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Fourth Study Commission – Public and Social Law

Answers of the United Kingdom to the Questionnaire

Although sexual harassment is consistently in the news today, the topic of workplace misconduct is much broader. It encompasses general harassment and other misconduct typically experienced by employees at the hands of their managers, including judges, as well as their peers. Harassment is broadly defined as unwelcome physical, verbal, non-verbal, and psychological behavior that interferes with work performance or the work environment. Examples of harassment include offensive jokes, name-calling, disparaging comments, displaying inappropriate images, unwelcome sexual advances, and inappropriate touching.

Workplace misconduct is a universal problem that causes serious harm to those subjected to it. There is much to be gained by exploring what causes such misconduct to persist, what actions can prevent such misconduct, and what consequences violators should bear. Discussing how to break down barriers to reporting this misconduct, such as limitations on confidentiality, is also paramount.

Questions:

1. Does your country have laws or regulations that cover workplace harassment? Is harassment defined separately or is it incorporated within other provisions of the labor code?

‘Harassment’ is a free-standing cause of action which is a relatively recent statutory creation introduced in October 2015 in the United Kingdom to comply with the requirements of the EU Equal Treatment Directive (under 79/207) as amended by the EU Equal Treatment Directive (number 2002/73) (now consolidated into the recast EU Equal Treatment Directive) (number 2006/54) which obliged member states to ensure that harassment was treated as unlawful discrimination.

Before the specific harassment provisions were introduced in October 2005, if an employee believed that he or she had been subjected to discriminatory ‘harassment’ at work had to bring a claim under the direct discrimination provisions of the relevant legislation. For example, a woman complaining of sexual harassment had to establish that on the grounds of her sex, she had suffered less favorable treatment than was or would have been meted out to a man and that she had she had been subjected to a detriment as a result.

A stand-alone claim of harassment now under Section 26 of The Equality Act 2010, by contrast, does not require a comparative approach. It is not necessary for the worker to show that another person was, or would have been treated more favorably. Instead, he or she simply needs to establish a link between the harassment and a relevant protected characteristic. This departure from the traditional ‘comparative’ approach to equality towards one based upon dignity recognizes that an act which violates dignity or damages a person’s working environment can create a barrier to equality in the workplace,

Three forms of behaviour are prohibited under Section 26 of The Equality Act 2010 namely:-

- ‘general’ harassment that is conduct that violates a person’s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment;
- Sexual harassment;
- Less favourable treatment following harassment.

The general definition of harassment set out in Section 26(1) applies to all protected characteristics except marriage and civil partnerships, and pregnancy and maternity. It states that a person (A) harasses another (B) if:-

- engages in unwanted conduct related to a relevant protected characteristic and
- the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

The definition of sexual harassment is similar to that of general harassment set out above except that the unwanted conduct in question is of a 'sexual nature' as opposed to being 'related to a relevant protected characteristic'.

Individuals who are treated less favourably by their employer because they either reject or submit to sexual harassment or harassment related to gender reassignment or sex is covered in The Equality Act 2010. Such treatment is treated as a form of harassment.

There are three essential elements of a harassment claim under Section 26 of The Equality Act 2010 namely:-

1. Unwanted conduct;
2. It has the prescribed purpose or effect and
3. Which relates to a relevant protected characteristic.

In some cases, there will be considerable overlap between the components of the definition for example, the question of whether the conduct complained of was unwanted may overlap with the question of whether it created an adverse environment for the employee.

The Equality and Human Rights Commission for the United Kingdom's Code of Practice on Employment notes that unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts effecting a person's surroundings or other physical behaviour'. The conduct may be blatant, for example overt bullying or more subtle, for example, ignoring or marginalising an employee. An admission or failure to act can constitute unwanted conduct as well as positive acts.

For example, in the case of **Owens v Euro Quality Coatings Limited and Others (ET Case Number 1600238/2015)** an employer was liable for failing to remove a picture of a Swastika for some weeks which amounted to unwanted conduct.

