

Sexual harassment: Managers' questions answered

Detailed guidance from the Equal Opportunities Commission

March 2006



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Equal Opportunities Commission

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Foreword

Sexual harassment is a serious problem in the world of work. Despite the spread of good practice that has seen progressive employers taking steps to protect the dignity of their workers. In recent years many employers have taken steps to protect the dignity of their workers. However, sexual harassment still represents one of the largest areas of complaints to the Equal Opportunities Commission.

From our contact with hundreds of organisations and individuals, we know that sexual harassment has serious potential to undermine and destroy working relationships. As the European Commission noted in 1991, “*sexual harassment pollutes the working environment and can have a devastating effect upon the health, confidence, morale and performance of those affected by it*”. If complaints of harassment are not resolved internally, costly litigation and damage to an organisation’s reputation may follow.

Conversely, the benefits for business of tackling harassment can be substantial. Sickness absence, stress and conflict in the workplace are reduced. Staff retention, efficiency, morale and profitability are increased.

Jenny Watson
EOC Chair

Introduction

In the light of the changes to the definition of sexual harassment within the SDA, the EOC has noted concern from employers that they will be held responsible for harassment in an increasing number of situations.

In addition managers inform us that they lack confidence when faced with dealing with complaints of sexual harassment. Even the most experienced managers are likely to encounter difficulties when faced with complaints, partly because of their infrequency. Policies and procedures, while important, can never cover all the circumstances that can arise or the practicalities of how to handle them with sensitivity, tact and fairness.

That is why we have written this guide. It is designed to answer the questions that are frequently asked about dealing with sexual harassment. It covers the legal position from the employer’s viewpoint and how to handle complaints of harassment. It also gives guidance on the measures you can put in place to prevent harassment occurring in the first place – and to minimise the risk of liability if it does.

It should be read in conjunction with our existing [guidance for managers and supervisors on sexual harassment](#), part of our series of checklists for managers and supervisors, and available on our website. The checklist deals with these issues in a shorter format, whereas this guidance revisits them in more depth.

The basics

What is the legal definition of sexual harassment?

The Sex Discrimination Act describes sexual harassment as:

- unwanted conduct on the ground of a woman or man's sex or unwanted verbal, non-verbal or physical conduct of a sexual nature or unwanted conduct on the ground of the recipient's rejection of or submission to the conduct described above,
- that has the purpose or effect of (1) violating the recipient's dignity or (2) creating an intimidating, hostile, degrading, humiliating, or offensive environment for the recipient.

Conduct will be taken to have had that effect on the recipient if, having regard to all the circumstances, including in particular his or her perception of it, it can be reasonably considered as having that effect.

Sexual harassment is unlawful under the Sex Discrimination Act

The term now encompasses a varied range of behaviours – physical, verbal and non-verbal – as well as environmental factors – such as explicit sexual talk and the sharing of pornography – that the tribunals have judged to be capable of causing offence in the workplace.

? Question

Can a person's conduct be sexual harassment if they did not intend to harass or were unaware that they were causing offence?

Conduct which has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for someone can be harassment, even if creating that kind of environment was not the intention behind the conduct.

In any organisation there is a range of attitudes among employees about what kind of behaviour passes as intimidating, hostile, degrading, humiliating or offensive. What one, or even a majority, might see as harmless fun and banter, even as a compliment, another may find unacceptable. They may consider the complainant to be oversensitive, prudish, or to have elicited the harassment through their appearance or behaviour. But behaviour can amount to sexual harassment even if the person doing it or those who witness it do not view it that way.

Is sexual harassment based solely on the complainant's perception of whether the conduct was offensive?

The complainant's perception has to be given particular regard. This means that in the vast majority of circumstances the complainant's view that it was offensive to them should be accepted. However, it may not be sexual harassment if no reasonable person, *with the same perceptions and sexual attitudes as the complainant*, would regard the conduct as capable of damaging the complainant's dignity or creating an offensive environment for them.

Therefore, contrary to media accounts the new definition of sexual harassment will not include conduct such as politely holding open a door for a female colleague!

What sort of behaviour is included?

Sexual harassment is not only unwanted physical contact or making obscene or suggestive remarks. It can occur in a variety of forms, such as: circulating emails with rude or 'dirty' jokes, displaying lewd posters, 'eying someone up' and leering and following someone round.

See Annex I for a fuller explanation.

? Question

What is the difference between bullying and sexual harassment?

At times it can be difficult to distinguish between behaviour which could be sexual harassment and that which is simply bullying. Bullying takes on a discriminatory aspect and can be challenged under the SDA where the behaviour is directed at a person or group of persons because of particular characteristics relating to their gender.

When will my organisation be liable for sexual harassment?

An employer is liable under the SDA for sexual harassment committed by employees in the course of their employment. The individual harasser may also be liable. Your organisation's only defence against liability will be that, in advance of the harassment, you had taken all the steps it was reasonably practicable to take to prevent this sort of behaviour occurring.

Whose conduct might we be liable for?

Your organisation is liable for sexual harassment committed by 'employees', whether or not your organisation approved of the conduct. Under the SDA, however, the term 'employee' is used in a wide sense and does not mean just the actions of people on your payroll. Employers can be liable for the conduct of anyone working for them that they have a degree of control over, such as contractors.

A senior accounts executive, B, was sexually harassed by an accountant who sub-contracted his services to her employer. B filed a tribunal claim for sexual harassment by the accountant, and also the subsequent handling of the investigation into her treatment, its inconclusive outcome and the dismissal of her grievance. The tribunal held that B's employer was liable for the acts of the accountant because it had a degree of control over him and had effectively co-operated with and therefore 'aided' him by failing to take action. The accountant himself and his consultancy company were also found liable.

Which of our workers are we required to protect?

As well as employees, your organisation is responsible for preventing harassment against:

- agency workers,
- ex-employees – where the discriminatory act is closely connected to their employment,
- job applicants,
- contract workers including consultants and other professionals,
- students on work experience,
- vocational trainees,
- volunteers, if they receive an allowance or are contracted to provide a service,
- board members, non executive directors, and councillors, and
- customers harassed by an employee providing a service to them.

Equally, your organisation can be liable for the conduct of these persons.

Who might be more vulnerable to sexual harassment?

Research has found that young women and new entrants to the labour market, divorced and separated women, and those with irregular or precarious employment contracts are disproportionately at risk. Women working in male-dominated environments, women with disabilities, lesbians and women from racial minorities are also more vulnerable, as are gay men and young men.

What about staff who are off work premises?

Harassment can occur outside the workplace, such as at conferences, training days and even socialising after work. See Annex I for a fuller explanation.

What if the alleged harasser is a client or customer?

You still have a duty of care to protect your employees, and legal obligations under the SDA to protect all personnel working for the organisation. It is a good idea to set out and display some key principles for customers about the organisation's culture and its position on sexual harassment.

Who will be liable to pay any compensation to the complainant?

