Personal Injury

Sexual harassment in the workplace

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Since the allegations regarding Harvey Weinstein's conduct and the Presidents Club's fundraising dinner have entered the public domain, a spotlight has been shone on the availability of legal protection currently available to employees. This article considers the different routes through which employees can seek redress for claims of sexual harassment in the workplace, looking at both employment tribunals (ETs) and civil courts.

Employment tribunals

Employees may bring claims under the Equality Act (EqA) 2010 in the jurisdiction of an ET. The EqA 2010 prohibits three types of harassment:

- harassment related to sex
- sexual harassment
- and less favourable treatment because the employee rejects or submits to harassment.

As set out below, an employee may bring a personal injury claim if any psychiatric injury is sustained as a result of such conduct.

EqA 2010 provisions

The first cause of action arises where an individual engages in unwanted conduct related to sex and the conduct has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (s26(1)). In deciding whether conduct has this effect, an ET must consider the employee's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect (s26(4)). There is no need for the employee to have already made it clear that the conduct is unwanted for it to constitute harassment. This cause of action may cover conduct such as intentional bullying or making offensive sexist jokes.

The second cause of action involves unwanted conduct of a sexual nature, which has the purpose or effect referred to in s26(1) (s26(2)). The word 'effect' has the same meaning as with harassment related to sex. This may cover unwanted verbal, non-verbal or physical conduct of a sexual nature. Conduct may still be regarded as unwanted where an employee has put up with conduct for years or had a consensual relationship with the alleged perpetrator.

The third cause of action arises where an individual engages in unwanted conduct of a sexual nature or related to

gender reassignment or sex, which has the purpose or effect referred to in s26(1), and because of the employee's rejection of or submission to the conduct, the employee is treated less favourably than they would have been treated if they had not rejected or submitted to the conduct (s26(3)). The reason for the less favourable treatment also includes the employee's rejection of or submission to harassment from a third party. This provision covers conduct such as where an employee is not promoted because they rejected sexual advances from their manager.

For the purposes of the EqA 2010, anything done by an employee in the course of their employment is treated as having also been done by the employer (s109(1)). Employers may avoid liability for harassment of a member of staff by their employees where they can demonstrate that they took all reasonable steps to prevent the harassment (s109(4)). In addition, employees are personally liable in respect of any harassment that they commit.

Third-party harassment

The position is not straightforward in respect of acts done by third parties, such as customers or clients. The EqA 2010 initially extended statutory protection of third-party harassment to all the protected characteristics, except for marriage, civil partnership, pregnancy and maternity (s40(2)(a)). There were high thresholds for an employee to overcome. An employer was not liable unless it knew that the employee had already been harassed by a third party on at least two occasions (s40(3)). Moreover, an employer was not liable where it took reasonably practicable steps to prevent the harassment (s40(2)(b)).

However, the third-party harassment provisions were short-lived: they were repealed with effect from 1 October 2013 by the Enterprise and Regulatory Reform Act 2013. While there is growing pressure on the current government to re-enact the provisions in some form, employees may only bring third-party harassment claims under s26 EqA 2010. An employee could argue that an employer's inaction to deal with the behaviour of third parties is unwanted conduct in and of itself, related to their sex, which violated their dignity or created a proscribed environment. That said, it may be difficult to show that an employer's inaction actively created a hostile environment. There are some environments, such as hospitals or prisons, where unwanted conduct may be regarded a 'hazard of the job' (*Sheffield City Council v Norouzi* [2011]).

Practicalities

If an employee decides to bring a claim for harassment in an ET, there are certain factors to be taken into consideration. Firstly, the words 'in the course of employment' are not restricted to the meaning used to establish vicarious liability in tort but are to be given their ordinary meaning (*Tower Boot Co Ltd v Jones* [1997]). Employment-related decisions are likely to be seen as arising in the course of employment; however, the position is more complicated where conduct occurs off the premises or outside of working hours. It is a highly fact-sensitive assessment (*Chief Constable of Lincolnshire Police v Stubbs* [1999]).

Moreover, employees must bring claims in an ET within three months of the alleged conduct, subject to the Acas early conciliation period. In some instances, an employee may not bring a claim until they have left employment, which may be well after the conduct. This may cause difficulty with limitation periods, particularly where the claim for harassment relates to a single incident. That said, acts occurring more than three months before a claim is brought may still form the basis of a claim if they are part of 'conduct extending over a period' for the purposes of the EqA 2010 (s123(3)). In any case, an ET can use its discretion to extend time for bringing a claim for harassment by such period as it thinks just and equitable (s123(1)(b) EqA 2010). In practice, this is not an onerous test for an employee to satisfy.