In the case of **HM Land Registry v Grant** the ‘outing’ of a gay employee, that is revealing his or her sexual orientation against his or her wishes, can amount to unwanted conduct for the purposes of unlawful harassment.

Unwanted conduct will often arise from a series of events. It is noteworthy that the definition of harassment, which requires the unwanted conduct in question having the purpose or effect of

- (i) violating B’s dignity or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her are disjunctive in that a claimant only has to show that the conduct had the purpose or effect either of violating dignity or of creating a prescribed environment. He or she does not have to show both.

differs from the position under the EU Equal Treatment Framework Directive (Number 2000/78) and the recast EU Equal Treatment Directive (Number 2006/54) which define harassment as occurring where unwanted conduct related to a protected ground takes place ‘with a purpose or effect of violating the dignity of a person (*and of creating an intimidating, hostile, degrading, humiliating or offensive environment*). By replacing the word ‘and’ with ‘or’ domestic discrimination legislation in the United Kingdom is designed to reflect the domestic case law that had developed over the years, in particular, in the context of sex and race discrimination and offers a higher level of protection than the Directives originally envisaged.

Article 2(d) of the recast Equal Treatment Directive defines sexual harassment slightly differently in terms of the prescribed purpose or effect –namely ‘unwanted ... conduct of a sexual nature ... with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment’.

This appears to envisage that if a degrading environment has been created or intended, this will have the purpose or effect of violating dignity. However, it also suggests, so far as sexual harassment is concerned, that dignity may be violated without such an environment having been created.

In deciding whether conduct has the effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, each of the following must be taken into account:-

1. The perception of B;
2. The other circumstances of the case and;
3. Whether it is reasonable for the conduct to have that effect. (See Section 26(4) of The Equality Act 2010).

However, that section is not applicable to ‘purpose’ cases.

The test therefore has both subjective and objective elements to it. The subjective part involves the Tribunal looking at the effect of the conduct of the alleged harasser (A) has on the complainant (B). The objective part requires the Tribunal to ask itself whether it was reasonable for B to claim that A's conduct had had that effect.

The relevant protective characteristics are listed in Section 26(5) of The Equality Act 2010. They are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. As far as race is concerned, the protection from harassment extends to colour and nationality as well as ethnic or national origins. Section 9(1) of The Equality Act 2010.

It is also clear under UK domestic law that harassment may be claimed where the unwanted conduct is based upon the protective characteristic of another person. The Equality and Human Rights Commission Employment Code gives a number of examples of this kind of harassment, including 'where a worker has a son with a severe disfigurement. His work colleagues make offensive remarks to him about his son's disability. The worker could have a claim for harassment relating to disability'. While harassment, on the basis of a third party's relevant protected characteristic is often termed 'harassment by association' or 'associative harassment', the victim does not need to establish any particular strength of association with the third party.

The breadth of the definition in Section 26(1) of The Equality Act 2010 means that harassment claims may also be brought on the basis of conduct related to an abstract relevant characteristic that is not directed at the victim ('abstract protected characteristic') or to a relevant protected characteristic that the victim is wrongly perceived to have ('perceived protected characteristic') or that is attributed to the victim in the knowledge that he or she does not actually possess it ('attributed protected characteristic'). Such types of harassment may be termed 'conceptual protected characteristic').

2. What remedies exist for victims reporting workplace misconduct? What penalties or ramifications do offenders face? Do you have examples of court cases/judgments or administrative proceeding involving harassment?

Employers are liable for acts of harassment carried out by employees in the course of their employment, even if these were carried out without their knowledge or approval, but employers have a defence if they can show that they took 'all reasonable steps' to prevent the employee from carrying out the act or such acts, see sections 109(1), (3), (4) of The Equality Act 2010. Almost an identical provision is made in respect of principal and agents: section 109(2) provides that anything done by a person as an agent for or with the principal's authority, is treated as having also been done by the principal. However, unlike the situation regarding the actions of employees, a principal cannot avoid liability by arguing that he took all reasonable steps to stop the agent from acting in a discriminatory way.