The complainant can take a claim against their employer and the harasser. If a court or employment tribunal finds that harassment did take place, it can order the employer and the harasser both to pay compensation towards the complainant; the employer only to pay compensation; or the harasser only to pay compensation (although this is unusual).

How can my organisation protect itself from liability for sexual harassment claims?

Your organisation will have a defence against liability only if it can prove that it took such steps as were *reasonably practicable to prevent the employee from doing that act, or acts of that description*. How extensive those steps have to be depends on the size and culture of your workplace and its specific needs. The type of steps which will prevent harassment are set out below and should be viewed as your organisation's basic responsibilities.

What are my organisation's basic responsibilities in preventing harassment?

There are two basic responsibilities: firstly, prevention – through the implementation of policies and practices which establish a harassment-free environment; and secondly, handling complaints fairly in accordance with procedures.

The EC Recommendation on the *Protection of the Dignity of Women and Men at Work 92/131/EEC* has a Code of Practice annexed to it, which explains the importance of various methods.

The basic preventative steps are:

- Have an effective and well-communicated policy.
- Train all staff and managers on the policy and their responsibilities under it.
- Make sexual harassment a disciplinary offence.
- Monitor the policy and its success regularly.

The basic steps for handling complaints fairly are:

- Develop clear procedures for investigating complaints confidentially and compassionately without delay.
- Train staff who will be investigating complaints to handle them sensitively and in accordance with the procedures.
- Provide support as necessary for the complainant, the alleged harasser and managers handling the complaint.

For further details of these measures, see Annex 2.

Are there any other steps we need to take?

You will need to consider whether there are any other steps that it would be reasonably practicable for your organisation to take in order to prevent harassment.

Ms Caniffe, a female council employee, was sexually assaulted by a colleague at work. The Council argued that by having disciplinary, grievance and personal harassment policies in place, which had been drawn to the attention of all employees, it had taken all practicable and reasonable steps possible to prevent sexual harassment happening at work. However the Employment Appeal Tribunal ruled that, in deciding whether an employer is liable, it is necessary to take into account not only what preventative steps have been taken by the employer, *but also* whether there are any further steps the employer could have taken which would have been reasonably practicable.

What if no employees have complained of harassment?

Even in the absence of a specific complaint, you may have reason to suspect a problem because of persistent rumours, perhaps, or comments made by departing employees in exit interviews. Rising absence levels in a particular department or team may signal a problem with a certain manager. It is necessary to be alert to signals, to be proactive if you have any reason to believe that there is hidden harassment, and to tackle the situation even in the absence of formal complaints.

Some employers ask their employees anonymously via a workplace survey, such as a stress audit or general satisfaction survey, whether they have witnessed or suffered bullying or harassment.

Dealing with a sexual harassment complaint or situation

However you hear of potential sexual harassment in your organisation – via formal complaints, rumour, or anonymous comments – it is important to deal with the matter sensitively and swiftly. Inadequate handling of a complaint can lead employees to resign on the grounds of constructive dismissal and can amount to further unlawful discrimination in the eyes of a tribunal.

? Question

What if a manager witnesses harassment towards someone who does not report to them?

This is where things often go awry. Frequently in tribunal claims, the claimant's evidence is that another manager witnessed the incident, or that they complained to that manager, but nothing was done. This does not put the organisation in a good light and could harm your defence against liability for the harassment. You do need to deal with the situation as the law will look at your organisation as a whole and won't be influenced by internal departmental boundaries.

Should we deal with a sexual harassment matter formally or informally?

The informal route may be useful if a complaint does not fit into the serious misconduct category, e.g. if there has been a genuine misunderstanding about what has been said. Even if you start down the informal route, you can revert to a formal procedure later if the circumstances require it.

What information do I need before deciding the most appropriate procedure?

You need to determine:

- The extent and seriousness of the allegation by the complainant.
- The complainant's wishes and his/her expectations about what making a complaint will achieve.
- Whether this is a repeat incident, or similar issues have occurred before with the alleged harasser.

How far should I accord with the complainant's wishes?

Many people are very reluctant to make a formal complaint, not only because of the stress of doing so, but also because they fear that it may make the situation worse or have negative employment consequences for them. However, your powers of investigation and the action you can take will be more limited if an informal route is followed. You therefore need to explain the advantages and disadvantages of both the formal and informal routes and ascertain the complainant's wishes. Even if, armed with this information and having reassured him/her that the formal process would be conducted discretely and confidentially, the complainant wishes you to proceed informally, ultimately as a manager it is for you to decide how best to deal with the issue.

What other factors are relevant to the decision?

Whether you follow a formal or informal procedure will depend on:

- the seriousness of the allegation and of the incident(s),
- its effect on the individual concerned,
- its potential effect if repeated,
- whether the alleged harasser is in a position of trust and responsibility,
- whether the procedure would enable appropriate disciplinary action to be taken against the alleged harasser,
- what message the choice of procedure will send out to other staff,
- whether the procedure has the capacity to deter a recurrence, and
- whether the informal complaints procedure would be sufficient remedy for the complainant.

What steps should we follow for an informal procedure?

A suitable timescale for completing an informal complaints procedure would be two weeks.

1. Establish the facts of what happened from the complainant's viewpoint, keeping a record of what is said.
2. Make it clear to the complainant that you are taking the allegation seriously, albeit acting informally.
3. Put the allegations to the alleged harasser, keeping a record of what is said. Advise them of the timescale and steps involved, including confidentiality.
4. Consider whether any steps need to be taken to limit or remove contact between the complainant and alleged harasser.
5. Speak to any witnesses or other parties identified by the complainant or alleged harasser, informing them of the need for ongoing confidentiality, and any sanction for breach of confidentiality.
6. Evaluate the findings of your discussions/meetings.
7. Ask any supplementary questions needed to make a decision.
8. Advise the parties of the outcome and any proposed action as soon as possible.

What action can we take following an informal complaint of harassment?

Once you have established that there is a problem, where appropriate you can require the harasser to:

- cease the behaviour,
- conform to the organisation's policies and standards,
- attend training or mentoring or participate in other awareness raising, and/or
- be monitored in relation to harassment.

You may inform the employee that formal processes will start if there is any repetition of the behaviour.

What steps should we follow for a formal procedure?

In our experience, a good practice timescale for completing the following procedure is 20 working days. Each step in the process should be taken without unreasonable delay. However, the target timeframe is not a legal requirement and is subject to the complexities of the complaint.

The main steps in the procedure are:

INITIAL STAGE

1. Ensure the complainant submits a formal grievance if he or she has not already done so. It is advisable for the grievance to be submitted in writing. If the complainant does not feel able to do this, you could arrange for an independent person to help them prepare the written grievance.
2. Inform the alleged harasser of the allegations contained in the grievance.
3. Based on the complaint set out the terms of reference of the investigation.
4. Tell the complainant and the alleged harasser how the investigation will be carried out and who they will be dealing with.

