

Sexual harassment and harassment at work

Technical
guidance

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Foreword

The Equality and Human Rights Commission is issuing this guidance on sexual harassment and other forms of harassment at work to help employers, workers and their representatives understand the extent and impact of harassment in the workplace, the law in this area and best practice for effective prevention and response.

The #MeToo movement has highlighted the fact that sexual harassment is pervasive in contexts as diverse as Hollywood and Westminster, and reveals the barriers that many women and men experience in reporting it. Meanwhile research shows that lesbian, gay, bisexual and transgender (LGBT) people and ethnic minorities and also continue to face unacceptable levels of harassment at work. No workplace is immune to harassment, and a lack of reported cases does not mean that people have not experienced it.

Employers are responsible for ensuring that workers do not face harassment in their workplace. They should take reasonable steps to protect their workers and will be liable for harassment committed by their workers if they fail to do so. Our 2018 report, 'Turning the Tables', highlighted some of the most prevalent issues, and made a range of recommendations to the UK Government aimed at tackling the issue. This guidance is just one of the outcomes of this process.

We have a set of powerful tools to enforce the law. We can, for example, take organisations to court and intervene in individual cases. We also provide information, support and advice so that employers can help prevent workplace harassment and respond effectively when it does occur.

This guidance is the authoritative and comprehensive guide to the law and best practice in tackling harassment. It provides real and relevant examples for both workers and employers in a user-friendly and accessible way so employers of all sizes and types can take practical steps to eliminate harassment in the workplace.

We have prepared and issued this guidance using our powers to provide information and advice under section 13 of the Equality Act 2006. It is **not** a statutory code issued under section 14 of the Equality Act 2006. This means that while an employment tribunal is not obliged to take this guidance into account in cases where it thinks it is relevant, it may still be used as evidence in legal proceedings.

In developing this guidance we have consulted representatives from a range of groups, including government departments, public sector bodies, trade unions, representative bodies, lawyers, regulators and third sector organisations. These contributors have enriched and improved the content and we are grateful for their help.

Further detail about the terms used in this guidance can be found at the end of this document.

The scale and effect of harassment in the workplace

The evidence of the need for tougher action on harassment in the workplace is overwhelming. Harassment at work in all its different forms has a significant negative effect on both workers and employers. It damages the mental and physical health of individuals, which affects both their personal and working life, and has a negative impact on workplace culture and productivity. Moreover, ineffective responses to harassment complaints compound the impact of the harassment on the individual.

In the following sections we discuss the prevalence and effects of some of the different forms of harassment in the workplace.

Sexual harassment and harassment related to sex

In early 2018 we called for evidence from women and men who had experienced sexual harassment at work, the findings from which we published in our report, 'Turning the tables'.¹ The aim was not to describe the scale of the problem but to draw on a wide range of experience to find practical solutions.

Three-quarters of people who responded had experienced sexual harassment at work. Nearly all of the people who had been sexually harassed were women. While sexual harassment can be perpetrated or experienced by both men and women, we know that women are most often the targets and men the perpetrators. Harassment in the workplace largely reflects power imbalances based on gender and is part of a spectrum of disrespect and inequality that women face in the workplace and everyday life.

¹ [Equality and Human Rights Commission \(2018\), 'Turning the tables: ending sexual harassment at work'](#) [accessed: 6 January 2020].

The most common perpetrator of harassment was a senior colleague. However, just under a quarter of respondents reported being harassed by customers, clients or service users – known as third party harassment.

Around half of respondents hadn't reported their experience of harassment to anyone in the workplace. Barriers to reporting included:

- the view that the employer would not take the issue seriously
- a belief that alleged harassers, particularly senior staff, would be protected
- fear of victimisation
- a lack of appropriate reporting procedures.

Our findings reflect other research that has been undertaken in this area. For example, Trades Union Congress (TUC) research in 2016² found that 52 per cent of women had experienced unwanted behaviour at work, including groping, sexual advances and inappropriate jokes, which rose to 63 per cent for young women aged 16–24. Similarly, research undertaken by the Young Women's Trust³ found that 1 in 5 young women said they either didn't know how to report sexual harassment, or were too scared to, because of concerns that this might mean losing their job or being given fewer hours. Their findings also indicated that 1 in 14 young women reported being treated less well in their job, or while looking for work, because they had rejected sexual advances.

The professional, financial, and emotional impact on those who have been harassed can be profound. Some respondents to our survey described receiving threats that their career could be damaged if they pursued their complaint, or said they had been disciplined or lost their job because they complained. Others said they were blamed for the harassment taking place or felt punished by being moved to another department or role and described how their reputation and health were damaged.

² [Trades Union Congress \(2016\), 'Still just a bit of banter? Sexual harassment in the workplace in 2016'](#) [accessed: 6 January 2020]. The results of the research came from a sample of 1,537 adult women who were asked about sexual harassment.

³ [Young Women's Trust \(2018\), 'It's \(still\) a rich man's world: inequality 100 years after votes for women'](#) [accessed: 6 January 2020]. The findings are from a survey of 4,010 young women aged 18–30.

While recent research largely concentrates on sexual harassment, it is clear that harassment related to sex such as unwanted sexist comments is a problem too.⁴ For example, our pregnancy and maternity discrimination research found that one in five mothers said they had experienced harassment or negative comments related to pregnancy or flexible working at work. While pregnancy and maternity is not a protected characteristic under the harassment provisions, such behaviour would amount to harassment related to sex.

The economic costs of sexual harassment and harassment related to sex are harder to estimate. However, it is clear that such harassment can have serious economic consequences for employers as a result of the negative impact on staff engagement and productivity, which in turn can undermine organisational effectiveness and cause damage to an employer's public reputation.

Reducing the barriers that stop women participating fully in the workplace is also central to the future success of the UK economy. Harassment is a significant contributing factor to the gender pay gap which, along with other workplace equality issues, has a serious economic impact. McKinsey⁵ found that ensuring gender equality in UK workplaces has the potential to add an extra £150 billion to business-as-usual gross domestic product (GDP) forecasts in 2025, and could translate into 840,000 additional female workers.

Harassment of LGBT people

In 2019, the TUC conducted a survey of more than 1,000 lesbian, gay, bisexual and transgender (LGBT) people on their experience of sexual harassment at work. Its report, 'Sexual harassment of LGBT people in the workplace',⁶ revealed that nearly 7 out of 10 (68 per cent) of LGBT people who responded had been sexually harassed at work.

⁴ See Chapter 2 for an explanation of the difference between sexual harassment and harassment related to sex.

⁵ [McKinsey & Company \(2016\), 'Women Matter 2016: reinventing the workplace to unlock the potential of gender diversity'](#) [accessed: 6 January 2020].

⁶ [Trades Union Congress \(2019\), 'Sexual harassment of LGBT people in the workplace'](#) [accessed: 6 January 2020].

Around two-thirds of those surveyed had not reported their experience of sexual harassment in the workplace. One in four people identified that doing so would have meant revealing their sexual orientation and/or gender identity and that they were afraid of being 'outed' at work.

Many of the incidents of sexual harassment that were highlighted appeared to be linked to the sexualisation of LGBT identities. Harassment ranged from verbal abuse, to unwanted touching, and serious sexual assault.

Evidence from a number of studies⁷ echoes these findings and shows that LGBT people suffer much higher levels of bullying and harassment (more broadly than just sexual harassment) at work than heterosexual people: twice as high for gay and bisexual men or four times as high for LGBT people as a whole, according to different studies.

A Unison guide⁸ on harassment at work states that persistent harassment commonly leads to poor work performance and attendance, which in turn may lead to dismissal and the root cause – homophobia or biphobia – never being acknowledged.

LGB workers who do complain of harassment are frequently accused of being over-sensitive, having no sense of humour or of 'bringing it on themselves' by not hiding their sexual orientation.⁹

⁷ [National Institute of Economic and Social Research \(2016\), 'Inequality among lesbian, gay bisexual and transgender groups in the UK: a review of evidence'](#) [accessed: 6 January 2020].

⁸ [Unison \(2016\), 'Harassment at work: a UNISON guide'](#) [accessed: 6 January 2020].

⁹ As above.

Evidence presented in a review commissioned by the Government Equalities Office and published by the National Institute of Economic and Social Research (2016),¹⁰ suggests that trans people may be even more likely to experience discrimination and harassment at work than LGB people, with one study finding up to 50 per cent of trans people in work had experienced this. Respondents reported extremely poor service from human resources departments, a lack of understanding among managers of trans issues and little support when they faced discrimination and harassment. Consequences of this included restricted job choice, reduced progression and inability to be 'out' at work.

Harassment related to race

The TUC's report on racism at work, 'Racism Ruins Lives',¹¹ which sets out the findings of its 2016/17 survey, shows that racism in the workplace still plays a major role in the experience of ethnic minority workers.

Over 70 per cent of Asian and Black workers reported that they had experienced racial harassment at work in the last five years.

The most common form of racial harassment encountered at work was racist remarks. Of those who responded, 46 per cent of people from Black, Asian and Mixed Heritage background, and 32 per cent of non-White other participants reported that they had been subjected to 'verbal abuse and racist jokes'.

More than 40 per cent of workers who reported a racist incident to their employer said that their complaint was either ignored or that they themselves had subsequently been identified as 'troublemakers'. Of respondents who raised a complaint, 1 in 10 said that they were subsequently disciplined and/or forced out of their job as a result of doing so.

Nearly half of all respondents said that racism had negatively affected their ability to do their job.

¹⁰ [National Institute of Economic and Social Research \(2016\), 'Inequality among lesbian, gay bisexual and transgender groups in the UK: a review of evidence' \[accessed: 6 January 2020\].](#)

¹¹ [Centre on Dynamics of Ethnicity, University of Manchester \(2019\), 'Racism Ruins Lives: an analysis of the 2016-2017 Trade Union Congress Racism at Work Survey' \[accessed 6 January 2020\].](#)

Harassment related to religion or belief

'Racism Ruins Lives',¹² while focused on race, also draws attention to Islamophobia and antisemitism in the workplace and the way in which different religious groups are represented as constituting a distinct racial group. The report highlights the many encounters of Islamophobia and antisemitism reported through the TUC's racism at work survey.

A report by the Social Mobility Commission, 'The Social Mobility Challenges Faced by Young Muslims', found that the 'othering' of Muslims by employers and colleagues through Islamophobia, racism, discrimination and harassment in the labour market can increase the disadvantage experienced by young Muslims. They found that racism and discrimination in the workplace is limiting aspirations and preventing young Muslims from 'aiming high' and fulfilling their potential.

Harassment related to age

Both young and older workers have experienced harassment and discrimination at work. Research from the Department for Work and Pensions' (DWP), 'Attitudes to Age in Britain 2010/11',¹³ found that one-third of respondents had experienced age discrimination in the past year, and younger respondents aged under 25 were at least twice as likely as all other age groups to have experienced age prejudice. Experiences of age discrimination were also affected by factors such as gender. For example, the chances of a man experiencing age discrimination are about eight per cent lower compared to a woman.

¹² [Centre on Dynamics of Ethnicity, University of Manchester \(2019\), 'Racism Ruins Lives: an analysis of the 2016-2017 Trade Union Congress Racism at Work Survey' \[accessed: 6 January 2020\].](#)

¹³ [Department for Work and Pensions \(2011\), 'Attitudes to age in Britain 2010/11' \[accessed 6 January 2020\].](#)

Harassment related to disability

A Wales TUC report, 'Disability and "hidden" impairments in the workplace',¹⁴ stated that 24 per cent of disabled respondents said that they felt that disability was treated negatively in their workplace. In contrast, just six per cent of non-disabled respondents said they felt that disability was treated negatively in their workplace, highlighting a lack of awareness of the issues disabled people face. Respondents described negative and often discriminatory attitudes and behaviour towards disabled people. This included harassment such as insulting or inappropriate questions and comments and excluding or isolating disabled workers due to their disability.

Taking action

The scale of harassment that we and others have found is disturbing – and has been largely hidden due to under-reporting. Low reporting rates have often been taken by employers to mean that harassment is uncommon in their workplace. In fact, a lack of reported incidents could reflect an absence of confidence in reporting and resolution procedures, indicating an even greater problem.

