

Sexual Harassment Claims in the Workplace: Legal Responsibilities & Changes

[Nick Coffey]

Hello and welcome to this episode of TW Law Talk by Taylor Walton Solicitors, the podcast series which aims to get to the heart of the legal issues which matter to you, offering insight, information and perhaps debunking a few myths along the way. I'm Nick Coffey, broadcaster and mediator, very much hoping that I won't need my mediation skills today with my co-hosts. Today we're turning our attention to employment law in general and specifically the key question of sexual harassment at work.

Joining me here in Taylor Walton's offices in St Albans are Alec Colson, who's a partner and head of employment and Nicola Smyrl, who's also a partner in the firm. Hello to both of you. In this episode we're going to look closely at what sexual harassment is in a legal sense, what amounts to sexual harassment, how workers are protected and what do businesses large and small need to do to ensure they're fully compliant with the law.

We'll explore the risks businesses run if they don't comply with the law, and we'll ask whether employers can actually go too far in seeking to prevent sexual harassment in the workplace. A lot for us to run through today. Alec, let's start with the basic question.

In a legal sense, what is sexual harassment?

[Alec Colson]

Sexual harassment is actually defined in the Equality Act of 2010. It's where an individual engages in unwanted conduct of a sexual nature and then further defined as conduct, and I'll quote, the purpose or effect of either violating an employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for another employee. So, as you can tell from that, it is quite complicated and open to interpretation what actually amounts to sexual harassment.

[Nick Coffey]

And Nicola, this is quite a large window, isn't it?

[Nicola Smyrl]

Yes, I suppose one limiting factor is that for an employer to be liable for sexual harassment, it must be committed in the course of employment. But it does apply to a wide group of workers. So, it would encompass not just employees, but also workers who might be on a more casual arrangement and also agency workers are protected by the legislation in question.

[Nick Coffey]

Is there a sliding scale as to how serious an incident needs to be before it can actually amount to sexual harassment?

[Alec Colson]

There is. It is a wide range. If I can say at the lower end, it could be banter in the workplace, which an employee finds offensive.

And at the far end or the higher end of the scale, it could be a form of sexual assault. So, we are talking a very wide window and that's where it can become difficult for employers.

[Nick Coffey]

So, in terms of banter, imagine that I'm working in a business that is perhaps quite male dominated, it's the sort of place with a grandfather's generation, father's generation, perhaps a little bit old school. And within the context of that very male environment, there are, I don't know, two or three women working there. Are you suggesting that even a dodgy joke, Nicola, can actually be perceived as sexual harassment in the workplace?

[Nicola Smyrl]

Well, yes, that would be right. So, the legislation focuses on the purpose or the effect of what is happening. So, if the effect of that conduct is that it has the ability to create an intimidating, hostile, degrading, humiliating or offensive environment or violate that female's dignity, then yes, that could fall within the definition of sexual harassment and probably should be tackled by the employer.

[Nick Coffey]

How wide is the scope of responsibility for employers? For example, if something happens, I don't know, at a Christmas party or happens at drinks after work or even happens just because employees are friends outside of work, so they've gone to football or they've socialised at the weekend. At what point does an employer's responsibility start and end?

[Alec Colson]

Yes, it is wide. Generally speaking, the course of employment generally means where someone is in the workplace or can extend to, for example, the Christmas party or someone's farewell event in a local pub. And the case law on this is generally speaking where it is connected with the work, as I say, with a Christmas party or going for drinks after work, and that can also be included in the course of employment.

So, it is a wide interpretation and many employers try to say, well, no, this didn't happen during the working day. Well, that's not how the employment tribunal will necessarily look at it. They will look at it and say, well, was it connected with the work force?

And in most cases, the tribunal will decide, well, yes, that was during the course of employment. Now, if it happens unconnected with work, in giving your example of a local football game at the weekend, which is not necessarily connected with work, then that may fall outside the course of employment. The problem is, though, of course, is that if something happens between two employees outside of work, that can clearly have an effect at work.

[Nick Coffey]

And it could be two employees who are in a consensual relationship, for example. Can that spill into this part of employment law?

