

# Duty to Prevent Sexual Harassment

Schools' Human Resources Workshop

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What will be covered in this workshop?

1. **What is harassment**
2. **Sexual harassment and the new law**
3. **Preventing harassment**

# What is harassment?

## s. 26 of Equality Act 2010

- Legal definition of harassment
- It is more than bullying
- Bullying can amount to harassment
- Harassment is unlawful if related to a protected characteristic

## Relevant protected characteristics are:

- Age
- Disability
- Gender reassignment
- Race
- Religion or belief
- Sexual orientation
- Sex

What protected characteristics are missing?

# Who is protected?

- **Applicants**
- **Ex-employees**
- **Employees**
- **Workers**

Employers need to be consistent in how they manage any complaint.

# Analysing the legal definition of harassment

# 1. Unwanted conduct

- **EHRC guidance – unwelcome or uninvited**
- **Employee doesn't need to object to the conduct for it to be viewed as unwanted**
- **What one employee may tolerate as acceptable behaviour, another person may find offensive or degrading**
- **In determining whether something is considered to be harassment, the motive of the harasser is irrelevant**

## EHRC guidance – includes various examples of unwanted conduct:

- **spoken words**
- **written words**
- **banter**
- **posts or contact on social media**
- **imagery**
- **graffiti**
- **acts affecting a person's surroundings**
- **aggression**
- **physical behaviour towards a person or their property**
- **physical gestures**
- **facial expressions**
- **mimicry**
- **jokes or pranks**

# 1. Unwanted conduct (contd.)

- In some cases, it will be obvious that conduct is unwanted because it would plainly violate a person's dignity.
- At the opposite end of the spectrum are cases in which many people would not like the behaviour, but the actions of the particular worker concerned make it clear that in their case, the conduct was not unwanted.
- There may be circumstances in which a course of conduct is not unwanted in the earlier stages, but at some point 'oversteps the mark' and becomes unwanted.

# Workplace Banter

## How do you distinguish between daily banter and harassment?

- Oxford dictionary definition: *the playful and friendly exchange of teasing remarks; "there was much good-natured banter"*
- Banter can sometimes amount to harassment.

### **Munchkins Restaurant Ltd and anor v Karmazyn and ors**

This case is the authority for the fact that where the claimant participated in sexual banter in the workplace, this does not preclude he or she suffered sexual harassment.

In this case, the claimants participated in the banter as a coping strategy.

## 2. Unwanted conduct related to a relevant protected characteristic

- **s.26 refers to “a” relevant protected characteristic. It does not state the claimant’s relevant protected characteristic.**
- **This means the employee or ex-employee or applicant does not have to have the protected characteristic themselves in order to win the claim of harassment. The conduct needs to be related to a protected characteristic, and not to the claimant’s protected characteristic.**

### **English v Thomas Sanderson Blinds [2008] EWCA Civ 1421 CA**

This case was whether because of homophobic banter someone could be legally harassed even when they don't have the protected characteristic.

The claimant was not gay and the harassers didn't think he had the protected characteristic.

This is not a case of perceived discrimination.

The claimant was successful in his claim of harassment on grounds of sexual orientation because what was being said about him was related to a protected characteristic.

3. The conduct has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

### Purpose

- **Very difficult to prove this**
- **Have to prove intent**

### Effect

- **Focus on impact on victim, rather than harasser's motive**
- **Take into account:**
  - **Victim's perception**
  - **Other circumstances**
  - **Whether it is reasonable for the conduct to have that effect**

### **Harper v Housing 21 ET/2408839/2012**

An Employment Tribunal held that vulgar and offensive comments about a worker's race (which were passed off as "banter" by the employer) constituted race-related harassment.

The manager said that her intentions were not malicious, however this was irrelevant. What mattered was that the comments had the effect of creating an offensive environment.

# Relevant circumstances

## **EHRC Code examples**

- **Health**
- **Mental capacity**
- **Cultural norms**
- **Environment**
- **Previous experiences**

## **Additionally:**

- **Is the harasser in a position of authority over the victim?**
- **The racial and cultural backgrounds of those involved**

# Relevant circumstances (contd)

## Leighton v Kahraman

### **The circumstances of the case.**

What might be acceptable behaviour in one context might constitute harassment in another.

For example, the Claimant, who was disabled, argued that placing hands and trying to push her electric wheelchair in the context of an argument could constitute harassment.

