



## Sex Discrimination & Harassment: Grievances & Tribunal Claims

Last month Andy Gray was dismissed and Richard Keys resigned from their jobs as Sky Sports presenters following sexist remarks made at work.

Our first article looks at how to deal with a grievance, what conduct constitutes sexual harassment and what the implications are for an employer if an employee were to bring a sex discrimination claim.

### Dealing with a grievance

On receipt of a grievance the employer should, meet with the employee and investigate the allegation. The employee can bring a work colleague or Union rep to the meeting.

The employer may decide that it should be dealt with under the disciplinary procedure. In this case, the person who raised the grievance should be informed and they may be interviewed again during the investigation.

The employer can instead investigate the full facts in the context of a grievance, and if upheld, start a disciplinary procedure.

The employee who raised the grievance should be offered a meeting to conclude their grievance after the grievance or disciplinary process is concluded. If they are not happy with the result they should be given the opportunity to appeal.

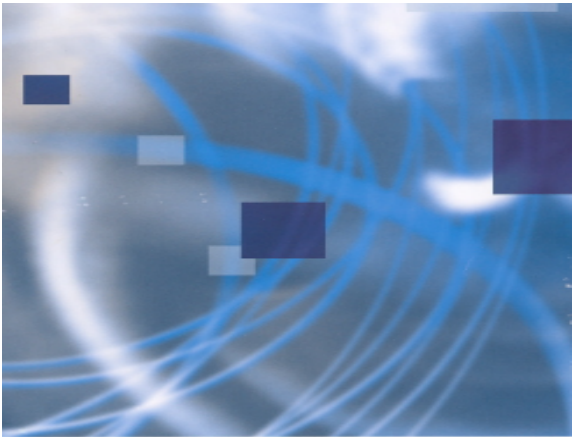
### Claims arising from sexist comments

Ideally, an employee who has been the victim of sexist treatment by a colleague will bring a grievance so that the employer can investigate it. However, there is no need for them to bring a grievance before making a claim to an Employment Tribunal. The employee may even resign before claiming.

Whether or not they bring a grievance, an employee can claim that they have been unlawfully discriminated against either on the basis that the conduct amounts to sexual harassment or that they have subjected the employee to a detriment.

Harassment is defined in section 26 of the Equality Act 2010 as

- Engaging in unwanted conduct that has the purpose or effect of violating her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or
- Engaging in any form of unwanted conduct of a sexual nature, that has the purpose or effect of violating her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or
- On the ground of her rejection of or submission to unwanted conduct of a sexual nature, he treats her less favourable than he would treat her had she not rejected, or submitted to, the conduct.



When deciding whether particular conduct amounts to harassment, a Tribunal must consider the perception of the person making the complaint, the circumstances of the case and whether it is reasonable for the conduct in question to have the effect alleged.

If an employee cannot show the conduct amounted to sexual harassment, they may still be able to prove unlawful discrimination if they can show that they were subjected to a detriment because of their gender.

### Liability for sex discrimination

An employee who claims sex discrimination can bring claims against either or both the employer and the individual whose conduct they complain about.

Normally, under section 109 Equality Act, the employer is “vicariously liable” for the actions of their employees, so it is not a defence for an employer to say they knew nothing about it, even if the employee who complained never brought it to their attention.

However, there is a defence available to an employer to show that it took all reasonable steps to prevent that type of discrimination taking place. It is not easy for an employer to defend a claim on this basis.

Normally a “Diversity” or “Equal Opportunities” Policy, which has been properly implemented, publicised to all employees and upon which management and supervisory staff are regularly trained would be needed for an employer to avoid liability for the discriminatory actions of its employees. Whilst this may be time consuming to adopt and implement, it could potentially save an employer from significant and expensive future claims.

An employee may not wish to make a claim where her grievance is conducted sensitively, but even if she does, the award for “injury to feelings” is likely to be less.

