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Insights

SEXUAL HARASSMENT - WHAT DOES "IN THE COURSE OF EMPLOYMENT" MEAN?

Oct 30, 2025

SUMMARY

Our employment law update for October covers a case about whether serious acts of sexual harassment took place in or outside the course of employment. We also have a general news round-up covering recent developments in progress of the Employment Rights Bill and the rejected proposal to charge employment tribunal fees.

For an employer to be vicariously liable for acts of sexual harassment by its employees, the harassment must take place “in the course of employment”. The scope of “in the course of employment” has been the subject of a good deal of case law and debate, and this recent EAT case gives useful guidance on the point.

The facts are important:

- the respondent is based in Cardiff. On the day in question, the female claimant wrongly believed that, on 1 November, she was required to work at Hereford racecourse;
- the respondent had an arrangement where, if transport to a venue was required, an employee would drive others from the Cardiff office and receive contributions for fuel expenses etc. On the day, the claimant was late, and missed the lift to Hereford;
- she was then offered a lift by CD, who had just finished his shift and was not working;
- the claimant accepted CD’s offer of a lift. During the drive to Hereford, CD received a call from the respondent where it was stated that the claimant was no longer required to work at Hereford. CD told the claimant this and offered to drive her back to the Cardiff office. The claimant declined and asked CD to drop her off at a bus stop;
- CD did not drop her off and continued driving. Then, when driving and stopping by the side of the road, he carried out serious acts of sexual harassment against the claimant;

- the claimant eventually escaped and reported CD to the police.

CD had also, whist he was working and in the week before giving the claimant a lift, sent her numerous messages of a sexual nature. He also contacted her several times in the morning of 1 November.

The claimant brought a claim against the respondent, alleging it was vicariously liable for CD's sexual harassment. The respondent agreed that the acts complained of constituted sexual harassment, but argued that, when the harassment took place, CD was acting outside the course of his employment.

The tribunal focused on the knowledge/authorisation of the employer as to the acts of CD. The tribunal found that CD was acting outside the scope of his employment because of the following:

- CD was not working at the time. He was not required to work at Hereford that day, nor was he required by the respondent to drive the claimant there. There was no evidence he was required to work that day at Hereford racecourse;

- the respondent had arranged "authorised" transport to drive the employees to Hereford. The only reason the claimant got into CD's car was because she missed the respondent's "official" transport and CD offered her a lift. The respondent had not authorised CD driving the claimant to Hereford; and

- whatever CD's motive was in offering a lift to the claimant, it was not because of a requirement linked to his employment. The lift by CD was not arranged or sanctioned by the respondent and the respondent had no knowledge of it.

The claimant appealed. She claimed the tribunal had failed to take into account the "extension of the workplace" principle established in (amongst others) the 1999 case of *Chief Constable of Lincolnshire Police v Stubbs*. In *Stubbs* a female police officer was sexually harassed by a male colleague at a pub where officers had gathered socially after work. The tribunal considered that the social gathering was closely connected to work and that the male officer's conduct took place in the course of employment. Although outside the workplace and outside working hours, the pub was deemed to be an "extension of the workplace" because the incident was a social gathering involving officers either immediately after work or for an organised leaving party. The individuals were only there because of work. The EAT commented that the situation would have been very different if the discriminatory acts had occurred during a chance meeting between the parties at a supermarket, which would have had no connection/nexus to work.

The EAT held that the tribunal should have taken into account CD's previous inappropriate communications (when he was working) and treated his later conduct in the car as an extension of that. The tribunal had also taken irrelevant factors into account, including that the respondent had

no knowledge of or had not authorised CD giving the claimant a lift to Hereford. The respondent's knowledge was not a critical factor.

The EAT disagreed with the tribunal's analysis on the core issue of whether the sexual harassment took place in the course of CD's employment. It emphasised that the tribunal had not taken into account sufficiently the "extension of the workplace" principle from *Stubbs* and had not sufficiently taken into account the simple point that CD and the claimant were only in CD's car because of a work connection, particularly as the claimant genuinely thought she was required to work that morning. The fact that CD, whilst working, had sent multiple texts to the claimant both in the previous week and earlier that morning also needed to be considered with a view to the lift he offered the claimant being both an "extension of work" and an extension of a course of sexually inappropriate conduct.

