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UK Proposals To Fight Workplace Sexual Harassment

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Business and Human Rights

On March 27 2018, the UK Equalities and Human Rights Commission (EHRC) published a report, *Turning the tables: ending sexual harassment at work*, in which it makes a number of recommendations for legal changes to better protect the victims of sexual harassment at work.

Summary of Recommendations

The key EHRC recommendations are:

- A mandatory legal duty on employers to take reasonable steps to prevent workplace sexual harassment, enforceable by the EHRC. Currently the only route to challenge an employer's failure to prevent harassment is through an individual victim bringing an employment tribunal claim.
- A statutory code of practice on preventing sexual harassment, with a power for employment tribunals to uplift compensation by up to 25% for breach.
- Targeted sexual harassment training for managers, to be developed by Acas.
- A confidential online tool for employees to report instances of sexual harassment.
- Government research every three years into the incidence of sexual harassment.
- Publication of employers' sexual harassment policies online.
- Legislation to ban non-disclosure agreements which purport to prevent disclosure of future acts of harassment, discrimination or victimisation.
- A statutory code of practice to deal with the circumstances in which a non-disclosure agreement or confidentiality clause in a settlement agreement may validly prevent disclosure of allegations of past sexual harassment.
- Increasing the time limit for claims so that employees have up to six months from the end of any internal grievance procedure to bring a claim.
- Interim relief (similar to that in whistleblowing claims) for those dismissed following a sexual harassment allegation.
- Reintroduction of an amended version of the statutory questionnaire procedure for sexual harassment cases.
- Reintroduction of employment tribunals' powers to make wider recommendations in sexual harassment cases.

- Restoration of the repealed third party harassment provisions in section 40 of the Equality Act 2010, amended to remove the requirement for there to have been two or more instances of harassment.

Comment

Amongst these wide-ranging proposals, a key (and topical) recommendation is a blanket ban on non-disclosure agreements (NDAs) which would limit the disclosure of *future* sexual harassment. The EHRC recommends legislation to make such NDAs void (to the extent that they prohibit the disclosure of allegations of discrimination, harassment or victimisation).

The report recommends a different approach in relation to the (much more common) type of NDA or confidentiality clause used in settlement agreements relating to alleged *past* sexual harassment. In these cases, the EHRC recommends that a statutory code of practice should set out "the circumstances in which confidentiality clauses preventing disclosure of past acts of harassment will be void", as well as "best practice in relation to the use of confidentiality clauses in settlement agreements".

However, absent any significant development of the common law, a code of practice in isolation would be unlikely to render a contractual confidentiality obligation void. As such, primary legislation would be required; this could set out broad principles to be interpreted by judges, taking into account the code of practice.

Conclusion

It remains to be seen what the UK Government will make of these recommendations. However, the UK Parliament's Women and Equalities Committee held an evidence session on March 28, 2018, pursuant to its inquiry into sexual harassment in workplaces, so the EHRC report is certainly timely.

Given the recent harassment scandals in the UK and US, the report is also likely to contribute to an increase in litigation claims and workplace grievances relating to sexual harassment. Certainly, recent media coverage has given employees more confidence to come forward. In response to this, it is important for employers to take a look at their workplace culture and consider whether they should be taking any steps to improve it.

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