# Disciplinary Action for Sex Discrimination

The employer may, initiate disciplinary action where sexist conduct has come to the employer's attention with or without this being the subject matter of a grievance.

An employer should consider whether or not it could lead to dismissal (gross misconduct), and whether or not to suspend the employee.

If it should be obvious to the employee that it could be serious enough to merit dismissal then there is no problem classifying it as "gross misconduct" but it would be better if that kind of conduct is mentioned in the disciplinary procedure, staff handbook or employment contract as an example of "gross misconduct." Often "sexual harassment" is listed as an offence of gross misconduct, but sex discrimination which does not amount to harassment may be less clear cut.

If the type of offence has not been listed in the disciplinary procedure as "gross misconduct", and if it is not obviously a sackable offence, then an employee who is dismissed for a first offence can claim "unfair dismissal."

If the disciplinary procedure doesn't give the employer the right to suspend, there is probably an implied right to suspend the employee on full pay.

The normal reasons for suspension are to enable the allegation to be investigated, or to protect the accuser until the disciplinary is concluded. Suspension does not imply that dismissal is the likely sanction, nor is it necessary to suspend if dismissal is being considered.

The allegation should be properly investigated, by interviewing relevant witnesses and preparing written statements. The employee could be interviewed as part of the investigation, but they don't have to be as they will have the opportunity to put their case forward at a disciplinary meeting.

The employee should be invited to a disciplinary meeting by letter in which they are told:-

1. The allegation in enough detail for them to defend it (with copies of any statements or written evidence)
2. If it could result in dismissal
3. Their right to be accompanied by a Union rep or work colleague

There is no need for witnesses to attend, the employer can use written statements. The accused employee should be allowed to state his case and if he brings witnesses with him they should be heard. The employer can then conclude whether the allegations are proven and what the appropriate sanction should be.

If the employer has already fully investigated and upheld the allegation as a grievance a disciplinary meeting will need to be held to decide what the disciplinary sanction should be. However the employer should ensure that the employee accused was given an opportunity to fully defend themselves against the allegation during the grievance procedure, and if the employee brings up any new evidence at the disciplinary meeting that should be considered.

The employer must consider the seriousness of what happened and any mitigating factors.

If it is gross misconduct, the usual sanction will be dismissal. An employer may instead give a final written warning. Dismissal for gross misconduct can be with immediate effect.

If the offence isn't one of gross misconduct, an employee who is dismissed because they are already subject to a final written warning should be given their contractual notice.

If a warning is given the employee should be informed of the type of warning and how long the warning will last.

The result should be confirmed in writing (even if it has been communicated to them at the meeting). The letter should say that they have the right of appeal, who to appeal to and the deadline for appealing.

## Useful Information at a glance

### National Minimum Wage

Age	
Age 22+	£5.93
Age 18 - 21	£4.92
Age 16 - 17	£3.64

### Statutory Sick Pay

Current Rate £79.15. From 06 April 2011 £81.60 (for up to 28 weeks in any 3 year period)

### Parental Payments

Type of Payment	From 06.04.11	Maximum Period
Statutory Maternity Pay (higher rate)	90% of weekly earnings	6 weeks
Statutory Maternity Pay (basic rate)	£128.73 per week (or 90% of earnings if lower)	33 weeks
Maternity Allowance	£128.73 per week (or 90% of earnings if lower)	39 weeks
Statutory paternity pay	£128.73 per week (or 90% of earnings if lower)	2 weeks
Statutory adoption pay	£128.73 per week (or 90% of earnings if lower)	39 weeks

**Maximum weekly pay for redundancy calculation** £400

This newsletter does not provide a full statement of the law and readers are advised to take legal advice before taking any action based on the information contained herein. For further information please contact: Stephen Woolley (Head of Employment) or Rachel Mills, Robinsons Solicitors, St James Court, Friar Gate, Derby, DE1 1BT. **Tel:** (01332) 254 185, **Email:** rachel.mills@robinsons-solicitors.co.uk

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