The effects of harassment on individuals are damaging, long-lasting and profound, and they harm employers. All harassment is unacceptable and it is not inevitable. Employers can and must take action to change culture and behaviours and eradicate harassment in the workplace. By taking the practical steps outlined in this guidance, employers can protect their workers against harassment and transform workplace cultures.

¹⁴ [Wales TUC Cymru \(2018\), 'Disability and "hidden" impairments in the workplace'](#) [accessed: 6 January 2020].

1. Introduction

Scope of the guidance

What this guidance covers

- 1.1.** This guidance applies in England, Scotland and Wales and covers sexual harassment, harassment and victimisation in employment under the work provisions in the Act. The work provisions are based on the principle that people with the protected characteristics set out in the Act should not be harassed or discriminated against at work (**Part 5 of the Act**).

Who this guidance is for

This guidance will:

- help **employers** to understand their legal responsibilities in relation to harassment and victimisation; the steps they should take to prevent harassment and victimisation at work; and what they should do if harassment or victimisation occurs
 - help **workers** to understand the law and what their employer should do to prevent harassment and victimisation, or to respond to their complaint of harassment or victimisation
 - help **lawyers and other advisers** to advise workers and employers about these issues, and
 - give **employment tribunals and courts** clear guidance on the law and best practice on the steps that employers could take to prevent and deal with harassment and victimisation.
- 1.2.** While all employers must take reasonable steps to prevent harassment, what is reasonable will vary from employer to employer. Small employers may have more informal practices, have fewer written policies and may be constrained by a smaller budget. This guidance should be read with awareness that large and small employers may carry out their duty to prevent harassment in different ways but that no employer is exempt from this duty because of size.

Our role

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. We operate independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. We enforce equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. We also encourage compliance with the Human Rights Act 1998.

- 1.3.** We exist to protect and promote equality and human rights in Britain. We stand up for freedom, compassion and justice in changing times. Our work is driven by a simple belief: if everyone gets a fair chance in life, we all thrive.
- 1.4.** We use a wide range of different methods to tackle discrimination, disadvantage and human rights abuses, work with other organisations and individuals to advance fairness, dignity and respect, and we are ready to take action against those who abuse the rights of others. Our statutory powers give us a range of tools with which to do this.
- 1.5.** We are recognised as an expert and an authority on equality and human rights law, evidence and analysis. Policymakers, businesses and public bodies turn to us for guidance and advice.
- 1.6.** We are also Britain's national equality body and have been awarded an 'A' status as a national human rights institution (NHRI) by the United Nations. We work with equivalent bodies in Scotland and Northern Ireland, across Europe and internationally to protect and promote equality and human rights around the world.
- 1.7.** Participation in work is an important aspect of personal fulfilment as well as an economic necessity, and the right to work and to fair working conditions are fundamental human rights.

Please note that throughout this guide we use the terms:

- **'must'**: where the person or organisation referred to has a legal duty
- **'can'**: where the person or organisation has a power (not a duty) under statutory or common law
- **'should' or 'could'**: for guidance on good practice.

2. What is harassment?

Introduction

- 2.1.** In any workforce there will be a range of attitudes about what conduct is considered to be offensive, humiliating, intimidating, hostile, or degrading. What one worker – or even a majority of workers – might see as harmless fun or ‘banter’, another may find unacceptable. A worker complaining about conduct may be considered by others to be overly sensitive or prudish. However, it is important to understand that conduct can amount to harassment or sexual harassment even if that is not how it was intended. This chapter explains what types of behaviour amount to harassment under the Act. These include harassment related to a relevant protected characteristic, sexual harassment, and less favourable treatment for rejecting or submitting to harassment. No form of harassment can ever be justified.
- 2.2.** Unlike direct discrimination, harassment does not take a comparative approach. That is, it is not necessary for the worker to show that another person without the protected characteristic was, or would have been, treated more favourably. For an explanation of direct discrimination, please see Chapter 4 of the [Employment Statutory Code of Practice](#).

What the Act says

- 2.3.** The Act makes three types of harassment unlawful. These are:
- harassment related to a ‘relevant protected characteristic’ (**s.26(1)**)
 - sexual harassment (**s.26(2)**), and
 - less favourable treatment of a worker because they submit to, or reject, sexual harassment or harassment related to sex or gender reassignment (**s.26(3)**).
- 2.4.** ‘Relevant protected characteristics’ are:
- age
 - disability

- gender reassignment
- race
- religion or belief
- sex, and
- sexual orientation (**s.26(5)**).

2.5. Unlike other forms of discrimination, pregnancy and maternity and marriage and civil partnership are not protected under the harassment provisions. However, harassing somebody because of pregnancy or maternity would be harassment related to sex.

Harassment related to a protected characteristic

- 2.6.** This type of harassment arises when a worker is subject to unwanted conduct that is related to a protected characteristic and has the purpose or the effect of:
- violating the worker's dignity, or
 - creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker (**s.26 (1)**).
- 2.7.** Conduct that has one of these effects can be harassment even if the effect was not intended.

Meaning of 'unwanted conduct'

- 2.8.** Unwanted conduct covers a wide range of behaviour. It can include:
- spoken words
 - banter
 - written words
 - posts or contact on social media
 - imagery
 - graffiti
 - physical gestures
 - facial expressions
 - mimicry
 - jokes or pranks
 - acts affecting a person's surroundings
 - aggression, and
 - physical behaviour towards a person or their property.

- 2.9.** The word ‘unwanted’ means essentially the same as ‘unwelcome’ or ‘uninvited’.
- 2.10.** Unwanted means ‘unwanted by the worker’ and should be considered from the worker’s subjective point of view. However, external factors may be considered by a tribunal or court in deciding whether it accepts that, subjectively, the conduct was unwanted as explained further at 2.11 to 2.14.
- 2.11.** It is not necessary for the worker to say that they object to the conduct for it to be unwanted. However, in deciding whether a claimant has established that the conduct was unwanted, a tribunal or court may take into account whether or not the worker objected to the conduct (among other things).
- 2.12.** In some cases, it will be obvious that conduct is unwanted because it would plainly violate a person’s dignity.

Example

A male manager is to interview a female worker, whom he line manages, for a promotion opportunity. The manager says that she’s the favourite for the job because she’s the best-looking candidate. The manager’s statement is self-evidently unwanted and the worker need not object to it for a tribunal or court to find it is unwanted.

- 2.13.** At the opposite end of the spectrum are cases in which many people would not like the behaviour, but the actions of the particular worker concerned make it clear that in their case, the conduct was not unwanted.

Example

A male worker is called a number of homophobic names by his colleagues who know that he is actually heterosexual. Many workers would not welcome this sort of behaviour. However, an employment tribunal finds that this worker did not object to the conduct, which continued for several years. He willingly joined in, making equally offensive comments to his colleagues. There is also evidence of genuine friendships with the colleagues, such as going on holiday with one of them. The tribunal finds that in the circumstances, the worker's actions do not indicate that the conduct was unwanted.

- 2.14.** There may be circumstances in which a course of conduct is not unwanted in the earlier stages, but at some point 'oversteps the mark' and becomes unwanted.

Example

In the previous example, the colleagues use very offensive homophobic terms about the worker in an in-house magazine, which is read by a much wider group than the immediate group of colleagues. In the circumstances, the tribunal accepts that this article oversteps what the worker has previously deemed acceptable and was therefore unwanted.

Meaning of 'related to'

- 2.15.** Unwanted conduct 'related to' a protected characteristic has a broad meaning. The conduct does not have to be because of the protected characteristic. It includes the following situations:

- a) Where conduct is related to the worker's own protected characteristic**

Example

If a worker with a hearing impairment is verbally abused because he wears a hearing aid, this could amount to harassment related to disability.

- 2.16.** Protection from harassment also applies where a person is generally offensive to other workers but, in relation to a particular worker, the conduct is unwanted because of that worker's protected characteristic.

Example

During a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexist nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She would be able to make a claim for harassment related to sex, even though the remarks were not specifically directed at her.

b) When there is any connection with a protected characteristic

Workers are also protected where the unwanted conduct is connected to a protected characteristic, even if the worker does not have the relevant protected characteristic. This includes where the employer knows that the worker does not have the relevant characteristic. Connection with a protected characteristic may arise in several situations:

- The worker may be associated with someone who has a protected characteristic.

Example

A worker has a son who is a trans man. His work colleagues make jokes about his son's transition. The worker could have a claim for harassment related to gender reassignment.

- The harasser may wrongly believe the worker to have a particular protected characteristic.

Example

A Sikh worker wears a turban to work. His manager wrongly assumes he is Muslim and subjects him to Islamophobic abuse. The worker could have a claim for harassment related to religion or belief because of his manager's perception of his religion.

- The worker is known not to have the protected characteristic but nevertheless is subjected to harassment related to that characteristic.

Example

A worker is subjected to homophobic banter and name calling, even though her colleagues know she is not gay. Because the form of the abuse relates to sexual orientation, this could amount to harassment related to sexual orientation.

- The unwanted conduct related to a protected characteristic is not directed at the particular worker but at another person or no one in particular.

Example

A manager racially abuses a Black worker in front of a White colleague. The Black worker has a clear claim for harassment related to race. In addition, the Black worker's White colleague is offended and could also bring a claim of harassment related to race.

- The unwanted conduct is because of something related to the protected characteristic, but does not take place because of the protected characteristic itself.

Example

A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.

- 2.17.** In all of the circumstances listed, there is a connection between the unwanted conduct and the protected characteristic, and so the worker could succeed in a claim of harassment if the unwanted conduct has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- 2.18.** However, in deciding whether conduct was related to the protected characteristic, an employment tribunal may take account of the context in which the conduct takes place.

Example

A Muslim worker, has a conversation with a colleague about so-called 'Islamic State' fighters. The worker relays to the colleague some comments made by a journalist about Islamic State fighters which are of a positive nature. Later that month the colleague approaches the worker and asks, 'Are you still promoting Islamic State?' The worker is upset at the allegation that he promotes Islamic State and brings a claim of harassment related to religion or belief. The tribunal finds that the colleague asked that question because of the worker's previous comments, not because the worker is a Muslim or because of anything related to the worker's religion. The question was therefore not harassment.

Sexual harassment

- 2.19.** Sexual harassment occurs when a worker is subjected to unwanted conduct as defined in paragraphs 2.8 to 2.14 and which is of a sexual nature. The conduct need not be sexually motivated, only sexual in nature (**s.26(2)**).

Example

A male worker alters a pornographic image by pasting an image of his female colleague's face on to it. He then sends it to their other colleagues, causing them to ridicule her. There was no sexual motivation behind this act, but the use of the image is sexual in nature.

- 2.20.** Conduct 'of a sexual nature' includes a wide range of behaviour, such as:
- sexual comments or jokes
 - displaying sexually graphic pictures, posters or photos
 - suggestive looks, staring or leering
 - propositions and sexual advances
 - making promises in return for sexual favours
 - sexual gestures
 - intrusive questions about a person's private or sex life or a person discussing their own sex life
 - sexual posts or contact on social media
 - spreading sexual rumours about a person
 - sending sexually explicit emails or text messages, and
 - unwelcome touching, hugging, massaging or kissing.
- 2.21.** An individual can experience unwanted conduct from someone of the same or a different sex.
- 2.22.** Sexual interaction that is invited, mutual or consensual is not sexual harassment because it is not unwanted. However, sexual conduct that has been welcomed in the past can become unwanted.

Example

A female worker has a brief sexual relationship with her supervisor. The worker tells her supervisor that she thinks it was a mistake and doesn't want the relationship to continue. The next day, the supervisor grabs the worker's bottom, saying 'Come on, stop playing hard to get'. Although the original sexual relationship was consensual, the supervisor's conduct after the relationship ended is unwanted conduct of a sexual nature.