FACT FINDING STAGE

1. Interview the complainant, who is entitled to be accompanied by a union representative or colleague.
2. Interview or obtain written statements from any witnesses for the complainant.
3. Interview the alleged harasser, who is also entitled to be accompanied by a union representative or colleague, at a separate meeting
4. Interview or obtain written statements from any witnesses for the alleged harasser.

INTERIM ACTION DURING THE INVESTIGATION

1. Where necessary, make arrangements to prevent contact during the investigation.
2. Provide support and counselling where necessary.
3. Take steps to establish confidentiality.

EVALUATION OF EVIDENCE AND DECISION ON OUTCOME

1. Consider whether additional meetings are required with any party to clarify the facts.
2. Evaluate the evidence and decide on the outcome.
3. Prepare a written report and communicate the outcome to the parties in writing.
4. Decide whether or not the disciplinary procedure should be invoked or some other action taken.
5. Inform the complainant of his/her right to appeal if they are dissatisfied with the outcome of their grievance. The courts have, however, held that it is not for the complainant to dictate the disciplinary action that should be taken against the alleged harasser.

The steps in the initial stage

1. The complainant's formal written grievance

Why is it advisable that the grievance be put in writing?

If the employee wishes to use the grievance as a basis for an application to an employment tribunal the grievance must have been set out in writing before a tribunal will consider the complaint. This is commonly known as raising a 'statutory grievance' and imposes certain requirements on the employer. For further guidance, see the ACAS Code of Practice: Disciplinary and Grievance Procedures and ACAS's Advisory Handbook on these procedures.

What if the complainant does not want to make a formal complaint or doesn't want to put their complaint in writing?

It is difficult to balance the need to investigate any complaint of sexual harassment with the need to protect an alleged harasser in circumstances where a complainant is reluctant to take matters further. However, you still have to act on a verbal complaint. Ultimately you have a duty to other members of staff and to the alleged harasser to investigate the complaint and reach a conclusion. Similarly, the lack of a written complaint should not affect your investigation. The requirement for a written grievance relates only to the statutory grievance procedures – if a grievance has not been put in writing the complainant must do so before raising a Tribunal claim.

The complainant should not be obliged to make a formal complaint to the person about whom they are complaining, or to anyone else closely associated with them. Where the alleged harasser is the complainant's direct line manager or supervisor, the complainant should be able to make the complaint to another appropriate person.

2. Informing the alleged harasser of the allegations contained in the grievance/complaint

What if the person complained about threatens libel action against the person making the complaint, or against the organisation?

This does happen occasionally. However, don't allow such a threat to affect your judgment or the objective handling of the complaint. It is not libellous to inform someone of an allegation or finding made against them as part of a genuine investigation, or to inform other relevant persons, or to express a view that a reasonable person could have held.

3. Setting out the terms of reference

What should the terms of reference contain?

In order to provide clarity, draw up the investigation's terms of reference in writing. The terms of reference should state:

- precisely what the complaint is about,
- the alleged incident(s) and when they were said to have taken place,

- who is said to have witnessed what,
- from whom statements will be taken,
- who is the investigating manager/team,
- how the process will be managed and in what timeframe, and
- the conduct and venue of the meetings.

Make sure that managers carrying out the investigation are not connected in any way with the allegation that has been made.

4. Telling the parties how the investigation will be conducted

Who will conduct the investigation?

The investigation should be run by a senior manager who has training in and a good understanding of discrimination issues. He/she should have (as far as possible) no prior involvement with the parties. They should be seen by those involved as having credibility, integrity and impartiality. In our experience, some complainants come out of investigation meetings feeling their complaint has not been taken seriously or that they themselves are under suspicion.

Tell the parties that accurate written records will be kept of all meetings.

What are the main points to get across?

Reassure the parties that the investigation will be conducted in a manner that is fair and impartial. Impress upon them the need to keep the investigation confidential – see page 16.

The steps in the fact finding stage

I. Interviewing the complainant

Can the complainant be represented?

The complainant has the statutory right to be accompanied at any grievance hearing. This means you must give him or her sufficient time to secure adequate support – a colleague or trade union representative.

If an employee's representative cannot attend on a proposed date, the employee has the right to propose an alternative date within five days. If you do need to adjourn the grievance meeting, you will still be under a duty to continue with the statutory grievance procedure. If an employee proposes an alternative date, you are under a duty to facilitate the meeting on the new date proposed. This duty continues until two meetings have been proposed and adjourned. However, bear in mind the statutory grievance procedures set a minimum standard of conduct rather than best practice; there is no reason why you cannot allow for a meeting to be set at a later date if this is mutually acceptable.

Where should the meeting be held?

Make sure that the meeting is held in an appropriate place. Although the parties may wish the meeting to be held in a neutral venue and not at work, remember that you may be discussing sensitive matters and your choice of venue must be appropriate to the serious matter in hand. Some complainants are concerned about the visibility of making a complaint so try to arrange a discrete and acceptable venue.

How should interviews be recorded?

Make and keep written records of meetings, interviews, and conversations. This applies to interviews with both parties and witnesses.

2. Obtaining written statements from any witnesses for the complainant

How do I interview witnesses?

Tell the witnesses that they are entitled to be accompanied to the meeting by either a Union representative or a work colleague. However, the person accompanying the witness should not be another witness in the same investigation.

Record any reluctance of witnesses to reveal information – this could point to the fact that a witness feels under pressure to remain silent.

Don't put words into the witnesses' mouths or ask leading questions – give them an opportunity to speak and try to get as much information as possible from them.

After you have interviewed them, give them a copy of their interview notes. Ask them to check and sign them, as a record of what they have said.

What can I do if a witness is unwilling to make a statement?

If a witness is unwilling to give evidence, consider whether you can take a statement from them anonymously. This step should be taken only as a last resort. It is only fair that the alleged harasser knows of what is being alleged and by whom. That said, if you are concerned about the safety of witnesses (particularly if they have been threatened), the law does allow you to take steps to retain their anonymity. However it will rarely be the case that you can do this – do not promise witnesses that their statements will not be passed to the alleged harasser unless there are exceptional reasons for doing so – such as genuine and serious threats to someone's safety.

3. Interviewing the alleged harasser at a separate meeting

Does the alleged harasser have to be represented?

The legal right to be represented applies to an alleged harasser in the context of disciplinary hearings rather than investigatory meetings relating to the complaint. However, it is good practice to allow an alleged harasser to be accompanied by a colleague or union representative, provided that the representative is not a witness.

What if one of the persons involved is absent on sick leave?

If absence is likely to lead to undue delays in the investigation, you need to consider what can be done to facilitate progress. There are a number of options:

- an occupational health referral;
- additional support, for example from a counselling service;
- where there is concern about contact with other parties when attending meetings in the workplace, arranging an alternative venue;
- suspending the investigation for a set period;
- proceeding with input from a representative in the absence of one of the parties (this should be put to the parties concerned and their response taken into account).