An employee may also have a claim against his or her employer for direct discrimination because of a protected characteristic if he or she can show that, in failing to prevent harassment by a third party, the employer treated him or her less favourably because of a characteristic protected by The Equality Act 2010.

The way in which an employer deals with harassment (whether by a third party or otherwise), once it has occurred, can itself amount to harassment if an employer's actions are responsible for creating a hostile environment. There are two examples which demonstrate this point.

Example (1)

In the case of **Rose-Brown v The Home Office (UKBA)** Employment Tribunal Case Number 2313044/10, a black British woman of Afro-Caribbean origin, was employed as a chief immigration officer. On 14 October 2009 two black contractors came to the office to deal with excessive heat. One of R-B's junior colleagues, R, a white woman, stated that it was only black and Asian people who did not feel hot in the office and that they were selfish in complaining that it was cold and the heat was turned down but refusing to wear extra layers of clothing and if they did not like the weather, they should go back to their own countries. R-B complained immediately.

R was suspended and given a written warning and required to attend diversity training. She was then allowed to return to her old job where she sat some fifteen feet from R-B. R-B was appalled at this and complained immediately. She felt distressed and undermined as a manager that an individual who reported to her had made highly offensive racist comments to her in public and had been re-instated in the office with no outward display of discipline. She

also complained that R was taunting her because she blamed R-B for what had happened. R-B subsequently went off work sick suffering from stress and anxiety. She was referred to Occupational Health, which recommended a transfer to another office.

R-B brought a claim for sexual harassment under section 3A of The Race Relations Act, (which was the relevant legislation then). The Tribunal held that the claim in respect of R's initial behaviour was out of time. However, in allowing R to return to work in the same office as R-B, the employer was guilty of harassment in breach of section 3A of The Race Relations Act. R-B had made it perfectly clear that R's return to the office was unwanted. Although it did not have the purpose of creating an intimidating, hostile environment, it had that effect.

Example (2)

In the case of **Owens v Euro Quality Coatings Limited and Others (ET Case Number 1600238/2015)**, see above, the Tribunal upheld O's harassment claim brought after a Swastika was drawn on the wall of the men's toilets and not removed for at least two weeks. While EQC Limited did not deliberately leave the Swastika, it failed to treat the matter with the seriousness it deserved or to consider the degree of offensiveness of the symbol. Failure to remove it promptly was necessarily unwanted conduct amounting to harassment.

Court protection

An employer can be vicariously liable under the Protection from Harassment Act 1997 for acts of harassment committed by employees in the course of their employment. Significantly, unlike liability under the Equality Act 2010, the 1997 Act --which imposes both civil and criminal liability and was principally aimed at tackling the practice of stalking—and provides no defence for the employer. But there has to have been a course of conduct.

Employment Tribunals

Employment Tribunals have jurisdiction to hear claims of workplace harassment and can:

- Make a declaration as to the rights of the complainant and the respondent;
 - To order the respondent to pay compensation to the complainant and/or
 - To make an appropriate recommendation.
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- A declaration is simply a statement that the employer has violated the employee's rights. It does not require the employer to take any particular action. A declaration is the appropriate remedy where an employee or job applicant has suffered no loss. A declaration is also

appropriate where the claimant is only seeking to establish a point of principle.

- The most commonly requested remedy is an order requiring the respondent to pay compensation to the complainant. The amount of compensation available corresponds to the damages that could be ordered by a County Court in England and Wales for a claim in tort or by a Sheriff Court in Scotland in proceedings for reparation, see section 124(2)(b) and (c)(6) combined with section 119(2) and (3) of The Equality Act 2010. This means that there is no upper limit on the amount of compensation that can be awarded for discrimination. The aim of compensation is, the best that money can do it, to put the applicant into the position she or he would have been in but for the unlawful conduct. She will also be able to claim for any financial loss flowing from the treatment as well as to claim for any injury to feelings caused by the treatment and, in exceptional cases where psychiatric illness results, damages for personal injury.