The judge agreed that the wheelchair is “integral to the individual” not something “others can take hold of” and an attempt to do so undermined the Claimant’s independence and dignity.

## 4. Is it reasonable for the conduct to have had the effect?

- Is the employee hypersensitive? If yes, then not likely to be harassment.

### **Heafield v Times Newspaper Ltd [2013] UKEAT/1305/12**

In this case, the respondent had engaged in “unwanted conduct but that this conduct did not have the purpose or effect of violating the claimant’s dignity or of creating an adverse environment for him.

# Sexual harassment - The new law from 26 October 2024

Worker Protection (Amendment  
of Equality Act 2010) Act 2023

# What is sexual harassment?

- **It is unwanted conduct of a sexual nature.**
- **An individual can experience unwanted conduct from someone of the same or a different sex.**
- **Sexual interaction that is invited, mutual or consensual is not sexual harassment because it is not unwanted. However sexual conduct that has been welcomed in the past can become unwanted.**
- **The conduct does not have to be directed at the victim for it to be harassment.**

# EHRC examples of what is conduct of a sexual nature

- **sexual comments or jokes**
- **displaying sexually graphic pictures, posters or photographs**
- **suggestive looks, staring or leering**
- **propositions and sexual advances**
- **making promises in return for sexual favours**
- **sexual gestures**
- **intrusive questions about a person's private or sex life or a person discussing their own sex life**
- **sexual posts or contact on social media**
- **spreading sexual rumours about a person**
- **sending sexually explicit emails or text messages**
- **unwelcome touching, hugging, massaging or kissing**

# Vicarious liability and third-party action

- An employer can be liable for harassment of colleague on colleague, manager on employee, irrespective of whether the harassment is done with the employer's knowledge or approval.
- The employer can be liable for actions whilst someone is at work as well as outside the workplace, in the course of their employment.
- E.g. work such events, such as Christmas parties organised by employers – this is seen as an extension of the workplace, even if held offsite.
- A worker cannot bring a stand-alone claim in the employment tribunal for third party harassment.
- However, EHRC guidance makes it clear that the preventative duty does extend to requiring employers to take reasonable steps to prevent sexual harassment of workers by third parties, such as clients and customers.

## Third-parties:

- Volunteers
- Students
- Parents
- Contractors
- Visitors

# Preventing Harassment

# General Duty to Prevent Harassment – ALL reasonable steps

1. The steps to prevent harassment must have taken place before the harassment occurred.

## **Canniffe v East Riding of Yorkshire Council [2000] IRLR 555 EAT**

In *Canniffe v East Riding of Yorkshire Council* [2000] IRLR 555, the EAT holds that the proper approach to the employer's statutory defence to vicarious liability for unlawful discrimination is:

- (1) to identify whether or not the employer took any steps at all to prevent the employee, for whom it is vicariously liable, from doing the act or acts complained of in the course of his or her employment; and,
- (2) having identified what steps, if any, the employer took, to consider whether or not there were any further steps, that it could have taken, which were reasonably practicable.

# General Duty to Prevent Harassment – ALL reasonable steps

- **Employment Tribunal will consider many factors, including but not limited to:**
  - Whether the employer had a comprehensive written equal opportunities policy and training was provided in relation to that;
  - Whether the employer had previously taken any disciplinary action where discrimination had occurred;
  - How effective the steps taken by the employer were likely to be at the time that they were taken; and
  - How effective those steps proved to be in practice.

## **Caspersz v Ministry of Defence EAT/0599/05**

This case is a good example of where the employer had satisfied the statutory defence of taking “such steps as were reasonably practicable” to prevent harassment occurring.

The MOD had a “Dignity at Work” policy in place. It took all reasonable steps to investigate the complaint as soon as it was aware of the allegations. Two MOD witnesses gave evidence to show how seriously the MOD took allegations of breach of its policy. The MOD’s policy, practice and actions all complied with the Code of Practice annexed to the EC Recommendation on the Protection of the Dignity of Women and Men at Work.