What happens if counter-allegations are made?

Counter-allegations are often made against the person who has complained about sexual harassment, or their witnesses. The counter-allegations might be made by the subject of the original complaint, by his or her friends or colleagues, or witnesses. If the counter-allegations are about unrelated incidents to the terms of reference, they should be addressed via a separate procedure and should not detract from your investigation of the original complaint.

4. Interviewing or obtaining written statements from any witnesses for the alleged harasser

What is good practice in relation to witnesses?

When a witness has been interviewed, it is good practice to give them a copy of their interview notes for checking and signature.

Interim action during the investigation

What are the main issues to consider?

These are:

- Whether to make arrangements to prevent contact during the investigation.
- Whether it is necessary to provide support and counselling.
- How to establish and maintain confidentiality.

Separating the complainant and alleged harasser

What arrangements may be needed to prevent contact during the investigation?

Although you will not have decided on the outcome at this point, it is sensible to take certain precautions should harassment have occurred. After a serious complaint of sexual harassment has been made, it is often necessary to limit contact between the parties as early as possible and to ensure this is maintained. Limiting contact will minimise the danger of any alleged harassment being repeated, and of anyone involved being victimised or retaliated against. Precautionary separation defuses the situation and gives a chance to investigate in a less pressurised environment.

In practice how can we separate the complainant and alleged harasser?

It is not always easy to arrange this. A transfer, working from home, or suspension pending the outcome of an investigation may be the only options. It may be tempting to move the complainant if he or she is more junior and easier to accommodate elsewhere. However, this is very rarely a satisfactory solution and may serve to compound any discrimination. Don't make the complainant feel it is his/her obligation to move.

It is important to assess the risks of transferring the alleged harasser and to keep the situation under review. It would not be appropriate to transfer someone who is under suspicion of sexual harassment to an environment that could lead to further incidents.

? Question

Why separate if the complainant is on sick leave?

The need to make arrangements to move the harasser or the complainant may appear to be less pressing if the complainant is absent on sick leave. However, a complainant may not feel that there is 'an open door' to return to work if doing so will bring them into contact with the alleged harasser.

Can we treat the alleged harasser and complainant differently when separating them?

It may be appropriate to treat the parties differently in some instances – for example, the alleged harasser may be suspended on full pay if he/she is the subject of a complaint which could lead to serious disciplinary action, but the complainant would not be suspended.

If someone is to spend time away from the organisation, pending the outcome of an investigation, do not penalise them before you know the outcome either by a reduction in pay, or through the use of their leave entitlement.

However, **beware of promoting the alleged harasser to another post as a way of relocating them: you risk being seen as condoning any harassment** that may later be found to have occurred.

Providing support and counselling where necessary

What support should we offer to the parties?

For most people, making a complaint is itself very stressful. You may have a welfare officer or occupational health adviser who can assist with this. In any event, the complainant should be offered support and/or counselling appropriate to his or her needs, whether through an advice line, a meeting with an occupational health officer, or a mentoring or buddy system. Whoever provides this service should be independent, confidential and sensitive to the complainant's needs.

You may also need to keep an eye on the health and mental state of the person complained about and to make available counselling services, if necessary, to enable him or her to deal with the situation. However, make sure this is not seen as preferential treatment.

Taking steps to establish confidentiality

What should I tell the parties about keeping the investigation confidential?

The need for confidentiality needs to be impressed upon anyone you talk to in connection with the complaint. Information to those other than the main parties should be strictly limited to an explanation of the arrangements for investigating the allegations. At this stage you have a duty to safeguard reputations – avoid implying any wrongdoing by either party.

The situation will undoubtedly be very stressful with a lot at stake. It is likely and reasonable that the people concerned will want to seek support from colleagues as potential witnesses. The need for absolute confidentiality should be made clear to everyone involved in the process.

Nip any speculation and discussion among colleagues in the bud as firmly as possible in order to minimise disruption to the team, further stress to the parties concerned, and undue damage to reputations. Make clear that a failure to respect confidentiality may result in disciplinary action.

Be sensitive to those on the periphery who might be affected by changes to working arrangements. It may be obvious that there is an issue or incident if a colleague is absent, or a reporting line has changed. This is often a difficult balancing act: you will need to provide some form of explanation, even though you cannot explain the underlying reason for the changes. It may only be possible to say that the changes are important because of a confidential matter.

? Question

Are there any exceptions to the duty to maintain confidentiality?

You may need to make exceptions to the blanket duty to maintain confidentiality. For example, in respect of the alleged harasser, he or she may wish to consult a solicitor or doctor, confide in a friend or family member, or seek support in principle from a potential witness either directly or through a representative.

The steps to evaluating the evidence and deciding the outcome

I. Considering whether additional meetings are necessary

When is it necessary to hold additional meetings?

During the course of the investigation, it may become evident that further investigation or external advice is needed. It may be that you have been given conflicting information that you need to clarify with one or more persons.

What should we do if we need to hold additional meetings?

Set a deadline for the next stage of the investigation and keep the parties up to date with developments. It's not unusual for the parties to ask you to speak to additional witnesses and for you to have to postpone moving to the next stage of the process. This delay cannot be avoided – it's much better for you to do an in depth investigation at this stage than to have to re-open matters further down the line.

At any additional meetings, put the allegations or points in dispute to the other party and give them an opportunity to respond. When facts are disputed, it is tempting not to reach a decision. However, it is important to follow up all allegations and any inconsistencies as far as possible in an attempt to reach a conclusion.

2. Considering the evidence and reaching a decision

What do we do if the evidence is conflicting?

If the facts are disputed, the evaluation is even more difficult. Unfortunately, these are not unusual circumstances: the individual accused may not be willing to admit harassment, and witnesses may be unwilling to come forward for a variety of reasons, including concerns about possible repercussions. A common problem in investigations is that there may have been no witnesses, that the facts are denied, or the incidents are thought not to come within the ambit of the organisation's existing policy.

However, it is your responsibility to reach a conclusion as far as possible. It can be useful to prepare a document listing supporting evidence on the one side and contradictory evidence on the other side to help you form a reasonable belief that the harassment did or did not take place. You do not have to prove that the harassment actually occurred.

? Question

What does the complainant need to prove?

Remember that the standard of proof required here is not 'beyond reasonable doubt'. Instead you have to decide on balance whether you believe that sexual harassment took place – **it is your responsibility to draw conclusions from the evidence as to what is more likely to have happened than not.**

It will often be possible to do this by evaluating the evidence against the factors outlined below. It is important to be confident that the conclusion of the investigation is consistent with the available evidence and that other factors, such as the relative positions of the parties, have not influenced the decision-making process.

? Question

If there are no witnesses, and if the facts are disputed, how do I decide who's telling the truth?

When evaluating the evidence, consider the following points (though making allowances, where necessary, for each individual's vulnerability, and stress levels, and their ability to be articulate).