[Nicola Smyrl]

Yes. So sometimes that will happen where a relationship goes wrong and it becomes acrimonious and then things do spill into the workplace. So if there are incidents happening at work where, for example, one party to the relationship won't take no for an answer for the employee that doesn't want to be in a relationship anymore, then yes, potentially that might be something that spills into the workplace and that the employer might become liable for if they don't take action to try and resolve that issue.

[Nick Coffey]

I know there's been a recent shift around this in employment law, and we really want to touch on this because it's very important that businesses understand what their responsibilities are. But I just want to ask, hearing you both talk, if I'm putting myself in the shoes of an employer, I wonder whether part of your work revolves around ensuring that claims are not malicious because the way you're describing it suggests that that window is quite large. How do you as lawyers actually ascertain whether a claim is based in fact or is actually an attempt to, I'm trying to phrase this carefully, but perhaps cause problems for a person or persons or indeed the whole business?

[Alec Colson]

Yes, well there have been recent cases where the employer has taken the hard line and dismissed an employee for sexual harassment and then it's been found that the person's original complaint was malicious and so that can have a bearing and so it is important where an employer receives a complaint of sexual harassment, first of all clearly to take it very seriously, but also to investigate and to establish whether that's been made in good faith or bad faith. And as Nicola just said, some relationships at work may fall apart and then you may receive a malicious complaint.

I would say though they are fairly rare, but there is potential for that.

[Nick Coffey]

And this is where the importance of good process across your business comes into play. And I wonder actually, just a follow on from that, whether you mentioned there you could have a malicious claim from an employee, I wonder Nicola whether you also see cases where employers have used sexual harassment as an excuse to get rid of an employee and at that point you're into the realms of unfair dismissal and a whole other hornets' nest.

Does that happen as well?

[Nicola Smyrl]

Yeah, I mean I have seen cases where employers perhaps treated things more seriously than they should have done because perhaps the investigation doesn't bear out the allegation in full and there's not necessarily sufficient evidence to make a finding that there was harassment. But again, if an employer is doing a thorough investigation and is able to evidence what they say has happened, then hopefully if an employee makes that kind of allegation against an employer, they'd be in a position to show why they have taken the decisions that they've taken.

[Nick Coffey]

I think if there's one thing that I'd like listeners to take away from this episode, it is around this change, this shift in the law, which perhaps many businesses aren't even aware of. So very much putting your lawyer hat on here, Alec. Explain to us what has happened, what is the shift?

[Alec Colson]

Yes, since the 26th October this year, there has been a new duty placed on employers, what is known as a preventative duty or anticipatory duty, which is to actually see what steps can be taken to prevent sexual harassment occurring in the workplace or during the course of employment in the first place. So that places a new responsibility on employers to try and prevent sexual harassment occurring and that means certain measures need to be looked at. For example, conducting risk assessments to establish what parts of their business could amount to all instances of sexual harassment occurring.

The obvious one is things like after work events, Christmas parties, things of that nature, but also making employees aware of the importance of preventing sexual harassment in the workplace, having reporting structures in place. They can be in a number of forms. For example, you could have anonymous reporting as a way to assist a member of staff if they feel they are being sexually harassed.

Also, about training, training managers in particular about if they have suspicions that sexual harassment may be occurring in the workplace. Again, it's bringing the issue out with the employees so they're aware of the importance of seeking ways to preventing the harassment occurring. And so, this new duty on employers is going to be interesting to see how the employment tribunals interpret how far an employer has to go to prevent sexual harassment arising in the first place.

[Nick Coffey]

It's going to be quite onerous on businesses as well. Nicola, just so I understand correctly, could an employee bring a claim based on the mere fact that an employer has not put in place the right processes so there may not even have been sexual harassment, but can they bring a claim saying this company is not safe? And equally, if a case does reach tribunal, can the tribunal act in a more punitive way if they feel the processes were not in place?

[Nicola Smyrl]

Yes. So, under the new duty, there's no freestanding right to bring a claim that your employer has breached their duty to prevent sexual harassment in the workplace.

[Nick Coffey]

But what do you mean by freestanding?