As guidance, the EAT made the following points:

- it is the alleged harasser who must be acting in the course of employment;
- the term "course of employment" should be interpreted widely in discrimination law, to protect employees at external events and/or outside working hours;
- the tribunal will always need to consider carefully the factual background and details;
- if the harassment takes place outside work/working hours the tribunal should consider whether there is a sufficient "*nexus or connection with work*" such as to render it in the course of employment. The tribunal may need to consider whether the circumstances are such as to make the situation an "*extension of work and the workplace*"; and
- if the actions took place without the knowledge and/or authorisation of the respondent, this is not a critical factor

WHY THIS MATTERS

It is an important principle that sexual harassment that takes place outside work and outside working hours can still be deemed to be in the course of employment – this was established in cases such as *Stubbs*.

Previous cases have established that, to protect employees from too restrictive an interpretation, situations which are outside work but have a sufficient connection or nexus to work will be treated as an extension of the workplace. This case reinforces and restates those principles, with the caveat that each case must be decided on its facts.

AB v Grafters Group Ltd (t/a CSI Catering Services International)

NEWS

EMPLOYMENT RIGHTS BILL – POSSIBLE DELAY AND FURTHER CONSULTATION

The House of Lords was expected to approve the Commons' ERB amendments on 28 October, but, in an unusual development, did not. They rejected four provisions in particular which will be sent back to the commons. This could cause delay to both agreement on the final from of the ERB and even Royal Assent.

The Lords focused on (and rejected) the following amendments made by the Commons:

- the government's plans to introduce day one rights for unfair dismissal, the Lords insisting on a six-month qualifying period;
- proposed changes to zero-hour contracts – the Lords voted in favour of an amendment opposing the government's proposal to compel employers to offer guaranteed hours to employees from day one;
- changing the 50% turnout threshold for an industrial action ballot to be valid, which the Lords wants to keep; and
- the proposal that new trade union members should automatically pay into a political fund – the Lords were clear they thought this should be optional.

It is unusual for the House of Lords to send amendments back to the House of Commons after the Commons has already rejected them once.

As well as this possible delay, it has been agreed that four areas of the ERB will be subject to consultation, including:

- **Enhanced dismissal protections for pregnant women and new mothers (consultation closes on 15 January 2026)** - this covers the proposed measures making it unlawful to dismiss pregnant women, mothers on maternity leave and new mothers for at least six months after their return, except in specific circumstances. The consultation will seek views on whether existing potentially fair reasons for dismissal should continue to apply, be narrowed, removed, or replaced with a new tailored test;
- **Bereavement leave including pregnancy loss (consultation closes on 15 January 2026)** - this covers implementation of the day one right to unpaid bereavement leave for employees experiencing the loss of a loved one, including pregnancy loss before 24 weeks. This will address eligibility, when and how leave can be taken, as well as notice and evidence requirements;
- **Trade Union access to workplaces (consultation closes on 18 December 2025)** - this covers the right for trade unions to access workplaces to meet, support, represent, recruit or organise workers. The consultation will seek views on how unions will request access, how employers

will respond, factors the Central Arbitration Committee (CAC) will consider when determining access terms, and how fines for breaches will be determined; and

- **Duty to inform workers of trade union rights (consultation closes on 18 December 2025)** - this covers the new requirement for employers to provide written statements informing workers of their right to join a trade union at the start of employment and at other times. It will seek views on the form, content, delivery method and frequency of reissuing the statement.

These consultations are unlikely to delay the ERB itself and are intended to clarify how the provisions will specifically be introduced through Regulations. However, taken with the Lords' objections to key provisions in the ERB, it shows a degree of hesitancy regarding some of the changes proposed.

PROPOSAL TO CHARGE TRIBUNAL FEES DROPPED

David Lammy recently confirmed that the government will not reintroduce employment tribunal fees. His reasoning is that it is a "fundamental principle" that everyone, regardless of their income, should have access to justice to challenge unfair workplace behaviour.

This is probably a pragmatic step – the proposed level of fees was low (£55) compared to the fees charged when they were unsuccessfully introduced in 2013 (£1,200 and £1,600 to appeal). Lammy perhaps believed the fees would be unpopular with trade unions and would not be high enough to generate the kind of revenue to help clear the tribunal backlog. It is expected that "day one" unfair dismissal rights (if successfully implemented – see above) will lead to a 15% increase in tribunal claims, adding further pressure on the current tribunal system. However, the unpopularity of charging fees might outweigh the benefit of any small increase in revenue.

RELATED CAPABILITIES

- Employment & Labor

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