The harasser takes the victim as he or she finds him or her. This means that even if the victim is unusually sensitive or susceptible, the level of damage or loss sustained is therefore worse than it would have been for another individual, the harasser will be liable for the full extent of the damage, loss or injury as long as it can be shown that this flowed from the act of harassment. For example, in **Southern v Britannia Hotels Limited and Another (ET Case Number 1600507/14)**, the claimant was awarded £19,500 for acts of harassment (including inappropriate physical contact), relating to her sex, which she suffered over a period of eight months. The Employment Tribunal considered that the nature of the harassment suffered was not the very worst of its type. However, the claimant was a highly vulnerable person. She was only twenty-two years old and she had a long-standing history of mental ill health. Harassment committed by her manager, who held a position of power over her, and although the employer had the means and opportunity to address the problem, it had failed to do so.

The President of the Employment Tribunal of England and Wales, and the President of the Employment Tribunal in Scotland, have issued Presidential Guidance for Employment Tribunal awards for injury to feelings and psychiatric injury. There are three bands of awards from the 6 April 2019. The bands are as follows:-

A lower band of £900 to £8,800 (less serious cases);

a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band);
and an upper band of £26,300 to £44,000 (the most serious cases) with the most exceptional cases capable of exceeding £44,000.

The Employment Tribunal interest and awards in discrimination cases (Regulations 1996) give Employment Tribunals the power to award interest on awards made in discrimination cases. A Tribunal is required to consider whether to award interest even if the claimant does not specifically apply for it. Interest is calculated in accordance with rules – the current rate of interest being 8%. The relevant date for the purpose of calculating interest differs according to whether the interest relates to a sum of injury to feelings or to financial loss. For injury to feelings awards regulations provide that the period of the award of interest dates start on the act of discrimination complained of and ends on the date that the Employment Tribunal calculates the amount of interest. For all other awards interest is awarded for the period beginning on the ‘mid-point date’ and ending on the day of calculation. The mid-point date is the date halfway through the period beginning on the date of the act or unlawful discrimination or harassment and ending on the day of calculation.

- A recommendation is ‘a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant on any matter to which the proceedings relate’ see section 124(3) of The Equality Act 2010.
In the case of **Whittington v Morris and Another (ET Case Number 17846/89)**, a recommendation was made that the individual who had been sexually harassing the complainant be moved to a post elsewhere in the Health Authority and that he be suspended until such a move was practicable.
Other recommendations may be that an organisation should secure the services and appropriate HR professional to conduct a review of their existing equality disciplinary grievance and recruitment policies and procedures, and amend them or redraft them as necessary to ensure compliance with UK employment law. Or that there should be a programme of formal equality and diversity training.

If a respondent fails, without reasonable excuse, to comply with the recommendation, a Tribunal may, if an order for the respondent to pay compensation was made under section 124(2)(b), increase the amount of compensation to be paid or, if no such order for the payment of compensation was made, the Tribunal can decide to make one, see section 124(7).

In some serious cases of harassment, they may be included an added element of aggravated damages. That is compensation where the behaviour of the defendant may aggravate the injury caused to the complainant. So, in a harassment case where damages/compensation falls to be awarded for injury to feelings, the quantum of damage should reflect the aggravating features of the defendant's conduct and how it affected the complainant. Aggravated damages are supposed to be compensatory as opposed to being a punishment.

Judicial Grievance Policy

There is a Judicial Grievance Procedure which applies to Judicial Office Holders and members of Ministry of Justice staff. It covers complaints between staff and Judicial Office Holders. It provides a framework for dealing with problems informally or through mediation. The policies are:

1. Judicial Grievance Policy for complaints made by Judicial Office Holders against Judicial Office Holder;
2. Informal resolution of complaints made by Ministry of Justice staff against Judicial Office Holders;
3. Informal resolution of complaints made by Judicial Office Holders against Ministry of Justice staff.