[Nicola Smyrl]

So, you can't bring a claim to say my employer has not complied with the duty to prevent sexual harassment. But if you have experienced something that you say amounts to sexual harassment and you can bring a claim for sexual harassment under the Equality Act, and if you can then show that your employer didn't comply with their duty to try and prevent that from happening in the first place, then the tribunal is able to increase the compensation it awards you by up to 25%. So that is quite a significant issue for employers because often in harassment cases, compensation can already be quite high, including what's known as an

award for injury to feelings, which is awarded in bands by reference to the kind of severity of the harassment suffered.

So, if you're already getting an award in the higher bands and then you add on 25% to that, then that could be quite a significant amount for employers. So yes, that is one potential consequence of failing to put the duty, taking steps to comply with your duty. It also is clear that enforcement action can be taken by the Equality and Human Rights Commission.

So, the Equality and Human Rights Commission already produces guidance that tribunals take into account when they're looking at harassment claims. But they will have enforcement powers in relation to this duty to take action against the employer and they can carry out investigations and issue unlawful act notices. And they can also kind of require employers to enter into agreements with them to prevent future instances of harassment potentially taking place.

So, there are some significant consequences for employers and they ought to take the duty seriously and look at what they need to be doing within their business to take steps to comply.

[Nick Coffey]

I have this little sense, both of you, that there are people listening to this right now screaming at their phones or their laptops, hearing that phrase injury to feelings. And I worry that there are some people who are thinking, the world's gone mad. Is this something that you see in your line of work, Alec?

[Alec Colson]

Yes, injury to feelings does have a precise legal meaning in this context. But basically, the employee who has been subject to sexual harassment can be awarded what is known as an injury to feeling award. And as Nicola alluded to, there are different bands, what is known as Vento bands.

You have level one, level two, level three, so the lower band is in a range of say, £2,000 up to about, I think it's £11,000. And then there's the middle band. And then for very severe sexual harassment, which could include some form of sexual assault it's up in the higher bands, which can be around £60,000.

So, it is a sliding scale. But it's very much at the discretion of the employment judge to decide which band the person, victim, falls into. And the person who's been subject to sexual harassment, they will be asked how it has affected them.

And that can range, obviously, from it may just be if it's, say, an off-colour joke, obviously it's much lower band than at a higher level. So, yes, it's always difficult to advise on what the level of injury to feeling is going to be, because it's very much at the discretion of the employment judge.

[Nick Coffey]

So, this leads to an important question for anyone listening to this who might be considering making a claim. And I suspect your answer to this next question is, well, Nick, how long is a

piece of string? However, people are going to want to know what kind of compensation levels they can have.

What you've described there is the add-on, if I've answered correctly, the add-on for injury to feelings. I know, for example, at an employment tribunal, having been through a few cases myself professionally, so that sounded wrong, having helped people through a few cases myself professionally, that there is a cap, for example, on what you can be awarded in the case of unfair dismissal, which I think is a year, if my memory serves me right. Is it that linear when it comes to cases of sexual harassment, or is actually the sky the limit?

[Nicola Smyrl]

In discrimination claims generally, there's no cap. So, compensation for loss of earnings is not capped in the same way as an unfair dismissal claim. So, you aren't limited to a year's salary in a discrimination claim.

In cases where the tribunal is considering losses flowing from an act of discrimination, they will take into account similar principles as they would in an unfair dismissal claim. So, you'd have to show that you've incurred a certain level of loss and that you've taken steps to try and mitigate that loss, say, by looking for new jobs and things like that. An injury to feelings award is kind of unique to discrimination and some other types of claims to compensate the individual for the hurt that they have suffered to their feelings as a result of being discriminated against or harassed.

So that would be on top of an award for lost earnings or other losses that might flow from whatever discrimination you have suffered.

[Nick Coffey]

It could go quite high.

[Nicola Smyrl]

Yes.

[Alec Colson]

Yes, there have been high awards made. Particularly if you're working in a highly paid job, we are looking at, in some cases, millions. So, it could be an expensive trip for the employer at the tribunal.

But obviously, those people are very high earners and sort of average earnings are clearly a lot lower. People often do see things in the newspaper thinking, gosh, I can win a million pounds. But that's because the employee may be working in the city and is a banker and suffered.

