



# The Work Couch

NAVIGATING TODAY'S TRICKY PEOPLE CHALLENGES TO  
CREATE TOMORROW'S SUSTAINABLE WORKPLACES

## Episode 7 – Sexual harassment in a post #MeToo era – (Part 2) with Macaela Joyes

**Ellie**

Hi and welcome to the Work Couch Podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. Every other week, we explore those thorny HR issues that people teams and in-house counsel are facing right now, and we discuss the practical ways to tackle them. My name is Ellie Gelder and I'm a Senior Editor in the Employment, Equality and Engagement team here at RPC and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. We recently kicked off our podcast series on preventing workplace sexual harassment in this post-MeToo era when we spoke to Kelly Thomson and Aaron Goonrey about the differences and commonalities in the UK and Australian legal regimes on this area of employment law. So, this week in part two of the series we'll be discussing the practicalities of dealing with allegations of sexual harassment and some essential do's and don'ts to bear in mind at each stage of the process. It's been over five years since the #MeToo went viral as a response to the widespread prevalence of sexual harassment and assault, particularly in the workplace. So why are we still talking about this? Well, unfortunately, despite the far-reaching impact of the #MeToo movement and increasing demand for change, sexual harassment remains a serious issue in the workplace today, and, with the Worker Protection (Amendment of Equality Act 2010) Bill 2022-23 currently before Parliament in the UK, the issue of workplace sexual harassment is back in the spotlight. According to research published by the Scottish Trade Union Congress, a third of women surveyed had experienced sexual harassment at work in the last year. 70% of those women felt unsupported within their workplace when they did make a report, and 85% of women who made a report said that their report and experience was not taken seriously or dealt with appropriately. And it's not just women who are being subjected to workplace harassment. A survey from the TUC in 2019 found nearly 7 in 10 lesbian, gay, bisexual and trans individuals had been sexually harassed at work, while black and minority ethnic women and disabled men and women reported the highest rates of workplace sexual harassment. And men also suffer as the victims of workplace sexual harassment and often find it particularly difficult to come forward. So, the sad reality is that this is an issue that HR professionals and managers alike may well have to deal with at some point. And unfortunately, the reported lived experiences of individuals who've been through such processes demonstrates that improvements could be made. So, keeping to our theme from part one of this podcast series of having a British and a southern-hemisphere accent, I'm delighted to be joined on The Work Couch today by Macaela Joyes, who is an Associate in our Employment, Engagement and Equality team. Hi, Mac. Thanks so much for joining me today on the Work Couch.

**Macaela**

Hi, Ellie.

**Ellie**

So, let's jump straight in then. A common theme throughout the reports into workplace sexual harassment is the prevalence of sexualised jokes. And I'm sure we've all heard comments to the effect that you just can't joke about anything anymore. So, what does the current law say about where the line should be drawn?

**Macaela**

Okay, so if I start with a very typical lawyer's response here, it really depends, but the Equality Act 2010 defines sexual harassment as unwanted conduct of a sexual nature which has the purpose or effect of violating someone's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The definition is very broad. It can encompass things that some people might argue is just a joke or just workplace banter. Could also be displaying porn, asking intrusive questions right through to criminal sexual assault. Just to be very clear, memes and WhatsApp and text Teams chats can constitute sexual harassment. I'm mentioning that because I have had to spend hours working through hundreds of pages of memes in sexual harassment matters and honestly, they just do not look anywhere near as funny when you're viewing them in that light. I think it's also really important for us to note, and the Fawcett Society's recommendations make this point, sexual harassment is not always motivated by sexual interest. It can be used to humiliate and belittle people, and that does come out in those jokes sometimes.

