

Employment

Drawing the line

How far does the law protect employees from sexual harassment, ask **Chris Bryden & Michael Salter**

IN BRIEF

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- PHA 1997 can also render employers liable for the acts of their employees.



As the maelstrom surrounding Jimmy Savile engulfs the BBC and, if newspapers reports are to be believed, expands to other facets of the public sector, it is useful to consider how much the law has changed over a relatively short period of time and the potential exposure there may be for employers faced with allegations of sexual harassment.

In the employment context, the Equality Act 2010 (EqA 2010) and its predecessor legislation prohibited harassment on grounds of the protected characteristic and, in the case of the Sex Discrimination Act 1976, prohibited sexual harassment which was harassment of a sexual nature and which did not depend on the sex of the victim.

Establishing liability

Recently, in general terms, the law of tort has relaxed considerably the circumstances in which an employer can be liable for the torts of its employees. Gone are the days when an employer would be found not liable for their employee's acts if those acts were deemed to be "frolics of their own". In a situation such as the Savile allegations the BBC would, in the 1970s, have been likely to be able to rely on this. Now, the law is one of proximity to work: did the employee's employment mean they could have committed the act? If so, then the employer is liable.

On the theme of vicarious liability, the Protection from Harassment Act 1997 (PHA 1997) can also render employers liable for the acts of their employees. Articles that have suggested the threshold for liability is the

criminal standard are incorrect. While that was the law as expounded by the Court of Appeal in *Conn v Sunderland City Council* [2007] EWCA Civ 1492, in December 2009 the Court of Appeal handed down its decision in *Veakins v Kier Islington Limited* [2009] EWCA Civ 1288. At first instance, the court applied the "sensible prosecuting authority" test that had developed since *Conn*, and dismissed the claim. The Court of Appeal disagreed with this approach and stated that the primary focus when assessing any claim under PHA 1997 is to look at what side of the oppressive-unacceptable/unattractive-unreasonable-regrettable line the conduct fell. The criminal liability test was a gloss on the primary focus. While there could be no doubt that the allegations around the BBC would satisfy the *Conn* test, the requirement for them to do so before liability arises has been removed.

Today's law

The current state of the law goes wider than merely protecting the victim. Since the implementation of the Public Interest Disclosure Act 1998, now incorporated into Pt IVA of the Employment Rights Act 1996, workers and employees are protected from detriments, and employees are protected from dismissal, when the reason for that detriment or dismissal was that they made a protected disclosure or, in popular parlance, they "blew the whistle". A qualifying disclosure includes one which alleges a criminal act is being, has been or is likely to be committed, where a legal obligation is similarly

infringed or where a person's health and safety is equally endangered. The "whistle-blower" is protected even if the failure they report is that of a third party and not their employer.

Furthermore, the law protects workers from harassment by people who are not employed by the same employer as they are, provided such harassment is based on a protected characteristic. The government has recently begun consulting on the removal of this part of EqA 2010. Until its removal, the law provides that an employee who has been harassed on the grounds of sex can complain to their employer even if the harasser is not employed alongside them. In such circumstances, the employer would have an obligation to take such steps as was reasonably practicable to prevent the third party from committing these acts.

What is clear is that an employer who faces allegations of harassment by or towards its employees cannot, as has been alleged may have occurred in past cases, brush the allegations under the carpet. The law has developed and been expanded on numerous occasions and in various ways to ensure that protection for people aware of harassment are protected and covered and are able to escalate their concerns to their employers or others. NLJ

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