[Nick Coffey]

So, they're working in businesses that would have the funds to fund that kind of payout. What about small businesses listening to this who perhaps turn over £100,000, £200,000 of a year? Will this shift apply to them?

And what do they do if they've got an employee who ends up being awarded a sum which, I don't know, could potentially bankrupt them? Does that happen?

[Alec Colson]

It can happen, yes. And yes, the new preventative duty applies to all employers, large or small. There's no exemption for small employers.

So yes, it can be an expensive process. So that's why it's so important that all employers, particularly small employers, have processes in place. They have a sexual harassment policy in place so they can deal with complaints in the appropriate way.

But also putting measures in which try to prevent the sexual harassment arising in the first place. So, as I mentioned before, having processes in place, what part of their business could result in a sexual harassment complaint?

[Nick Coffey]

We're sat in St Albans. I know you've got an office in Harpenden, an area that I know very, very well. And you've got offices across the patch.

We are in an area that is full of sole trader or small businesses, you know, up to three to five employees. We know because we're all part of the same network, so we meet these businesses. If they're listening to this, some of them might have either a sense of panic or a sense of saying, I just haven't got time for this.

This is just not for me.

[Nicola Smyrl]

I don't think that businesses need to panic, but it probably would be sensible to take some advice about what they could do to put some processes in place to help them show that they have thought about sexual harassment in the workplace and taken steps to prevent it. So probably a good starting point would be to do a risk assessment, and that can be carried out in a similar way to the way a business would assess health and safety risks. So, it's a familiar principle to small employers.

[Nick Coffey]

It becomes part of what they do.

[Nicola Smyrl]

Absolutely, yes. That will help them to highlight areas where there might be a risk of sexual harassment in the workplace and think about what they could do in practical terms to stop that from happening. If you've only got a few employees, putting a policy in place, drawing that to their attention and having some training on sexual harassment shouldn't be a particularly onerous obligation, but it could kind of pay dividends in the future.

[Nick Coffey]

It could save you a lot of money. Before we start to wrap up, I just want to look at the process for you as lawyers, particularly for someone coming to you with a sexual harassment claim. The mere fact of coming to you can be quite a big step because we're talking potentially about quite an intimate situation.

We're also talking about a situation where someone might fear losing their job, which in the current climate more than ever is stressful. It's always stressful, but I think at the moment

more than ever, and therefore there's perhaps that fear of stirring the hornet's nest. And then also there's the element of working out whether it's worth the hassle, and that worth part of it could be a question of the value of the potential compensation, which of course you can't know because you're not the tribunal.

So if someone's listening to this because they're thinking about coming to you with a claim, how can you, well for starters, perhaps explain the process, what you do when someone comes to you, and how can you reassure that person listening that actually it's a process that will not make the situation even worse for them on an emotional and on a practical level?

[Alec Colson]

Yes, in relation to an individual seeking advice rather than the employer, then our duty as a lawyer is to explain what the process is in terms of bringing a claim. So, it would be hearing what they have to say about what happened. Does it amount to sexual harassment?

Does it meet the legal definition we highlighted at the beginning?

[Nick Coffey]

And you'll be quite straight about that, I'm guessing.

[Alec Colson]

Yes, I think you do need to be straight. You don't want to be taking someone down the employment tribunal route if it's not a strong claim. But that needs to all be explained to the potential claimant, what the legal tests are, so they know right at the very beginning what the process is.

Because clearly, as you've indicated, it's a very stressful business going down presenting any kind of claim, but certainly a sexual harassment claim is up there as being probably the most stressful. And of course, the potential in a tribunal claim, it's a win-lose. It's no score draw, it's a win-lose.

And on that basis, there are risks. But many claims are actually settled before tribunal has taken place. So, there's always potential for settlement.

And particularly with sexual harassment claims, probably neither side relish the prospect of going to an employment tribunal. So, it's better that, in many cases, to see whether settlement can be reached. But sometimes that's not always possible.

[Nick Coffey]

And hence why we have tribunals.

[Alec Colson]

Yes, exactly.

[Nick Coffey]

Just as a final thought, I wonder whether there's a case for saying that employers can actually go too far in seeking to prevent harassment. I'm guessing that can actually, in and of itself, cause some difficulties in the workplace.