The relevant grievance procedures were issued in November 2013.

However, there is the opportunity to bring into play the appropriate formal process. It covers complaints by staff members which might include one person's behaviour against another or a more general allegation of bullying and harassment.

If staff members are simply reporting alleged misconduct by a Judicial Office Holder in which he or she has not been personally affected, those matters will be dealt with under the relevant formal discipline and complaints regulations and rules for the Judiciary.

This policy sits alongside the formal Ministry of Justice Grievance Policy and other regulations. Staff support is available via union representatives, work place colleagues or a work place support advisor and for Judicial Office Holders, support is available from their Senior Judicial Office Holder.

The Human Resources Directorate gives support to both victims and those against whom allegations are made. The aim is to take action promptly at the lowest appropriate level in order to achieve a mutually acceptable solution which in turn should help restore a harmonious working environment as quickly as possible. The Judicial Office Holder has the right to be accompanied to any meeting by a fellow or more senior Judicial Office Holder.

If both parties agree, in principal, to mediation then a suitably trained mediator will be identified.

Judicial Office Holders who are the subject of complaints do have access to the protection provided for under the formalized Judicial Complaint Proceedings.

Only in the case of complaints that are ultimately found to reveal misconduct will the outcome be recorded in the Judicial Office Holder's personal file.

3. Do you have examples of judicial misconduct related to harassment or bullying?

The Judicial Conduct Investigations Office received 498 complaints of inappropriate behaviour and comments in the year 2017 to 2018. There were 39 upheld complaints. In the Court Judiciary, two Judges were removed and two reprimanded with formal advice given for four others. In the Tribunals, four Tribunal Judges were removed, one reprimanded and one formal advice given. The 39 cases is a figure that represents less than 0.2% of all Judicial Office Holders.

When the Judicial Conducts Office investigates alleged misconduct cases ,including harassment by a member of the Judiciary, it rarely gives a number of details about the case. For example, in June 2019 the Judicial Complaints Office issued a forty-five word statement regarding a named Tribunal Judge, who had been handed formal advice by The Lord Chancellor and The Lord Chief Justice following a complaint that he made a remark in Tribunal, which suggested that he holds a ‘prejudicial view of Iranian parties’. Nothing else was said about who complained, who investigated the matter and what the formal advice consisted of.

An article in a leading legal periodical, *The Law Society Gazette*, was critical of the lack of detail.‘ The Judicial Conduct Investigations Office gives few details about why decisions about Judges conduct are ever made, who made the decisions and why a particular sanction was imposed.’ This is an opinion expressed by one individual writer.

It is therefore difficult to give full details relating to examples of judicial misconduct relating to harassment or bullying.

However, if bullying does occur by a Judge in the course of the hearing of a case, comments are made by higher courts. One recent example is the case **Jan Tomasz Serafin v (1) Grzegorz Malkiewicz (2) Czas Publishers Limited (3) Teresa Bazarnik-Malkiewicz 2009 (EWCA Civ 852)**, Decision handed down on the 17 May 2019 by the Court of Appeal in England and Wales. One of the grounds of appeal was unfair judicial treatment. It was alleged that during the trial the High Court Judge showed hostility and rudeness to the complainant and represented party. It was said that he made frequent gratuitous interjections during the trial, hostile to the claimant, putting the claimant under enormous pressure and making it extremely difficult for him to conduct the litigation. The behaviour made the trial process either unfair or conducted with the appearance of unfairness and the Judges’ findings were not safe or reliable. The Court of Appeal said that the Judge’s interventions during the claimant’s evidence were highly unusual and troubling. ‘On numerous occasions the Judge appears not

only to have descended to the arena, cast off the mantle of impartiality and taken up the cudgels of cross-examination but also to have used language that was threatening, over-bearing and frankly, bullying. One is left with regrettable impression of a Judge who, if not partisan, developed an *animus* towards the claimant.’ The nature, tone and frequency of the Judge’s interventions were such to surrender the libel trial unfair and that ground of appeal was upheld.

