



Farore Law

- Mini Guide -

A DETAILED INTRODUCTION TO HARASSMENT CLAIMS AND OFFENCES

What is harassment?

Simply put: harassment is unwanted behaviour intended to cause alarm and distress to another. Harassment is different from other kinds of discrimination in that it deals with the treatment of a single person, rather than addressing the difference in treatment between various people. It is irrelevant that the offender would have treated others in a similar way to a complainant.

Claims of harassment in the workplace are common, but harassment claims can also be brought in any situation covered by the Equality Act 2010. This includes (and is not limited to) conduct within partnerships, public offices, trade organisations, local authorities, and bodies responsible for awarding qualifications.

This blog piece offers an introduction to harassment under the following Acts:

- the **Equality Act 2010**;
- the **Protection from Harassment Act 1997**;
- the **Criminal Justice and Police Act 2001**; and
- the **Serious Organised Crime and Police Act 2005**.

Harassment under the Equality Act 2010

Harassment is defined by **section 26(1) of the Equality Act ("EqA") 2010** as "unwanted conduct" that has the purpose or effect of violating a person's dignity, or creating an intimidating,

hostile, degrading, humiliating or offensive (“adverse”) environment for that person. This is applicable in a variety of situations, namely those that occur in the workplace. Such unwanted conduct must relate to one of the relevant “**protected characteristics**”.

The “protected characteristics”

The EqA 2010 contains 9 protected characteristics; the following 7 are the characteristics related to harassment under the EqA 2010:

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex; and
- sexual orientation.

The ‘missing’ characteristics are (i) civil partnership and marriage, and (ii) maternity and pregnancy. (Case law has confirmed that unwanted conduct involving these 2 characteristics can be dealt with under the sex characteristic). It is important to note that the unwanted conduct must engage one of the 7 protected characteristics above. However, there is no need for an individual to actually possess one of those characteristics for unwanted behaviour to constitute harassment under the EqA 2010 - for example, a heterosexual man may take offence at being referred to by homophobic slurs.

The ‘unwanted conduct’

It is clear that conduct will be unwanted if an individual explicitly states that it is unwelcome, but this does not mean that conduct is automatically regarded as welcome if an individual says nothing about it. Some behaviours may clearly be unwanted depending on context, such as racist comments or sexual touching; an employee may not wish to speak out against employees who are more senior, or may keep quiet out of fear of being considered a ‘troublemaker’.

Examples of unwanted conduct include:

- displaying offensive images;
- Facebook (or other social media) posts;

- facial expressions;
- gestures;
- graffiti;
- jokes (including 'banter' or teasing); or
- verbal comments.

Unwanted conduct also accounts for an individual's behaviour as a whole. For example, asking a colleague on a date may not in itself amount of harassment, but continually asking that same colleague may well do so.

With regard to workplace harassment, the EqA 2010 applies to any behaviour that constitutes part of the course of employment.¹ This includes behaviour arising during out of employment hours or away from the working premises. The Act also provides protection from any harassment that occurs when the employment contract is over, as long as that harassment "*arises out of and is closely connected to*" the former employment relationship.²

The 'purpose or effect' of the harassment

Harassment occurs when a person intends or causes an adverse environment. A finding of harassment may still be found if a person has the *intention* to create such an environment, even if it does not occur. Conversely, harassment can also be found if an adverse environment is created as a consequence of a person's actions, even if s/he never intended the adverse environment to develop. It is therefore essential to account for a complainant's subjective view of the alleged harassment.

It is ultimately up to each individual to determine for themselves what is or is not acceptable behaviour. However, this is dependent on a test of reasonableness, which accounts for the complainant's perception and the circumstances of the situation.³ This allows context to be taken into account, and provides protection against hypersensitive complainants. As such: whether or not conduct can be defined as 'unwanted' in law is not something that is completely down to the complainant. (Note that this 'reasonableness test' is a defence against *unintended* harassment, and will not be applicable to a person who intended to create an adverse environment.)