- How responsive was each individual and how detailed was their evidence?
- What was the demeanour of the individual and their willingness to contribute responses when asked?
- Are there any discrepancies in the interview notes, statements and oral evidence and, if so, how frequent and how significant?
- Are any explanations for particular inconsistencies in evidence reasonable and credible in the context in which they are given?
- Did any explanation given by an individual detract from their evidence?
- Has a party previously been the subject of a complaint? This may go towards their credibility but be wary about placing too much reliance on this.

? Question

How credible is witness evidence?

There may be some additional factors to take into account in relation to the evidence of witnesses in particular:

1. What is the witness's relationship to either party?
2. Is there a potential vested interest in supporting or acting against the party concerned which may reduce the value of the testimony and if so, to what extent?
3. Does the witness's oral and written evidence appear independent and realistic in the circumstances?

3. Preparing a written report and communicating to the parties

What should the written report contain?

It should set out details of the allegations, whom you spoke with, what facts you found, and details of the outcome.

What conclusions can the report reach?

Your report will, on the basis of the evidence provided:

- conclude that all the alleged incidents did take place, or
- accept some and reject some of the allegations, or
- reject all of the allegations, or
- be unable to come to any conclusions.

What should be communicated to the complainant and the alleged harasser?

They need to be informed of your decision in writing.

4. Decide whether to invoke the disciplinary procedure or take some other action

What sort of disciplinary action is appropriate?

If the complaint is partially or totally upheld, consider taking some form of disciplinary action that reflects the nature and seriousness of the misconduct. This could range from an informal warning regarding the need for care in future conduct to a dismissal.

You can get detailed guidance on how to handle this stage of the process from the statutory procedure on discipline and dismissal, and the accepted standards for disciplinary action in the ACAS Code of Practice (www.acas.gov.uk). It is important not to undermine your formal harassment procedure by failing to take adequate or appropriate disciplinary action.

It may also be necessary to transfer the harasser.

If the complaint is not upheld, there are still likely to be unresolved issues between the parties, so you could offer mediation sessions with both parties or consider offering voluntary transfers.

? Question

If the complaint is not upheld, does that mean that it was made in bad faith?

The mere fact that a complaint fails does not mean that it has been made in bad faith. A complaint has only been made in bad faith where there is evidence that the complainant has been deliberately dishonest, rather than emotionally confused and upset. Taking any action that could be seen as retaliatory against someone who felt they had a genuine complaint of sexual harassment, or who acted as a witness, could be construed as victimisation (see page 21), which is unlawful under the SDA.

5. Informing the complainant of his/her right to appeal

Who should hear the appeal?

The appeal should be heard by an independent and, where possible, more senior manager. If there is no such person, consider whether an external person could hear the appeal. See the ACAS guidance on the statutory grievance procedures for more information.

? Question

What if the complainant does not agree with the disciplinary action I have taken against the alleged harasser?

It is not for the complainant to dictate the disciplinary process to be followed. If disciplinary action is not taken or the complainant does not agree with any sanction imposed against the alleged harasser, he/she may raise a further complaint that his/her grievance was not taken seriously. However, it is not for the complainant to interfere with any disciplinary process against the alleged harasser.

What further action may be required following the investigation?

The two main issues to consider are reintegration and preventing a backlash.

Why reintegrate those involved?

Whatever the outcome, it may be necessary to reintegrate all those who have been affected by the investigation in your workplace. Leaving the situation to resolve itself may result in unpleasant reactions, or difficulties in working relationships.

Your objective in reintegrating employees is to ensure that they can return to work as productive and healthy members of the workforce.

Who will be responsible for reintegrating those concerned?

If you have an HR function, they may take a lead in the process. Otherwise consider a departmental manager, an occupational health officer and/or welfare officer/equality officer. It may also be appropriate to include an external facilitator with specialist knowledge and experience to advise on the issues. The participants need the autonomy and the discretion to agree and ensure actions are undertaken. Review progress at regular intervals.

Who might have been affected by the investigation?

- The complainant: There will be many factors affecting how much help and support a complainant needs in returning to the workplace. These include: the nature, seriousness and frequency of the sexual harassment or the allegations; the length of the investigation and how widely it was known about; and whether they have suffered any detrimental treatment at work as a result of the complaint. It is important to consult the individual(s) concerned about your proposals and agree any action taken with them to ensure there are no negative consequences for them.
- The alleged harasser, whether the subject of a proven or an unsustained complaint.
- Witnesses who acted in good faith, but have suffered detrimental treatment.
- Colleagues and peers who have had to deal with disruption and uncertainty.
- The team as a whole. Members may be more sympathetic to one party or the other and you may need to reaffirm some ground rules about what is acceptable behaviour. Consider the need for team-building strategies or further training to ensure that company policy and professional standards of behaviour are understood and adhered to.

? Question

What if the complainant is worried about having contact with the other parties in the future?

It is generally the harasser who should be relocated, rather than the complainant, if this is the only way to ensure that contact is avoided. However, the complainant may feel that he/she cannot return to their former post and may choose to transfer, in order to break with the past. In those circumstances, do your utmost to arrange a transfer to a post and location with equivalent prospects and benefits. Where one is not available, consider whether it is possible to relocate the complainant's post, or incorporate aspects of their former post into the alternative one.

For further suggestions regarding reintegration, see Annex 3.

Why keep an eye out for any backlash?

Sometimes, even if a complaint is not upheld, the complainant is wrongly viewed as a trouble maker or the alleged harasser is treated as though 'there's no smoke without fire'. Keep an eye out for any such behaviour throughout and after the process and deal with it. If an employee feels that he/she is being treated less favourably than other colleagues because they complained about harassment, they may be able to bring a victimisation complaint under the SDA.

What is unlawful victimisation?

Extreme examples of behaviour that could be construed as victimisation if triggered by an earlier complaint include:

- Dismissing someone or making them redundant, transferred or required to relocate.
- Denying payment of commission or a bonus.

However, more common examples include:

- Being bullied or cold-shouldered or a blind eye turned to bullying by colleagues.
- Being refused the right to return after maternity leave.
- Being given a poor appraisal.
- Being refused a reference.
- Undue criticism of performance or setting someone unrealistic deadlines or workload.
- Spreading malicious rumours about someone.

How can we prevent victimisation?

You need to be clear with all staff who have been involved that victimisation will not be tolerated and can itself form the basis for disciplinary action.

Common problems during the procedure

? Question

What if the person complaining was in a sexual relationship with the alleged harasser?

This does not preclude sexual harassment or indeed victimisation claims. If the relationship has ended, or one party has tried to end it but the other will not accept this and persists with unwanted attentions, the tribunal is likely to construe this as sexual harassment.

? Question

What if the person complaining of sexual harassment is subject to separate disciplinary action or dismissal?