Less favourable treatment for rejecting or submitting to unwanted conduct

- 2.23.** The third type of harassment occurs when:
- a worker is subjected to unwanted conduct
 - of a sexual nature
 - related to sex, or
 - related to gender reassignment
 - the unwanted conduct has the purpose or effect of
 - violating the worker's dignity, or
 - creating an intimidating, hostile degrading, humiliating or offensive environment for the worker, and
 - the worker is treated less favourably because they submitted to, or rejected the unwanted conduct (**s.26(3)**).

Example

In the previous example, the worker responds to the supervisor's behaviour saying, 'Get off me, I'm not playing hard to get!' After that, the supervisor starts to make things more difficult for the worker, giving her more work to do than others and being more critical of her work. The supervisor is treating the worker less favourably because she rejected his unwanted conduct.

- 2.24.** Under this type of harassment, it may be the same person who is responsible for the initial unwanted conduct and the subsequent less favourable treatment, or it may be two (or more) different people (**s.26(3)(a)**).

Example

Continuing with the previous example, the supervisor informs his line manager, who he is friendly with, about his rejection by the worker. The line manager feels sorry for the supervisor, thinking that the worker 'led him on'. When the worker applies for a promotion, the line manager rejects her application saying that 'she can't be trusted', an opinion based on her rejection of the supervisor. The line manager's actions also amount to less favourable treatment because of the worker's rejection of the supervisor's unwanted conduct.

Meaning of 'purpose or effect'

- 2.25.** For all three types of harassment, if the harasser's **purpose** is to violate the worker's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for them, this will be sufficient to establish harassment. It will not be necessary to look at the effect that conduct has had on the worker.
- 2.26.** Unwanted conduct will also amount to harassment if it has the **effect** of violating the worker's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them, even if that was not the intended purpose.

Example

Male workers download pornographic images on to their computers in an office where a woman works. She may make a claim for harassment if she is aware that the images are being downloaded and the effect of this is to create a hostile and humiliating environment for her. In this situation, it is irrelevant that the male workers did not intend to upset the woman, and that they merely considered the downloading of images as 'having a laugh'.

- 2.27.** In deciding whether conduct had that effect, each of the following must be taken into account:

- a) **The perception of the worker**; that is, whether they feel that it violated their dignity or created an offensive environment for them **(s.26(4)(a))**. This part of the test is a subjective question and depends on how the worker regards the treatment.
- b) **The other circumstances of the case**. Circumstances that may be relevant may include:
- the personal circumstances of the worker experiencing the conduct (for example, the worker's health, including mental health; mental capacity; or previous experience of harassment)
 - whether the harasser is in a position of trust or seniority to the worker, or holds any other form of power over them
 - the race or cultural background of those involved. For example, a particular term may be offensive to people of one race because historically it has been used as a derogatory term in relation to that race, whereas people of other races may not generally understand it to be offensive, and
 - the environment in which the conduct takes place **(s.26(4)(b))**.
- c) **While the worker's perception of the conduct is key to whether something amounts to sexual harassment, consideration must also be given to whether it is reasonable for the conduct to have that effect**. This is an objective test. A tribunal or court is unlikely to find unwanted conduct has the effect, for example, of offending a worker, if it considers the worker to be hypersensitive and that any other reasonable person subjected to the same conduct would not have been offended **(s.26(4)(c))**.

2.28. Sometimes the harasser may put forward evidence to suggest that their conduct could not have had the relevant effect on the worker. Where they do so, an employer must not rely on irrelevant information about the conduct of the individual.

Example

A worker's manager makes comments to her about her breasts. The worker brings a claim of sexual harassment against her employer. The manager informs the employer that the worker previously posed topless on page 3 of a national newspaper. The employer tries to produce this information to the tribunal as evidence that the worker could not have been offended by her boss's comments. The tribunal would be right to find that the information is irrelevant. The worker could be offended by her boss's comments regardless of the fact that she had posed topless for a newspaper.

Meaning of violation of dignity or creation of an intimidating, hostile, degrading, humiliating or offensive environment

- 2.29.** To amount to harassment, the unwanted conduct must have had the purpose or effect of violating the worker's dignity, **or** creating a hostile, degrading, humiliating or offensive environment for them. It is not necessary to show both.
- 2.30.** Many acts of unwanted conduct will have the effect of both violating the worker's dignity and creating the relevant environment for them. However, it is possible that an act may do one but not the other.
- 2.31.** 'Environment' in this context means a state of affairs. An environment may be created by a single act of unwanted conduct, but the effects of that single act must be longer in duration to do so. Whereas a single act of unwanted conduct which does not have an enduring effect could well violate a person's dignity in the moment.

2.32. Example

A Black worker's colleague says that he is a member of a far-right activist group and joined because he thinks there are too many 'coloured' people in the UK taking jobs away from 'indigenous' people. He only makes the comment once but it creates an intimidating environment for the worker every time she sees him in the office.

3. What is victimisation?

Introduction

- 3.1.** Our 'Turning the Tables' report revealed that fear of victimisation is one of the biggest barriers to people reporting harassment at work. It is important that employers recognise the role that fear of victimisation plays in relation to how they approach and deal with harassment and sexual harassment at work. This will be a key factor in their ability to fulfil their duty to prevent and protect employees from harassment. This chapter explains what the Act says about victimisation in the context of harassment at work. For consideration of victimisation in the wider context please see Chapter 9 of the [Employment Statutory Code of Practice](#).

What the Act says

- 3.2.** Victimisation means treating a worker badly (subjecting them to a detriment) because they have done a protected act – for example, making a complaint of harassment (see paragraphs 3.6 to 3.16 for the full definition). Victimisation also means subjecting a worker to a detriment because it is believed they have done or are going to do a protected act; the worker does not actually need to have done the protected act (**s.27(1)**).

Example

A bar owner hears a rumour that one of his workers may make a grievance about harassment related to race by a colleague. As the worker has only been in his employment for a few weeks, the owner dismisses the worker to avoid dealing with the grievance. The worker, in fact, had no intention of raising a grievance. Nevertheless, the bar owner has subjected her to a detriment because he believed that she would, and as such her dismissal is an act of victimisation.

- 3.3.** The worker does not need to compare their treatment with the treatment of another worker who has not done a protected act, and show that this comparable worker would not have been subjected to the same detrimental treatment. The worker only has to show that they have experienced detrimental treatment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act (**s.27(2)(c) and (d)**).
- 3.4.** The detrimental treatment does not need to be connected to a protected characteristic. However, there does need to be a protected act (see paragraphs 3.6 to 3.16 for the definition of a protected act).

Example

A worker gives evidence to the employment tribunal which supports his colleague's claim of sexual orientation discrimination. As a result, the worker is denied a promotion. The worker has been subjected to a detriment because he did a protected act – giving evidence in connection with a claim under the Equality Act. This is victimisation. The worker's sexual orientation is irrelevant to whether he has been victimised or not.

- 3.5.** Former workers are also protected against victimisation.

Example

A grocery shop worker resigns after making a sexual harassment complaint against the owner. Several weeks later, she tries to make a purchase at the shop but is refused service by the owner because of her complaint. This could amount to victimisation.

What is a ‘protected act’?

- 3.6.** Former workers are also protected against victimisation.
- making a claim or complaint under the Act (for example, for discrimination or harassment)
 - helping someone else to make a claim by giving evidence or information
 - making an allegation that someone has breached the Act, or
 - doing anything else in connection with the Act **(s.27(2)(a)-(d))**.
- 3.7.** This protection will apply to anyone making a claim or allegation that the Act has been breached or assisting someone (like a colleague) in doing so. It is irrelevant whether the Act was breached or not, as long as the person doing the protected act genuinely believes that the information or evidence they are giving is true.
- 3.8.** Protected acts include claims or allegations of discrimination and harassment under both the Act and any of the legislation that the Act replaced.

Example

In 2009, a worker brought an employment tribunal claim under the Sex Discrimination Act 1975 against her employer. In 2019, she applies for a job with another company. Upon checking her employment history, the company feels that her reason for leaving her previous employment is vague and calls the previous employer to find out more. The previous employer says a number of bad things about the worker. Although the worker brought proceedings under the Sex Discrimination Act 1975 and not the Act, she has still done a protected act and her previous employer's comments may still therefore amount to victimisation.

- 3.9.** As this example suggests, there is no limit on how much time may elapse between the protected act and the detriment, provided that the worker is subjected to the detriment because of the protected act and not because of some other reason.
- 3.10.** The protected act may relate to any part of the Act, not just the employment provisions. The act of victimisation may relate to the provision of services, goods or education or the exercise of a public function, for example.

Example

A nurse is employed by an NHS Trust. She is being treated at the hospital where she works. She brings a claim under the services provisions of the Act against the Trust, relating to sexual harassment that she was subjected to while undergoing treatment. She is subsequently denied a promotion by her manager who says that she is not a 'team player', a view based on her bringing a claim against her employer. Although her claim is brought under the services provisions of the Act, she is still protected against being subjected to a detriment in her employment and can accordingly bring a claim for victimisation.

- 3.11.** While a claim of victimisation will often be brought against the person or employer who carried out the discrimination or harassment, this will not always be the case. The behaviour which is the subject of the protected act can be committed by any person.

3.12. Example

A worker leaves her employment at her local village shop and brings a claim against the owner for harassment related to age. The worker applies for a job at another local shop. The owner of the second shop knows about the claim and turns down the worker's application, saying that he can't afford it if she were to bring a claim against him. Although the protected act relates to her employment with the first shop, she still has the right not to be subjected to a detriment by the second shop, because of that protected act.

- 3.13.** An act will not be a protected act where the worker gives false evidence or information or makes a false allegation in bad faith. This is a two-stage test.
- 3.14.** First, a tribunal or court must decide whether the evidence, information, or allegation is false. This is an objective exercise that involves weighing up the evidence for and against. If a tribunal or court decides that on balance the evidence, information or allegation is more likely to be true than false, then the act is protected.
- 3.15.** If a tribunal or court decides that the evidence, information or allegation is more likely to be false, then it must decide whether it was given or made in bad faith. The focus here is on whether the individual acted honestly or not.
- 3.16.** If a worker has an ulterior motive for providing the evidence or information, or making the allegation, this does not necessarily mean that the worker doesn't honestly believe it is true. So an ulterior motive will not of itself mean the worker acted in bad faith. However, it may be a relevant piece of information for a tribunal or court to consider in deciding whether the worker acted honestly. Other factors such as the length of time it took the worker to raise the matter may also be relevant.

Example

A worker is going through a performance management process. During the process, the worker raises an allegation that the manager conducting it racially harassed him three years ago. The worker is subsequently dismissed for poor performance. He brings a claim for victimisation, alleging that he was in truth dismissed because he made an allegation of racial harassment, not because of his poor performance. The tribunal finds that the worker's allegation is not true and then considers whether it was made in bad faith. The tribunal finds that the worker primarily made the allegation to disrupt the poor performance proceedings, but had an honest belief in it. The allegation was therefore not made in bad faith and is a protected act. The tribunal must then go on to consider whether the worker has been subjected to a detriment.

What is a 'detriment'?

- 3.17.** 'Detriment' is not defined by the Act and could take many forms. Generally, a detriment is being treated badly. This could include, for example, being rejected for promotion, denied an opportunity to represent the employer at external events, excluded from opportunities to undertake training, or not being given a discretionary bonus or performance-related award.

Example

A senior manager hears a worker's grievance about harassment. He finds that the worker has been harassed, offers a formal apology and directs that the harassers be disciplined and required to undertake diversity training. The senior manager's director thinks that the harassment did take place, but that the manager should have rejected the worker's grievance to protect the company's reputation. As a result, he doesn't put the senior manager forward to attend an important conference. This is a detriment.

- 3.18.** A detriment might also include a threat made to the complainant that they take seriously and which is reasonable for them to take seriously. There is no need to demonstrate physical or financial consequences. However, an unjustified grievance alone would not be enough.

Example

An employer threatens to dismiss a worker because he thinks she intends to support a colleague's sexual harassment claim. This threat could amount to victimisation, even though the employer has not actually taken any action to dismiss the worker and may not really intend to do so.

- 3.19.** Detrimental treatment amounts to victimisation if a 'protected act' is one of the reasons for the treatment, but it need not be the only reason.