[Nicola Smyrl]

Yes, there was a fairly recent case brought against Apple Retail UK, where the claimant in that case had brought a claim of unfair dismissal after being dismissed for an incident which was alleged to be sexual harassment. And that claim was successful because the tribunal felt that the employer had gone too far in that situation. It was a fairly unusual case in that the employee who was dismissed was taking photographs of another employee without her knowledge and then kind of distributing that to his other friend at work.

So, the employee in question never became aware of this, but the employer did become aware of it and labelled it as sexual harassment. And the judge was critical of Apple because it said that their harassment policy was too vague. It lacked a clear definition of harassment.

And there was no evidence that the photos had offended the colleague in question or created an intimidating environment.

[Nick Coffey]

They took quite a sting there, didn't they?

[Nicola Smyrl]

Yes, so in that case, the judge felt that a final written warning would have been more appropriate if the employee had been warned that he shouldn't engage in this conduct.

He wouldn't have done it again. And that potentially would have resolved the issue where the employee in question who had had the photographs taken wasn't even aware. So yes, that's a cautionary case, I suppose, to think about what is the most appropriate outcome in any situation, not kind of jump to the end conclusion that it must be a dismissal situation.

[Nick Coffey]

See, I find this quite interesting. And I really am talking here as a layperson. But I know that, for example, I can't leave here today and go on the train and take a photo of someone without their consent.

I know that. And it would strike me again, very much as a layperson, if in a place of work, someone is taking photos and distributing them, that that is inappropriate behaviour. And it would strike me that as an employer, I might choose to not want that in my midst.

Is this a good example of actually how complex the layers of employment law are when relating to sexual harassment?

[Alec Colson]

Yes, indeed. And it does depend on how the evidence comes across in the employment tribunal, how the judge sees it, and the other tribunal members. So, it is complex.

And you can understand that employers are extremely nervous about sexual harassment issues because there's so much in the news now. Every day you open the newspaper and there's some case of sexual harassment. There's big personalities involved recently about a history of sexual harassment occurring within a well-known store.

So, employers are naturally nervous and wanting to be seen to do the right thing. And I know that's why it's important, but sometimes it probably goes too far, but it's a risk for

employers. Obviously, our job as lawyers is to advise our clients about each situation and whether or not it constitutes sexual harassment.

Is it serious enough for dismissal? So, these are all fine judgment calls and you're not always going to get it right.

[Nick Coffey]

I think with this whole series, we're very careful not to fall into the obvious trap of saying, go speak to your lawyer, come and speak to you guys. I think in summary of all of this, it is fair to say that this is the kind of situation where as businesses and employers, you have a duty to make sure you get this right and get the right advice potentially from yourselves as employment lawyers, because the costs of doing it wrong, the cost both emotionally and practically and indeed financially can be very high.

[Nicola Smyrl]

Yes, I think certainly with the new duty coming to force, it would be a good time to evaluate where you are as a business in terms of harassment and sexual harassment and thinking about putting some processes in place to try and prevent that. Although it might be an initial expense to go and get some legal advice on these matters, it's something that will continue to apply to your business for a long time. So overall, it's probably more cost effective to do the job of getting your business in a place to be compliant with the duty rather than having to face a claim further down the line.

[Nick Coffey]

As with all legal issues, you have that constant conflict that you'd rather never have any clients. You'd rather not be in a situation where anyone was needing your advice, however clearly you are needed. Alec, Nicola, really interesting.

I appreciate your time. For more information about the issues that we've raised in this episode, you can get in touch with Alec and Nicola. Perhaps the best thing to do is to head to the Taylor Walton website at taylorwalton.co.uk. If you found this episode interesting, please do subscribe to it in your podcast app. That way you'll be notified first of all future episodes. And if you do get a moment, and if you are enjoying this, perhaps you could leave a review. That would really help get the word out there too.

Until next time, from me, Nick Coffey, Alec and Nicola, it's goodbye for now.

[Alec Colson and Nicola Smyrl]

Goodbye.

Taylor Walton Solicitors – www.taylorwalton.co.uk