¹ Section 109, EqA 2010

² Section 108(2), EqA 2010

³ Section 26(4), EqA 2010

Employers' reasonable steps to prevent harassment

A vicariously liable employer⁴ will be able to defend itself against a claim of harassment if it can demonstrate that it took “*all reasonable steps*” to prevent the relevant employee from engaging in the unwanted conduct. Whether or not such steps are reasonable depends on their effectiveness: case law has confirmed that relevant factors include the “*time, effort and expense of the suggested measures*” and whether or not they “*are disproportionate to the result likely to be achieved*”.⁵

Sexual harassment

Sexual harassment is described as “**unwanted conduct of a sexual nature**” that has the purpose of creating an adverse environment for a person. This is provided for by **section 26(2) of the EqA 2010**, and the elements of unwanted conduct as noted above apply in the same way to sexual harassment.

The difference between ‘harassment’ and ‘sexual harassment’ is that the latter does not require a link to a protected characteristic: it is enough that the conduct is of a sexual nature. Examples include sexually suggestive comments, or inappropriate touching.

Harassment under the Protection from Harassment Act 1997: criminal, etc.

The Protection from Harassment Act (“**PfHA**”) 1997 was first introduced to provide women protection from stalking. The PfHA 1997 does not define precisely what harassment is, but does note that it includes actions that may alarm and cause distress,⁶ which covers a wide range of behaviour. It is important to understand that the behaviour complained of must be oppressive, and not merely trivial.⁷

Furthermore, there must be a minimum of two occasions of oppressive behaviour for it to equate to a ‘course of conduct’.⁸ The PfHA 1997 does not state how much time needs to pass between each instance of harassment – this is decided on a case by case basis. The question is whether or not the instances are “*so connected in type and in context as to justify the*

⁴ An employee can be vicariously liable for employees acting in the course of their employment. See *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 A.C. 224

⁵ See *Croft v Royal Mail Group Plc (formerly Consignia Plc)* [2003] EWCA Civ 1045; [2003] I.C.R. 1425

⁶ Section 7, PfHA 1997

⁷ See *R. v Curtis (James Daniel)* [2010] EWCA Crim 123

⁸ Section 7, PfHA 1997

conclusion that they amounted to a course of conduct".⁹ The fewer the incidents and the longer the period of time between them, the less likely they will be considered as a 'course of conduct' for the purpose of establishing harassment.¹⁰

As with claims of sexual harassment under section 26(2) of the EqA 2010, the PfHA 1997 is useful in that there is no requirement for the harassment to be related to a protected characteristic (as it is under section 26(1) of the EqA 2010). The PfHA 1997 is not limited to claims against individuals, and can be used to bring claims against employers who are vicariously liable for their employees (so long as the oppressive conduct occurred during the course of employment).

The PfHA 1997 outlines two criminal offences with regard to harassment:

- **Section 2: Pursuing a course of conduct amounting (or what s/he ought to know amounts) to harassment of another;** and
- **Section 4: Pursuing a course of conduct causing (or what s/he ought to know will cause) another to fear violence.** This is subject to a reasonableness test, in that a reasonable person in the position of the victim at the time would also have cause to fear the use of violence, based on the same facts.¹¹ The fear need not be of immediate violence. (However, a fear of the *possibility* of violence will not suffice.)

When is Section 2 harassment justified?

Harassment under Section 2 of the PfHA 1997 may be defensible in the following 3 circumstances:

- if the unwanted course of conduct was pursued in order to prevent or detect crime;
- if the unwanted course of conduct was pursued under an enactment or rule of law, or to comply with a condition or requirement imposed by an enactment; or
- if, in the circumstances, the course of conduct was reasonable.

When is Section 4 harassment justified?

