

Vexed and harassed? Sex discrimination at work

By Craig Rothwell

Discrimination happens. From the outrageously deliberate to the unwittingly trivial, discriminatory acts in the workplace occur in a variety of ugly guises. Each of these will be looked at in turn, starting with the one which arguably has limited the aspirations of over 50% of the world's population ever since Eve persuaded Adam to take a bite of the apple: sex discrimination.

There are various types of sex discrimination. The most obvious type is sexual harassment. The term is well-known, but it is probably fair to say that it still means different things to different people even in these enlightened times. This is perhaps because sexual harassment can range from apparently trivial remarks to criminal behaviour. So it is best to take as a starting point how the law attempts to define it:- sexually harassing someone is if he (or she) engages in sexual comment or sexual conduct towards that other which is vexatious and which he (or she) knows, or ought reasonably to know, is unwelcome.

To move off the point a little, you might be surprised to see the 'or she' in brackets. Whilst the law was introduced with the aim of protecting female employee's dignity at work, in the interests of equality all round, it also ensures male dignity can be preserved. Although this may not be too relevant in Bermuda's workplaces, there have been a few cases in England involving, usually, young male school-leavers walking into a female dominated factory work environment as a first job, some of whose members revel in bawdy and industrial language. Intimidated and distressed, these male workers have then somehow found the additional courage to take the matter to court, suing for sexual harassment.

Whilst those type of cases might raise an uncharitable chuckle, others do not. A single gratuitously insulting sexual remark, physical act or e-mail may be enough to constitute sexual harassment, and certainly a pattern of such behaviour would be, particularly after the employee to whom they are addressed objects to them.

Even if there is no obvious objection – and many employees choose to put up with things silently in the hope that it will go away – this does not let the harasser off the hook. The test to decide what constitutes harassment is objective – the question is what your average employee would reasonably consider as unwelcome behaviour, not what your average chauvinist might think is acceptable!

Dealing with sexual harassment by employees is often extremely difficult from an employer's perspective. They have to ensure that they treat both the victim of the harassment and the alleged harasser fairly. Jumping to quick conclusions that the complaint is too trivial or, at the opposite extreme, firing the harasser immediately without a fair investigation or hearing are not wise moves.

Instead, to offer some useful guidelines, it is best to have a separate grievance procedure for harassment which is advertised within the company. This will enable and encourage victims to bring any harassment to the employer's attention at an early stage when it is much easier to handle. Otherwise if not caught early, employers will always be faced with the 'it's me or him' situation when victim and harasser can no longer work together at all. Any complaint made should then be treated in confidence and some positive action be taken fairly quickly. This is important as it ensures that the victim does not feel unsupported so preventing that employee from having good grounds to resign and claim constructive dismissal.

At the same time, the employer should consider carefully what interim measures might be taken against the alleged harasser. If there is a risk that the complaint might prove to be untrue then alternative options to the usual suspension of the alleged harasser might be taken. For instance, moving the harasser to another work area (or, if the organisation is large enough, both victim and harasser to different areas to be entirely

even-handed) pending the outcome of an investigation might be preferable. There is then less risk that the alleged harasser might claim that the implied duty of trust and confidence has been breached by his immediate suspension and resign.

Finally, the investigation must then be carried out fairly recognising the rights of both victim and harasser. It should not slide into a witch-hunt against one or the other. That sounds obvious, but the heightened emotions created by such complaints have led surprisingly many mild-mannered managers conducting the disciplinary proceedings to imagine themselves in 1690s Salem in their zealous adoption of either victim or harasser's cause. As ever, lateral rather than puritanical thinking is the employer's safest approach and this is never more true than when dealing with sexual harassment complaints.

This article contains information of a general nature and should not be relied upon as a substitute for professional legal advice given with respect to a particular factual situation.

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