Labour&European
law review
Autumn 2019 | issue 144

Focus on Sexual Harassment at Work

www.thompsonstradeunion.law
www.thompsons.law

Jo Seery considers the legal tests that are required to prove sexual harassment and the approach that tribunals generally take when deciding a complaint

Sexual harassment still an issue at work

SEXUAL HARASSMENT has long been a priority issue for unions who have exposed just how pervasive it is in the workplace. As such, they have provided support networks for women and negotiated sexual harassment policies and procedures.

What is the extent of the problem?

However, as tribunal claims for sexual harassment are included within tribunal classification of claims for sex discrimination, it is difficult to know if there has been an increase in the number of legal claims since campaigns like #MeToo shone a light on the prevalence of sexual harassment at work almost two years ago.

What is clear, however, as the TUC found in its report *Still just a bit of banter? Sexual harassment in the workplace*, is that those most affected tend to be vulnerable workers such as young workers and those on zero hours contracts. The fact that a legal claim is dependent on an individual bringing a claim against their employer is also undoubtedly a factor.

What does the law say and how is it applied?

The right to pursue a legal claim as a result of being subjected to sexual harassment is set out in the Equality Act 2010.

It applies to job applicants, apprentices, employees and former employees, workers, contract workers and agency workers. So those on zero hours contracts are covered.

Who is liable?

Employers are liable for the discriminatory acts of their workers done in the course of employment. This means that employers are liable for sexual harassment in the workplace and for the actions of any of their workers who harass a work colleague. Claims can be brought against both the employer and the individual harasser.

However, an employer has a defence if they can show that they took all reasonable steps to prevent the harassment.

To rely on this defence the employer must have taken actual practical steps before the harassment started. In other words, simply having a policy on sexual harassment is not enough on its own to amount to a reasonable steps defence, as per the decision of the Employment Appeal Tribunal in **Caspersz -v- Ministry of Defence**.

However, even if an employer succeeds in this defence a claim may still proceed against an individual harasser provided that it can be shown the employer would still have been liable but for that defence.

How is sexual harassment defined in the Act?

Section 27 defines sexual harassment as unwanted conduct of a sexual nature that ➲

➲ has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

The Equality and Human Rights Commission gives examples of conduct of a sexual nature that includes unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails containing material of a sexual nature.

Other examples include sexualised comments about dress or appearance, deliberately brushing up against someone, non-consensual sharing of sexual images or videos, inappropriate sharing of sexual comments on social media, coercion and threats.

Unwanted conduct of a sexual nature can be a single remark or incident or a series of comments or behaviours. A tribunal will consider all the acts together when determining if sexual harassment has occurred rather than assessing each act individually.

"Employers and individual perpetrators may dismiss complaints of sexual harassment as "just banter" in an attempt to trivialise it and undermine an individual's perception"

How can individuals prove sexual harassment?

For harassment to be unlawful it must satisfy the definition set out in section 27. Most cases of sexual harassment therefore depend on a tribunal finding that the unwanted conduct had the prescribed effect of violating a person's dignity or creating an intimidating, hostile, etc environment.

When determining whether or not harassment has the prescribed effect, the tribunal will take into account:

- the perception of the person complaining of the harassment
- the circumstances surrounding the case, and
- whether it was reasonable for the conduct to have that effect.

How is an individual's perception assessed?

Employers and individual perpetrators may dismiss complaints of sexual harassment as "just banter" in an attempt to trivialise it and undermine an individual's perception.

However, it is for the tribunal to consider how that person actually felt or perceived their dignity to have been violated on the basis that people have different tolerance levels. As a result, conduct that might be offensive to one person may not be to another.

Similarly, tribunals understand that incidents which, on the face of it appear to be innocuous, can take on a different significance where there is evidence that there have also been acts of a sexual nature.

For example, being shown family photographs would, on its own, seem unobjectionable but, taken together with sexual innuendo, the act of showing photographs may be treated as part of a course of conduct all of which amounts to sexual harassment.

The individual's perception is not considered in isolation, however, and a tribunal will take into account the context of what was said or done and surrounding circumstances such as the person's health, their status and working relationships.

What if the harassment has taken place over a long period?

