



Equality Act 2010

Employer liability for harassment of employees by
third parties

ATL Response

This response is on behalf of ATL, a trade union affiliated to the TUC. ATL currently represents 160,000 members across England, Northern Ireland, Scotland and Wales.

Our members are teachers, supply teachers, heads, lecturers, managers and support staff in maintained and independent sector schools and colleges.

1. a) Have you experienced conduct that you consider would count as third party harassment at work? b) If you have, did you make a claim to an employment tribunal against the employer? If yes, please give details; if you did not, please say why.

3. Have you ever advised or acted for a) an employer who has had an allegation of third party harassment brought against it; or b) an employee claiming to have been the subject of conduct which would count as third party harassment? If yes, please give details.

Anecdotal evidence from our members is that one third have been victims of bullying from pupils/students, parents and governors. It is therefore clear that third party bullying is a significant problem in the education sector. The NASWUT survey¹ further supports this fact, and indeed it is plain from their figures that prejudiced related bullying is much more likely to come from pupils than colleagues.

The specific provision (s.40) introduced in the Equality Act 2010, which makes clear that employers are liable for repeated harassment if they fail to take reasonably practicable steps to prevent it, was welcomed by ATL and other unions.

The reason s.40 was supported by unions was that many had struggled to get employers to address harassment of staff by service users, customers

¹ The experience of prejudice-related bullying and harassment amongst teachers and headteachers in schools (2011)
<http://www.naswut.org.uk/MemberSupport/NASWUTPublications/AllPublications/ResearchProjects/index.htm>

and clients. It was felt that s.40 provided greater clarity and certainty in the legal position, it would encourage employers to take third party harassment seriously and it was a good basis for securing further action in the workplace such as procedures for reporting incidents of third party harassment and consideration of effective measures to protect staff.

It is not surprising that there have not been more reported tribunal cases under the third party harassment provisions, given the following factors: the very short timeframe since the introduction of s.40 which extended protection to all the protected characteristics; the requirement that harassment has to have occurred and been reported to the employer on three or more occasions; and the fact that harassment is often unreported unless there is confidence that the employer will take appropriate steps to deal with it and the situation will not be made worse for the victim.

4. Do you agree or disagree that the third party harassment provision should be repealed? Please explain your answer.

Disagree. Contrary to what the government has asserted, s.40 does address a real problem, the provisions are workable and they are necessary in order to make clear to employers and employees what their obligations and rights are.

The ministers for equality, Theresa May and Lynne Featherstone, in their foreword to the consultation paper, state that the third party harassment provisions were introduced "without any real or perceived need" and there has only been one reported tribunal case brought since the third party harassment provisions were introduced in 2008. This implies third party harassment is not a real problem. As with any new provision, it will take time for people to become aware of s.40 and for cases to progress to tribunal. Therefore, the number of reported cases should not be taken as the sole indicator of the need for such a provision. It is naïve to conclude that in the absence of reported tribunal cases there is no problem.

The government's *Plan for Growth* said it would remove the "unworkable requirement... for businesses to take reasonable steps to prevent harassment of their staff by third parties as they have no direct control over it".

It makes so sense to propose to remove a provision on the basis that it “has given rise to concern that businesses, especially small businesses, would find it difficult to comply with”². The provisions are by no means complex and it is difficult to see how they can be difficult to comply with. Put simply an employer is expected to take reasonable practicable steps if an employee reports harassment by a third party. In ATL’s view this is a basic requirement that should be a responsibility of an employer whether or not there is specific legislation. Unfortunately the mere fact that some businesses hold this view illustrates the necessity to have specific legislation to require them to look after their employees. S.40 is a workable provision as highlighted by the one tribunal case that has been brought under s.4A of the SDA (now s.40 of the Equality Act).

In many circumstances, there are steps employers can take and should take if they are responsible employers showing proper care for their employees. This is evident from the notices displayed in workplaces of good practice employers, stating that harassment of staff will not be tolerated and strong action will be taken against perpetrators of it e.g. removal from premises, refusal to deliver services. In 2009, the TUC signed an agreement with Acas, BIS, CBI, PPE and HSE on ‘Preventing workplace harassment and violence’,³ which covered harassment by third parties and provided guidance on what steps employers and workforce representatives could take in response to it. This suggests that all the signatories to that agreement accepted that employers do have some control and responsibility for addressing abusive behaviour of third parties against their staff.

The cases that have been brought involving third party harassment also indicate that there are steps employers could have taken to protect staff. ATL further believes that the case law and the confusion over whether employers could be held liable under other provisions of the Equality Act 2010 shows there is a real need for s.40, in terms of creating clarity and

² Page 5 of the Consultation paper

³ <http://www.hse.gov.uk/violence/preventing-workplace-harassment.pdf>

certainty in the law (particularly if the government makes statements such as the one in its *Plan for Growth*).

