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Sexual harassment in the workplace, Part 3 – all reasonable steps (UK)

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Normally an employer will be liable for one employee's harassment of another unless it has taken "*all reasonable steps*" in advance to stop conduct of that sort happening, the "statutory defence". Employment Tribunals can be reluctant to allow an employer to escape liability in that way because that may leave the employee without meaningful recourse (they can sue the individual perpetrator too, but few do), so the bar is high.

The question then is, what does "all reasonable steps" mean? Unfortunately, there is very little case law guidance on this (largely because there have been so few cases in which employers have sought to argue the point). It is clearly not a lightweight obligation – the statutory defence does not say "*some reasonable steps*" or "*such steps as might be expected to make any difference*" or "*such steps as do not lay you open to significant employment relations damage or to other claims*". The Equality and Human Rights Commission's (EHRC) Code of Practice says that "reasonable steps" might include: (i) implementing an equality policy; (ii) ensuring workers are aware of the policy; (iii) providing equal opportunities training; (iv) reviewing the equality policy as appropriate; and (v) dealing effectively with employee complaints.

Whilst most large employers can say they do (i) and sometimes (ii), in our experience few are able to demonstrate consistent compliance with (iii) to (v).

The fact that so few employers ever seek to rely on the statutory defence is something that the government picked up on in its recent consultation on sexual harassment in the workplace. It said that the EHRC will be issuing a statutory code of practice later this year to help employers to understand better what is expected of them and, in particular, what might be considered as "all reasonable steps" to prevent harassment. We anticipate that this will include some reference to the importance of the "tone from the top", i.e. of the business being able to show that senior management do not regard this as merely an issue for the lower ranks, and that the business is willing to hold its most senior people to account where need be, even if they are big earners for the company. In the regulated financial services sector we may see also the suggestion that employees are told in terms that the FCA now regards sexual harassment as potentially reflecting on fitness and propriety and so one's whole career becomes at stake. There may also be a suggestion of consultation about this with any union or other worker representative body you recognise.

The fact this defence exists is therefore another incentive (if needed) for employers to ensure they are taking proactive steps to tackle sexual harassment in the workplace. If you do this then, not only will your workplace be a better place to work, you are also less likely to face claims of sexual harassment and, if such claims are brought, you are more likely to be able to defend them successfully.

Employers might be forced to take such steps in any event. In its consultation on sexual harassment in the workplace, the government is toying with the idea of imposing a mandatory duty on employers to protect employees from harassment, i.e. to turn the statutory defence from good practice and "insurance" into a proactive obligation. If you have views on the government's proposals then do get in touch and we will keep you posted about future events on this topic.

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