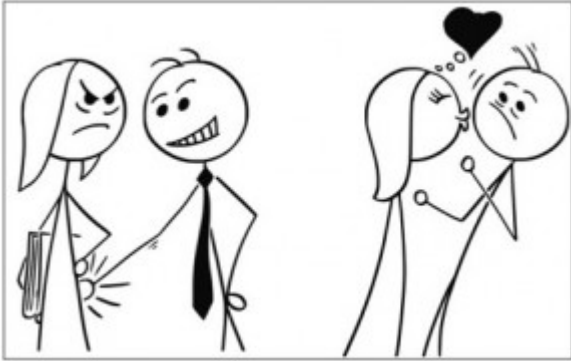


Employer's guide to tackling sexual harassment at work

Practical guidance for employers on how to tackle sexual harassment at work.



Following the groundswell of publicity across the media and social media regarding sexual harassment allegations and disciplinary offences, employers are well advised, morally of course and in terms of best practice, to review the most effective ways of tackling and putting a stop to such behaviour in the workplace.

This article will help you understand the risks, to employees as well as employers. We explain the law, how to deal with a complaint, how to protect your staff from sexual harassment, how to help employees feel comfortable reporting issues and how to put the business in the best position to defend a claim.

Employers can be vicariously liable for any acts of harassment. Employees too can have a personal liability. Both the employer and the individual accused of the harassing behaviour can be sued. You will see cases taken against both employer and the individual.

It is therefore really important for every business to deal correctly with any complaints of, or concerns about, sexual harassment. A possible defence is available to an employer if it can show it took all reasonable steps to prevent the harassment (see the section below on Liability and Reasonable Steps Defence).

What is sexual harassment?

General harassment occurs when person A harasses another person B, by engaging in unwanted conduct related to sex (or any of the other protected characteristic) which has the purpose or effect of:
violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Sexual harassment occurs when a person engages in unwanted conduct of a sexual nature that has the purpose or effect of
violating someones dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Less favourable treatment occurs when A or another person engages in unwanted conduct of a sexual nature or conduct that is related to gender reassignment or sex, that has the purpose or effect referred to above and because of B's rejection of, or submission to, the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(For example, Beth's line manager Adam ensures Beth is not put forward for promotion because she rebuffed his advances in the pub after the office away day).

It's important to remember that it is the effect of the behaviour on the recipient that counts - and not how it appears to the person doing the behaviour, or anyone else."

Sexual harassment: once is enough

A one-off act of harassment is sufficient, there does not need to be repeated behaviour or a pattern of behaviour. Be aware that you may receive a complaint about someone who does not work for the business (for example, a client, trainer, cleaner; third parties who visit the premises or are involved with the business and with your staff).

Don't ignore it!

Potentially unlimited compensation is available to victims of sexual harassment who take successful legal cases.

Employment Tribunals can make public declarations against businesses which would create embarrassing and damaging publicity and make the business less attractive to customers, clients and of course future staff. Working in a culture where sexual harassment, however subtly contrived, is present and seen as going unchecked or dismissed creates a prevailing mood of fear and futility that is ultimately damaging for staff and business alike.

Some examples of sexual harassment

- Propositioning and making sexual advances
- Unwelcome touching, hugging, massaging or kissing
- Sending sexually explicit emails and text messages
- Suggestive looks, staring or leering
- Criminal behaviour, including sexual assault, stalking, indecent exposure and offensive communications
- Watch for office banter also, sexual harassment couched as office banter can be quite subtle and closely related to culture of an organisation.

This is not an exhaustive list but gives you an idea of some of the types of behaviour that may appear in a complaint.

Dealing with complaints of sexual harassment

The Equalities and Human Rights Commission (EHRC) has published

Some of the suggestions are listed below, with our comments.