If this is due to periods of sickness absence: check that none of the absences were caused as a result of the action, as the stress resulting from harassment often leads to periods of sickness absence. If this is due to poor performance or attitude take into account that both can be related to or stem from the harassment or can result from a manager's view towards a complainant. In the circumstances, consider suspending any action or dismissal until the investigation into the sexual harassment complaint is complete.

? Question

What if an employee has made an allegation of sexual assault and the matter is being investigated by the police?

You should still conduct your own objective investigation without delay but be mindful of any requests from the police. Sometimes the police will ask you to postpone your internal investigations so that you do not influence the police investigation or tip someone off. The police will, however, be dealing with a potential criminal action and may not press charges, for whatever reason. This does not necessarily mean that the alleged incident did not occur. In any event, it is necessary to get to the bottom of the issue for all concerned and it is still possible for the complainant to bring civil proceedings at an employment tribunal. Bear in mind that in criminal proceedings, cases have to be proved 'beyond reasonable doubt', whereas in civil cases, the standard of proof is considerably lower – on the 'balance of probabilities'. So a case involving an alleged sexual assault could fail in the criminal courts, but succeed at an employment tribunal.

? Question

What if the complainant, or alleged harasser has already initiated tribunal proceedings?

This can happen prior to an investigation reaching a conclusion. This may be in order to preserve legal time limits for bringing an action. In any event, it is vital not to penalise the individual in any way for taking this action, or to suspend the investigation. It will still be necessary to carry out your own investigation into the allegations and come to a conclusion.

? Question

What if the parties involved have resigned?

If either party resigns prior to the conclusion of the investigation, you need to clarify whether they will continue to participate. You should continue with the investigation, even where there is no co-operation from the alleged harasser, or the complainant has resigned. It is not appropriate to leave issues permanently unresolved. The investigation needs to be conducted impartially, within the terms of reference, taking account of all the evidence which is available and following the procedures to an objective conclusion. Enable the parties to participate in the investigation and inform them of the outcome. Bear in mind you could still be the subject of a sex discrimination claim for failing to investigate a complaint properly.

? Question

What if the complainant withdraws the complaint?

Such a request to withdraw should not be accepted without fully considering the implications and reason for any sudden change of heart. There is still a duty to eliminate sexual harassment from the workplace. As complaints do not simply resolve themselves (particularly where serious allegations are made), you may need to see the investigation through to its conclusion. However, as a manager it is for you to decide how best to deal with this issue (particularly where serious allegations have been made).

Annexes

Annex I

What is sexual harassment?

Perceptions of what constitutes sexual harassment differ. Some people think of sexual harassment as being a series of acts which are directed to a woman and to which it is her responsibility to object. In fact illegal sexual harassment covers a broad range of circumstances and is not necessarily restricted to:

- A series of acts. One incident can constitute sexual harassment if it is serious – a manager shouting 'hiya big tits' to his female secretary that led to her resignation was sufficiently serious for the complainant to win her claim.
- Conduct specifically directed at the person who complains of it – reading porn magazines in a corner can create a degrading and offensive environment.

A woman resigned because of what she felt were intolerable working conditions. She felt isolated and demeaned by her draftsmen colleagues' attitudes towards women. They put pin-ups of women in suggestive poses in the drafting room; these were renewed regularly and discussed along with pornographic pictures which were frequently passed round among the men.

- Conduct that is publicly objected to by the recipient – people may signal that the behaviour is 'unwanted' in other ways, for example, by leaving the room.
- Conduct that is directed at members of one sex only – where men and women are both subjected to the behaviour, such as being in a room where pornography is being viewed, it can still amount to sexual harassment if the woman considers the behaviour offensive but the man does not (or vice versa).

A young male trainee resigned because of women workers' unrelenting innuendoes and crude jokiness about his private life. The women intended this as friendly banter, gestures of affection and thought, as they were generally 'old enough to be his mother', that he could not possibly feel threatened. In fact he found it deeply shaming and his discomfort had only fuelled the treatment.

Sexual harassment is not justifiable by reference to the victim's dress or demeanour. For example, just because someone wears a short skirt or appears willing to join in racy banter, this will rarely be a defence against a claim.

Examples of possible sexual harassment:

- Displaying demeaning or sexual images of men and women, for example on calendars, photos or posters, in public parts of the workplace, or downloading pornographic material onto computers.
- Using sexually explicit or degrading language, whether or not it is directed at an individual – even in workplaces where strong language and sexual references are the norm.

In a training course about approaches to dealing with crimes, the trainer used foul language and imagery throughout. He used a torch smeared with ketchup and mayonnaise to illustrate a sexual assault.

- Passing around lewd jokes by email, whether or not they are personally directed at particular individuals.
- Ridiculing or demeaning someone over their personal appearance.
- Demeaning someone by acting on or verbalising stereotypical perceptions about their race – such as physique, personal appearance, sexual prowess (this could be both sexual and racial harassment).
- Invading a person's private life with intrusive personal comments and questions.

A transsexual employee was persistently questioned about her sex life by colleagues and HR made enquiries into her private life, including asking relatives whether she had an active sex life in an attempt to establish whether she was a genuine transsexual.

Sexual harassment outside the workplace

Incidents at, for example, work-related social events, training courses, away days, and team meals may qualify as harassment. Office parties and work social events where alcohol can lead to a blurring of normal workplace boundaries have led to many employers becoming liable for harassment. Factors such as whether the harasser was in a position of trust, whether he or she was still on duty, where the incident happened, and the degree to which the event was connected with work will all be relevant in determining whether you are liable.

While off duty, a detective sergeant was subjected to two incidents of sexual harassment, which took place in a public house immediately after work. The Employment Appeal Tribunal ruled that an employer could be liable for incidents of sexual harassment which take place at social gatherings involving employees that take place immediately after work, or at an organised leaving party, as these occasions are seen to be extensions of the workplace.

Annex 2

Effective measures for preventing sexual harassment

1. Have an effective and well communicated policy

A sexual harassment policy should:

- Explain that all staff have the right to work in a climate of respect, regardless of gender, age, ethnicity, religion, disability or sexual orientation.
- Define what sexual harassment is. It is helpful if your policy indicates the range and types of behaviour that can constitute sexual harassment and explain clearly that it is unlawful. In addition to dealing with the most easily recognisable forms of harassment, the policy should address issues such as potentially offensive posters/calendars; inappropriate use of email and internet sites; potentially offensive office banter; and behaviour at work-related social functions.

- State that sexual harassment is a serious issue that will not be tolerated or condoned by the organisation. Your policy should outline the effect it can have both on complainants and the organisation.
- Explain the responsibility of staff for upholding the policy and standards of behaviour, making it clear that individuals will be liable for any unlawful acts they commit at work.
- Give an undertaking that complaints will be taken seriously and investigated fully, impartially and promptly, with appropriate action being taken where necessary.
- Explain how staff can raise a concern or complaint about sexual harassment and the procedures by which complaints may be investigated.
- Make clear that if a complaint of harassment is made, other staff must not victimise or prejudge either the complainant or the alleged harasser.
- Explain how sexual harassment is treated under the organisation's disciplinary policy and that it is a disciplinary matter which may lead to dismissal.

