

HARASSMENT¹

Section 26 of the Act unifies existing legislation and clarifies harassment. Section 26 defines harassment, which now includes three specific types:

- (1) Harassment which involves unwanted conduct which is related to a relevant characteristic and has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or violating the complainant's dignity. Note: this applies to all protected characteristics apart from pregnancy and maternity and marriage and civil partnership ;
- (2) Sexual harassment which is unwanted conduct of a sexual nature where this has the same purpose or effect as the first type of harassment ;
- (3) Treating someone less favourably because they have either submitted to or rejected sexual harassment, or harassment related to sex or gender reassignment .

The Act provides

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) 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.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

¹ Declan O'Dempsey. I would also like to thank Damian McCarthy and Anna Beale for their help in preparing this paper. An expanded version of this paper will appear in the LAG Discrimination Law handbook to be published shortly.

(5) The relevant protected characteristics are—

age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.²

Scope

In itself harassment is not made unlawful under section 26 – it is only where the harassment is related to a relevant protected characteristic that it becomes unlawful. The relevant protected characteristics are

- age
- disability
- gender reassignment
- race
- religion or belief
- sex
- sexual orientation

The definition of the protected characteristic may be important in each case. Harassment because of a third party's protected characteristic will be prohibited.

Under Part V of the EqA 2010, which deals with work, harassment is prohibited in the following situations:

- harassment of an employee or applicant by an employer (s. 40);
- harassment of police officers by the responsible Chief Officer or responsible authority (s. 42);
- harassment of partners or prospective partners by a firm, or members or prospective members by a limited liability partnership (s. 44 and 45);
- harassment of barristers and pupils (advocates and devils in Scotland) by barristers, clerks and those instructing barristers (s. 47 and 48);

² The new provisions do not, therefore, apply to harassment relating to pregnancy or maternity, or marriage and civil partnership.

- harassment of a person seeking to be, or appointed to, a personal or public office, by the person who has the power to appoint to or recommend appointments to that public office (s. 49 – 51);
- harassment of a person who holds or is applying for, a particular qualification by a qualifications body (s. 53);
- harassment of a person who uses or asks for the use of employment services provided by an employment service provider (s. 55);
- harassment of a member, or an applicant for membership, of a trade organisation by that trade organisation (s. 57);
- harassment of a member of a local authority in connection with that member carrying out official business, by the local authority (s. 58).

How much old case law is of relevance? Some older case law may have a limited relevance.

The statutory provisions

TYPE 1: Under the Act a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has a particular purpose or effect. Note that the conduct is prohibited if it has either the prohibited purpose or the prohibited effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B .

TYPE 2:A also harasses B if A engages in unwanted conduct of a sexual nature, and the conduct has the prohibited purpose or effect .

TYPE 3: A also harasses B if A or another person engages in unwanted conduct of a sexual nature (or that is related to gender reassignment or sex), the conduct has the prohibited purpose or effect and because of B's rejection of (or submission to) the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct .

Ascertaining the prohibited effect: The Act makes provision to assist in deciding whether conduct has the prohibited effect in all these cases . Each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect .

Under previous legislation there was no uniform definition of the first type of harassment.

Human rights and Harassment

Tribunals will need to be required to balance, for example, the rights to freedom of expression and of academic freedom against the right not to be offended, in determining whether an individual has

been harassed. However it is important to emphasise in any case in which such a defence is raised as a factor that Article 10 ECHR only protects the responsible expression of free speech . It does not protect hate speech or speech which harasses a person . Similarly the claimant will have a right to respect for their private and family life. This will include the ability to form relationships, such a friendships, at work.

Nevertheless Art.10 ECHR protects not only “the information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society.”

It may be that a certain variance will be seen in the protection that is afforded to persons by section 26 against harassment depending on which protected characteristic is in issue.

The Explanatory Notes give the following examples of harassment:

- A white worker who sees a black colleague being subjected to racially abusive language could bring a claim for harassment if the language also causes offence to the white worker;
- An employer who displayed any material of a sexual nature, such as a calendar featuring pictures of topless women, may be harassing employees where this makes the workplace an offensive place to work, whether male or female;
- A shopkeeper propositions one of his shop assistants. She rejects his advances and is then turned down for a promotion which she would have got if she had not turned down the sexual advances. The shop assistant would have a claim for harassment.

To this could be added that 'outing' someone without their permission may constitute harassment , calling a worker with a same sex partner by names appropriate to the opposite sex . Clearly the section covers a very wide range of activity.