- Deal with any complaint in a fair and timely manner.
Early engagement is vital, as is your reassurance from the outset that those involved will be listened to and heard.
- Provide for quick and informal resolution of less serious complaints.
Don't always insist a complaint is put in writing if this means any delay in getting on with the investigation or getting to the nub of the issue quickly.
- Make sure it is clear to those involved that disciplinary action up to and including summary dismissal may be taken if a complaint of sexual harassment is upheld.
Ensure that harassment on the grounds of any protected characteristic is listed in the company disciplinary policy as one of the acts of potential gross misconduct.
- Suspend the alleged perpetrator during the investigation – depending on the seriousness of the complaint.
Explain to the alleged perpetrator that the suspension is a neutral act, necessary because the Employer is under a duty to investigate quickly the complaint and the suspension allows the necessary focus to take place, it protects the complainant and prevents interference in the investigation, which must be fair.
- Ensure the confidentiality of all involved, subject to any requirement to involve external agencies.
- Offer informal support to the complainant, including counselling in serious cases.
- Guarantee that the complainant will not be disadvantaged by making the complaint.
A common barrier to employees coming forward with a complaint is fear of losing their job if they speak up.
This could amount to victimisation and is illegal. Despite this, the fear may be very real, so giving reassurance that the complainant will suffer no disadvantage by speaking up is extremely important.
- Make adjustments to enable the complainant to participate in the disciplinary process without fear of victimisation. Allow a complainant to be accompanied to any investigatory meeting by a family member in order to provide support.
- Where an employer believes that a criminal offence may also have been committed, provide for the matter to be reported to the police and provide appropriate support to the complainant.

Acas recommends that those investigating such complaints have special training. The Acas [guidance](#) makes it clear that the process can also be distressing for the alleged perpetrator and so support should also be offered to them also, without impeding the fairness of the process. However, employers should not be seen to be favouring the alleged perpetrator, as this may give the appearance of bias and lack of impartiality in the investigation process. Read more about supporting those involved in a sexual harassment below.

Liability and Reasonable Steps Defence

As the employer, you want to be able to protect your staff from sexual harassment, and to show that you

took all reasonable steps to prevent such behaviour or reduce the risk of it as far as was possible.

To be protected by the Reasonable Steps Defence, employers must:

- ensure the business has appropriate policies and procedures to explain what inappropriate conduct is. Policies and procedures alone aren't enough, employers must also
- provide training so that staff understand what constitutes inappropriate conduct, the implications of breaches and that line managers know how to deal with complaints
- impose disciplinary sanctions for non-compliance.

Consider staff training and awareness which spells out what behaviour is appropriate and what is not. It is always best to assume this distinction is not obvious to all! Cultural differences for example may mean that examples of appropriate and inappropriate conduct need to be provided. Make training more than just an annual seminar, consider how, where, and how often, to keep the training firmly in mind and current for staff as time goes on. In support of training, some companies run "dignity at work" days or weeks. Set the tone from the top: involving the leadership and upper management in training and in embedding a culture of zero tolerance of sexual harassment will influence employee behaviour and help staff to feel more comfortable about reporting issues.

The Legal Partners regularly run training sessions and feedback tells us that these sessions are well received and appreciated. As well as helping employees be more aware of their own behaviour, and better equipped to detect incidents, it can help create an environment where disclosure can happen more easily.

Policies and procedures aren't enough. To be protected by the reasonable steps defence, Employers must provide training so that staff understand what behaviour is ok, and what behaviour is not.

You may also have to consider whether there is a knock on impact on other office cultures eg drinking in the office, perhaps on Fridays or when people are working late. Is it appropriate? Is it increasing a risk in terms of behaviour?

It won't necessarily help your defence if the person complaining about the harassment also engaged in office 'banter' or seemingly put up with the situation for longer than might on the face of it seem acceptable before making a complaint.

In the case of *Munchkins Restaurant Ltd v Karmazyn and others*, waitresses at a restaurant had for a long time put up with the manager's requirements that they wear short skirts and his subjecting them to talk of a sexual nature including talk about sexually explicit photographs left around the workplace. It took some time for the women to raise their complaints and in the meantime, as a coping mechanism, the women had at times asked the manager about his sex life as they found this to be a potentially successful way of deflecting his attention from them. Neither of these issues resulted in a successful defence for the employer and the women were awarded compensation.

