HR review

Richard Lister: How employers in European jurisdictions should deal with workplace sexual harassment

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Legal experts from the leading global HR and employment law firm alliance, Ius Laboris explain the legal position on sexual harassment at work in five European countries and best practice for employers

Recent allegations against the film producer Harvey Weinstein and a host of other high-profile individuals have put the spotlight on sexual harassment and how it remains a persistent problem, particularly for working women. This is despite the increasing legal regulation of workplace harassment across the globe in recent years and a growing recognition that dignity at work is an important issue for employers to address.

Within European jurisdictions, there is a degree of uniformity in laws concerning sexual harassment on account of European Union legislation. The issue was first addressed in a concerted way at EU level in 1991, with the adoption of a Recommendation on the dignity of women and men at work and a Code of Practice on measures to combat sexual harassment.

The current EU definition of sexual harassment set out in the 2006 Equal Treatment Directive (2006/54/EC): *"where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".*

While EU regulation has led to some measure of consistency in member states' laws dealing with sexual harassment, there are significant differences of emphasis and approach. This article outlines the legal position and key elements of best practice for employers in five countries – the UK, Italy, France, Denmark and Belgium.

United Kingdom

The law prohibiting sexual harassment in the UK is set out in the Equality Act 2010. This protects all employees and many other types of workers from harassment at work that is related to any of various protected characteristics, including sex.

There is a general definition of harassment covering any unwanted conduct which is based on sex, and which has either the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. This definition is wide enough to cover a wide range of conduct, from one-off sexist comments or jokes right up to serious sexual assaults.

In addition, in line with the EU definition (above), the definition of harassment specifically covers unwanted conduct "of a sexual nature", which is prohibited if it has the purpose or effect referred to above. It is also harassment if the harasser treats the victim less favourably because of the victim's rejection of or submission to this conduct. This covers the situation where a person's career is damaged when they either give into or refuse sexual advances from a more senior employee.

It is not necessary for a victim to have made it clear in advance that harassing conduct was unwanted, and the harasser may still be liable for harassment even if he/she was not aware of the effect of the behaviour. The victim's reaction to the behaviour must be reasonable, so a purely subjective perception that seemingly innocent behaviour is harassment will not necessarily meet this test. Such behaviour may, however, become harassment if the conduct is repeated after the victim has asked for it to stop.

Employers in the UK are liable for acts of sexual harassment committed by their employees, even if these were not authorised or known about. An employer has a defence in this situation if it can show that it has taken all reasonable steps to prevent the harassment from occurring.

Although it is important to deal with issues of harassment promptly when they arise, this is not sufficient to show all reasonable steps have been taken. Employers are expected to be proactive in preventing sexual harassment from happening at all, by implementing clear policies and providing training to their staff – particularly to managers who may be in a position of power over other employees.

Italy

The relevant law is set out in the Italian "Code of Equal Opportunities" (Law No 198 of 11 April 2006, Article 26 para.2). This defines sexual harassment as a form of discrimination and, in particular, as unwanted conduct of a sexual nature expressed in any way which violates, or is intended to violate the dignity of an employee or which creates an intimidating, hostile, degrading, humiliating or offensive working environment. This closely reflects the EU definition (above).

Any agreements or decisions concerning the employment contract of an employee who is a victim of sexual harassment are null and void if they are adopted as a consequence of the employee's refusal of, or subjection to, the harassment. So, for example, an employee who is subjected to a punitive transfer – even if formally justified by technical and organisational reasons – for refusing to endure to harassment may appeal to the court to get the transfer cancelled.

Even if the employer is not itself the perpetrator of the harassment, it could still be liable on account of the general obligation to ensure the health and safety of all employees (Article 2087 of the Italian Civil Code). As a

result, employers have a duty to prevent and punish sexual harassment occurring in the workplace. They should adopt all necessary measures to guarantee a safe working environment, in which everyone's dignity is respected, and interpersonal relationships are promoted (based on principles of equality provided for by Italian Constitution).

In this context, the way in which the employer approaches employees who report sexual harassment becomes crucial. To prevent potential liability for sexual harassment, employers could draft clear policies clarifying what amounts to sexual harassment and prohibiting any unlawful conduct (which may include retaliation against employees for bringing complaints of harassment). The policy can expressly provide for possible legal remedies to be taken against the harasser.

An employer receiving a complaint of sexual harassment by an employee should carry out a prompt and accurate investigation. If the allegation is established, the employer should take appropriate disciplinary action against the harasser, including dismissal depending on the seriousness of the case.

France

Sexual harassment is a criminal offence in France. It is defined by the fact of repeatedly imposing behaviours or discussions with a sexual connotation on a person that either: offend his or her human dignity because of their degrading or humiliating characteristics; or create an intimidating, hostile or offensive situation for that person. Any form of serious pressure, even if not repeated, that is exercised with the real or apparent aim of obtaining a sexual favour for the perpetrator or for a third party also amounts to sexual harassment. In the work-related environment, employers have a duty to protect employees against such harassment, as part of their general obligation to provide a safe working environment.

When faced with a sexual harassment claim, the employer should immediately conduct an investigation, in association with employee representatives, to determine whether the allegations are genuine. The occupational doctor should also be advised of the situation and involved in the investigation.