Harassment under Section 2 of the PfHA 1997 may also be defensible in the following 3 circumstances:

⁹ See *R. v Patel (Nitin)* [2004] EWCA Crim 3284; [2005] 1 Cr. App. R. 27

¹⁰ See *Lau v DPP* [2000] 1 F.L.R. 799

¹¹ Section 4(2), PfHA 1997

- if the unwanted course of conduct was pursued in order to prevent or detect crime;
- if the unwanted course of conduct was pursued under an enactment or rule of law, or to comply with a condition or requirement imposed by an enactment; or
- if, in the circumstances, the course of conduct was reasonable for the protection of herself/himself, and/or the protection of her/his property.

Justification in the interests of national security

Should the Secretary of State provide a certificate confirming that in her/his opinion the alleged harassment was done on behalf of the Crown in relation to (a) national security; (b) the economic wellbeing of the United Kingdom; (c) the prevention of detection of serious crime, then that certificate will serve as conclusive justification for the behaviour.¹²

Stalking

The Protection of Freedoms Act (“*PFA*”) 2012 also amends the PfHA 1997 by introducing two separate offences of stalking:

1. Section 2A: **The offence of stalking**; and
2. Section 4A: **Stalking involving fear of violence or serious alarm or distress**.¹³

Stalking is not defined by the PFA 2012; rather, a non-exhaustive list of examples of behaviour that could constitute stalking is provided:¹⁴

- following a person;
- contacting (or attempting to contact) a person by any means;
- publishing any statement or other material (i) relating (or purporting to relate) to a person, or (ii) purporting to originate from a person;
- monitoring a person’s use of the internet, email or any other form of electronic communication;
- loitering in any place (whether public or private);
- interfering with another person’s property; or
- watching or spying on a person.

¹² Section 12, PfHA 1997

¹³ Section 111, PFA 2012

¹⁴ Section 2A, PFA 2012

Harassment under the Criminal Justice and Police Act 2001: harassment within the home

The Criminal Justice and Police Act 2001 (as amended by section 126 of the Serious Organised Crime and Police Act 2005) addresses the offence of harassment to a person at his or her home.

This offence has 4 elements:

- the offender is present outside or in the vicinity of the person's home;
- the offender is present there for the purpose of representing to (or persuading) the resident or any another individual (whether or not that individual lives at the person's home) that either (i) s/he should not do something that s/he is entitled or required to do; or (ii) that s/he should do something that s/he is not under any obligation to do;
- the offender intends (or ought to have known that) her/his presence amounts to the harassment of, or causes alarm or distress to, the resident; and
- the offender's presence amounts to (or is likely to result in) the harassment of, or causes alarm or distress to, the relevant person.

With regard to this particular offence: the police may demand that the offender leave the vicinity of the person's home for a specified period no longer than 3 months. Should the offender return before the end of that specified period for the purpose of element (ii) above, then the offender will commit a criminal offence.

Harassment under the Serious Organised Crime and Police Act 2005: harassment of 2 or more people

Section 125(2) introduced the offence of harassment of 2 or more people, along similar lines to harassment within the home as described above:

"A person must not pursue a course of conduct -

(a) which involves harassment of two or more persons, and

(b) which he knows or ought to know involves harassment of those persons, and

(c) by which he intends to persuade any person (whether or not one of those mentioned above) -

(i) not to do something that he is entitled or required to do, or

(ii) to do something that he is not under any obligation to do."

This particular offence is designed to catch those who target organisations rather than individuals (namely activists and/or protesters). For example: an individual who, in protest at an upcoming business deal between two companies, decides to stand outside the office building and shout through a megaphone in an alarming way, may be caught under this Act.

Last updated: October 2019

This content is intended only as a general guide and does not constitute, nor should be used as a substitute for, legal advice.



Farore Law is a law firm authorised and regulated by the Solicitors Regulation Authority, SRA No. 805325. The SRA Standards and Regulations can be accessed at sra.org.uk/solicitors/standards-regulations.

Farore Law is a limited liability company, registered in England. Its registered office address is Central Court, 25 Southampton Buildings, London WC2A 1AL. Its Company Number is 12795054, and its VAT no is 359 1529 74.