4. Does the judiciary have rules, ethics codes, or legislation relating to harassment by judges and judicial staff? What are the procedures for reporting misconduct and enforcing the rules? What sanctions can be imposed against a judge?

There is a Guide to Judicial Conduct (first edition 2003 and latest edition March 2019). The Guide has a section headed 'Behaviour towards Court staff and Court users'. This says -----

'members of the Judiciary should seek to be courteous, patient, tolerant and punctual, and should respect the dignity of all. They should ensure that no one in Court is exposed to any display of bias or prejudice on grounds which include, but are not limited to 'race, colour, sex, religion, national origin, cast, disability, age, marital status, sexual orientation, social and economic status and other like causes'.

In the case of those with a disability, care should be taken with arrangements made for and during the Court hearing do not put them at a disadvantage. Further guidance is given in the Judicial Colleges' Equal Treatments Bench Book. The duty remains on the judicial office holder to apply the law as it relates to allegedly discriminatory conduct.

Care should be taken to ensure proper access to justice and equality of treatment where one or both of the parties before the Court are unrepresented'.

The Judicial Discipline (Prescribed Procedures) Regulations 2014 set out the process for dealing with complaints about Judicial conduct. Regulation 7 provides for the Lord Chief Justice with the agreement of the Lord Chancellor, to make rules for dealing with complaints about Judicial misconduct.

The Lord Chief Justice of England and Wales has responsibility as Head of the Judiciary for the welfare, training and guidance of the judiciary of England and Wales. The Lord Chancellor and Lord Chief Justice exercise disciplinary powers under part 4 of The Constitutional Reform Act 2005 over all Court and Tribunal Judges, Magistrates and Coroners.

The Judicial Conduct Investigations Office was established by Regulations made under the 2005 Act to assist in the handling of complaints. Whilst the Judicial Conduct Investigations Office, in handling complaints, and the Lord Chancellor and Lord Chief Justice in exercising their disciplinary powers may choose to have regard to the Guide, they are not obliged to follow it.

If the disciplinary panel considers that an office holder should be removed or suspended from their office, the disciplinary panel must advise the Lord Chancellor and the Lord Chief Justice whether removal or suspension is justified.

The Lord Chancellor and the Lord Chief Justice may agree to dismiss a case or to take a particular disciplinary action.

The Lord Chancellor and the Lord Chief Justice are responsible for the final decision in relation to judicial discipline and there is no right of appeal against their decision. They are assisted in this capacity by nominated Judges, Investigating Judges, Disciplinary Hearing Panel Members and Officials in the Judicial Conduct Investigations Office.

The Judicial Appointment and Conduct Ombudsman has a role if a person applies for a review of the handling of matters involving judicial conduct or discipline on the grounds that there has been a failure to comply with the prescribed procedures or some other maladministration. However, the Ombudsman cannot comment on the merits of any decision made in respect of a particular case. However, if satisfied that the grounds of the complaint to him are justified, he may make recommendation to the Law Chancellor and the Lord Chief Justice. If the Ombudsman considers any decision to be unreliable as a result of maladministration, he can set the decision aside and refer the matter back to the Judicial Investigations Office.

If another nominated Judge decides that disciplinary action is appropriate, he may recommend that the Law Chancellor and the Lord Chief Justice issue the subject of the complaint with formal advice; a formal warning; or a reprimand. In the most serious of cases he or she may recommend suspension or removal from office.

Where there is no finding of judicial misconduct, but the nominated Judge considers that the complaint raises issues which should be addressed with the Judicial Office holder through pastoral support, advice or training, the nomination Judge may decide to raise the matter directly with the subject of the disciplinary proceedings or may refer it to the appropriate leadership Judge to provide guidance or training.

Acting Regional Employment Judge Philip Davies (England and Wales)
London South
June 2019