The investigation will entail discussions with the alleged victim and the alleged perpetrator and identify possible witnesses. It is advisable to ask stakeholders to issue affidavits to build the case for a potential trial. These should be handwritten, including certain mandatory specifics, in order for them to be used in court.

If the result of the investigation is that sexual harassment has occurred, the harasser should be dismissed. Case law has determined that sexual harassment constitutes serious misconduct, which makes it impossible to continue executing the employment contract.

Any failure by an employer to react when there is a sexual harassment claim is likely to make matters significantly worse for it. The victim may choose to go to court and claim damages for the company's failure to provide a safe working environment, possibly contending that there is a case for constructive dismissal to terminate the employment contract. This would include a claim for all sums connected to the termination and damages for dismissal without legitimate grounds.

In addition, the Labour Inspector may be advised of the situation and decide to start an on-site investigation to determine whether there is a sexual harassment. Such investigations are usually very time consuming, as the Inspector will want to see the employees concerned as well as potential witnesses, in addition to the company's general manager and HR director. French employers generally seek to deal with matters of this type in a in a confidential manner to avoid adverse publicity.

Denmark

The Danish Act on Equal Treatment of Men and Women defines sexual harassment closely in line with the EU law definition (above). The following instances of conduct have been held to constitute sexual harassment: touching breasts or crotch; patting buttocks and thighs; verbal advances; invitations to sex; dirty jokes. According to case law, it is not currently possible to set a lower threshold for what may be deemed to constitute sexual harassment.

Employers are required to take action when they become aware that an employee is alleging sexual harassment, but, there are no specific legal obligations in relation to investigative procedure to be followed. According to the Danish Working Environment Authority, it is advisable for the employer to talk with the alleged harasser as well as the alleged victim to determine the facts. As it may be difficult for the employer to be objective, it is also advisable for it to involve a third-party adviser in these matters.

Similarly, there is no legislation or case law in Denmark specifying that the employer is obliged to implement particular measures to prevent sexual harassment in the workplace. The Danish Working Environment Authority recommends that the employer discusses any such measures with the employees. This dialogue could, for example, take place in the cooperation committee (if there is one).

Most large companies have implemented a sexual harassment policy that provides guidelines on information regarding the type of behaviour which will not be tolerated, specifying that sexual harassment is prohibited and laying down clear directions on how and where employees can file a report. However, it is not common that companies offer training courses for their managers to prevent sexual harassment.

Belgium

There is extensive legislation in Belgium on the prevention of so-called “psychosocial” risks at work, including stress, conflicts, burnout etc. This forms part of the general law on wellbeing at work, which also contains measures on safety and security and employees’ health. The most extreme forms of psychosocial risks at work are violence and harassment (bullying) and sexual harassment.

Companies need to take measures to prevent sexual harassment. Such measures must be based on a risk analysis and will differ from one business to another, taking into account factors such as the activities, the context and whether it is a large or small organisation.

Employers also need to implement internal procedures to enable employees who have been sexually harassed to contact a neutral and objective person of trust and/or a specialised prevention counsellor (usually someone who is external to the company and a certified psychologist). Employees who use these internal procedures are protected against dismissal. Finally, employers should provide psychological assistance and support to victims.

Companies failing to comply with the legislation on psychosocial risks at work risk criminal penalties and can be ordered to pay damages to employees who have been victim. The harasser can also be liable under both the civil and criminal law. (Sexual harassment at work is considered a crime under Belgium’s Social Criminal Code.)

In light of the legislation outlined above, employers who are confronted with allegations of sexual harassment should first verify the exact content of the complaints are and whether they are credible. They should take the time and effort to listen to the employee and try to reach to a solution.

In case of proven sexual harassment by a work colleague where any further collaboration appears impossible, the employer may consider taking disciplinary sanctions against the harasser. Different courts have decided that acts of sexual harassment can justify proceeding to a dismissal for serious cause without notice or severance pay. In this type of scenario, it is advisable for employers to take the lead in searching for a solution themselves, rather than asking the employee asserting sexual harassment to start an internal procedure based on the above laws. The latter is generally time-consuming and laborious for all concerned and does not always lead to a satisfactory outcome.

Conclusion
It is clear from the above that there potentially severe legal penalties lie in wait for organisations that fail to take concerted measures to prevent sexual harassment in the workplace and deal with it effectively whenever it occurs. Prudent employers will have a comprehensive policy in place and seek to foster a culture in which harassment is outlawed and employees are encouraged to report unacceptable behaviour.

It is important for such anti-harassment policies to be drafted carefully to be consistent with the legal environment of the jurisdictions in which they are intended to operate. In general terms, however, key ingredients would include:

- a clear definition of sexual harassment and illustrative examples of impermissible behaviour;
- confirmation that employees are encouraged to report harassment by their colleagues, with straightforward channels for doing so;
- clear procedures for investigating complaints and formal/informal resolution processes;
- specification of the disciplinary sanctions that will apply when harassment has occurred (including dismissal where appropriate).

Once the policy is in place, it is important for employers to ensure it is implemented effectively, well understood throughout the organisation and followed in practice.

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About Richard Lister

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The online link to the article can be found here.