4. Obligations and liabilities under the Act

Introduction

- 4.1.** The Act makes discrimination, harassment and victimisation in the work relationship unlawful (**Part 5**).
- 4.2.** This chapter explains:
- who is protected against harassment and victimisation
 - whose conduct an employer may be liable for, and
 - what preventative steps employers must take to establish the statutory defence.

Who is protected against harassment and victimisation?

- 4.3.** Employers must take reasonable steps to prevent harassment and victimisation of a range of individuals who work for them (**s.83**). (See 4.20 to 4.27 and Chapter 5 for what is meant by 'reasonable steps'.)

What 'employment' means

- 4.4.** The Act protects all those who are in 'employment'. This has a wide meaning and covers:
- **employees:** those who have a contract of employment
 - **workers:** those who contract to do the work personally and cannot send someone to do the work in their place (see paragraph 4.5 as to how we use this term throughout the rest of the guidance)
 - **apprentices:** those who have a contract of apprenticeship
 - **crown employees:** those employed by a government department or other officers or bodies carrying out the functions of the crown, and
 - **House of Commons staff and House of Lords staff.**

Other work relationships covered by the Act

4.5. In addition to those listed in paragraph 4.4, protection from harassment under the Act also applies to a wide range of relationships that constitute work. Employers are also responsible for preventing harassment against:

- job applicants
- contract workers (including agency workers and those who contract to provide work personally such as consultants)
- police officers
- partners in a firm
- members in a limited liability partnership
- personal and public office holders, and
- those who undertake vocational training.

4.6. Work relationships that are given other names not specifically mentioned in the Act may nevertheless be covered by the Act if, in practice, the reality of the situation is that the individual falls into one of the categories that is covered. For example, an employer takes an individual on as an unpaid 'intern', but the circumstances suggest that in fact the individual has a contract of employment with the employer, and is therefore an employee. Volunteers are not protected under the work provisions of the Act, but may be protected under the services provisions of the Act if the organisation providing the volunteering opportunity is providing a service to the volunteer. This has not yet been tested in the courts.

4.7. We only differentiate between the terms employee, worker and other relationships covered by the Act at 4.4 to 4.14. For simplicity, throughout the rest of this guidance, we use the term 'worker' to refer to all employment relationships that are protected by the work provisions of the Act unless indicated otherwise. We do, however, provide guidance as to who falls into the categories listed in paragraph 4.4 at 4.8 to 4.14.

Who is an employee and who is a worker?

- 4.8.** In UK employment legislation, there is an overlap between who is an employee and who is a worker. All employees contract to do work for their employer personally, and so do workers. But not all workers have a contract of employment, so they are not all employees.
- 4.9.** Employees and workers are both protected against harassment and victimisation by the Act. Therefore the difference between an employee and a worker is not covered at length in this guidance.
- 4.10.** However, it might be necessary to clarify whether a person is an employee or a worker if that person wants to bring other claims under legislation outside the Act, which can only be made by employees. For example, the right not to be unfairly dismissed under the Employment Rights Act 1996 applies to employees, but not to workers. A more detailed overview of the different types of employment status and the employment rights that each category have beyond the Act can be found on the [gov.uk](https://www.gov.uk) website.

Who is self-employed?

- 4.11.** Sometimes, an employer may say that an individual is a self-employed contractor who is not protected by the Act, but the individual may believe they are an employee or worker who is protected.
- 4.12.** In resolving such a dispute, a tribunal or court must look at what the employer and the individual intended and what any contract between them says. However, what the contract says does not dictate whether a person is genuinely self-employed or not. A tribunal must look carefully at what actually happens between the employer and individual in practice. If in practice, the relationship is one which is protected by the Act, then the individual will be protected despite having a contract that says they are self-employed. Case law sets out a number of factors that a tribunal or court must weigh up when deciding whether an individual is self-employed and not protected by the Act, or an employee or worker who is protected by the Act. The following are indicators that the individual is an employee or worker:
- The employer is required to provide work to the individual.
 - The individual is required to do work offered to them by the employer.
 - The employer has a lot of control over the way the individual does the work.

- The individual is required to do the work personally (see 4.13).
- The individual is well integrated into the employer's workplace. They look like an employee or worker of the employer to the outside world rather than a self-employed person running their own business.
- The individual is not free to do work for others as well as the employer.
- The employer deducts tax from their pay.
- The individual is not required to have their own insurance in place; they are covered by the employer's liability insurance.
- The individual receives a wage. They do not take a share of profits and losses made by the employer.
- The contract between the individual and the employer says that they are an employee or worker.

The meaning of 'personal service'

4.13. A key issue in deciding whether someone is self-employed is often whether they provide personal service or not. That is, do they always do the work themselves and have no right to ask another person to do the work for them (a substitute). If they are required to do the work personally, they are likely to be an employee or worker. Conversely, if they have an unlimited right to use a substitute, then they are not required to provide personal service to the employer and are likely to be self-employed.

4.14. In between these two extremes, there will be cases where someone has a right to appoint a substitute but on certain conditions. For example, requirements that the substitute used is from a limited group of people; that the individual gets consent from the employer before using a substitute; or that the substitute has certain qualifications. The courts have not yet provided clear guidance as to how free an individual must be in order for the individual to be self-employed. They have taken a case-by-case approach to whether the particular circumstances of each case indicate that personal service is required.

Example

An electrician has a right under his contract to ask other electricians to do a job for him. However, the wording of the contract suggests that he will perform the work personally, and the right to use a substitute is significantly restricted to using other electricians who already have a similar contract with the company. The electrician's contract with the company suggests he has an obligation to provide personal service and therefore, he is protected by the Act.

The effect of illegal contracts on harassment claims

- 4.15.** The fact that a contract of employment is illegal will not normally prevent a worker pursuing their harassment claim. It will only prevent them doing so if there is an inextricable link between the conduct and the harassment (that is, the harassment is so tangled up with the illegal conduct that the two are impossible to separate). If the two things are impossible to separate, a tribunal or court may not be able to hear the claim because making an award of compensation in these circumstances would give the appearance that the tribunal or court condones the illegal conduct.

Example

A migrant worker without a valid work permit is sexually harassed by her colleague while working for a company. The contract of employment is illegal because the worker does not have a work permit. However, the tribunal can hear the worker's claim for sexual harassment. While her employment with the company may have created an opportunity for the colleague to sexually harass the worker, the harassment was not dependent on her employment. She could have been subjected to the harassment even if she had not been in employment with the company.

This can be contrasted with a case where the harassment is dependent on there being a contract of employment. For example:

A migrant worker obtains a job with a school without a valid work permit, by lying about his entitlement to work in the UK. He complains that he was repeatedly subjected to unwanted conduct related to his race including being passed over for promotion and being denied access to various benefits and facilities. The alleged acts of harassment were all dependent on there being a contract of employment. The migrant worker is therefore unable to pursue his claim.

When are employers liable for harassment?

4.16. Employers are liable for acts of harassment:

- committed by one worker against another of their workers
- committed by one of their workers against a job applicant or former worker
- committed by an agent acting on their behalf against one of their workers, and
- where a failure to deal with harassment of one of their workers by a third party, or by another worker outside of employment, amounts to direct or indirect discrimination (or breach of other legal obligations) (s.40).

Liability for harassment from workers

4.17. Employers will be liable for harassment committed by their workers in the course of their employment unless they can rely on the 'reasonable steps' defence (see 4.20). It does not matter whether or not the employer knows about the harassment (s.109(1) and s.109(3)).

Example

A bar worker's supervisor creates opportunities to be alone with her. While they are alone, the supervisor makes sexual comments about the bar worker's appearance and his feelings towards her. There are no witnesses and, as the harasser is the bar worker's supervisor, she feels unable to make a complaint to her employer. The bar worker leaves and makes a sexual harassment claim. The employment tribunal could find the employer liable for the actions of the supervisor if it failed to take all reasonable steps to prevent the harassment.

- 4.18.** The phrase 'in the course of employment' has a wide meaning. It includes acts committed in the workplace or in any other place where the worker is working. For example, when the worker is working offsite or attending a training course, conference or external meeting.
- 4.19.** It also includes other circumstances in which the worker is not actually working but that are connected with work. Whether or not acts committed outside of work are committed 'in the course of employment' will depend on the strength of the connection with work in each particular case. An employment tribunal will decide in each case whether the circumstances in which the harassment took place were an extension of the employment, or whether the connection with work is too weak.

Example

A worker is harassed by her colleague on two occasions. The first time, during drinks in the pub with colleagues immediately after work. On the second occasion, at a leaving party for another worker, which also takes place in the pub. Although the workers are not working at the time, the tribunal decides that these social gatherings with work colleagues immediately after work or at an organised leaving party are closely connected with employment. Therefore they fall within the definition of 'in the course of employment'.

Example

A worker receives an unexpected visit to her home from a colleague late at night, who subjects her to unwanted sexual advances. The tribunal finds that the incident is too remote from work to be 'in the course of employment'. Although the two colleagues met through work, they are essentially in the same position that they would have been had they merely been social acquaintances. (The employer should nevertheless take appropriate steps to deal with any complaint about this incident for the reasons set out at 4.52 to 4.53.)

Taking all reasonable steps to prevent harassment

- 4.20.** An employer will not be liable for harassment committed by a worker in the course of employment if they can show that they took all reasonable steps to prevent the harassment (the 'reasonable steps' defence) **(s.109(4))**.
- 4.21.** An employer will have taken all reasonable steps if there are no further steps that they could reasonably have been expected to take.
- 4.22.** In deciding whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective.
- 4.23.** A tribunal or court may find that it would have been reasonable for an employer to take a certain step, even if that step might not have prevented the act of harassment.

Example

A worker is gay and has not told his work colleagues this. One of his colleagues finds out through a mutual friend. The colleague reveals the worker's sexuality to other colleagues and makes offensive jokes about it. The employer has a harassment policy but has not taken steps such as using the induction process or training to make sure that workers follow it. The employment tribunal believes that such steps probably would have made no difference to the outcome: The worker's colleague probably would have broken the rules anyway. Nevertheless, the employment tribunal finds that it would have been reasonable for the employer to take those steps and they are therefore liable for the harassment.

- 4.24.** However, an employer is entitled to weigh how effective a step might be against other factors such as the time, cost and potential disruption that may be caused in taking the step. A step that is expensive, time consuming and troublesome to implement will not be a reasonable step to take if it will achieve nothing. Conversely, if a step would be effective, then this may outweigh any other negative factors.

Example

A Jewish worker at a large company is offended by comments made by her colleague, which are antisemitic. The worker raises the matter with her line manager, but the line manager does not think the comments are antisemitic. The line manager tells the worker she is being overly sensitive. The worker brings an employment tribunal claim against the company and her colleague. The company has an anti-harassment policy, refers to it on induction and includes reminders about the policy in internal newsletters. The company says that it would not have been reasonable to train managers, because it would have been expensive and time consuming. However, the employment tribunal finds that training would have been an effective means of preventing this type of harassment. It would have cost money and resulted in the loss of a working day for the company's managers, but it would have been reasonable for the company to incur the cost and disruption bearing in mind its size and resources.

- 4.25.** The requirement is to take preventative steps. The fact that an employer has taken steps such as an investigation and disciplinary action to deal with the harassment after it has occurred, will not be sufficient on its own to avoid liability. However:
- if an employer has taken effective steps to deal with harassment, this may help to prove that the anti-harassment policy in place to prevent harassment is taken seriously by the employer and used effectively when breached by a worker, and
 - any remedial action taken may be referred to in relation to future acts of harassment. For example, if an employer improved its reporting and investigation processes after a previous incident, this will help an employer to establish that it has taken preventative steps in relation to the current act of harassment.
- 4.26.** What steps were reasonable for an employer to take will depend on the circumstances of each individual case. For example, an employer who knows that a worker has previously committed an act of harassment may be required to take specific steps to ensure that they do not do so in future.

