



--

**The harassment is over:
Recent and future developments in discrimination**

--

ROBIN ALLEN QC

--

--





What I shall discuss today –

- What's happening about harassment
- Non – disclosure agreements
- Some recent cases of interest

Why harassment matters: The five key problems.

- Workplace disillusionment: productivity decline, employee absence, HR issues,
- Legal consequences: Employment discrimination and PI claims,
- Reputational issues: Damage to investment, business delivery, labour market reputation,
- Wasted time/costs: on appeals, restructuring, etc.
- Customer consequences: disengagement, brand damage, even dislike.

Azeem Rafiq



The Telegraph

Main laws in relation to harassment

- Section 26 Equality Act 2010 makes harassment by reference to protected characteristics unlawful conduct,
- Common law duty of care towards employees protects against stress at work causing serious mental or personal injury,
- Protection from Harassment Act 1997, makes repeated harassment both a crime and a civil wrong.

Just how common is sexual harassment?

Parliamentary Report March 2021 -

- 71% of women of all ages in the UK have experienced some form of sexual harassment in a public space.
- This number rises to 86% among 18-24-year-olds.
- Only 3% of 18-24 year-olds reported having not experienced any of the types of harassment listed.

[See also the GEO's 2020 Sexual Harassment Survey]



Government
Equalities Office

**Consultation on sexual harassment in the workplace
Report July 2021**

The 4 main themes in the Report

The evidence for the introduction of a mandatory duty on employers to protect workers from harassment and victimisation in the workplace

How best to strengthen and clarify the laws in relation to third-party harassment

Whether interns are adequately protected by the Equality Act 2010 and the evidence for extending the protections of the Act to volunteers

The views of stakeholders on extending employment tribunal time limits in the Act from 3 months

The headline points

- The government intends to introduce a duty requiring employers to prevent sexual harassment, to encourage employers into taking positive proactive steps to make the workplace safer for everyone.
- There will be explicit protections from third-party harassment.
- No specific further action on interns and volunteers.
- Government “...will look closely at extending the time limit for bringing Equality Act 2010 based cases to the employment tribunal from 3 months to 6 months.”

The Employer duty proposals

- A duty requiring employers to –
 - prevent sexual harassment, and
 - encourage positive proactive steps to make the workplace safer for everyone.
- A new EHRC code of practice.
- A new compensatory scheme in relation to the employer duty.

Third party harassment proposals

- Response to [Unite the Union v Nailard](#) [2018] EWCA Civ 1203 (24 May 2018).
- A new obligation to prevent harassment by third parties for whom the employer is not directly responsible such as customers and others who are on site or who engage with the employees through websites and other interfaces.
- Subject however to a taking all reasonable steps to protect the employees from such harassment.

Time limits: whether 3 => 6 months?

- Govt. recognises 3-months may be particularly problematic, given trauma of harassment.
- Govt. recognises also a factor in other Equality Act-based cases, e.g. pregnancy and maternity discrimination because starting legal proceedings unlikely to be paramount concern during what is already a period of significant change in someone's life.
-
- If extension then best across all grounds, but resource implications particularly post – pandemic.
- So further impact assessment to take place...!



Non-disclosure agreements

- No new legislation yet.
- Government still thinking about what to do, but
 - Are they a good idea?
 - Can they be *practically* enforced?
- Are there regulatory issues as in the financial services industry?
- Do they bring real benefits or do they create reputational risks?



Some interesting cases over the last few months

- Driscoll v V & P Global Ltd (EAT) on repudiatory conduct and harassment
- Stormsure (CA) on interim relief,
- Pitcher and Ewart v The University of Oxford (EAT) on mandatory retirement age,
-
- IX v WAB and MH Muller v MJ two CJEU cases on dress codes and religious, philosophical or political belief.

Driscoll v V & P Global Ltd [2021] IRLR 891

Repudiatory conduct causing constructive dismissal can be an act of harassment, contrary to sections 26 of the 2010 Act, where for example, sexist language is the ground for resigning.

Steer v Stormsure Ltd [2021] IRLR 762

Court of Appeal held the fact that a dismissed claimant in a whistleblowing case could claim interim relief, whereas a dismissed claimant in a sex discrimination case could not, did not amount to discrimination on the grounds of sex. Any dismissed whistleblower, whether male or female, could make an application for interim relief. Any discrimination claimant who had been dismissed, whether male or female, could not do so.

Pitcher and Ewart v The University of Oxford

- EAT held that two ETs could come to different decisions in relation to the justification for applying the University's age 67 retirement rule and declining employment extensions. The rule was based on (1) inter-generational fairness; (2) succession planning; and (3) equality and diversity. The judgment shows how person specific age discrimination claims are and how important it is to cover the evidential bases for the justification on each occasion



Cases C-804/18 IX v WABE and C-341/19 Muller

CJEU holds that an undertakings' internal rule prohibiting workers from wearing any religious symbols is not direct discrimination if universally applied.

Also not be indirect discrimination if policy of neutrality with regard to its customers or users, provided,

- first, that that policy meets a genuine need on the part of that employer, as demonstrated by the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out;
- secondly, that that difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner; and,
- thirdly, that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.

--

The harassment ~~is~~ (MUST BE) over:
Recent and future developments in discrimination

--

ROBIN ALLEN QC

--

--