



Response to Government Equalities Office consultation: Employer liability for harassment of employees by third parties: A consultation

1. The Discrimination Law Association ('DLA'), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.
2. The DLA is a national association with a wide and diverse membership. The membership currently consists of some 300 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.
3. We are responding separately to the consultation regarding other reforms to the Equality Act 2010. This response deals with the proposal to remove from the Act procedures whereby employers are liable for third party harassment of employees.

Introduction

4. We set out below the serious concerns of the DLA regarding the proposed repeal of s.40(2)-(4) of the Equality Act 2010, which imposes liability on employers for harassment of their employees.
5. If the government is serious in its intention to "stop discrimination and change behaviour", as set out in its equality strategy, then it is important to ensure that the Equality Act tackles all areas of discrimination and that actions by third parties are tackled by employers where this is feasible - and it is only in the latter circumstances that action is required by employers.
6. The DLA is concerned that this present consultation is fundamentally flawed both in relation to the reasons for its proposed repeal of the provisions but also in relation to the rationale for the adoption of the proposals in the first place.

7. At paragraph 2.3, the consultation document refers to the judicial review of the Government's implementation of the Equal Treatment Amendment Directive and states the at the resultant Court ruling "made it clear that the EOC and the Government agreed that there is nothing explicit or implicit in the directive which requires member states to impose employer liability for third party harassment in the way the then government set out in its factsheet".
8. The words of the judgment were that the leading counsel for the EOC accepted that there was nothing explicit nor **arguably** implicit - this is a question which in an appropriate case could be referred to the Court of Justice of the EU.

The rationale for repeal of the provisions

9. The Consultation document states at paragraph 2.4 that the "introduction of this provision has given rise to concern that business, especially small businesses, would find it difficult to comply with". Yet no evidence has been provided of this concern. And the provisions of section 40 have in any event 2 built in "protection" mechanisms in that they require "3 strikes", i.e. there must be 3 incidents of harassment before any claim can be brought, giving employers in effect plenty of notice and thus opportunity to address matters with a third party; and in any event they are only liable if there were reasonably practicable steps that they could take to address the harassment.
10. The Consultation document goes on to state that it has no evidence to suggest that the third party harassment provisions are serving a practical purpose or are an appropriate or proportionate manner of dealing with the type of conduct that they are intended to cover. Firstly, equally it has no evidence to suggest that they are not serving such a purpose. And this relies upon a lack of evidence from settlements and employment claims. The provisions may be used prior to any claims being raised - but no research has been commissioned into this possibility so far as we can see. The provisions may well have influenced employers to take action prior to the "first strike" - this may simply involve exhibiting notices stating that racist sexist etc behaviour from customers towards staff will not be tolerated - hence no possibility for any claims to be brought to a tribunal.
11. Further, the provisions have been in place for such a short time that it is surely premature to consider repealing them without having given them an opportunity to be utilised effectively.

Other legal remedies

12. It is DLA's view that the other legal remedies put forward in the consultation document, whilst imposing important legal obligations on employers to protect their employees from harm, do not in fact fulfil the same function as the third party harassment provisions, which state as follows:

40 Employees and applicants: harassment

- (1) An employer (A) must not, in relation to employment by A, harass a person (B)–
 - (a) who is an employee of A's;
 - (b) who has applied to A for employment.
- (2) The circumstances in which A is to be treated as harassing B under subsection (1) include those where–
 - (a) a third party harasses B in the course of B's employment, and
 - (b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.
- (3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.
- (4) A third party is a person other than–
 - (a) A, or
 - (b) an employee of A's.

13. It is also notable that all of these alternative remedies were in existence when Parliament agreed that there was a need to make employers liable for third party harassment on all of the protected grounds.

Duty of care

14. In order for any claim to be brought for a breach of the duty of care, there must be a physical or psychological injury. Where there is not, and this is often the case but there has been conduct which has one or both of the effects under the definition of harassment, there is no claim.

Health and safety

15. Any obligations of health and safety legislation are monitored and enforced by the health and safety executive: they are not something that an individual can raise or bring a claim in relation to.

General harassment provisions

16. General harassment provisions are of course extremely important. But these deal essentially with conduct which is carried out by those who are employees or agents of the employer, and not with "third parties", hence the need for the provisions of s.40.

17. In fact the consultation document is quite misleading in its approach to this. The implication is that claims can be brought under the general harassment provisions of the Equality Act. Three cases are cited in which claims have been brought under the general harassment provisions. The first (in time) of these, Gravell, is in fact a victimisation claim, relating to an application by an existing employee for a post. It has no relevance to third party harassment. The second, Conteh, is rejected by the tribunal and subsequently by the EAT. The third, Norouzi, has been brought on the basis of the Race Directive, adding emphasis to the point made above that this question may form the basis of a reference to the Court of Justice of the EU.
18. The cases raised in the consultation document simply confirm the need, in DLA's view, for there to be statutory provision for third party harassment, to provide the necessary clarity in this area.

Constructive dismissal

19. A failure by an employer to tackle the discriminatory conduct of a third party could well amount to a breach of contract entitling an employee to resign and claim constructive dismissal. In these times of financial insecurity and high unemployment, however, it would surely be preferable for those employees to have a right to take their claim to the employment tribunal whilst remaining in employment and to have a tribunal require the employer to take action in respect of third party conduct.

Protection from Harassment Act 1977

20. Whilst the protection from harassment Act does create both a civil tort and a criminal offence, caselaw has made it clear that the standard of proof for the tort created is close to that of a criminal standard of proof - which is entirely different from the standard required in an employment tribunal. In addition and as conceded in the consultation document, under this Act the employer is not liable for the acts of harassment by third parties. In many cases the identities of third parties involved in the harassment will be unknown to the victim, for example customers in a shop or bar, or passengers on a bus.

Equality impact

DLA is seriously concerned regarding the content of the Equality Impact Assessment in Annex 2 of the consultation document. There is nothing to demonstrate that in putting forward the proposal to repeal s.40(2) - (4) the government has taken into account the likely adverse impact on people who share a particular protected characteristic. The fact that all of the protected characteristics may be equally disadvantaged is not sufficient. There is no evidence that the government has considered ways in which the adverse equality impact of its preferred option could be mitigated. As stated above, the other legal remedies do not offer the same protection to employees vulnerable to third party harassment including women, ethnic minorities, disabled people, member of minority religions, gay men and lesbians, transsexuals and older workers.

Conclusion

21. In conclusion, DLA disagrees that the third party harassment provision should be repealed. There is nothing in the consultation paper that suggests that these provisions are unnecessary or that they are burdensome. Nor has any proper impact assessment on the removal of these provisions been conducted.

Discrimination Law Association
06 August 2012