In summary, don't ignore the complaint, don't sweep it under the carpet - investigate.

Even if, as can happen, the process of dealing with a complaint leads to an employee moving on by mutual agreement, once a complaint of sexual harassment has been made, it's still important to investigate it. You must get to the bottom of what has happened, consider what needs to change in order to prevent a recurrence in the future.

Your investigation needs to be thorough. The courts will pick up on half-hearted or token investigations.

In the case of *Southern v Britannia Hotels Ltd and another*, the employer failed to conduct anything like a thorough investigation and the ET commented that the employer "did not appear to have the slightest interest in getting to grips with what had actually happened". Miss Southern successfully sued for harassment committed by her Line Manager. The court awarded her £19,500 for injury to feelings and stated that the lack-lustre approach to their investigation contributed to the amount of damages awarded.

Non-disclosure agreements (NDAs) and confidentiality clauses in Settlement Agreements (Confidentiality Clauses)

NDAs and in particular Confidentiality Clauses do regularly appear to protect a company's business interests, information, intellectual property or trade secrets.

Don't however automatically use an NDA, or Confidentiality Clauses without taking advice. This is because in reported cases of sexual harassment, it has come to light that there has been a widespread and inappropriate practice of using NDAs or Confidentiality Clauses to silence employees about the sexual harassment they have experienced at work. The inappropriate use of NDAs as "gagging orders" was highlighted by the Equality and Human Rights Commission to the women and equalities committee in March 2018 following a call for evidence into sexual harassment in the workplace.

Just to emphasise how important this point is, on 12 March 2018 the Solicitors Regulation Authority (SRA), published a warning notice indicating that it would amount to professional misconduct for a Solicitor to prepare an agreement for use by a client that contains an inappropriate NDA which prevents an employee from, for example informing the Police or whistleblowing.

If you do need an NDA or a Confidentiality Clause, it must be carefully and specifically worded, so do take advice from The Legal Partners.

Supporting an employee who has made a complaint of sexual harassment

In its guidance, Acas offers this advice on supporting victims who come forward:

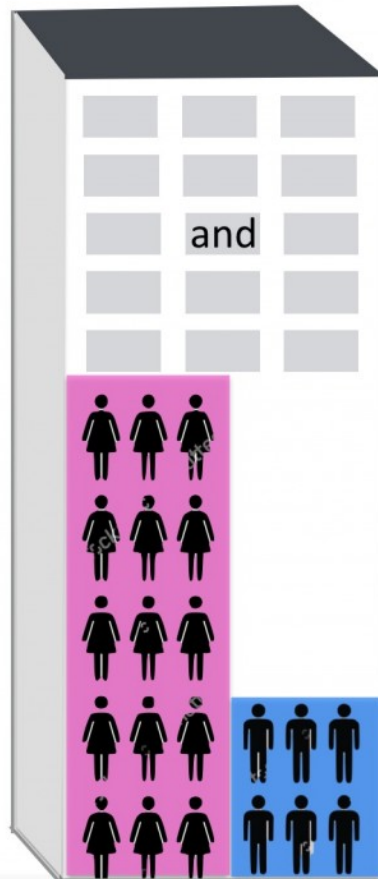
Experiencing sexual harassment is often extremely emotional and distressing for the worker involved. This means an employer should make reporting such a matter as stress-free as possible. In most cases this involves simple things like making sure there is plenty of time to discuss the matter and finding a private space to meet and making sure they have a family member to support them in meetings on the subject.

We would add that keeping in regular communication and ensuring those involved feel listened to and heard at each interaction and stage in the process is key to handling the issue sensitively and effectively.

In a BBC survey of over 2000 individuals

The ComRes poll for BBC Radio 5 conducted in 2017 spoke to more than 2000 people.

53%
of
women



20%
of
men

said they had experienced sexual harassment ranging from inappropriate comments to actual sexual assaults at work or a place of study..

..of those who said they had been sexually harassed at a place of work or study

63% of women



kept silent



79% of men