Tribunals understand that there are many situations where people will put up with unwanted conduct because they are constrained by a variety of social circumstances.

So, for example, in one case, a group of women workers who were subject to a number of comments including questions about their personal lives, and who were shown inappropriate photographs and asked to wear short skirts over a long period of time succeeded in their claims for sexual harassment.

In upholding their claim, the tribunal took into account the fact that they were migrant workers with no certainty of employment and so were financially constrained into putting up with the behaviour.

If it has been made clear to the perpetrator or a grievance has been lodged that the conduct is unwanted and is offensive and/or violates the individual's dignity, it will be harder for an employer to argue that the conduct did not have the perceived effect.

Where an individual feels unable to complain, trade union representatives can help by either raising the issue on their behalf or collectively in negotiations with the employer.

Can tribunals take the complainant's sexual behaviour into account?

One issue that can deter women from bringing a claim for sexual harassment is the extent to which their own behaviour may come under scrutiny should a case proceed to a tribunal.

The courts have made clear that a woman has a right to express her sexuality without prejudice to her right to decide what she finds offensive.

A tribunal can also disregard evidence that would create an atmosphere of prejudice. Nevertheless, a tribunal can take into account the complainant's own sexual behaviour when making an award for injury to feelings.

What about harassment by clients or customers?

When someone is subjected to harassment by a client, customer or service user, this is known as third party harassment. Although the law dealing with this type of harassment was repealed in 2013, case law has held that it may still be possible to argue that an employer is liable if, by failing to prevent harassment by a client or customer, the employer creates an intimidating, hostile etc. environment for the individual to work in.

How should claimants go about gathering evidence?

It is often difficult to obtain evidence of sexual harassment especially as it usually takes place behind closed doors leaving women feeling alone and isolated.

But as the #MeToo campaign has revealed, the perpetrators may have committed similar unwanted acts on others. The ACAS Ask and Respond questionnaire procedure is therefore useful in gathering information as it enables individuals to ask the employer questions about previous incidents of sexual harassment and what measures they put in place to prevent them.

What time limits apply?

The time limit for lodging a tribunal claim is three months less one day of the act or where there is a continuing course of harassment the time limit is three months less one day of the last act. There is also a requirement to contact ACAS to start early conciliation before a claim can be lodged.

The problem is that, in many cases, by the time a woman has plucked up the courage to speak to someone about the harassment, the time limit has well and truly passed.

Tribunals are able to apply their discretion to extend the time limits where it is just and equitable to do so but there is no guarantee that they will. So it is important for women to contact their union rep as soon as possible.

Conclusion

As can be seen, the legal route is limited and very much depends on an individual bringing a claim.

Following the launch of the TUC's campaign, "This is not working", and a petition asking the government to introduce a mandatory duty on employers to take proactive measures to prevent sexual harassment in the workplace, the government has now launched a consultation on a mandatory duty.

Such a duty on employers will need to be clear and robustly enforced. At the same time, women subject to harassment must have an easier route to access justice. What is clear is that more radical measures are necessary to bring about a real change.

Charlotte Moore looks at the various remedies that are available to claimants who succeed in their tribunal complaint that they have been sexually harassed in the workplace

Remedies in sexual harassment claims

IF AN EMPLOYMENT tribunal upholds a claim of sexual harassment, it has a number of remedies available to it, which are: declarations, recommendations and compensation.

What are declarations?

When a tribunal finds in favour of a claimant, it can make a declaration that the respondent (the employer) has breached the claimant's rights under the Equality Act 2010. However, despite a finding that the employer has breached the law, making a declaration does not require them to take any particular action as a result of that breach.

This remedy is generally considered to be appropriate when the claimant has not suffered any financial loss, although a tribunal may well make an award of injury to feelings. It is also appropriate if the claimant is only seeking to establish a point of principle. In other words, tribunals make a declaration in cases where they have found that the employer has done something wrong but it is not so egregious that it requires the claimant to be compensated.

"Compensation can be awarded by tribunals in discrimination cases for financial loss, injury to feelings and personal injury caused by the discrimination"

What are recommendations?

