it clear that this was unwanted. It was also alleged that Senior had attempted to influence the resulting internal investigation carried out by Baker McKenzie; prevented information regarding the complaint being shared within the firm, and failed to report the matter to the SRA.

The allegations against the firm were that it allowed Senior to influence, or try to influence the investigation; it failed to investigate effectively or independently; failed to share information regarding the matter appropriately within the firm, and failed to report the matter to the SRA. Interestingly, the SRA also brought proceedings against the HR Director. Although not a solicitor, where someone has been involved in misconduct in a legal practice, the SDT has the power to require any law firm seeking to employ that person in future to obtain permission.

In its decision in June 2020, the tribunal found that Senior had committed a "*severe breach of trust*" by "*abusing his position*". He also behaved improperly in emailing those involved in the investigation "*in a way which was "repeated and deliberate*"". The tribunal ordered Senior to pay a fine of £55,000 and a sum of £48,000 towards the SRA's legal costs. No findings of misconduct were made against the firm, the partner who led the internal investigation, or the HR Director. However, the Tribunal did find that there should have been "*a clearer and more independent process for dealing with issues such as this*". The tribunal dismissed the applications from the firm and two individuals that the legal costs they had incurred should be paid by the SRA.

## What should an employer do to prevent and respond to allegations of sexual harassment?

An employer is liable for any acts of sexual harassment carried out by an employee during the course of their employment even where this takes place without its knowledge or approval. However, it will have a defence if it can show it took "all reasonable steps" to prevent this from happening.

Earlier this year, the EHRC published technical guidance on sexual harassment following consultation with a range of groups to help understand the extent and impact of harassment in the workplace and best practice for effective prevention and it this is expected to become a statutory code of practice.

## Six key steps for employers

### 1. Risk assessments

Employers should proactively seek to be aware of what is happening in their organisation by investigating the extent of the potential problem rather than waiting for an issue to be reported. This should involve identifying areas of risk where harassment is more likely to occur such as power imbalances, job insecurity, lone working and lack of diversity in the workforce.

### 2. Culture of zero-tolerance

It is important to create a workplace culture of zero-tolerance to harassment and encourage employees to report inappropriate behaviour e.g. through an online telephone reporting system and give workers every opportunity to raise issues e.g. through anonymous surveys, exit interviews and informal one-to-ones.

### 3. Effective policies and procedures

Employers must ensure they have an effective and robust anti-harassment policy in place, which sets out clearly what conduct is unacceptable, the employer's zero-tolerance approach, how to report inappropriate conduct, the process that will be followed and the support available for victims and those who report it. Victims should have confidence that their allegations will be taken seriously and investigated promptly on a confidential and impartial basis. A policy should set out who to complain to if the perpetrator is the employee's line manager. It is also important the policy is followed through, so that where a complaint is upheld, the employer takes disciplinary action against the perpetrator and action is taken to protect those who report harassment against victimisation.

### 4. Regular training

Employers should also provide anti-harassment training for all employees including senior management so that they know what to do if they experience harassment (whether as a witness or a victim) and specific training for managers on how to handle complaints in line with anti-harassment policies. Such training should be carried out on an ongoing basis and evaluated.

### 5. Monitoring

This involves monitoring how complaints are dealt with to ensure they are properly investigated, that repeat offenders are dealt with, victims are protected and cultural problems are identified and resolved.

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### 6. Internal investigations

When investigating allegations of sexual misconduct, the following points should be kept in mind.

- It is imperative that a proper, rigorous and fair investigation is conducted.
- The investigation must be independent and impartial, regardless of the importance of the subject of the investigation and the political dynamics at play. Details of the ongoing investigation should not be shared.
- An organisation should consider bringing in internal experts in order to carry this out in order to maintain impartiality. Where there is a skill set deficit, organisations may wish to look externally to bring greater independence to any investigation.
- Those who are carrying out the investigation should be mindful of the content of internal emails.
- Consideration should be given to formulating a PR strategy at an early stage because allegations of sexual misconduct invariably attract press interest.
- Legal advice should also be sought at an early stage in cases such as this, particularly where there is a risk of professional disciplinary or other legal proceedings (including criminal proceedings).

## The use of confidentiality agreements - non-disclosure agreements

Most claims of sexual harassment are usually settled rather than going to an employment tribunal. The potentially unethical use of NDAs to silence victims of sexual harassment as part of a settlement agreement has been highlighted as a result of recent high profile cases.

Employers can still use these agreements and they can also benefit the employee as well as the employer. However, an NDA will be void if it seeks to prevent an individual making allegations of sexual harassment if it amounts to a protected disclosure, if it seeks to prevent disclosure of criminal activity or a report to the regulator. The EHRC has produced non-statutory guidance on the use of confidentiality agreements in discrimination cases. Solicitors advising on NDAs must take into account the SRA Warning Notice, SRA guidance and the Law Society Practice Note.

The Government has consulted on legislation to tackle the misuse of NDAs in cases of workplace harassment but this is yet to be implemented.

## Conclusion

Sexual harassment in the workplace is an issue that employers must address not least because it is damaging for the individual, creates a toxic workplace

environment and can result in significant reputational damage. There is no quick fix but a zero-tolerance attitude combined with effective policies, procedures and training should help to effect cultural shift for the benefit of all.

Charles Russell Speechlys has devised a unique service that combines legal and non-legal support to organisations to prevent and deal with issues that may have already arisen. Our legal support includes excellence in employment law, reputation management and regulatory legal matters and we have teamed up with Bell Yard Communications (a leading public relations specialist) and HelloSelf (one of the preeminent clinical therapists to support those going through the inevitable trauma and stress of an investigation and further proceedings). Our service, which is known as R4 (Review, Report, Resolve, Respect), aims to prevent these issues by education and training but also to deal with issues when things may sadly go wrong.

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