2. Train all staff and managers on the policy and their responsibilities under it

- A good policy will only be useful if staff know about and understand it. This sounds obvious, but it is all too easy to put a lot of effort into developing a policy and then let it gather dust on the shelf.
- Tell all new staff about the policy and procedures, giving them a copy when they join the organisation and building it into induction.
- Train all staff on how to prevent harassment, and on the organisation's policy and the procedures for making and dealing with complaints. Training will need to be refreshed occasionally (at least annually but preferably more often), and offered to new starters. It is the responsibility of all organisations to provide adequate training.
- Publish the policy and procedures on the organisation's intranet or in another readily accessible form, such as a loose-leaf folder/handbook that is accessible to all staff.
- Publicise the policy, through, for example, posters around the workplace.

3. Make sexual harassment a disciplinary offence

- Your procedure for investigating sexual harassment complaints needs to be linked to your grievance and disciplinary policies and procedures. The Employment Act 2002 sets out the minimum statutory requirements. The Advisory, Conciliation and Arbitration Service (ACAS) guidelines also set out the elements of good procedure. **Serious sexual harassment (including the victimisation of someone who has made a sexual harassment complaint) should normally be treated as gross misconduct.**
- Remind staff that there will be serious sanctions for any breach of the sexual harassment and disciplinary policies – up to and including dismissal.
- Further information is available from the ACAS publication: Code of Practice: disciplinary and grievance procedures.

4. Monitor the policy and its success regularly

- Provide staff with regular updates of changes to policy and procedures.
- Review periodically whether the policy is being successfully implemented and has produced a positive, harassment-free working environment for all staff.
- If complaints of sexual harassment are made, review the outcomes of cases to check procedures have been followed, any changes needed in the workplace have been made, and any other learning points from the case acted upon. HR departments should play an active part in reviewing policy and procedures, making necessary revisions and ensuring updating and compliance training is provided.

5. Develop clear procedures for investigating complaints confidentially and compassionately without delay

All employers should have procedures for complaints of sexual harassment to be reported and investigated. You should not wait for a complaint to be made before developing these procedures. The core elements of your procedure should cover:

- What an employee should do if they are experiencing sexual harassment. The first step will often be for the person who feels harassed to ask the alleged perpetrator to stop. However, the complainant may have already done this without success and the procedure will need to indicate to whom the complaint should be referred.
- Appropriate arrangements for preventing, or minimising the alleged harasser's contact with the complainant that should not be detrimental to the complainant.
- A clear statement of how complaints will be investigated, with safeguards for the fair treatment of the complainant and alleged harasser(s) throughout the process. Timescales for the process should also be included.
- Clear indication of responsibilities within the investigation, including the role of the personnel or human resources team if your organisation has one. **Complaints should be investigated by men and women of appropriate integrity, seniority, knowledge and experience**, who are able to carry out an investigation into the alleged incidents, and to produce an objective report and recommendations.
- Standards for handling the complaint and investigation including:
 - making sure there are written records of the investigation
 - ensuring all parties are fully informed of all the allegations against them
 - specifying all allegations must be addressed, all witnesses be interviewed, and all statements be verified as a true record
 - allowing adequate time for both parties to prepare for meetings and enable them to be represented
 - guidance on behaviours and conduct of meetings held as part of the investigation
 - guidance on consistency in producing a report on the investigation's findings and associated recommendations
 - responsibility for providing practical support to the complainant to reintegrate him/her into the workplace and for keeping a watching brief on the situation in the future
 - effective retraining on sexual harassment for the alleged harasser and management of his/her reintegration to ensure positive behaviours.

6. Train staff who will be investigating complaints to handle them sensitively and in accordance with the procedures

- Encourage supervisors and managers to set a good example through their own behaviour so that a positive workplace culture develops.
- Tell supervisors and managers to make sure their staff understand what sexual harassment is and why it is unacceptable.
- Encourage supervisors and managers to deal promptly with any complaints using the organisation's procedures.
- Incorporate positive and supportive behaviours into any appraisal scheme for managers and staff, to include compliance with policies and procedures.

7. Provide support as necessary for the complainant, the alleged harasser and managers handling the complaint

- Make sure the complainant and alleged harasser have access to support mechanisms but ensure that the alleged harasser is not seen as receiving preferential treatment.
- Encourage managers to seek advice from your personnel or human resources department (if you have one) on handling complaints and provide them with any support needed.
- In some cases it may be appropriate to treat sexual harassment as a health and safety issue. Sexual harassment can have a serious impact on the physical and mental well being of complainants. Risk assessments may help you to identify groups and individuals who may be vulnerable to sexual harassment. For example, the *European Code: Protecting the Dignity of Women and Men at Work* indicates that certain groups can be particularly vulnerable to sexual harassment: divorced and separated women, young entrants to the labour market, women or men in non-traditional jobs, women with disabilities, women from racial minorities. Lesbians, gay men and young men are also vulnerable to harassment.

Annex 3

Further suggestions regarding reintegration

Although this will be a sensitive time, it is important to fully consider reintegration to avoid continuing problems, such as: health problems and absenteeism; loss of performance; employee relations issues; and possibly even a claim of constructive dismissal (where the individual feels he or she is left with no choice but to quit).

How you manage the process depends not only on the needs of the individuals involved but also what the organisation can reasonably deliver.

1. Devise a written 'reintegration action plan' with specific objectives

Consider making the plan form part of the parties' objectives as part of the appraisal process. This will help to ensure adequate resources are allocated and buy-in. The action plan should:

- assign responsibilities to named individuals who have a responsibility for particular tasks and objectives;
- set target dates for actions to meet particular objectives, and make individuals accountable for slippages;
- give dates for catch-ups with the individual;
- give dates for review meetings by the 'reintegration team'/responsible managers until the plan is signed off;
- be agreed with the individual.

2. Considerations relevant to the complainant

Think very carefully before removing a sexual harassment complainant from his/her post, even if the risk assessment reveals challenging and difficult management problems.

Though it may seem the more difficult option, it may be better in the long run to be proactive in addressing those attitudes, following up with disciplinary action if necessary. Nor should you move an individual because they are more junior than the alleged harasser. This would amount to unlawful victimisation, regardless of the reasons for the move.