S.40 arises from the EOC's successful judicial review action, concerning the then government's failure to properly implement the revised Equal Treatment Directive. In that case⁴ it was held that the government had adopted too narrow a definition of harassment in the SDA by using the words "on grounds of her sex" and that wording closer to the Directive's "related to the sex of a person" should be used. The Court concluded that if the broader wording were adopted, as it held it should be, then this wording would enable claims such as the one in *Burton v De Vere Hotels*. The employer would be held liable without the victim having to show that their sex was the cause of the employer's failure to take steps to protect them, as was later held in *Pearce v Mayfield School*.

The previous government introduced a specific provision on third party harassment into the SDA and this was then extended to all protected characteristics in the Equality Act 2010. The general definition of harassment in s.26 of Equality Act 2010 also adopted the "related to..." wording of the EU equality Directives.

There have been two recent cases in which individuals sought to hold their employer liable for third party harassment under the old Race Relations Act's general harassment provision. In one, *Conteh v Parking Partners* [2011] EqLR 332, the EAT held that an employer was not liable for repeated racial harassment a black African woman suffered by employees of a client. Her employer failed to take the issue up with the client because he did not want to "rock the boat". The EAT took a causative approach to interpreting the words of the RRA, which defined racial harassment as being offensive conduct "on grounds of race" and held the employer was not liable because his failure to act was not motivated by the victim's race but by a desire not to "rock the boat".

⁴ *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRLR 327 [40] & [63]

In the other case, *Sheffield City Council v Norouzi* [2011] EqLR 1039, a tribunal held that an employer was liable for racial harassment of a social worker by a care home resident. As this was a public sector employer, EU law could be directly applied and the tribunal ruled, following the EOC's judicial review, that the Directive's "related to..." definition should be held to cover instances of third party harassment. The EAT later upheld this ruling while admitting that it created tensions with its ruling in *Conteh* but refused to consider arguments raised in *Conteh* as they had not been raised before the tribunal.

The consultation paper states that "it is possible" s.26 of Equality Act 2010, the general definition of harassment, which now uses the broader "related to..." wording, covers conduct that is currently covered by s.40. Following the rulings in the EOC judicial review and the EAT's subsequent judgement in *Norouzi* that seems probable but it is not certain how the tension between *Conteh* and *Norouzi* will be resolved by the courts. If it is possible that s.26 covers conduct covered by s.40 it is strange for the government to make such strong deregulatory claims for repealing s.40 and for it to describe the provision as "unworkable" and creating "uncertainty". With confusing messages from government about employer liability for third party harassment – implying that it is beyond the control of employers and not necessary as it does not address any real problem but then stating that employers are potentially liable under s.26 – there is some benefit in retaining s.40 in terms of creating clarity and certainty for all parties.

The one reported tribunal case brought under s.4A of SDA, which is now s.40 Equality Act 2010, shows that there are steps employers can take to influence or control third parties' behaviour and that s.40 is workable. In *Blake v Pashun Care Homes Ltd* [2011] EqLR 1293 a care worker suffered repeated sexual harassment by a resident, consisting of inappropriate touching and sexual advances. When she raised this with her employer she was told to be patient as it would take time for the resident to stop touching her and she was encouraged to deal with the resident, who it had taken 3 to 5 men to restrain, by herself. The tribunal held that the employer could have taken a number of reasonable steps to protect the

employee from sexual harassment, such as having another member of staff accompany her, consulting the resident's social worker or psychiatrist for advice, altering rotas to minimise contact with the resident or transferring her to another site. The claimant was awarded £7,500 for injury to feelings.

The conclusions reached by the tribunal in the *Blake* case are sensible and it is difficult to argue that the employer should not have borne some liability for its failure to protect the claimant. It is also worth noting that no other women were employed as carers in the care home and if the employer failed to deal with such sexual harassment by a resident and provide appropriate support to its staff, it would make it a difficult environment for many women to work in. There were therefore broader potential benefits of this case in terms of generally improving employment opportunities and working conditions for women.

The alternative legal remedies mentioned in the consultation paper will not necessarily provide adequate protection for employees and encourage action by employers to address third party harassment. The common law duty of care requires an individual to show physical or recognisable psychological injury resulted from the harassment; suffering general distress, hurt or grief (as the claimant suffered in *Blake*) would not be sufficient.

Claiming constructive dismissal is a risky strategy. An employee should not be forced to let things get to a stage where they have to resign from their job in order to get an issue addressed. The Impact Assessment states that this alternative route is "highly unlikely" and estimates that no additional constructive dismissal cases will be brought after the repeal of s.40.

