The Law Society

Equality Act 2010 - employer liability for harassment of employees by third parties

Response to the Government Equalities Office consultation

August 2012

Introduction

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Employment Law Committee ('the Committee'). The Committee is made up of senior and specialist employment lawyers from across England and Wales. Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are fee-paid employment judges.

Our interest in employment law and practice is to influence policy changes to secure 'good law making', to provide clarity for employers and employees, and to avoid possible unintended consequences. We welcome this opportunity to provide comments on the proposal to remove the third party harassment provision from the Equality Act 2010. Our comments reflect the concerns of solicitors with daily experience of putting employment law procedures into practice.

The consultation document seeks views on the proposed removal of the third party harassment provisions, 'given the current lack of evidence that there is a significant need for them or that they are effective in practice'.

We query whether this is the case and are concerned about the potential impacts of repealing this provision. In short, we do not believe that the third party harassment provision should be repealed.

Evidence of a burden

We do not consider it unreasonable to aspire to create a work environment where employers take reasonable steps to protect their employees from harassment by their suppliers and customers.

We understand that the Government is not suggesting that there be no protection for employees from third party harassment in the workplace but rather that such protection can be secured by other existing routes and that the protection offered under Section 40 should be repealed because it 'creates a burden for business'. We understand that the business community has also echoed this concern about the 'burden' of Section 40.[1] However, the precise nature of the burden created for employers is not detailed or quantified in the consultation paper. If there is a burden on employers there is no reported evidence that this burden is onerous nor is there a comparative consideration of the alleged burden of Section 40 as compared to the burden of the other routes available to employees to protect them against third party harassment in the workplace.

Section 3 of the Government's proposal sets out the other legal remedies available to address harassment by third parties in the workplace. In each case, those potential avenues of redress would mean that the employer would still bear 'a burden' of conducting its affairs so as not to expose its employees to third party harassment. The burden arising from these alternative remedies will not lessen following a repeal of Section 40 of the Equality Act 2010.

[1] Better Regulation Executive, *Businesses' perceptions of regulation,* 2007, http://www.bis.gov.uk/files/file44590.pdf

It is suggested that the lack of cases pursued under section 40 of the Equality Act 2010 indicates there is little evidence of this type of harassment occurring and as a result, the provisions regarding third party harassment are unnecessary. We would be cautious about drawing such a conclusion. In our experience, harassment on all grounds is not uncommon. We also refer to the Discrimination Lawyers Association response to the Discrimination Law Review: a Framework for Fairness (2007) which states that there is strong existing evidence of third party harassment, in particular on the grounds of race and sexual orientation in sectors such as health, education and commercial enterprises. As the Equality Act 2010 is only a recent piece of legislation, lack of use may have something to do with unfamiliarity.

Alternatively, the lack of cases brought under section 40 may also indicate that section 40 has had a deterrent effect. Knowing that they may ultimately be liable for not taking action to prevent third party harassment, employers are possibly being more proactive in taking steps to address the issue (such as displaying notices warning customers that harassment will not be tolerated; making clear their policy on such matters when contracting with third parties; and advising staff on what to do should such harassment occur). However, this is self evidently difficult to measure.

What might be the impact of repealing this provision?

The logic behind the proposal to remove section 40 because only a few cases are brought and that it places a regulatory burden on employers is fundamentally flawed.

Whilst claimants may raise proceedings for breach of contract and/or breach of the Protection from Harassment Act 1997, these do not cover the same ground as section 40.

A claim for breach of contract in the Employment Tribunal may be brought by a claimant only after a period of employment has ended. Likewise a constructive unfair dismissal claim also requires the termination of employment. This is clearly unhelpful to those employees who are experiencing harassment in the course of employment and wish to remain in that employment. Further, claims before the civil courts are much more costly than claims to the Employment Tribunal. For example, there is the risk for the employee that they will be required to pay the employer's costs and vice versa. This is likely to be a particular issue for SMEs and for low paid workers who face significant barriers to accessing justice or who may not wish to do so for reasons of job insecurity.

Moreover, a claim under the Protection from Harassment Act 1997 Act must be based on a 'course of conduct' amounting to harassment. It would be open to an employer to argue that, unlike section 40 which catches incidents of harassment from different persons, a 'course of conduct' may require action from the same harasser. The acts in question also have to amount to criminal acts which means that workplace incidents are generally unlikely to be covered except in severe cases. In addition, the primary thrust of the Protection from Harassment Act 1997 is to create a criminal liability which demands the support of the police and the relevant prosecuting authorities. This requires a much higher burden of proof and would also require the relevant employee to give evidence before a criminal court which may be more traumatic than giving evidence before the Employment Tribunal.

The stated aim of the policy objective is to reduce the cost of regulation on all businesses but we have concerns that repealing this provision (albeit with some clarification about responsibility for a failure to act, rather than responsibility for the

acts of third parties) would create greater confusion and introduce an lack of clarity for employers which would expose them to a greater risk of claims.

The purpose of section 40

We are concerned that some confusion may have arisen around what section 40 is designed to achieve, which colours the business community's approach to third party harassment. The purpose of section 40 is to make an employer liable for failing to act. The employer is not held responsible for the third party's actions in themselves.

Section 40 captures this responsibility by ensuring that employers will only be liable for failing to act in circumstances where they have been told of the harassment; when it has happened on at least two previous occasions; and where the employer has not taken such steps as would have been reasonably practicable to prevent the harassment. This strikes an appropriate balance between those responsible employers who, despite displaying their intolerance of staff harassment and doing all that is reasonably practicable to prevent harassment, have employees who nevertheless are subjected to incidents of abusive behaviour, and more reckless employers who are aware of a problem but have *failed to act* to protect their employees. We consider that more could be done to re-frame the issue as one of ‘failing to act’ rather than ‘being responsible for the actions of a stranger’.

Conclusion

Harassment on any of the protected characteristics is deeply offensive and distressing to those who experience it. We are concerned that any deterrent effect of the legislation, which has supported and encouraged best practice amongst employers and potentially reduced incidents of third party harassment at work, would be lost.