

Preventing Sexual Harassment at Work outcomes, sanctions & escalation guidance

Introduction

Two recurring topics that Senior leaders and HR specialists, attending our courses on preventing sexual harassment at work, seek detailed guidance on relate to:

- 1. Follow up or after care action that may be needed after completion of the investigative process and final outcomes**
- 2. Escalation of a complaint because of suspected criminal behaviour**

This short guidance note looks at both issues, against the backcloth of technical guidance from the Equality and Human Rights Commission (EHRC). It contains footnote links for easy access to this guidance and useful materials from the “Advisory, Conciliation and Arbitration Service” (ACAS) and the “Care Quality Commission” (CQC)

Those using this guide should also familiarise themselves with their organisation’s whistle blowing policy to ensure there is no unintended conflict.

1. Follow up or After Care Action

The key reference point here is the Technical Guidance published by the “Equality and Human Rights Commission” (EHRC) which together with material from ACAS is showcased on our training courses and should be incorporated within your policies and procedures.

The guidance envisages three possible scenarios for follow up or after care action that might be appropriate in the light of a decision to either

- A. Not uphold the complaint or take action short of dismissal
- B. Uphold the complaint but no dismissal action taken
- C. Uphold the complaint with dismissal

Whilst these are the three key common outcome scenarios other decisions are possible. In the event of other decisions or where clarification of the official guidance is needed; it should be sought in the from the EHRC, ACAS and other regulatory bodies with whom you work. We would also recommend employers consider, especially in complex cases, the benefits offered by formal legal advice.

We also suggest and strongly, that in-house advisory managerial notes reflecting the technical guidance published by the EHRC covering the three scenarios be incorporated into all relevant policies, together with appropriate trigger points inserted into both accompanying procedures and step-by-step process flowcharts.

For ease of reference, the EHRC Technical Guidance Notes 4.87 to 4.89 covering the three scenarios are set out below *in italics* reinforced at the postscript with a link.

FOLLOW UP OR AFTER CARE ACTION THAT MAY BE NEEDED AFTER COMPLETION OF THE INVESTIGATIVE PROCESS AND FINAL OUTCOMES

“Technical Guidance” published by the “Equality and Human Rights Commission”

Complaint not upheld or action taken short of dismissal

4.87 Where a complaint is not upheld, or it is upheld but this results in action short of dismissing the harasser, the employer should carefully consider the continuing relationship between the complainant and the (alleged) harasser. The employer should nominate someone to manage the reintegration of all those affected by the allegation and investigation including:

- *arranging the appropriate support and counselling for the parties*
- *arranging mediation*
- *making an offer of redeployment where any relationship breakdown cannot be resolved through other means*

Complaint upheld but no dismissal

4.88 If the complaint is upheld and the harasser is not dismissed, the employer may need to consider, as part of any disciplinary process involving the harasser, issues such as:

- *further training for the harasser*
- *permanent redeployment of the harasser to another role (or permanent redeployment of the complainant if that is their preference), or other measures needed to keep the two parties separate, and*
- *asking the harasser to apologise to the complainant*

Complaint upheld with dismissal

4.89 If a complaint is upheld and the harasser is dismissed; the employer should assess whether any post-employment issues might arise and ensure that it has appropriate processes in place to deal with them. For example:

- *How will it answer requests to provide a reference for the harasser, ensuring compliance with its duty not to provide a misleading or inaccurate reference to a potential employer? The employer should consider the risk that harassment may be repeated with a new employer in the future and should not assume that it cannot disclose details of the harassment to the potential employer for data protection reasons. It should instead consider whether the reasons for dismissal can be lawfully disclosed under Article 6 of the GDPR and what measures it can put in place to ensure that disclosure is proportionate, and*
- *If the workplace is open to the public, how will the employer ensure that the harasser does not target the complainant at work?*

ESCALATION OF A COMPLAINT BECAUSE OF SUSPECTED CRIMINAL BEHAVIOUR

The key reference point here is, once again, the Technical Guidance published by the Equality and Human Rights Commission (EHRC) which we explore in more detail during relevant courses

For ease of reference, the EHRC Technical Guidance Notes 4.70 to 4.74 covering suspected criminal behaviour is set out below in italics and should as with the guidance above, be appropriately referenced to your in-house policies, procedures and step-by step process flowcharts.

Additional points, which we highlight and explore in greater detail during our training courses, focus on the broader aspects of “safeguarding” and the possible need in certain circumstances to refer any sort of breach of standards to outside regulatory bodies such as the Care Quality Commission (CQC) inter alia the Disclosure Barring Service (DBS). There may well be other regulatory or professional bodies with whom you work that operate Codes of Practice requiring escalation of harassment complaints or other issues to them. You should ensure that these too are cross referenced in your managerial guidance as well related procedural flow charts.

EHRC Technical Guidance extracts:

4.70 Some acts of harassment may also amount to a criminal offence.

4.71 If an individual makes a complaint of harassment that may amount to a criminal offence, the employer should raise the possibility of reporting the matter to the police with the complainant and provide them with the necessary support if they choose to do so.

4.72 The employer should give the complainant’s wishes a significant amount of weight: if they do not wish to report the matter to the police then in most cases the employer should respect that wish.

4.73 In certain circumstances, however, an incident should be reported to the police. The employer should weigh up the risk of reporting the matter to the police contrary to the complainant’s wishes, against any risk to the safety of the complainant, the complainant’s colleagues and third parties if the matter is not reported to the police.

4.74 In cases where the police are involved, an employer should discuss the disciplinary process with the police. The employer should not assume that it cannot take any action to investigate the matter until police enquiries, or any subsequent prosecution have concluded. The employer should check with the police that it can carry out its own investigation without prejudicing any criminal process. If it is safe to do so, then the employer should consider whether it would be reasonable in all the circumstances to continue with an investigation immediately, rather than to await the outcome of the criminal process. Likewise, if the investigation does not result in a conviction, the employer should not assume that it cannot take further action. Criminal offences must be proved beyond reasonable doubt, meaning that there must be clear evidence supporting the allegation against the accused. An employer, on the other hand, need only have reasonable grounds to conclude that a disciplinary offence has been committed. This could involve, for example, the employer weighing up the evidence of the witnesses and deciding which witness or witnesses have provided the most cogent version of events.

Footnote links: -

EHCR

<https://www.equalityhumanrights.com/guidance/sexual-harassment-and-harassment-work-technical-guidance#furtherstepsaftertheprocesshasended>

EHCR

<https://www.equalityhumanrights.com/guidance/sexual-harassment-and-harassment-work-technical-guidance#criminalbehaviour>

ACAS

<https://www.acas.org.uk/sexual-harassment/steps-for-employers-to-prevent-sexual-harassment>

CQC

<https://www.cqc.org.uk/guidance-regulation/providers/notifications/allegations-abuse-safeguarding-notification-form>

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