<b>Ellie</b>	Absolutely, and as you mentioned, it's important to look at the purpose and/or the effect of that conduct, isn't it?
<b>Macaela</b>	Yes, when it comes to the issue of whether a comment that someone says was a joke or was just banter is sexual harassment, it's that purpose and effect part of the legal definition that's particularly important.
<b>Ellie</b>	So how is that effect assessed by tribunals then?
<b>Macaela</b>	So the effect is assessed from the claimant's subjective viewpoint, and then an objective assessment is undertaken regarding whether the effect was really reasonable or whether the victim's being a little bit hypersensitive. In that regard, the law strikes a bit of a balance really. Some comments which are presented as being a joke will therefore be sexual harassment, others will not. But it's really important to note that the law focuses on the impact on the individual. So, just because a comment might not offend me, or you <b>Ellie</b> , it doesn't mean it's not offensive per se.
<b>Ellie</b>	So, tell us about some of the cases that have come before the employment tribunal where supposed jokes, innocent jokes have escalated to become something far more serious.
<b>Macaela</b>	Yeah, so that escalation of comments is a really common thing in both the case law and also in people's reported experiences. One example is the 2019 Employment Appeal Tribunal decision in <i>Fricker v Gartner UK Limited</i> , where what started as the manager sending a text message saying "good girl" to his direct report, which she brushed off with a "haha" response, escalated to the manager attempting to kiss and touch the employee, which I think we can all be clear is pretty clear sexual harassment.
<b>Ellie</b>	Yeah, absolutely. So, is that where policies and procedures can come in then so that everybody in the organisation is clear about what is and what isn't acceptable?
<b>Macaela</b>	Exactly. So having those really clear policies, but going beyond that, having that really embedded in your workplace culture is so important. And in a workplace where borderline comments are more commonplace and accepted, there is a much greater risk of someone crossing that line. And that was seen in another tribunal decision, <i>Smith v Renrod Ltd</i> , where the Tribunal found that there was a culture of sexual banter and sexual behaviour in the workplace which the claimant also engaged in, and the Tribunal found that the situation between the colleagues did not shock the complainant, and on the specific facts of that case, that behaviour didn't go too far. However, the personal innuendo and the questioning by the claimant's manager was offensive and unwanted and went beyond what was acceptable to the complainant. That case is also really interesting because the Tribunal noted that where a culture of sexual banter exists in a male-dominated industry, and that culture is actively condoned by a male manager, a female employee may feel compelled to join in with it and not obviously take offense at it, even though the language and conduct would otherwise be demeaning.
<b>Ellie</b>	Absolutely. So going along with something or joining in with conduct might actually mask the fact that that person is in reality feeling really demeaned by it. What about where that sort of conduct, that banter has gone on for a really long time?
<b>Macaela</b>	Yes, so both of those two issues were actually considered in <i>Munchkins Restaurants Ltd v Karmazyn</i> . And in that case, the EAT held that the fact that the employee, actually employees, there were multiple claimants in that case, had put up with the conduct for years, didn't mean that it could not be unwanted. And neither did the fact that the employees sometimes initiated that type of banter as a coping mechanism in that workplace.]
<b>Ellie</b>	That's really interesting how it can be a coping mechanism. You heard me mention the statistics earlier, so regarding the number of complainants saying that when they've chosen to report, and obviously that's an issue that frequently doesn't get reported, but the vast majority who did report felt unsupported and said their experience wasn't taken seriously or dealt with appropriately. So, I guess even a really well-intentioned response can be the wrong one. So going back to your earlier comment, having clear policies and processes and being prepared in advance can really help.
<b>Macaela</b>	Definitely when you receive a sexual harassment complaint, it's not the time you want to be working out what process to apply. And linked to that as well, the sensitive nature of the complaints means that the first disclosure is not necessarily going to be made to HR. And depending on the size of the organisation, while it's not possible necessarily to have everyone trained in how to handle such disclosures, they should be aware of what the processes are that are in place, what structures exist and who they should be going to.
<b>Ellie</b>	Okay, so beyond having clear policies and processes, preparing in advance, what else can listeners be doing to ensure a complaint is dealt with appropriately and with a supportive response?

