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Workplace sexual harassment—time to ‘shake up the current ineffectiveness of the system’?

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The Equality and Human Rights Commission (EHRC) has called for urgent action from employers to protect their employees from sexual harassment, after finding that ‘toxic workplace cultures’ and the ‘very real fears of victimisation’ mean that employers’ responses are inconsistent. Lawyers from Bindmans LLP, Lewis Silkin LLP, Mishcon de Reya LLP and Stewarts discuss potential future changes to employer practices, arguing that it is time to ‘shake up the current ineffectiveness of the system’ that has allowed workplace harassment to go ‘unchecked and unpunished’.

EHRC recommendations to ‘eliminate sexual harassment in every British workplace’ include:

- new laws to strengthen protection for harassment victims—the limitation period should be extended to six months, and interim relief should be introduced
- a change in workplace culture—a mandatory duty on employers to take reasonable steps to protect workers from harassment should be introduced, as well as a statutory code of practice
- greater transparency about incidents of harassment—the publication of company policy should be mandatory, and non-disclosure agreements and confidentiality clauses should be made void

Law and regulation is ‘not the only answer’

Shazia Khan, partner at Bindmans LLP, says that it is unacceptable that sexual harassment has become ‘normalised’ in the workplace: ‘In effect, employers appear desensitised to the practice acting in a laissez-faire manner paying lip-service to complaints raised.’

Khan adds that this shows that the current framework fails those at ‘the receiving end of such unwarranted abuse and exploitation’.

Michael Burd, partner at Lewis Silkin LLP, discusses the EHRC’s focus on ‘corrosive’ cultures leading to workplace harassment. The EHRC suggests that the onus should now be on employers to prevent and resolve workplace harassment. Burd notes that the question of how the onus will be brought about is an interesting one:

‘The fact is that the law has for some time required employers to safeguard employees’ health and safety, and that sexual harassment and discrimination have been unlawful for many years.

‘But that of itself has not been enough to change cultural norms that have all too frequently allowed workplace harassment to go unchecked and unpunished.’

Burd suggests that law and regulation, although playing an important role in driving societal change, is never going to be the only answer: ‘It is undoubtedly the case that the #MeToo campaign, and all the public and social media comment which has emanated from it, has probably done more to raise public consciousness about the issue, and to shift the public’s notion of what is and is not acceptable behaviour, in a period of months than anti-discrimination legislation has achieved over some 50 years since its inception.’

Asa Waring, legal director at Mishcon de Reya LLP, agrees that legal changes will not be enough: ‘It is clear from this report and other data on sexual harassment that cultural change is needed, including in relation to empowering employees to speak up.’

Practical steps to ‘mitigate the risk of workplace harassment’

Joseph Lappin, employment solicitor at Stewarts, suggests several steps that an employer should take to ‘mitigate the risk of sexual harassment occurring in the workplace’:

- implementing equality and diversity policies which address the issue of sexual harassment
- providing diversity and equality training to senior managers so that they can react quickly if confronted with allegations of sexual harassment by team members

- making it easy to report sexual harassment confidentially and investigating allegations quickly and robustly, regardless of the seniority of those involved
- taking steps to protect those employees who believe they have been harassed at work and providing them with internal and external support networks
- conducting disciplinary investigations and taking steps to discipline any members of staff found to have committed acts of harassment, including dismissal where appropriate

Khan adds that a mandatory statutory reporting regime may go towards 'shaking up the current ineffectiveness of the system', while enticing employers to 'address all complaints fairly, thoroughly and promptly, placing the victim at the centre of solutions instead of marginalising and victimising them'. She continues:

'An immediate ban on the use of non-disclosure agreements to silence victims in exchange for financial incentives must be outlawed.'

Waring says that a mandatory, legally enforceable duty on employers to safeguard their workers accompanied by a statutory code of practice is 'likely to be more effective than non-binding guidelines': 'It should not be too onerous for those employers who already have the proper procedures in place

Use of confidentiality clauses has 'tricky aspects'

Burd says that the EHRC's recommendation for the government to make confidentiality clauses void has some 'tricky aspects' to it: 'Clearly, they should never be used to gag victims or prevent whistleblowing or abuses of power; no question about that.

'But in my experience, there are instances where confidentiality is really important to the victim, in some cases enabling them to feel comfortable returning to a workplace without fear that "everyone knows".'

Burd concludes: 'If there is to be a code of practice around this it will require some careful thinking about to ensure that victims' interests are not inadvertently impacted adversely.'

Source: Report: Turning the tables—ending sexual harassment at work

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