Alternatively, if a harassment claim is successful, a tribunal may make a recommendation requiring the respondent to take specified steps within a stipulated time period to remove or reduce the adverse effect of the harassment on the claimant.

Examples of recommendations that a tribunal might make include: introducing an equal opportunities policy; ensuring policies (such as harassment policies) are more effectively implemented; moving a harasser to another department away from the claimant; removal of any sanction from the claimant's records; circulation of the tribunal's judgment around the employer's board; and/or recommending training in equal opportunities for the wider workforce.

If the employer fails to comply with a recommendation without offering a reasonable excuse, a tribunal may increase the compensation to the claimant or award compensation if it has not already done so.

Tribunals have no power to enforce a recommendation, but a failure to comply could be used to support subsequent similar harassment claims made by the claimant or their colleagues.

What awards of compensation can tribunals make?

Compensation can be awarded by tribunals in discrimination cases for financial loss, injury to feelings and personal injury caused by the discrimination.

When assessing compensation, the tribunal should aim to put the claimant in the same position they would have been had the harassment not occurred. Unlike compensation for unfair dismissal, there is no upper limit or statutory cap on the amount that can be awarded. However, only losses caused by the act(s) of harassment will be recoverable.

a) Financial loss

Financial loss that can be claimed include salary (subject to any state benefits received) and/or pension loss, loss of any employment benefits and any expenses incurred (such as prescription charges for medication, counselling fees, or expenses involved in looking for new employment or study opportunities, if the employment has ended).

In addition, a tribunal may award stigma damages if a claimant can show compelling evidence that by bringing a harassment claim they have been prejudiced in the labour market or suffered loss of career progression, because employers are less likely to employ them as a result.

b) Injury to feelings

Compensation can also be awarded by tribunals for injury to feelings, irrespective of whether the claimant has suffered any financial loss. The award is compensatory, not punitive in nature, so a tribunal cannot inflate the award because it disapproves of the way the respondent has behaved.

In addition, case law has determined that awards should "not be so high as to amount to a windfall, nor so low as to diminish respect for the law and undermine [harassment] protection".

It is for the claimant to establish that their feelings have been injured. While medical evidence is not required, it can help in a claim for injury to feelings to highlight the ways in which the harassment has impacted on the claimant.

When calculating an award for injury to feelings, the tribunal will take into account factors such as the degree of hurt, distress or upset caused, the claimant's vulnerability and the seriousness of the harassment.

In **Vento -v- Chief Constable of West Yorkshire Police**, the Court of Appeal set out clear guidelines on the level of injury to feelings awards and established three bands of potential awards, which have been subject to inflationary increases over the years.

These bands are currently as follows:

Lowest band – less serious cases, such as a one-off incident or an isolated event. Awards lower than this should be avoided	£900 - £8,800
Middle band – more serious cases which do not merit an award in the highest band	£8,800 - £26,300
Top band – most serious cases, such as where there has been a lengthy campaign of harassment. Awards can exceed this only in highly exceptional cases	£26,300 - £44,000

A good example is the case of **Southern -v- Britannia Hotels Ltd and anor**, in which the claimant was awarded £19,500 for acts of harassment (including inappropriate physical contact) relating to her sex, which she suffered over a period of eight months.

The tribunal found that the nature of the harassment was not the very worst of its type. However, the claimant was a highly vulnerable person as she was only 22 and had a long-standing history of mental ill health. The harassment was committed by her manager, who held a position of power over her, and although her employer had the means and opportunity to address the problem, they failed to do so.

"A tribunal cannot inflate the award because it disapproves of the way the respondent has behaved"

While employers are liable for the discriminatory acts of their employees or agents done in the course of their employment, they have a defence if they can show that they took such steps as were reasonably practicable to prevent them from carrying out those acts. If there is a risk of the employer succeeding with this ➲

defence, the claimant can "join" the harasser as a co-respondent in the case. However, if the harasser is another employee or agent, they cannot simply sue them. Instead they would have to bring a claim against both the employee and the employer/agent.

So for example, in **Cox -v- Macklin Street Surgery and anor**, a trainee GP committed acts of sexual harassment that the employment tribunal described as "wholly inappropriate, suggestive [and] very unpleasant".

