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UK Government Launches Consultation on Sexual Harassment in the Workplace

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The UK government has launched a consultation on sexual harassment in the workplace to help it understand whether the current laws are operating effectively. (Spoiler alert – it does not think they are!)

The government acknowledges that despite the Equality Act 2010 containing clear provisions prohibiting sexual harassment, such misconduct persists in UK workplaces. It is, therefore, looking to employers to be more proactive in taking steps to prevent harassment happening in the first place.

The consultation is split into two parts: a set of online questions aimed at individuals who have experienced sexual harassment in the workplace; and a technical document that invites views on what any new legislation should say – the latter being of relevance to most employers.

The technical consultation invites views on:

- **Whether there should be a mandatory duty on employers to protect employees from harassment.** The suggestion is that the new duty would require employers to take "all reasonable steps" to prevent harassment of their employees. So, it will effectively take the defence that is currently available to employers when defending claims of sexual harassment and turn it into a proactive duty to prevent the harassment happening in the first place.
- The question then is who will be able to enforce the duty? Should it be the Equality and Human Rights Commission (EHRC), individual employees or both? And if individuals can bring a claim, how should any compensation be calculated? The consultation document asks if individuals should be able to claim compensation for breach of a statutory duty, in the same way they can if their employer fails to comply with its obligations to inform and consult under TUPE, thus allowing them to claim up to 13 weeks' gross pay in compensation, quite without suffering any actual detriment at all. We are anticipating some fairly robust responses from employers in relation to this suggestion!
- **Whether employers should be required to publish or report on any prevention and resolution policies publicly, with board sign off, to ensure that companies are engaging with this problem at an appropriately senior level.**
- **How best to strengthen and clarify the laws in relation to third party harassment.** The proposal is to re-introduce provisions making employers liable for any harassment of their staff by third parties.

  Keen followers of employment law will recall that third party harassment used to be unlawful, but these protections were removed by the Coalition government in 2013, as they were considered to be confusing and unnecessary. The consultation invites views on what form this protection should take and the circumstances in which employers would be held liable. It seems that the previous "three strikes" rule (which required two occasions of known harassment to have occurred before liability was triggered) will not be re-introduced, and suggestions are invited on what should replace it.
- **Whether volunteers and interns should have the same protection against discrimination, harassment and victimisation as others in the workplace.** As the law currently stands, volunteers are not protected under the Equality Act 2010, as they are not "employees", and only interns that satisfy certain criteria have protection. This seems a dead cert to be accepted.
- **Whether the time limit for bringing discrimination, harassment or victimisation claims should be extended, e.g. to six months.** The argument being that the current three-month time limit is too short and so may be creating a barrier to justice. The consultation document gives the example of sexual harassment cases, which can be traumatic for the individual involved and where it may, therefore, take longer for the individual to come to terms with the incident and/or identify it as an unlawful act before bringing a claim.

The government will also be introducing a statutory Code of Practice on Sexual Harassment at Work, something that the EHRC will be consulting on later this year. Amongst other things, the code will provide guidance on the steps that employers must take to be able to rely on the current statutory defence to a claim, namely that they have taken "all reasonable steps" to prevent the harassment. Such practical advice would be useful, as currently it is rare that employers seek to rely on this defence and clarity about what "all reasonable steps" means is, therefore, to be welcomed.

Although this consultation focuses on sexual harassment in the workplace, any changes will apply equally to other forms of harassment prohibited under the Equality Act 2010.

The consultation closes on 2 October 2019. We will be preparing a formal response to the consultation and arranging some events to discuss the issues raised in the document. This is an important consultation, and we encourage employers to engage with this process to ensure their views on the proposals are properly considered by the government before it makes any legislative changes. If all the proposals are implemented in their current form, this would represent a significant change in the discrimination law landscape for employers.

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