<b>Macaela</b>	The reality is being subjected to harassment will affect individuals differently and a process is not going to be identical in every situation. However, if we look at five general principles which can be applied. So first, thank them for telling you and acknowledge their courage for doing this. It takes a huge amount of courage to speak up. So, acknowledging this, thanking the individual for telling you, is really the first thing that you should be doing. Outside of the employment law sphere, this is normally where you would see someone recommending to make it clear that you believe them. The nature of an HR professional role means that it's not always appropriate for you to go quite that far. Even so, that doesn't mean you can't respond with empathy and in a way that acknowledges the difficulty for that individual. The next would be to listen actively. So, honour that courage that it took the person to disclose by actively listening to what they're saying. At this stage you really don't need to be going into full investigation mode quite yet; just give them a chance to talk. Many victims of sexual assault report that telling someone helps their healing but in the reverse to that if it's not handled appropriately, it can have the opposite effect.
<b>Ellie</b>	So, jumping straight into investigative mode at this stage without taking the time to actually plan also increases the risk of inadvertently saying something that could be seen as victim blaming. So, let's go on to your third general principle then.
<b>Macaela</b>	So, ask them how they would like to proceed and what support they need. There are situations where an employer might have to take forward an investigation without a formal complaint, but for the purposes of this podcast we're just going to put that to one side. Workers who have suffered workplace sexual harassment often report feeling powerless, and this is obviously exacerbated by the fact sexual harassment frequently occurs in situations where there's an unequal power dynamic already in play. Some of the most common mistakes come from really good intentions but assuming that you know what a complainant wants can disempower them. Also warning them that the process is going to be emotionally challenging is just really not necessary. They will already know that. If EAP is available, it's definitely worth seeing if that's something they're interested in, if they need any support in accessing that. However, linked to the previous point, listen to what they say and consider whether what they say they need can be accommodated.
<b>Ellie</b>	And it used to be fairly common practice, Mac, didn't it to move the person who's complained to another team or to change their role, so they don't have to interact with the individual accused of sexual harassment?
<b>Macaela</b>	It did, and if that's what the claimant wants, by all means, explore it. However, it is really important to be alert to the fact that this can have flowing consequences, for example, to career progression and can inadvertently place the individual at a disadvantage. It's certainly not something you should do without careful thought and clear justification in order to avoid appearing to punish the complainant for complaining. And really should be done in consultation with the complainant. If we look at the fourth point, which is just how important communication is in this situation. So, for most people, the reality is this process is foreign and the uncertainty that comes with it only compounds the stress and anxiety felt by the individuals who are involved in the process. Communicating the timeframes for any next steps and providing updates as soon as possible if anything changes can at least provide a little bit of clarity. A person's needs also can change during the process which is really important to note, so checking back and seeing whether that support structure you put in place at the start is still working and if not, what changes could be made. Also, it's pretty common to support an individual right through the process and then wrap it up. Whereas that communication and ongoing support really needs to keep continuing beyond the end of that process.
<b>Ellie</b>	Okay, so tell us about your last general principle.
<b>Macaela</b>	So final principle, don't over promise. For a proper investigation to occur, confidentiality might not be able to be maintained, so don't promise it if it's not something you can deliver. Similarly, and this does vary between processes, but a proper investigation can take quite a long time. Don't try and provide reassurances by promising a timeline that's not realistic.
<b>Ellie</b>	And again, that really comes back to having clear policies and procedures in place in advance. So, we've talked about the organisation's obligations towards the person who complains, but actually employees who've been accused of harassment also have to be treated fairly and impartially throughout the investigation and any subsequent disciplinary process. So how do you make sure you're meeting those obligations at the same time?
<b>Macaela</b>	Yes, I think it is really important not to lose sight of that fact that a sexual harassment complaint can also be incredibly stressful and place a huge amount of pressure on the person who is accused. The principles we've just been through with a few adjustments apply pretty equally to the person who's been accused of harassment. So firstly, acknowledge the fact that it is likely to be distressing for them as well. Show that you genuinely want to consider what they have to say and are going to consider what they have to say, and that

