

SEXUAL HARASSMENT – AN EMPLOYERS GUIDE

Harassment comes in three different guises namely general harassment, sexual harassment and less favourable treatment. This fact sheet focuses on sexual harassment.

What's the Law?

Section 26 of the Equality Act 2010 provides that behaviour will amount to sexual harassment if it is either meant to, or has the effect of, violating another's dignity, **OR** creates an intimidating, hostile, degrading, humiliating or offensive environment for another.

Complaints of sexual harassment in the workplace can be made by a wide variety of people including job applicants, staff (including employees, some workers and agency workers) and former employees.

What type of behaviour could amount to sexual harassment?

- Comments or jokes of a sexual nature;
- Unwelcome sexual advances;
- Touching;
- Various forms of sexual assault;
- Displaying pictures, photos or drawings of a sexual nature, or with a sexual connotation;
- Sending messages with sexual content or of a sexual nature.

The complainant does not need to be directly subjected to or even present at the time of the behaviour in question in order to bring a claim of sexual harassment. Furthermore, if a complainant is disadvantaged or treated badly following their reaction to behaviour of a sexual nature, by either the accused or another person, this may still amount to sexual harassment.

What should you do if an allegation is made?

Organisations should ensure there are policies and procedures in place that both encourages staff to raise a complaint of sexual harassment and gives them the confidence that the matter will be dealt with in a sensitive manner.

Such a policy or procedure should have as a minimal:

- a requirement that the allegation is responded to in a fair and timely manner;
- provisions to ensure that confidentiality is maintained as far as is possible – do however be aware of the limitations on guaranteeing anonymity and/or non-disclosure of complaints;
- guarantees and mechanisms to ensure that the complainant will not be disadvantaged by making an allegation of sexual harassment;
- a notification that disciplinary action, up to summary dismissal, may be taken if an allegation of sexual harassment is upheld;
- a right of suspension – however, advice should always be taken before invoking a suspension to ensure that this does not give the accused grounds for bringing a separate claim;
- support mechanisms for those involved – these can include counselling.

Organisations should also consider whether the obligation to inform a regulatory body that an allegation of sexual harassment has been made is triggered. Examples of when reporting obligations are triggered include complaints in organisations regulated by either the Financial Conduct Authority (FCA) or the Solicitors Regulation Authority (SRA).

The FCA in particular requires notification within 7 days of a person being suspended as a result of the harassment allegation. The SRA requires notification when the investigation report has been concluded and followed by disciplinary action.

Investigating sexual harassment allegations

Key to dealing with any complaint of sexual harassment is the investigation into the allegation. When undertaking an investigation employers should:

- assign an investigator who is suitably experienced and appropriately senior to the accused – in some instances it may be appropriate to engage an external investigator;
- deal with the issue of whether it is necessary to separate the complainant and the accused until the investigation has been concluded;
- conduct a thorough and balanced investigation which includes collating all relevant evidence – this can include evidence in relation to the current allegation such as CCTV, messages etc., as well as evidence of past allegations of a similar nature;
- conduct interview with the complainant and the accused as well as with any third parties who may be able to further the investigation. Those who are being interviewed should be offered the right to have a work colleague or trade union representative present at the interview; some employers may exercise their discretion to allow a friend or family member to be present during the interview.

A report should be produced at the conclusion of the investigation which sets out findings. Findings should be factual and premised on a balance of probabilities.

Disciplinary action

There is no requirement for an employer to have a separate procedure which is specific to dealing with sexual harassment complaints; often the disciplinary procedure will be used in these circumstances. Any procedure which is adopted in these circumstances should have, at its cornerstone, compliance with the ACAS code of practice on disciplinary and grievance procedures. Organisations should keep an audit trail of the process which can include letters, minutes of meetings and evidence packs.

In the event disciplinary action is taken, the right to appeal that action should always be given.

Legal assistance

Here, at Wilson Browne Solicitors, the employment team can advise in relation to sexual harassment allegations and all other aspects of employment law issues. Please contact our team on 0800 088 6004.