# Statutory Defence

## Statutory defence – take all reasonable steps

- **Having and implementing:**
  - an equal opportunities or an equality, diversity and inclusion policy
  - an anti-harassment and bullying policy
- **Regularly reviewing those policies**
- **Making all employees aware of the policies and their implications**
- **Providing adequate training to all staff**
- **Additional training for managers – in identifying and handling equal opportunities and harassment issues**
- **Considering and acting on initiatives put forward by employees and keeping evidence of this**

# New Duty to Prevent Sexual Harassment

## **New duty to prevent sexual harassment under s. 40A**

### **Refer to the EHRC Technical Guidance**

- (1) An employer (A) must take reasonable steps to prevent harassment of employees of (A) in the course of their employment.**
  - (2) “Sexual harassment” in subsection (1) means harassment of the kind described in section 26(2) (unwanted conduct of a sexual nature).**
- This does not say that it needs to be by other employees.**
  - This includes a duty to take reasonable steps by third parties, clients, suppliers, etc.**

Where the tribunal is satisfied that sexual harassment has occurred, the tribunal will consider whether the employer has taken reasonable steps

- **Employers must take reasonable steps to prevent sexual harassment of their workers in the course of employment. This is an objective test and will vary between different employers, as well as depending on the facts and circumstances of each situation.**
- **This takes into account the:**
  - **Nature of the working environment.**
  - **Time, cost and potential disruption of taking a particular step, weighted against the benefit it could achieve.**

# Risk Assessments

**Employers should anticipate the types of harassment.**

- 1. Consider the risks of sexual harassment in the workplace.**
- 2. Consider what steps it could take to reduce or remove that risk.**
- 3. Consider which of those steps it would be reasonable for it to take bearing in mind the time, cost and potential disruption caused by taking the step. Factors like the size of the employer and nature of the workplace are also relevant.**
- 4. Any reasonable steps identified should be implemented.**

# Complaints

- **How do you define bullying and harassment? Where is it found?**
- **How can staff make complaints?**
- **How will employers address complaints?**
- **Training and policies – how will you document staff have had access to these?**
- **Are staff clear about the sanctions if they are found to have committed an act of harassment?**

## **Governing Boards should be able to demonstrate:**

- They have a comprehensive written equal opportunities policy and training is provided in relation to that.
- All training offered to staff is reviewed on at least an annual basis and that this is current and up to date.
- The training is relevant to their school setting and is not generic or online that it is considered a tick box exercise.
- An evaluation of the training has taken place and staff understand their obligations.
- Where an incident of discrimination occurs, that they have taken appropriate action, including disciplinary action.
- Following an incident, review the actions to assess their effectiveness in practice.
- Following an incident, review and update the training as appropriate and deliver this and evaluate the impact of the training.
- Carry out staff surveys that will assess how employees feel about equalities in the workplace.
- Carry out case reviews to establish learning and review policies and training in place.

## Case Study

**Alex is a 24-year-old administrative assistant. She has been working at the school for several months. Her line manager, Miguel, is 45-years-old and works in the office as well.**

**When Alex first started work, she was asked to sit in the office and read the Employee Handbook. The handbook included a policy on bullying and harassment dated 2016. She was asked to sign a slip confirming she had read and understood it – as all employees did.**

**The school is having a lot of building work completed in the summer holidays and there are builders on site every day. Alex and Miguel are both working during this time. The builders have been making inappropriate comments to Alex and she has been responding by giving ‘as good as she gets’ – replying to their comments and seeming to ‘join in’. Miguel has seen Alex doing this and has started to make comments of a suggestive nature towards Alex himself.**

**The builders have an informal WhatsApp group with Miguel to arrange access to the school. This was not set up by the school. Miguel has posted some comments about Alex accompanied by a winking emoji.**

**In September, Alex has raised a grievance with the headteacher about Miguel’s behaviour. A senior leader heard the grievance and concluded that Miguel’s behaviour was not unwanted as she, herself, had joined in the behaviour with the builders and Miguel. The senior leader also concluded that the WhatsApp message was a personal message and not something that happened at work, so the school would not get involved.**

# Case Study

1. **What sort of harassment is Alex alleging here?**
2. **Do you think that Miguel's comments would be found to be 'unwanted conduct'?**
3. **Do you think that Miguel's comments had the purpose of harassing her?**
4. **Do you think that Miguel's comments had the effect of harassing her?**
5. **Was the senior leader right to conclude that the WhatsApp messages didn't take place at work so could not be 'harassment' for which the employer was responsible?**
6. **Do you think that the school could demonstrate that they had taken all reasonable steps?**

Any questions