In **Richmond Pharmacology v Dhaliwal**³ the Employment Appeal Tribunal gave guidance on the approach that should be adopted to the common core of harassment and which can be adopted for the new definition without violence:

- (1) Did the alleged perpetrator engage in “unwanted conduct”?
- (2) Did the conduct identified have (a) the prohibited purpose or (b) the prohibited effect?
- (3) was the conduct “related to” the protected characteristic?

Unwanted conduct

The conduct must be unwanted. The tribunal will look at the following factors:

³ [2009] IRLR 336

(a) the objective nature of what was said or done. Was it so offensive that it would obviously be unwanted; if not,

(b) did the context of what was said or done render it offensive of itself so as to be obviously unwanted; if not,

(c) has it been made clear to the alleged perpetrator that the conduct is unwanted?

It is not necessary for the alleged perpetrator to know that the conduct is unwanted save in (c). Lack of intent is not a defence .

The vulnerability of the claimant may also be a factor in determining whether participation in “banter” indicates that the conduct was not “unwanted”. Thus it was open to a tribunal to find that despite many years of putting up with sexually explicit inquiry, banter, and bullying by an employer, the employees were harassed. This was so despite the fact that on occasion the employees initiated such banter to deflect the employer from inquiring about their sex lives (see **Munchkins Restaurant Ltd & Anor v. Karmazyn & Ors**⁴)

In situations in which the nature of the behaviour and the context is such that the unwanted nature of the conduct is not clear what is B required to do?

It is not necessary for B to express discomfort with a particular course of conduct in words, nor would it be necessary for B to air views publicly. It follows therefore that it, in certain circumstances, it may be sufficient for B simply to walk out of a room, provided that any reasonable person would understand B to be denouncing the conduct.

In **Richmond Pharmacology v Dhaliwal** the EAT suggested boundaries to the concept of harassment:

'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

There is some suggestion from the case law that harassment will not be found to have taken place where it is de minimis. However EU law suggests that the principle of equal treatment is incompatible with any discrimination whatsoever.

'Related to'

⁴ 28th January 2010 [2010] UKEAT 0359/09

The term “related to” is not further defined. However, there must be a connection of some sort between the act complained of and the protected characteristic.

In **Equal Opportunities Commission v Secretary of State for Trade and Industry**⁵ the High Court held that that an earlier definition of sexual harassment containing the phrase ‘on the ground of’ did not implement this definition and hence did not properly implement the European legislation. It imported a requirement of causation or ratiocination. The European law makes harassment dependent simply on a connection or association with sex.

Clearly therefore ‘related to’ is intended to be wider than ‘on the grounds of’ and will capture all conduct which previously was captured by the ‘on the ground of’ test.

The wording is broad enough to capture harassment based on a third person’s protected characteristics or mistaken attribution of the characteristic .

In the *EOC* case, it was suggested, with the apparent agreement of the judge, that the facts in *Brumfitt v Ministry of Defence*⁶ (where the claimant complained of harassment based on the use of offensive words of a sexual, but not sex-specific, nature, directed at a mixed audience of men and women) would be covered by the test of unwanted conduct ‘related to [a woman’s] sex or that of another person’. Similarly, it was suggested that the conduct in *B v A*⁷ (unfair treatment of a woman owing to jealousy of conduct with another man) would also fall within a ‘related to’ test.

(2) Unwanted conduct of a sexual nature

Type 2 provides that A harasses B if A engages in unwanted conduct of a sexual nature. In addition the conduct must have the prohibited purpose or prohibited effect of

(a) violating B’s dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

There must be conduct of a sexual nature by A. An objective test is used. Although the phrase ‘any form of unwanted verbal, non-verbal or physical conduct’ which appeared in the previous definition of sexual harassment under the SDA does not appear in the Act, the Act uses the phrase ‘unwanted conduct of a sexual nature’. In keeping with the style in which the Act is drafted, it is suggested that this is intended to be perfectly general language aimed at capturing any form of such conduct.

Thus it is suggested that the tribunal will be able to determine whether conduct is sexual conduct by reference to:

(a) the nature of the conduct itself (unequivocal).

(b) the context (if conduct equivocal).

The conduct does not have to be directed at B.

⁵ [2007] IRLR 327

⁶ [2005] IRLR 4

⁷ [2007] IRLR 576

Sexual conduct towards a third party which has the required effect on B will be sufficient (provided it has the harassing effect).

Provided the conduct is of a “sexual nature” and the victim is affected in the required way, the reason for the sexual conduct is irrelevant.

The section, does not require any particular protected characteristic to be invoked by B and appears to establish ‘sexual nature’ harassment as a free standing prohibition. It would thus cover ‘horseplay’ taking the form of some indecent act or bullying which had a sexual element to it.