Example

A worker's colleague uses a term which he finds racially offensive. The colleague says he didn't intend to cause any offence and didn't realise it was a racially offensive term. Nevertheless, he has committed an act of harassment because the effect of his language was to cause offence. He accepts he shouldn't have used the term and apologises. The worker tells the employer that he accepts his colleague didn't intend any harm, he is satisfied with the apology and doesn't want it taken any further. The employer, however, reiterates to the worker's colleague that harassment will not be tolerated, ensures that he reads its anti-harassment policy again, and requires him to undertake training on harassment and racial awareness.

- 4.27.** Chapter 5 provides detailed explanations of the types of action employers can take to prevent harassment.

Liability for harassment by agents

- 4.28.** Employers are liable for harassment committed by their agents. Agents are those who act on the employer's behalf. Examples of agent relationships might be an external occupational health adviser engaged by an employer to provide an occupational health report on a worker, or a firm of management consultants appointed by an NHS Trust to deliver a project in a hospital (**s.109(2) and s.109(3)**).
- 4.29.** The employer does not need to know about or approve of the acts of its agent to be liable for them. The employer will be liable if it consents to the agent acting on their behalf. The employer does not need to expressly consent to the acts of harassment. Consent could be implied from the employer's actions.

Example

A firm of solicitors uses a recruitment agency to recruit a paralegal. The agency conducts interviews on behalf of the firm. The firm does not oversee the interview process, giving the agency free rein to conduct the interviews as they see fit. During one interview, the agency asks the applicant a series of questions concerning his ability to do the job on the basis of stereotypical assumptions about his disability, which amount to harassment. The firm has not expressly consented to the agency asking the questions. However, it will be liable for the harassment, because it gave the agency free rein to ask whatever questions it wanted and therefore impliedly consented to the agency's actions.

- 4.30.** An employer will not be liable for harassment carried out by its agents where the agent has acted without the employer's authority. For example, where the employer provides instructions for the agent to follow and the agent acts contrary to those instructions.

Example

A housebuilding company (the employer) uses a recruitment agency to recruit a site-supervisor. The employer asks the agency to sift CVs, undertake right to work in the UK checks and do an initial telephone interview. The employer asks the agency to follow its equality and diversity and anti-harassment policies. It also agrees a set of criteria against which candidates are to be judged during the interview. An agency employee checks identity documents and sees that one of the candidates is a trans male. During the interview, the agency asks this candidate a series of questions about his gender identity and questions his ability to 'command the respect of the men' on site. This is contrary to the criteria provided by the employer and the employer's policies. The agency has acted without the employer's authority and the employer would not be liable for the harassment. The agency would, however, be liable.

Harassment of former workers

- 4.31.** Employers must not harass former workers. An employer will be liable for harassment of former workers if the harassment is closely connected to the work relationship (**s.108**).
- 4.32.** The expression 'closely connected to' is not defined in the Act. This has to be judged on a case-by-case basis.

Example

A worker was employed by a sole trader (the employer). The employer found out that the worker was bisexual shortly before she left her job with the employer. The employer answers reference requests untruthfully. The worker finds out and asks the employer why she has been providing her with poor references. The employer says that she believes same-sex relationships are immoral and never would have given the worker a job in the first place if she had known about her sexuality. As the worker was employed by the employer and the harassment is closely connected with the work relationship, the employer will be liable for these acts of harassment.

- 4.33.** If a former worker is treated badly by the employer because they made a complaint about harassment, this will be covered by the victimisation provisions which are detailed in Chapter 3.

Harassment by third parties

Third party harassment and the Act

- 4.34.** Originally, the Act required employers to prevent third parties such as clients, customers or suppliers harassing their workers. An employer would have been liable if:
- a worker had been harassed by a third party on at least two previous occasions
 - the employer was aware of the harassment, and
 - the employer failed to take 'reasonably practical steps' to prevent harassment happening again.

- 4.35.** This provision was repealed. Subsequent case law stated that employers could be liable where their inaction itself violated the worker's dignity or led to the creation of an intimidating, hostile, degrading, humiliating or offensive environment for them.
- 4.36.** However, this changed following *Unite the Union v Nailard*. In that case, the Court of Appeal stated that the Act does not make employers liable for failing to protect workers against third party harassment. They will only be liable if they fail to take action because of a protected characteristic (*Unite the Union v Nailard* [2018] EWCA Civ 1203).

Example

A restaurant worker is sexually harassed by a customer. The worker complains to her manager. The manager sympathises with the worker and decides to serve the customer himself. The manager takes no further action, thinking that he has resolved the problem. However, the customer touches the worker inappropriately on his way out of the restaurant. The employer would have dealt with the complaint in the same way, regardless of whether the worker was a man or a woman. Therefore, as the law currently stands following *Nailard*, the employer will not be liable for harassment, despite not taking sufficient action to prevent the second act of harassment.

Example

A Black shop worker is subjected to a racially offensive term by a customer. When the worker complains to the shop owner, the owner says, 'Sorry mate, but your lot have got to expect a bit of that around here now and again'. The customer returns and continues to use the same term towards the worker. The shop owner may be liable for harassment related to race as his comments to the worker suggest that he thinks Black people should put up with racial abuse. Therefore, his lack of action, which has created an offensive environment for the worker, is motivated by the worker's race.

- 4.37.** While there is no specific protection against third party harassment under the Act, employers should still take reasonable steps to prevent third party harassment. Harassment by a third party can be just as devastating for a worker as harassment by a fellow worker. Employers who do not take reasonable steps to prevent or respond to third party harassment may be liable under other sections of the Act or other legislation in certain circumstances as set out in the following sections of this guidance.

Third party harassment: indirect discrimination

- 4.38.** It is possible that inaction or a particular way of dealing with complaints of third party harassment could amount to indirect discrimination. This occurs when a provision, criterion or practice (PCP) is applied in the same way, for all workers or a group of workers, but has the effect of putting workers sharing a protected characteristic at a particular disadvantage. It does not matter that the employer did not intend to disadvantage the workers.
- 4.39.** If a PCP is applied and puts workers sharing a characteristic at a disadvantage, then it will be unlawful unless the employer can justify it. That is, prove that they have a legitimate aim in applying the PCP, and that the PCP was a proportionate way to achieve that aim.
- 4.40.** 'Provision', 'criterion' or 'practice' can include:
- workplace policies
 - the way in which access to any benefit, service or facility is offered or provided
 - one-off decisions, and

- directions to do something in a particular way.

- 4.41.** 'Disadvantage' is a very broad term and can take many different forms. For example, the disadvantage could be not having a complaint of harassment investigated.
- 4.42.** Indirect discrimination is covered in more detail in Chapter 4 of the [Employment Statutory Code of Practice](#).

Example

A hotel worker complains that she has been sexually harassed by a customer. Her employer says she does not take action in response to complaints about sexual harassment by third parties, as she feels that she is not responsible for what third parties do and 'the customer comes first'. The employer would take no action regardless of whether the person harassed is a man or a woman. This practice places women at a particular disadvantage in comparison to men as statistics show that women are more likely to be sexually harassed at work than men. It is unlikely that the employer will be able to justify her practice of taking no action as she does not have a legitimate aim. It is not a legitimate aim to prioritise her customers over the safety of her workers.

Third party harassment: direct discrimination

- 4.43.** An employer may also be liable for direct discrimination if it treats complaints of harassment by a worker with a protected characteristic in a less favourable way than it treats complaints by others. Direct discrimination is covered in more detail in Chapter 3 of the [Employment Statutory Code of Practice](#).

Example

A male worker is sexually harassed by a customer. He makes a complaint about the harassment to his employer. The employer says that the worker should be flattered by the attention and doesn't do anything about it. Had the worker been a woman who had complained of sexual harassment by a customer, the employer would have taken the matter more seriously and taken action to address it. The employer has directly discriminated against the worker because of sex.

Third party harassment: health and safety at work

- 4.44.** The Health and Safety at Work etc. Act 1974 (HSWA) may apply where workers are subject to third party violence while carrying out their work.
- 4.45.** Third party violence means violence caused by any person who is external to the employer such as customers, clients, patients, service users, students and members of the public. Third party violence may take the form of physical or verbal abuse with the effect of causing physical or psychological harm to the worker.
- 4.46.** In general, for HSWA to apply, third party violence should arise out of the work activity of the employer. It occurs, for example, when the employer is providing a service (often to the public). Factors which increase the risk of third party violence may include, for example, services not meeting expectations, acting in a position of authority such as an enforcement officer, or dealing with people who have consumed alcohol or drugs.
- 4.47.** Under the Management of Health and Safety at Work Regulations 1999, employers are required to assess risks to their workers including reasonably foreseeable risks of third party violence. Employers should identify reasonably practicable organisational measures to prevent or control risks from third party violence as appropriate. Common measures include the provision of equipment, design of the workplace, instruction or training on personal safety which may involve conflict resolution techniques as well as support arrangements. Further information on violence at work can be found in the HSE leaflet ['Violence at work: A guide for employers'](#) (INDG69).

- 4.48.** Violence by a third party against a worker is likely to amount to a criminal offence. The actions of perpetrators should therefore be dealt with in accordance with 5.53 to 5.57.

Third party harassment: constructive unfair dismissal

- 4.49.** A contract of employment between an employer and employee always includes certain implied terms. One of these implied terms is that an employer will not act in a way which destroys the trust and confidence between the employer and the worker. If an employer breaches this implied term, then the worker will be entitled to resign and claim that they have been constructively dismissed. A failure to take action by an employer may amount to a breach of this term. If so, such a dismissal would likely be an unfair dismissal contrary to section 94 of the [Employment Rights Act 1996](#). For further information on constructive dismissal, see the [Acas website](#).

Third party harassment: Public Sector Equality Duty (PSED)

- 4.50.** Public sector employers must comply with the PSED. This means that when carrying out their functions, they must pay due regard to the need to:
- eliminate discrimination, harassment and victimisation
 - advance equality of opportunity between people who have a protected characteristic and people who do not, and
 - foster good relations between people who share a protected characteristic and people who do not.
- 4.51.** To comply with the PSED, public sector employers must give due regard to how taking steps to prevent third party harassment may help to eliminate discrimination, harassment and victimisation, advance equality of opportunity and foster good relations. For further information on the PSED, see the [PSED guidance on our website](#).

Harassment by a colleague outside of work

- 4.52.** As explained in 4.17 to 4.19, an employer will be liable for harassment by one worker against another if it took place during the course of employment. An employer will not be directly liable under the Act for harassment by one worker against another if it took place outside of employment.

- 4.53.** However, an employer must still take reasonable steps to deal with a complaint of harassment by one worker against another committed outside of employment, because the legal principles set out in 4.38 to 4.43 and 4.49 to 4.51 in relation to third party harassment, could be applied equally to any failure by an employer to deal with such a complaint. That is, the employer could potentially be liable for direct or indirect discrimination, constructive dismissal or breach of the PSED.

Who else can be liable for harassment?

- 4.54.** Workers may be personally liable for acts of harassment they carry out during their employment. They will only be liable under the Act if their employer is also liable for the harassment, or if their employer would have been liable but is able to rely successfully on the ‘reasonable steps’ defence (**s.110(1) and s.110(2)**) (see 4.20 to 4.27).

Example

A supermarket worker is subjected to comments about her race by a colleague. The worker subsequently brings a claim for harassment related to race against her employer and her colleague. The employer argues that it provided workers with equality and diversity training, implemented an anti-harassment policy, and investigated the complaint and dismissed the colleague for gross misconduct. The employment tribunal finds that the worker was subject to harassment related to race by her colleague. The supermarket will be liable unless the tribunal accepts that it took all reasonable steps to prevent harassment. The colleague will be liable regardless of whether the supermarket establishes the defence or not.

- 4.55.** Agents (as defined at 4.28 – 4.30) may also be personally liable for acts of harassment committed with the employer’s authority where the employer is also liable.

Example

A company uses a self-employed consultant to implement an IT project. The company puts the consultant in charge of its workers in the IT team assigned to the project. The company does not alert the consultant to its anti-harassment policy. The consultant constantly refers to a member of the IT team as 'old boy' and 'old-timer' and makes jokes about how technology has moved on since his day. Both the company and the consultant will be liable for the acts of harassment related to age as the consultant is acting as the company's agent.