The Protection from Harassment Act does not make employers' liable for third party harassment so does not get employers to address the issues they should be responsible for addressing. An individual could claim against the perpetrator but this may not be appropriate or possible (e.g. pupils and students) or it may not be the same perpetrator subjecting the victims to harassment (e.g. in the case of an employer failing to take

steps to protect female staff visiting a client workplace from sexual harassment). The PHA has also never been used by a victim of third party harassment despite being in force since 1997.

The drawback of health and safety legislation is that it cannot be enforced by an individual and the problem with the s.26 harassment provisions, as stated above, is the legal uncertainty as to whether or not they do cover third party harassment.

5. If this provision were removed, is there any other action that the Government should take to address third party harassment at work? Please explain your answer.

Yes. The government should make clear that employers can and should take steps to protect their staff from harassment by third parties related to the protected characteristics.

Organisations such as HSE, Acas and EHRC should be encouraged to update their guidance immediately to cover legal liability for third party harassment in the absence of s.40 and good practice steps to prevent it.

Given the risk of third party harassment occurring in public-facing jobs, particularly delivery of frontline public services where staff can be put in vulnerable positions (e.g. working in high stress situations, entering people's homes or working alone), the government departments and public sector employer groups responsible for frontline service delivery should be encouraged to develop and provide clear guidance on steps organisations should take to protect their staff, in partnership with the relevant trade unions.

6. a) Can you provide any further data or examples of costs and benefits which have not already been included in the impact assessment? b) Do you have any comments on the assumptions, approach or estimates used?

The preferred option, option 2, does not include the costs of repealing s.40 in terms of increased discrimination in the workplace. The benefits that are identified under option 1, in terms of creating greater clarity and certainty on liability for third party harassment and reducing workplace

discrimination, should be included as costs under the repeal all option. As shown in the *Blake* case, if an employer fails to address third party harassment related to a protected characteristic that potentially makes it difficult for people who have that protected characteristic to work in that environment and so all the costs associated with stress, absence and lack of engagement and trust will be incurred.

There will be costs for government, Acas, EHRC, employer bodies, TUC, trade unions and advice agencies etc. in having to revise the guidance which have not been considered. Leaving it to the courts to reach a conclusion on whether employers can be held liable under the general harassment provision will also mean further costs in updating guidance down the line as the case law develops.

On p.29 it says there have been no cases under the third party harassment provisions in the SDA or the Equality Act 2010. This needs to be revised in light of *Blake*.

7. How many third party harassment cases would you expect to be brought each year if the third party harassment provisions were retained? Please explain your answer.

It is still very early days for claims brought under the Equality Act. There have been at least three recent tribunal cases involving third party harassment. These numbers may increase as awareness of the specific third party harassment provision in the Act grows.

The number of tribunal claims is not the only relevant measure of how effective the third party harassment provisions are. It may be that having the provisions in place has encouraged the resolution of disputes within the workplace. Where third party harassment has taken place, employers may now take this more seriously due to the new provisions and therefore, make more of an effort to resolve things to the employee's satisfaction as part of an internal procedure.

8. Does the consideration of the impact on equality in the impact assessment properly assess the implications for people with each of the protected characteristics? If not, please explain why.

No. ATL does not understand how the conclusion is reached that repealing s.40 “will reduce confusion for employers and their employees about their respective responsibilities and rights” given the confusion and uncertainty about whether in the absence of s.40 third party harassment would be covered by s.26 of Equality Act 2010 or possibly be covered by a myriad of other statutory provisions.

The EqIA also wrongly seems to suggest that because all protected characteristics will be treated the same if s.40 is repealed there is no equality impact. The assessment of equality should focus on the impact the repeal of s.40 will have on those most likely to suffer third party harassment related to a protected characteristic (i.e. women, BME staff, LGB&T staff, older and younger people, disabled staff etc.) when compared to others who do not share a protected characteristic with them (i.e. men, white staff, heterosexual staff, non-disabled etc). The EqIA does not demonstrate that due regard has been had to the particular need to address the disadvantage certain groups suffer because of a protected characteristic nor does it address the under-representation of some groups in certain occupations or workplaces where they may be particularly vulnerable to harassment from third parties due to the kind of service users, customers or clients they deal with.

9. Does the justice impact test in the impact assessment properly assess the implications for the justice system? If not, please explain why.

The justice impact test does not deal with the government’s position that S26 may provide protection. If S40 is repealed it will be necessary for this issue to be tested and it is likely that considerable judicial time and expense will be used up as the issue is likely to go through the complete appeal process.