(3) Unwanted conduct of a sexual nature or that is related to gender reassignment or sex

In Type 3 harassment A also harasses B if the following conditions are satisfied. (1) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex. (2) The conduct must have the prohibited purpose or effect. (3) Finally, because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

Where B alleges that they were subjected to a sexual assault outside work, A may not treat B less favourably because of A’s views about the sexual activity involved (for example whether it was consensual). Likewise if B is transsexual and receives insults from A’s customers due to this (which B rejects), as a result of which A will not send B to those customers, this will constitute this type of harassment it is suggested.

The comparison must be carried out between the fate of a person who does submit to (or reject) the unwanted conduct and it must be shown that A has treated B less favourably than a comparator (real or hypothetical) who has submitted to (or rejected) that conduct.

“Purpose or Effect”

In all cases of harassment the claimant must show that the perpetrator engaged in the unwanted conduct with the prohibited effect or purpose.

Purpose: In considering whether particular conduct had the prohibited purpose, the tribunal must investigate the alleged harasser’s motive or intention.

The purpose must be either of violating B’s dignity or of creating for B an intimidating, hostile degrading, humiliating or offensive environment.

If conduct has the prohibited purpose, it does not matter whether it has that effect on B. In particular it is not necessary to consider B’s perception of the unwanted conduct. When considering whether unwanted conduct has the prohibited effect, the Act requires a tribunal to consider the factors set out in section 26(4). Thus if the purpose is to create the prohibited environment or violate B’s dignity, that is sufficient.

Effect: Even if conduct is not intended to cause harassment, the effect may nonetheless give rise to a harassment claim where the conduct has the effect of violating B’s dignity or of creating for B an intimidating, hostile degrading, humiliating or offensive environment.

In the context of considering whether unwanted conduct has the prohibited effect, it is necessary to deal with the requirements of section 26(4) of the Act. In deciding whether conduct had the prohibited effect, the Tribunal must have regard to the following :

- (i) the perception of B;
- (ii) the other circumstances of the case;
- (iii) whether it is reasonable for the conduct to have that effect.

Tribunals will therefore have to consider both a subjective and an objective test, whilst also weighing up all other relevant factors in any given case. Weight will be attached to the Claimant's perception but this will not be the overriding factor in a tribunal's assessment of the effect on an individual.

The perception of B

Does not create a subjective test for the existence of the prohibited effect. The victim "must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question" (see **Dhaliwal**).

The other circumstances of the case

Can include the circumstances of the person experiencing the conduct, among others:

- the individual's health, mental health or mental capacity;
- cultural norms;
- previous experience of harassment;
- differences in age and/or status;
- fluency in English or other relevant language.

Whether it is reasonable for the conduct to have that effect

The effect of this is that all of the requirements in section 26(4) are factors in an objective test. Tribunals will also consider the implications of various rights such as that of academic freedom and freedom of expression (as set out in Article 10 of the European Convention on Human Rights).

Third party liability (s40)

Section 40 provides for protection against harassment of employees by person other than their employer. It is restricted to the employer – employee relationship as defined in the Act. So it is not available to office holders and others who do not work under a contract of service or personally to execute any work. It makes the employer liable for harassment of its employees by third parties, such as customers or clients, over whom the employer does not have direct control.

Liability only arises if harassment has occurred on a least two previous occasions, the employer is aware that it has taken place, and has not taken reasonable steps to prevent it happening again.

The Act says that if A is an employer, A must not, in relation to employment by A harass B (an employee of A's or one who has applied to A for employment). This creates the unlawful act of harassment. It is confined to the employer employee relationship (actual or prospective). However section 40(2) provides that included in the circumstances in which A is treated as harassing B is the situation in which, in the course of B's employment, a third party harasses B. A will only be liable however if "A failed to take such steps as would have been reasonably practicable to prevent the third party" from harassing B.

Even if that condition is satisfied, A will not be liable if "A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion". Section 40(4) provides that a third party is a person other than A, or an employee of A's.

An employer is required to take reasonably practicable steps to prevent a third party from harassing an employee. The use of the phrase "reasonably practicable" indicates a difficult test for the employer to satisfy. The tribunal in considering whether the employer has failed to take such steps as were reasonably practicable will consider

(1) what steps were taken?

(2) were there any further steps that were reasonably practicable that should have been taken and could have been taken by the employer?

In that context it will ask whether any such further steps would have been of any consequence or have had any realistic chance of success. But even if the step identified had not had any realistic chance of success, if in fact it was reasonably practicable for them to be done, they should have been done, and the employer will have failed to take such steps as were reasonably practicable to take to prevent such harassment.