- 4.56.** A worker can make an employment tribunal claim against the worker or agent who personally harassed them, without also making a claim against their employer. However, in order to succeed in their claim against the worker or agent, they must be able to show that the employer could have been liable under the Act had they made such a claim.

4.57. Example

A worker is sexually harassed by his colleague. The worker brings a claim against both his employer and his colleague, but subsequently withdraws his claim against his employer. The worker decides to pursue his claim against his colleague to a tribunal hearing. The colleague is also employed by the employer and therefore had the worker pursued his claim against the employer, it would have been liable (unless it could establish the 'reasonable steps' defence). The colleague may therefore also be liable under the Act.

- 4.58.** If a worker or agent reasonably relies on a statement by the employer that an act is not unlawful, then the worker or agent will not be liable even if the employer is liable **(s.110(3))**.

4.59. Example

The chief executive of a company tells a manager to ask a worker, who is 67, a series of unjustified questions regarding his intention to retire and his performance, all based on stereotypical assumptions about people of the worker's age. The chief executive tells the manager that he is entitled to do so because the worker is over 65 and only people below 65 are protected. The chief executive is wrong as the Act protects employees of all age groups against harassment related to age. If the manager reasonably relies on that statement and follows the chief executive's instructions, he will not be personally liable. The employer would still be liable.

5. Taking steps to prevent and respond to harassment

Introduction

- 5.1.** An employer will be liable for harassment or victimisation committed by its workers unless they can show that they took all reasonable steps to prevent such behaviour. The relevant factors as to whether an employer has taken all reasonable steps are considered in paragraphs 4.20 to 4.27. This chapter sets out what steps can be taken to prevent harassment and protect workers, to help employers understand how best to meet their responsibilities under the Act (**s.109(4)**).
- 5.2.** As explained in Chapter 4, there is no prescribed minimum about what an employer can do to prevent harassment and protect its workers. It is an objective test about what it is reasonable for the employer to do in the circumstances. This will vary from employer to employer depending on the size and nature of the employer, the resources available to it and the risk factors which need to be addressed within the particular employer or sector. Therefore, not every step set out in this chapter will be reasonable for every employer to take, nor should they be considered exhaustive. Employers should consider what steps they have taken to date and what further steps it is practicable for them to take.
- 5.3.** This should not be a one-off exercise. Employers should continue to review whether there are any further steps it is practicable for them to take, considering issues such as whether there have been any changes in the workplace or the workforce and the availability of new technology such as new reporting systems.

Preventing harassment

Effective policies and procedures

- 5.4.** All employers will be expected to have in place effective and well communicated policies and practices which aim to prevent harassment and victimisation. The policies should be monitored and their success regularly reviewed (see 5.16 to 5.18). Employers should not conflate different forms of harassment. They should have different policies to deal with sexual harassment and harassment related to protected characteristics or have one policy which clearly distinguishes between the different forms of harassment. Employers should also consider preparing separate strategy documents to accompany their anti-harassment policy or policies, setting out what measures they will take to tackle the different forms of harassment. These documents should take into account issues such as the different causes of different forms of harassment and the risk of different forms of harassment occurring in the employer's particular workforce.
- 5.5.** To ensure that workers' views are taken into account, anti-harassment policies and other measures to prevent and respond to harassment should be developed in consultation with recognised trade unions, or where there isn't one, other worker representatives.
- 5.6.** A good anti-harassment policy (or policies where, for example, an employer has separate policies to deal with sexual harassment and other forms of harassment) will:
- confirm who the policy covers
 - state that sexual harassment, harassment and victimisation will not be tolerated
 - state that sexual harassment, harassment and victimisation are unlawful
 - state that harassment or victimisation may lead to disciplinary action up to and including dismissal if it is committed:
 - in a work situation
 - during any situation related to work such as at a social event with colleagues
 - against a colleague or other person connected to the employer outside of a work situation, including on social media or
 - against anyone outside of a work situation where the incident is relevant to their suitability to carry out the role.

- state that aggravating factors such as abuse of power over a more junior colleague will be taken into account in deciding what disciplinary action to take
- define the protected characteristics that harassment may be related to
- define harassment related to protected characteristics, sexual harassment, less favourable treatment for rejecting or submitting to sexual harassment and victimisation separately. Different forms of harassment should not be conflated
- (if bullying is included within the same policy) distinguish between bullying and harassment
- provide clear examples to illustrate each definition of the different forms of harassment, which are relevant to the employer's working environment and which reflect the diverse range of people whom harassment may affect
- include an effective procedure for receiving and responding to complaints of harassment (see 5.34)
- address third party harassment. This section should outline:
 - that third party harassment can result in legal liability (see 4.34 to 4.51)
 - that it will not be tolerated
 - that workers are encouraged to report it
 - what steps will be taken to prevent it. For example, warning notices to customers or recorded messages at the beginning of telephone calls
 - what steps will be taken to remedy a complaint or prevent it happening again. For example, warning a customer about their behaviour, banning a customer, reporting any criminal acts to the police, or sharing information with other branches of the business
- include a commitment to review the policy at regular intervals and to monitor its effectiveness
- cover all areas of the employer's organisation, including any overseas sites, subject to any applicable local laws which impose any additional requirements on the employer.

Malicious complaints

5.7. In our work on sexual harassment, we have found that policies often overemphasise malicious complaints, which does not reflect the fact that the vast majority of complaints are made in good faith. We have also found policies on malicious complaints that, if put into practice, would result in workers who make good faith complaints that are not upheld being victimised contrary to the Act. While employers can lawfully state within their policy that malicious complaints may lead to disciplinary action, if not worded carefully, statements to this effect may discourage complainants coming forward. People may be worried that they will be disciplined if their allegation is not upheld. Where such a statement is included, it should be made clear that:

- workers will not be subjected to disciplinary action or to any other detriment simply because their complaint is not upheld, and
- workers will only face disciplinary action if it is found both that the allegation is false and made in bad faith (that is, without an honest truth in its belief).

Interaction with other policies

5.8. Other policies and procedures should be reviewed to ensure that they interact well with the anti-harassment policy and that they create a culture in which the risk of harassment is reduced. An employer should consider, for example:

- Do the examples of misconduct and gross misconduct in the disciplinary policy match or cross reference the anti-harassment policy?
- Do the policies on use of IT, communications systems and social media include appropriate warnings against online harassment and encourage workers to report it, even where such harassment takes place on personal devices?
- Does the dress code potentially foster a culture that could contribute to the likelihood of sexual harassment or harassment related to race or religion occurring? See the UK Government's [guidance on dress codes and sex discrimination](#) for further information.
- Is it clear from performance objectives that managers will be expected to deal appropriately with complaints of harassment?

Awareness of policies

- 5.9.** Employers should ensure that all workers are aware of their anti-harassment policies. Employers should consider publishing their policies on an easily accessible part of their external-facing website. This will enable a worker to access a copy of the policy if, for example, they are off work with a stress condition related to their harassment and cannot access the internal system. It will also mean it is available to other workers, such as contract workers, who similarly may not have access to internal systems. Doing so also demonstrates the employer's commitment to transparency and tackling the issue.
- 5.10.** Where policies are not publicised externally, they should nevertheless be as freely available as possible to all workers, including those who do not have access to the internal IT systems. This may mean, for example, providing copies to each worker or publishing them on the intranet. It is not appropriate to tell workers that they can get copies from a manager as the worker may be reluctant to ask the manager and alert them to the fact that they have a complaint. Likewise, leaving copies in an area that is accessible to all workers, such as a staffroom, would not be appropriate, as a worker may not wish other workers to see them reading the policy.
- 5.11.** The policies, and the staff handbook in general, should also be referenced in (though not necessarily incorporated into) the contract of employment, written statement of particulars or other terms and conditions of work.
- 5.12.** The policies should be verbally communicated to workers during the induction process, at which point they should also receive a copy of it or otherwise know where they can access a copy.
- 5.13.** If employers amend their policies or introduce one for the first time, they should raise awareness of it among workers. They should also take opportunities to remind workers of the existence of the policy and what it contains, highlighting the policy's key messages – such as the employer's zero tolerance approach to harassment and how to report harassment. Employers can communicate the policies and their contents using, for example:
- internal newsletters
 - physical or digital noticeboards
 - staff meetings
 - reminders to staff ahead of key events where the risk of harassment increases, such as an office party, and
 - an annual reminder to staff.

- 5.14.** If necessary, the policies should be translated for a linguistically diverse workforce or provided in an accessible format for those with disabilities.
- 5.15.** The policies should be shared with other organisations that supply workers and services. This is to ensure that all workers supplied to the employer are aware of the standards expected of them under the policies and how to report instances of harassment.

Evaluation of policies

- 5.16.** The effectiveness of the policies should be evaluated through the use of, for example:
- centralised records that record complaints in a level of detail that allows trends to be analysed. For example, date of events, areas of business, roles of complainant and harasser, protected characteristic, legal category (harassment, sexual harassment etc.), outcome and brief reason for outcome. Employers should ensure that any such register is compliant with the General Data Protection Regulation (GDPR). They should, for example, review contracts, policies, procedures and privacy notices to ensure that they inform workers that such data will be stored and ensure that appropriate safeguards are in place to protect the data and ensure that any processing of data is proportionate. For example, ensuring that access to the data is restricted to a limited number of people. Further guidance on compliance with the GDPR can be found on the website of the [Information Commissioner's Office](#).
 - staff surveys which ask all workers questions on an anonymised basis to obtain as accurate a picture of harassment that is happening in the workplace as possible, including:
 - whether they have been subjected to or witnessed harassment. The questions should describe behaviours which constitute harassment and ask the worker whether they have experienced such behaviours rather than asking the worker directly whether or not they have experienced harassment
 - what type of harassment they have experienced
 - whether they reported the harassment;
 - if they did not report the harassment, why not
 - if they did report the harassment, what the outcome was
 - were they satisfied with the outcome and if not, why not

- if they were to experience harassment in the future (whether they have experienced it in the past or not), whether they would feel able to speak up and if not, why not, and
- whether they believe there are any steps the employer should be taking to address harassment at work.
- lessons-learned sessions once complaints have been resolved, and
- feedback provided through conversations with employees. For example, during exit interviews (see 5.19).

5.17. Employers should not assume that the number of complaints of harassment made is an accurate reflection of the level of harassment happening in the workplace. Employers should compare data they have regarding reported cases of harassment against data received through the other means listed above, to identify the extent to which harassment is reported. The gap between the actual level of harassment and harassment that is reported can then be monitored, to determine whether the policy and other steps put in place to encourage reporting are working.

5.18. Policies should be reviewed annually. As part of this review, any themes arising from evaluation and monitoring and feedback received through means such as staff surveys and lessons-learned sessions should be considered. This should include evaluating whether the policy is leading to appropriate and consistent outcomes to complaints or whether further steps need to be taken to improve this.

Detecting harassment

5.19. Employers should proactively seek to be aware of what is happening in the workplace. There may be warning signs that harassment is taking place, beyond informal and formal complaints. For example, sickness absence, a change in behaviour, comments in exit interviews, a dip in performance or avoidance of a certain colleague. Employers should give workers every opportunity to raise issues with them, even where there are no warning signs of harassment, for example, through:

- informal one-to-ones
- sickness absence or return-to-work meetings
- meetings about performance
- open door meetings with senior management or 'town hall' meetings
- exit interviews
- a post-employment survey, and

- mentoring programmes and staff networks.

5.20. Employers should consider introducing an online or externally run telephone reporting system which allows workers to make complaints on either a named or anonymous basis and makes clear to the worker what the employer may do with the information provided. While it is preferable for workers to raise issues without anonymising their details, some workers will not feel able to raise their complaints and issues will therefore go undetected. The introduction of a reporting system which allows anonymous reports to be made:

- will ensure that those complaints that would otherwise go unreported are captured
- provides the employer with an opportunity to give complainants information about the support and safeguards that can be put into place if they were to report the matter on a non-anonymous basis
- enables the employer to take action to address the matter, even in cases where there may not be sufficient evidence to start an investigation due to the anonymity of the complainant. For example, by issuing a reminder of the policy to workers and monitoring the area of the business affected.