	you've not predetermined an outcome by actively listening to them. Ask them what support they need and remind them that they can access EAP where this is available. Fourthly, maintain regular communication throughout the process. This would include in relation to who is being spoken to, and why, as well as the timeframes and again don't offer reassurances you can't give although I will note it is really important to reassure this individual that a fair and impartial process will be followed.
<b>Ellie</b>	So, when it comes to impartiality, how can you ensure this where either the person complaining, or the person accused are in senior roles?
<b>Macaela</b>	So, the reality is where one of the parties is a senior employee or in a position of power, impartiality will often be called into question. For that reason, it can be worth engaging someone external to the business, even where there is an internal person who could do an excellent job, the appearance of impartiality is also important.
<b>Ellie</b>	And on the topic of investigations, obviously there can be an overlap between behaviour that constitutes harassment under the Equality Act and also criminal offences, for example sexual assault, stalking, offensive communications.
<b>Macaela</b>	Yes it can, and actually because an abuse of power can be an aggravating factor carrying higher culpability in criminal sentencing, the courts are likely to view workplace sexual offending, and particularly by a more senior employee, very seriously.
<b>Macaela</b>	So this is what occurred when the former conservative MP, Charlie Elphicke, was sentenced for two years of imprisonment in 2020 for three counts of sexual harassment against his female employees.
<b>Ellie</b>	So when should an employer consider involving the police then?
<b>Macaela</b>	Early in the process, employers should consider whether the conduct complained of could potentially constitute a criminal offence and whether the police should be informed. However, that decision about whether to go to the police should ultimately be left with the employee unless the employer considers that there is an immediate risk of further harm. There are a wide range of factors why someone may choose not to go to the police, so employers should certainly not draw any inferences from that decision. However, the reality is that unless the employee is prepared to cooperate with the police, the police aren't likely to be able to take any action.
<b>Ellie</b>	And it's important to point out as well that employers need to consider any regulatory obligations that might arise. So, for example, the Solicitor's Regulatory Authority and the Financial Conduct Authority, they'll expect to be informed of sexual misconduct issues at the outset of the employer's investigation. So, Mac, if the police are involved, how should the employer proceed with its own investigation?
<b>Macaela</b>	I'm actually going to give a wee bit of an unhelpful answer here, Ellie, and say at that point employers should really be getting specialist advice from both employment and criminal practitioners. The Equality and Human Rights Commission guide notes that an employer should not assume that it cannot take any action to investigate the matter until police inquiries and any subsequent prosecution have concluded. However, employers really need to be liaising with police to ensure there's no risk of prejudicing the criminal proceedings. There's also legislation which creates specific obligations when conducting an investigation in these circumstances. And an employer could potentially commit a criminal offence, for example, perverting the course of justice if it does not act appropriately when investigating such a complaint.
<b>Ellie</b>	I can see why you've said really important to get advice from specialist lawyers in that area. Mac, if you were to give some key takeaways for listeners of this podcast, what would they be?
<b>Macaela</b>	So going back to what we've said throughout this podcast, preparing in advance, the importance of those policies, and actually embedding those policies in the workplace. Also, being human. Think about how you would like it handled if you were the complainant or the respondent. Although this does lead to my next point, which is that putting yourself in the shoes of the individual at the heart of the process is helpful from an empathy perspective. However, at the same time you need to avoid making assumptions or prejudgments. Obviously this is relevant in all investigations, but it is pretty interesting to see just how often people end up expressing personal opinions or gut-feel insights in a harassment case. Finally bear in mind that there are additional considerations where the matter is one which the police are or could be involved in.

**Ellie**

Some fantastic takeaways there on a particularly complex area of employment law. Mac, thank you so much for joining me today. We'll keep an eye on the progress of the Worker Protection Amendment of Equality Act 2010 Bill 2022-23, which is currently before Parliament. But if you'd like an explanation of the likely changes that we're expected to see, do listen to our previous episode on preventing sexual harassment, where Kelly Thomson talks us through the purpose of the Bill. If you would like to revisit anything we discussed today, you can access transcripts of every episode of The Work Couch podcast by going to our website <http://www.rpc.co.uk/theworkcouch> or if you have questions for me or Mac or perhaps suggestions of topics you'd like us to cover in future, then please get in touch by emailing us at [theworkcouch@rpc.co.uk](mailto:theworkcouch@rpc.co.uk). We'd really love to hear from you. And finally, if you enjoyed this episode, we'd be so grateful if you could spare a moment to rate, review and subscribe, and please spread the word by telling a colleague about us. Thank you all for listening and we hope you'll join us again in two weeks.



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