Other important considerations are:

- What is the state of the individual's health and wellbeing? How have they responded to the stress and anxiety caused by the case? Take into account sickness and absence records, but **do not assume that just because there has been no absence there has been no detrimental impact on their health.** Be prepared to offer a free medical assessment if you think there may be underlying issues, or to pay for a professional counselling service. The Health and Safety Executive offers advice on how to assess and address the stress risks caused by difficult relationships at work. In this case you will need to take into account the individual's own views and those of their line managers, any opinion from his or her GP, and the conditions and atmosphere they are now working in.
- How has the sexual harassment case, and/or any absence, affected their performance or harmed their career progression? You may need to consider development opportunities, a training package, funding for qualifications, assignments that would help to address capability issues and restore the individual's position as far as is possible. Do they need any refresher training if there has been a prolonged absence?
- Have they suffered a loss of self-confidence and self-respect that could affect their ability to relate to colleagues and/ or customers as they did before, or to perform their job as well? You may consider appointing a mentor from within the organisation or externally, with the ability to advise on practical work management issues and strategies for coping with work demands.
- Have they lost credibility and standing among their colleagues and/or in the wider workplace that could compound this?
- Is there likely to be retaliatory action from colleagues as a result of their involvement in the case?
- Are they concerned that their work environment will be 'safe' from harassment from now on?

3. Reintegrating a harasser, untruthful complainant or false witness

Some factors to take into account are:

- Do you need to make necessary arrangements for avoiding contact between the offender and the complainant? This may involve altering shift patterns or hours of work, or transferring the offender to another suitable post in a different section or location. Ensure this does not result in the offender benefiting from a promotion or pay rise: this would be seen as a reward and could undermine efforts at reintegration.
- Does the individual understand clearly their obligations and the organisation's position: i.e. that there must be no repetition of sexual harassment; no further inappropriate accusatory or retaliatory action of any kind towards any individual; and no discussion of the issues? Put a review mechanism in place, and make it clear to the individual that in the event of any such actions there would be disciplinary consequences. This should be followed by written confirmation, either by recorded notes of the meeting, agreed with the individual, or by letter.
- Does the individual need any training specific to the requirements of a new post?
- Are there any training needs relating to the harassment, or to equality or diversity issues specifically? Ensure the individual receives adequate training on company policy on sexual harassment and victimisation, and review with him or her the adequacy of that training.
- Are there any training needs relating to his or her professionalism and/or personal skills? **Identify any training needs that will enable the individual to be more effective in his or her role, including positive behavioural styles.**
- Has the individual's credibility and standing among colleagues been affected, and could this affect his or her ability to do the job?
- Is there likely to be any retaliatory action from colleagues? This needs to be watched for and dealt with, if necessary, through appropriate disciplinary action.

Annex 4

Sexual harassment and the law

The UK legislation which applies to sexual harassment is:

- **Sex Discrimination Act 1975**

This makes it unlawful for employers and other organisations to treat either women or men less favourably because of their sex. It also prohibits less favourable treatment in employment and vocational training of a person on the ground of an intention to undergo, currently undergoing, or having undergone gender reassignment.

The general employment provisions deal with all aspects of work and work-related benefits, including facilities or services, transfer or training, promotion, and generally detrimental treatment related to gender, transgender, or married status.

The SDA applies regardless of length of service in employment and hours worked. It applies to (1) work carried out wholly in Great Britain (2) work carried out partly in Great Britain (3) in certain circumstances work carried out wholly outside Great Britain for an establishment in Great Britain. It also includes work on board ship, hovercraft and aircraft in certain circumstances.

The SDA also protects people who are not ‘employees’ in the sense required for some other employment rights, such as the right not to be unfairly dismissed. It protects people engaged under a contract personally to execute work or labour. Contract workers whose labour is supplied by their employer to another person (the principal) are protected against discrimination by the principal. Special provisions apply the SDA to police officers, who are office holders rather than employees.

There are special provisions prohibiting discrimination by:

- firms against partners or potential partners,
- trade unions and employers’ organisations against members or potential members,
- authorities or bodies in conferring authorisations or qualifications needed for or facilitating engagement in a particular profession or trade,
- people providing vocational training,
- employment agencies, or
- in relation to barristers or advocates.

Victimisation is less favourable treatment compared to others because of asserting rights, or doing anything in good faith with reference to the SDA.

● **Employment Rights Act 1996**

The Employment Rights Act protects employees from unfair dismissal/constructive dismissal after one year’s qualifying service, regardless of the hours worked. Claims can be brought under ERA and the SDA in tandem.

There is no qualifying period for unfair dismissals where the dismissal relates to the employee raising a health and safety issue. Raising an issue of serious sexual harassment or bullying would arguably amount to raising a health and safety concern.

● **Protection from Harassment Act 1997**

The Protection from Harassment Act 1997 (PHA) outlaws a course of conduct (conduct on at least two occasions) amounting to harassment which can reasonably be taken to be harassment. Harassing includes alarming a person, or causing distress and could include abusive or silent phone calls, threatening correspondence, following someone, or waiting for them outside their place of work. The PHA provides for civil and criminal offences, the latter enabling a restraining injunction. Civil claims for compensation are brought in the County Court, or High Court and could include some workplace conduct such as verbal abuse or aggressive correspondence.

Under the PHA employers can be held to be vicariously responsible for employees’ acts of harassment of third parties, including of fellow employees, committed in the course of employment.

● **Management of Health and Safety at Work Regulations 1999**

The regulations require every employer to make a suitable and sufficient assessment of the health and safety risks to which their employees are exposed whilst they are at work.

The Health and Safety Executive’s (HSE) publication ‘Work-related Stress’ points out that one of the causes of stress is relationships at work which involve bullying, racial or sexual harassment.

The codes of practice which apply to sexual harassment at work are:

- **The Equal Opportunities Commission's (EOC) Code of Practice – Sex Discrimination**

This makes recommendations to employers, trade unions and other organisations on how to avoid incidents of sex discrimination and victimisation. The Code also recommends basic proactive measures that organisations should take in order to help achieve equality between men and women at work. The EOC recommends all reasonable practical steps should be taken to ensure a standard of conduct/behaviour is observed which prevents members of either sex from being intimidated, harassed or otherwise subjected to unfavourable treatment because of their sex.

The tribunal can take into account failure by an employer or organisation to carry out recommendations made in the Code when deciding sex discrimination claims.

- **The European Commission's (EC) code of practice on the Protection of the Dignity of Women and Men at Work (92/131)**

This recognises sexual harassment as being conduct that undermines the dignity of men and women at work. The Code defines sexual harassment and makes recommendations for employers and unions.

The European Directives which apply to sexual harassment are:

- **Equal Treatment Directive (76/207)**

This provides that there should be no discrimination on grounds of sex, either directly or indirectly, or by reference to marital or family status, in access to employment, training, working conditions, promotion or dismissal.

- **Equal Treatment (Amendment) Directive (2002/73)**

This amends the Equal Treatment Directive, most importantly by adding legislative definitions of 'sexual harassment' and of 'harassment'. These have been incorporated into the Sex Discrimination Act 1975 as of October 2005.

Equal Opportunities Commission Helpline

Free, confidential and impartial advice and information on sex discrimination and equal pay

0845 601 5901

9am – 5pm Monday – Friday

Calls from BT landlines are charged at local rates

Calls may be monitored for training purposes

Interpreting service available through Language Line, when you call our Helpline

Typetalk service available on 18001 0845 601 5901

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