Training

5.21. Workers should be provided with training which addresses each of the three types of harassment along with training on victimisation. Training should ensure that workers know what each of the three types of harassment involves and what victimisation is, what to do if they experience it and how to handle complaints of harassment. Training should be tailored towards the nature of the employer, the target audience (in terms of, for example, the seniority and job roles of the audience and the best method to deliver the training to them) and the employer's policy to maximise its impact. For example:

- In industries where third party harassment from customers is more likely, training should be provided on how to address such issues. This will vary from employer to employer. For example, in a call centre, a manager may require guidance on what to do in the event of a worker receiving an abusive phone call. In a pub, the manager may need guidance on what to do in the event of physical or verbal abuse of staff.

- All workers, including those without supervisory or management responsibilities, will require guidance on issues such as acceptable behaviour, recognising harassment and what to do should they experience or witness it. Supervisors and managers may need additional guidance on what to do upon receiving a report or complaint of harassment, investigating complaints, taking disciplinary action and supporting workers.

5.22. Employers should keep records of who has received the training and ensure that it is refreshed at regular intervals.

5.23. Employers should make sure that there are workers who are trained in providing support to individuals who have experienced harassment through the process of making a complaint. This may be, for example, members of the human resources department or other nominated workers who may be identified by a title such as harassment 'champions' or 'guardians'. Such training should include the particular sensitive issues involved in different forms of harassment related to different protected characteristics.

Assessing risks relating to harassment

5.24. Employers should make an assessment of risks relating to harassment and victimisation. Existing risk management frameworks, traditionally used in the workplace health and safety context could be used for this process. Assessments should identify the risks and the control measures identified to minimise the risks. Factors may include, for example:

- power imbalances
- job insecurity
- lone working
- the presence of alcohol
- customer-facing duties
- particular events that raise tensions locally or nationally
- lack of diversity in the workforce, and
- workers being placed on secondment.

Arrangements for agency workers

5.25. Before supplying agency workers to a hirer, the agency should check that the hirer has appropriate arrangements in place for the prevention of and to deal with complaints of harassment and victimisation.

- 5.26.** Where agency workers are engaged, the agency and hirer should clearly divide responsibilities in relation to handling complaints of harassment and victimisation between them and confirm these arrangements in writing.
- 5.27.** Normally, it will be most appropriate for the hirer to investigate any complaint relating to harassment or victimisation of agency workers that has occurred during the course of the agency providing their services to the hirer. However, there may be exceptions to this. For example, the parties may wish to make different arrangements in circumstances where the complaint is made by an agency worker against another worker from the same agency. The hirer should not simply end its engagement of the agency in order to avoid investigating the issue properly.
- 5.28.** The arrangements between the agency and hirer should include agreement as to when and how one party will update the other on progress and take input where appropriate.
- 5.29.** The agency should make sure that the agency worker is provided with clear guidance as to who to make a complaint to, whose policy applies in which circumstances and that the agency worker receives an induction into both the agency's and hirer's policies and procedures.
- 5.30.** An agency should hold regular catch-ups with its workers and give them the opportunity to raise any issues that have come up in the workplace.

Confidentiality agreements

5.31. Employers should promote a culture of transparency, where workers feel empowered to speak up about discrimination and the root causes of issues can be tackled. Employers must only use confidentiality agreements (also known as confidentiality clauses, non-disclosure agreements, NDAs, or gagging clauses) where it is lawful. It will not be lawful to use confidentiality agreements to prevent workers from whistleblowing, reporting a criminal offence or doing anything required by law such as complying with a regulatory duty. Confidentiality agreements should only be used where necessary and appropriate and the employer should follow best practice where they are used. See [our guidance on confidentiality agreements](#) for further details.

Addressing power imbalances

5.32. Harassment often takes place and goes unreported where there is a power imbalance in the workplace. For example, there may be a power imbalance between a senior manager and someone junior to them, where a worker with a particular protected characteristic is in a minority in the workplace or where a worker is in insecure employment. Employers should consider what action they can take to reduce power imbalances by, for example, taking steps to reduce feelings of isolation, addressing under-representation of workers, ensuring that decision making at senior levels is more representative of different groups, and providing sufficient support for workers at all levels. The employer could, for example:

- take positive action measures to improve representation of an under-represented group, such as introducing a development programme or mentoring network for the under-represented group(see Chapter 12 of the [Employment Statutory Code of Practice](#) for further information on positive action)
- tackle bias in recruitment, development and promotion decisions by taking a transparent and structured approach to such processes, including assessing all candidates against a set of objective criteria and ensuring diversity of representation on assessment panels
- introduce training on topics such as diversity and inclusion, particularly for those who have responsibility for the overall strategy of the organisation and such as the board and for those who make decisions on recruitment, development and promotion

- introduce or extend flexible working to all roles and encourage the take up of shared parental leave to help improve representation of women in the workforce, especially at senior levels
- recognise a trade union or introduce another means of collective bargaining to ensure that workers are represented in decisions such as those regarding policies and procedures
- include a worker representative such as a trade union official on panels that hear complaints of harassment and disciplinary panels, and
- ensure that harassment champions or guardians are representative of those who are, for example, in insecure employment and more junior positions (**ss.158 and 159, Equality Act 2010**).

Responding to harassment

Anti-harassment procedure

- 5.33.** When an employer becomes aware that harassment is taking or has taken place, it is important that they deal with it promptly, efficiently and sensitively.
- 5.34.** To deal effectively with complaints of harassment, a good anti-harassment procedure should:
- tell workers how to make a complaint. This should not be too restrictive. For example, they should not be required to make a complaint on a specific form
 - define multiple reporting channels for workers who wish to report harassment, to ensure that a worker is not required to report an incident to the perpetrator or someone who they may feel will not be objective
 - set out a range of approaches for dealing with harassment – from informal solutions to formal disciplinary processes
 - set out a range of appropriate consequences and sanctions if harassment or victimisation occurs
 - state that victimisation or retaliation against a complainant will not be tolerated
 - provide contact details for and information about support and advice services available to the complainant or alleged harasser, provided by the employer or within the workplace, such as:

- an employee assistance programme
- a list of contact points within the employer
- recognised trade unions, and
- provide contact details for and information about external sources of support and advice both locally and nationally such as:
 - the Equality Advisory and Support Service
 - Protect (the whistleblowing charity)
 - local advice centres
 - helplines which have been set up to deal with specific forms of harassment (such as the helplines provided to deal with sexual harassment by the Scottish Women's Rights Centre in Scotland and Rights of Women in England and Wales).

Informal resolution

- 5.35.** The procedure should tell the worker how they can raise an issue informally. However, the policy should not place the onus on the complainant to resolve an issue personally.
- 5.36.** It should provide the worker with guidance on how to raise the issue directly with the harasser if that is their preferred method, they feel able to and it is appropriate to do so. This may involve the complainant speaking to the harasser directly to explain how their conduct has made them feel and why they would like it to stop. The procedure should not place any pressure on a worker to take this approach.
- 5.37.** Often a complainant may not feel able to resolve an issue directly and may need support from a third party to resolve their complaint. The procedure should ensure that where a complaint is raised informally, those who it is raised with fully engage in resolving the issue and provide them with guidance on how to do so. The procedure should direct the complainant towards someone (preferably a choice of people) who is equipped to help them resolve their complaint such as a manager, trade union representative, a harassment 'champion' or 'guardian' (see 5.23) or a member of human resources. This person should listen to the complainant and work out how best they can help them to resolve the issue informally and in a way with which the complainant is most comfortable having considered the different options. They may, for example:
- provide the complainant with advice on how to approach the issue directly with the alleged harasser

- support the complainant in raising the issue with the alleged harasser by accompanying them in any discussion or helping them to set out their thoughts in writing
- raise the matter informally with the harasser on the complainant's behalf
- arrange mediation by a trained mediator between the complainant and the alleged harasser
- help to obtain advice on how best to resolve the issue and/or assistance in doing so from other sources either internally such as from human resources or externally from sources such as Acas.
- help to obtain advice on or assistance in dealing with issues relating to particular protected characteristics. For example, from a charity with expertise relating to a particular disability, or
- help to obtain counselling or support for the individual.

5.38. The procedure should recognise that an informal solution may not be appropriate or may not work in many cases. For example, any informal solution is unlikely to be appropriate in more serious cases or to work in cases where the alleged harasser is unlikely to accept that they have done anything wrong. It should be clear that the worker can make the matter formal at any stage if they wish to.

Formal resolution

5.39. This section highlights some particular issues that employers should be aware of when dealing with formal complaints of harassment. However, a detailed explanation of the steps that should be taken in conducting an investigation or a grievance or disciplinary hearing process is beyond the scope of this guidance. Employers should familiarise themselves with Acas guidance on [conducting workplace investigations](#) and [discipline and grievances at work](#).

5.40. The formal reporting channels set out in the anti-harassment policy should ensure, wherever possible, that a worker is able to raise an act of harassment or victimisation with someone other than the alleged harasser. Where possible, this should be someone more senior than the alleged harasser.

- 5.41.** Employers should not set a time limit within which complaints must be made. A worker may not be able to raise a complaint within any such time limit due to, for example, illness or fear of victimisation. If complaints are raised about historical matters, these should be investigated in line with normal processes. Employers should not make assumptions that because an alleged event took place a long time ago, it will not be able to find any evidence relating to it.
- 5.42.** Roles and responsibilities during the process should be clearly defined. Employers should ensure independence and objectivity at each stage of the process. For example, wherever possible, different people at escalating levels of seniority should conduct the investigation, formal hearing and appeal hearing phases. Employers should avoid appointing people to carry out these roles who have been involved in the issue. They should, where possible, appoint people from different parts of their organisations who have no or less knowledge of the people involved and consider appointing an external investigator where necessary to ensure objectivity. They should also take into account the particular sensitivities of the case. For example, a woman who has been sexually assaulted may be more comfortable talking to a female investigator.
- 5.43.** If a worker feels that an investigation is taking a long time, this can cause them to feel that their complaint has not been taken seriously or aggravate the stress and worry that they may experience while waiting for the outcome. Target timescales for each stage of the process should be set and communicated to the complainant. These timescales should provide for a prompt but thorough process. They should be realistically achievable and kept to, other than in exceptional circumstances. The employer should provide the complainant with regular updates on progress and, when expected timescales are not met, the employer should give the worker a clear explanation as to why.

5.44. Employers must inform the complainant and alleged harasser of their statutory right to be accompanied to formal grievance hearings by a trade union representative or colleague. Employers should consider extending this right to be accompanied by a colleague or trade union representative to other meetings such as investigation meetings where reasonable. Employers should also consider extending the right to be accompanied, to allow persons others than colleagues or trade union representatives where appropriate bearing in mind the need to maintain confidentiality in the investigation. In certain circumstances, employers must extend the right to be accompanied in order to comply with certain legal obligations. For example, an employer must allow a worker to be accompanied by another person if that would be necessary:

- to comply with the duty to make reasonable adjustments for a disabled worker
- if not extending the right in order to help a worker overcome a language barrier would amount to discrimination, or
- to maintain trust and confidence between the employer and employee. For example, if a vulnerable employee needs emotional support and this cannot be provided by a trade union representative or colleague.

Example

A worker has made a complaint of sexual harassment. She isn't in a trade union and it would be unreasonable to expect her to recount explicit details of the harassment in front of a colleague. She finds it very stressful and upsetting to talk about the matter and requires emotional support in order to do so. It would be reasonable in these circumstances to allow the worker to be accompanied by someone who can offer emotional support, such as a friend.

- 5.45.** Employers should ensure that investigators have appropriate expertise to conduct an investigation and that they have access to appropriate advice, taking into account the nature of the particular complaint to be handled. For example, an investigator appointed to deal with a complaint of antisemitism should have a good understanding of what antisemitism means. An investigator appointed to deal with a complaint where the complainant has suffered trauma as a result of their experience, should understand how to question the complainant in a way that avoids compounding the trauma.
- 5.46.** Investigators should clearly identify the facts that they need to establish, the questions they will need to ask and the evidence they will need to obtain. Investigators should avoid inappropriate lines of questioning. For example, it would not be appropriate to ask a person who complains of sexual harassment about their sexual history.