Remedy

If an employee succeeds in establishing a claim for harassment, an ET may order an employer to pay compensation. This is assessed in the same way as any other claim in tort (s124(6) EqA 2010). To be recoverable, the loss suffered by the employee must be directly attributable to the act of discrimination (*Coleman v Skyrail Oceanic Ltd* [1981]). However, the ordinary tortious principle of remoteness of loss does not necessarily apply in harassment cases. In *Laing Ltd v Essa* [2004], the claimant in a race discrimination claim did not have to show his loss was reasonably foreseeable; he only had to prove that there was a direct causal link and that the chain of causation had not been broken.

As well as financial loss, employees can claim non-financial loss, which may include damages for personal injury (*Sheriff v Klyne Tugs (Lowestoft) Ltd*

[1999]). In a claim for personal injury arising from sexual harassment, employees are likely to have suffered psychiatric injury. Medical evidence is usually required to establish the cause of the injury, although it is not an absolute requirement (*Hampshire County Council v Wyatt* [2016]). An ET may have to consider whether an injury has been caused by both discriminatory and lawful causes. In such circumstances the employer will only be liable for the part of the injury which is caused by its discriminatory act (*Thaine v London School of Economics* [2010]).

Employees may also seek additional heads of non-financial loss, including an award for injury to feelings. This has the potential to increase compensation considerably: the 'bands' of compensation currently comprise a lower band of £900 to £8,600 (for less serious cases), a middle band of £8,600 to £25,700 (for cases which do not merit an award in the upper band), and an upper band of £25,700 to £42,900 (for the most severe cases). However, care should be exercised to distinguish injury to feelings from psychiatric injury: an ET must not double-compensate employees for the same harm.

Taking the above into account, employees may be able to recover greater financial losses in an ET than in the civil courts. Furthermore, employees no longer have to pay tribunal fees to bring a claim and are unlikely to be subject to a costs award. However, employees should bear in mind that there is a considerably shorter limitation period than in the civil courts. In addition, the claim for compensation will be assessed by an ET which is unlikely to be as experienced in applying tortious principles as the civil courts and could lead to more mixed results.

Civil courts

What happens if an employee feels prevented from bringing a claim for harassment within three months of the conduct because, for example, they remain in employment alongside the perpetrator? They could instead bring a claim against their employer under the Protection from Harassment Act 1997 or for negligence in the County Court or High Court, where there are more generous limitation periods of three and six years respectively.

Claims regarding the statutory tort of harassment and negligence will be well known to readers of the PILJ and a detailed consideration is not set out here. However, it is important to note there are critical differences to harassment claims brought under the EqA 2010. In particular, the course of conduct required for a statutory harassment claim must be sufficiently serious so as to give rise to criminal liability, which is a significantly higher threshold than the test referenced in s26(1) EqA 2010. Further, the conduct must cause alarm and distress to the victim, and the alleged perpetrator must know, or ought to know, that the conduct amounts to harassment.

This provision is likely to assist employees only where they have suffered from very serious wrongdoing, such as stalking. However, there is no defence that the employer took all reasonably practicable steps to prevent the harassment. An employee does not need to prove the harm was foreseeable, although this condition is required for negligence claims in the usual manner.

Estoppel

Employees should be alive to procedural difficulties which may arise if they seek to bring a claim for harassment in the civil courts which has already been brought in an ET. The doctrine of cause of action or issue estoppel will apply where there has been a 'final and conclusive decision on the merits' (*Staffordshire County Council v Barber* [1996]). A final decision in fact covers not just a judgment on the merits, but also any 'actual decision of a competent court dismissing the process' (*Lennon v Birmingham City Council* [2001]).

What are the consequences if an employee decides to abandon their claim in the ET prior to a final determination on the merits? An employee may withdraw their claim at any stage, under r51 of the ET Rules of Procedure 2013 (ET Rules). The tribunal will issue a judgment dismissing the claim, which would prevent the claimant from starting a further claim, unless either:

- at the time of withdrawing, the claimant expressed a wish to reserve the right to bring a further claim against the employer and the ET is satisfied there would be a legitimate reason for doing so; or
- the ET believes that to issue such a judgment would not be in the interest of justice, under r52 of the ET Rules.

Notwithstanding the above, there are certain circumstances in which a claimant can bring fresh proceedings even where an ET has dismissed an earlier claim on the same issue. In *Nayif v High Commission of Brunei Darussalam* [2014], a race discrimination claim brought in the ET was dismissed because it was out of time. The claimant issued a claim for breach of contract and negligence in the High Court, alleging psychiatric injury arising from the discrimination. The Court of Appeal held that estoppel did not arise as there had been no actual adjudication of any issue nor had the claimant conceded the issue.

Conclusion

Employees may bring claims containing allegations of sexual harassment in either the ETs or civil courts. Limitation will undoubtedly be a significant factor in determining the choice of forum. They may also wish to consider the available causes of action and loss which has been suffered, specialism of judges and potential costs ramifications. If possible, these factors should be considered before a claim is presented to a particular forum to avoid any estoppel issues from arising.