Confidentiality during an investigation

- 5.47.** During an investigation of a complaint, and whether the process is informal or formal, the employer should ensure that the complaint is kept confidential (subject to any legal obligations or rights such as a requirement to report to a regulator). This will protect the complainant from any further disadvantage, such as gossip among colleagues about the harassment. Confidentiality should not, however, necessarily continue once the complaints process has been concluded (see 5.31 and 5.66 to 5.69).
- 5.48.** As confidentiality means that workers cannot speak to other witnesses about the issue, employers must ensure that they follow up with all witnesses suggested by the complainant and the alleged harasser and actively seek evidence for and against the allegations to ensure that no evidence is missed. The employer should ensure that any witnesses they speak to about the complaint are made aware that:

- the matter is confidential (subject to any personal legal or regulatory obligations or rights), and
- breach of confidentiality will be a disciplinary offence.

Requests by workers not to take action

5.49. If a worker raises a complaint with the employer but asks them not to take the matter any further, an employer should still take steps to ensure that the matter is resolved. The employer should, for example:

- keep a record of the complaint and the worker's request to keep the matter confidential
- encourage the worker to address the issue informally either directly themselves or with support
- provide the worker with any necessary support and guidance on how to address the issue informally
- keep the situation under review by checking in with the worker to find out if the situation has improved, and
- where the situation has not improved, explain to the worker that it is necessary to address the issue both for their well-being and that of their colleagues.

5.50. Where possible, the employer should respect the wishes of the complainant. Not doing so could compound any harm caused by the original conduct. However, there may be circumstances in which the employer should take action because the risk of not taking action outweighs the risk arising from overriding the complainant's wishes. In assessing the relative risk of the options, the employer should ask:

- Have they considered and exhausted all other possible options such as those already referred to in this guidance?
- What will the impact be of overriding the complainant's wishes on them?
- What are the potential risks to the complainant, the complainant's colleagues and to other third parties if the employer does not take further action?
- Have other complaints been made against the same person?
- What is the likelihood of the matter being resolved by the complainant without intervention by the employer?

- 5.51.** For example, it may be appropriate to take further action where the harassment is so serious that there is an immediate risk to the safety of the complainant, their colleagues or anyone else that the harasser may come into contact with. The risks may be higher in cases where criminal behaviour has taken place (see 5.53 to 5.57).
- 5.52.** If the employer decides that it must take formal action then it should explain its decision to the complainant and ensure that it has put in place appropriate safeguards to prevent further harassment or victimisation of the complainant (see paragraphs 5.58 to 5.63) as well as support and counselling for the complainant to deal with any impact the decision may have.

Criminal behaviour

- 5.53.** Some acts of harassment may also amount to a criminal offence.
- 5.54.** 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.
- 5.55.** 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.
- 5.56.** 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.

5.57. 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 have to 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.

Preventing further harassment or victimisation during an investigation

5.58. When a formal complaint of harassment or victimisation is made, an employer should consider what steps need to be taken while the matter is investigated to ensure that:

- the complainant is not subjected to further acts of harassment
- the complainant is not victimised for having made a complaint
- any potential adverse impact on the complainant is minimised
- other workers are safeguarded against similar behaviour, and
- there will be no interference with the investigation.

5.59. In some cases, no action may be necessary because, for example, the employer is satisfied that the complainant is prepared to continue working with the alleged harasser and that the alleged harasser is unlikely to repeat the alleged behaviour while under investigation.

- 5.60.** In other cases, it may be necessary to limit the contact between the complainant and the alleged harasser and ensure this is maintained to minimise the risk of the alleged harassment being repeated. For example, by redeploying the alleged harasser to another part of the employer or a different site pending conclusion of the matter, arranging working from home, or removing duties from the harasser that bring the complainant and harasser into contact. Any measures to limit contact should normally be applied to the alleged harasser unless, for example, the complainant's preference is to be moved. It is important to assess the risks of moving a worker elsewhere before doing so. For example, whether the alleged harasser might pose a risk to other workers other than the complainant.
- 5.61.** In cases where there is a continuing risk to the complainant or their colleagues, or to the integrity of the investigation, then the employer should consider suspending the alleged harasser on full pay. The employer should consider carefully the necessity of suspension and any viable alternatives before pursuing this route. Employers should ensure that alleged harassers are able to access appropriate support and this will be particularly important where they are suspended from work.
- 5.62.** The employer should make clear to the alleged harasser that any steps taken are a precaution only and do not imply that the employer has formed any conclusions about the complaint. Likewise, if the alleged harasser makes counter allegations against the complainant, then the employer should be clear with both parties about how it formed its view as to which party to suspend, redeploy or remove duties from, so as to avoid any suggestion that it has favoured one account over the other.
- 5.63.** The need to take preventative steps to protect the complainant will be particularly important in cases where the complainant did not want to make their complaint formal but the employer has concluded that they have to deal with it formally due to the risks of not doing so (see 5.49 to 5.52).

Witnesses to harassment

- 5.64.** The anti-harassment policy should encourage witnesses to harassment or victimisation to take steps to address it. This may include:
- the witness intervening where the witness feels able to do so
 - the witness asking the person subjected to the harassment if they would like the witness to report it or support them in reporting it
 - the witness reporting the incident where the witness feels that there may be a continuing risk if they do not report it, and
 - requiring witnesses to cooperate in an investigation.
- 5.65.** The employer should assure witnesses that it will not subject them to a detriment for providing information and that it will also take steps to prevent them being subjected to a detriment by any other worker.

Reporting outcomes and data protection

- 5.66.** To be effective in encouraging those with complaints to come forward, the outcome to a formal complaint of harassment should be as transparent as possible. This means that wherever appropriate and possible, if a complaint is upheld then the complainant should be told what action has been taken to address this including action taken to address the specific complaint and any measures taken to prevent a similar event happening again in the future. If the complainant is not told what action has been taken, this may leave them feeling that their complaint has not been taken seriously or addressed adequately.
- 5.67.** Employers may have concerns that reporting outcomes such as disciplinary action taken against the harasser, may be a breach of obligations that it owes to the harasser. In particular, they may be concerned about breaching the General Data Protection Regulation (GDPR). However, while employers must comply with the data protection principles under Article 5 GDPR, they should not assume that disclosure of the harasser's personal data will amount to a breach of the GDPR. It often will not if the employer has been clear that outcomes may be disclosed, considered what grounds it has for disclosure and acts proportionately in disclosing personal data.

- 5.68.** Employers should take steps to enable disclosure of the outcomes to complainants where it is appropriate to do so. This includes reviewing contracts, policies, procedures and privacy notices to ensure that they inform workers when the outcome of complaints and disciplinary proceedings may be disclosed.
- 5.69.** The employer should consider on a case-by-case basis each of the grounds on which data can be processed lawfully under Article 6 of the GDPR (and Article 9, where special category data is involved) and what measures it can put in place to ensure that disclosure is proportionate. The employer should record its decision as to whether the outcome can be disclosed or not and its reasons for that decision. Further guidance on compliance with the GDPR can be found on the website of the [Information Commissioner's Office](#).

Further steps after the process has ended

- 5.70.** Where a complaint is not upheld, or it is upheld but this results in action short of dismissing the harasser, the employer should consider carefully 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, and
 - making an offer of redeployment where any relationship breakdown cannot be resolved through other means.
- 5.71.** 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

5.72. 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?

Sources of further guidance

Acas: For information and advice on all aspects of workplace relations and employment law.

Citizens Advice: A network of charities offering confidential advice online, over the phone, and in person, for free.

Code of Practice on Employment: Definitive guidance about what the Equality Act means.

Equality Advisory & Support Service: The EASS Helpline advises and assists individuals on issues relating to equality and human rights, across England, Scotland and Wales. EASS can also accept referrals from organisations which, due to capacity or funding issues, are unable to provide face to face advice to local users of their services.

Information Commissioner's Office: For information and advice on data protection

Law Society's find a solicitor service: To find a solicitor in England and Wales.

Law Society of Scotland's find a solicitor service: to find a solicitor in Scotland

Law Works: to find free advice, representation and online resources

Protect: For information and advice on whistleblowing.

Recruitment & Employment Confederation: for information on recruitment practices and standards, including agency workers' rights

TUC: Represents affiliated trade unions. The TUC website provides guidance on workplace issues for workers and union representatives, and has a trade union finder tool for those considering joining a trade union.

Glossary of terms

Acas: Advisory, Conciliation and Arbitration Service

The Act: Equality Act 2010

Agent: Agents are those who act on the employer's behalf. An employer may be liable for acts of discrimination committed by an agent against one of its employees. (See paragraph 4.28.)

Detriment: Subjecting a worker to a detriment means treating them badly. (See paragraphs 3.17 to 3.19.)

Confidentiality agreement: Any clause or separate agreement that prevents a worker (or their employer) from discussing or passing on information. Sometimes referred to as confidentiality clauses, non-disclosure agreements, NDAs or gagging clauses. See [our guidance on confidentiality agreements](#).

Employee: An individual who has a contract of employment with their employer. Employees are protected against discrimination, harassment and victimisation under the Equality Act 2010. (See paragraphs 4.4 to 4.14.)

Gender reassignment: A person has the protected characteristic of gender reassignment if they are proposing to undergo, are undergoing or have undergone a process for the purpose of reassigning their sex by changing physiological or other attributes of sex. No legal or medical process is required.

Harassment: Unwanted conduct related to a protected characteristic that has the purpose or effect of violating a worker's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (see Chapter 2).

Protected act: A worker does a protected act if they: make a claim or complaint under the Act (for example, for discrimination or harassment); help someone else to make a claim by giving evidence or information; make an allegation that someone has breached the Act; or they do anything else in connection with the Act. (See paragraphs 3.6 to 3.16.)

Protected characteristic: A term used in the Act to describe the characteristics that people have in relation to which they are protected against discrimination and harassment. Under the Act, there are nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Marriage and civil partnership and pregnancy and maternity are not protected under the harassment provisions. (See paragraphs 2.3 to 2.5.)

The ‘reasonable steps’ defence: A defence available to employers in claims of harassment. The employer will not be liable for any action of harassment by one of its workers if it can show that it took all reasonable steps to prevent it. (See paragraphs 4.20 to 4.27.)

Sexual harassment: Unwanted conduct of a sexual nature that has the purpose or effect of violating a worker’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (see Chapter 2).

Third party harassment: Harassment of a worker by someone who does not work for and who is not an agent of the same employer. For example, a client, customer or service user.

Trans: A term used to describe a person whose gender identity is not the same as the sex assigned to them at birth. It can also include someone who does not identify as male or female (non-binary) or someone who is outside any gender definition (non-gender). In this guidance we use the term ‘trans’ to refer to a person with the protected characteristic of gender reassignment. For example: a trans man – a person whose sex was recorded as female at birth but who identifies and lives as a man.

Unlawful: Contrary to the law and specifically in the context of this guidance, contrary to the Act.

Victimisation: Subjecting someone to a detriment because they have done, or because it is believed they have done or may do a protected act. (See paragraphs 3.2 to 3.5.)

Worker: As defined under the Equality Act 2010, this is an individual who does work for an employer and is required to do the work personally – that is, they cannot send someone (a substitute) to do the work in their place and are therefore not self-employed. Workers are protected against discrimination, harassment and victimisation under the Equality act 2010. **Note that we use the word ‘worker’ in this guidance to include both workers and employees. (See paragraphs 4.4 to 4.14.)**

Contacts

This publication and related equality and human rights resources are available from [our website](#).

Questions and comments regarding this publication may be addressed to: correspondence@equalityhumanrights.com. We welcome your feedback.

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EASS

For advice, information or guidance on equality, discrimination or human rights issues, please contact the [Equality Advisory and Support Service](#), a free and independent service.

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