Both the employer and harasser admitted sexual harassment which had led to the claimant's resignation, due to the employer's failure to respond properly to her complaints. In assessing compensation, the tribunal awarded damages for injury to feelings of £2,500 against the employer and £3,500 against the harasser. The tribunal found that the context of sexual harassment as a whole was towards the lower end of the scale but the claimant was undergoing IVF and the stress she suffered caused her to haemorrhage.

> *"The tribunal must focus on the aggravating effect of the respondent's conduct on the claimant's injury and not on the employer's conduct or motive, as they are not punitive in nature"*

c) Personal injury

Damages for personal injury can be claimed as part of compensation for harassment. Most of these are in relation to new psychiatric injury suffered as a result of the harassment.

Compensation for personal injury is made up of general and special damages. General damages include pain and suffering and loss of amenity and are calculated in accordance with the Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases. Special damages cover financial loss arising out of the injury, such as medical expenses and loss of earnings.

The tribunal must be careful to ensure that when assessing general damages for pain and suffering (as part of personal injury damages) and assessing injury to feelings, it does not compensate the claimant twice for the same injury.

However, a claimant can be awarded a figure for injury to feelings for the type of harassment to which they were subjected, as well as a sum for personal injury if the harassment caused them to develop anxiety and/or depression and they were unable to work as a result.

d) Aggravated Damages

Aggravated damages are an aspect of injury to feelings awards but are additional to any amount the tribunal may award under the Vento guidelines. They are awarded only in the most serious cases where the respondent's conduct has aggravated the claimant's injury.

Case law has determined that they can be awarded where the respondent has acted in a "high-handed, malicious, insulting or oppressive manner and with bad intentions".

When calculating the amount of the award, the tribunal must focus on the aggravating effect of the respondent's conduct on the claimant's injury and not on the employer's conduct or motive, as they are not punitive in nature.

Examples of conduct that could lead to an award of aggravated damages include: attempting to cover up or trivialise the harassment; failing to investigate complaints or take them seriously; promoting or rewarding the harasser; intimidating the claimant during litigation (for example through oppressive and unwarranted costs warning letters); and unjustified assertions that the claimant is acting in bad faith.

e) Exemplary Damages

Exemplary damages are awarded to punish the respondent and are only available in very rare cases where the compensation itself is insufficient punishment and the respondent's conduct is either:

- oppressive, arbitrary or unconstitutional action by servants of the government; or
- calculated to make a profit which could exceed the compensation otherwise payable to the claimant.

Rakesh Patel looks at the use of confidentiality clauses in settlement agreements in the era of the #MeToo movement and high-profile cases like that of businessman Sir Philip Green

The impact of confidentiality clauses

BASICALLY, CONFIDENTIALITY clauses (also called non-disclosure agreements or gagging clauses), which are found in settlement agreements, restrict what a party to the agreement can say, or who they can tell about a specific situation.

The agreements also often include non-disparagement clauses preventing the parties to the agreement from saying anything derogatory about each other or specific, named individuals.

In an employment context, they are often used when someone's employment has come to an end; or alternatively to settle a dispute with an existing employee who remains in their job.

Confidentiality clauses are not, however, confined to sexual harassment cases only. They are included in almost all agreements resolving any kind of employment claim or dispute. In fact, it is very rare for there not to be some form of confidentiality clause in a settlement agreement, although the degree of confidentiality required from the employee can vary.

Why have they come under scrutiny?

The clauses are contentious because they are alleged to silence people sometimes in return for large sums of money. So, for instance, Sir Phillip Green is alleged to have reached a number of agreements with

members of his staff who accused him of subjecting them to inappropriate behaviour.

They have therefore come under scrutiny recently by the Women and Equalities Select Committee (WESC) of the House of Commons. After completing a report into sexual harassment in the workplace last year, the WESC launched an inquiry into the use of confidentiality clauses because of concerns that they were being used to

➲ routinely cover up allegations of unlawful discrimination and harassment.

Following up on this, the government published a consultation document in April this year on the misuse of confidentiality clauses in the employment context, and whether further legislation to tackle any misuse was needed.

What has the government proposed?

In July the government published proposals in response to its earlier consultation.

While acknowledging that "confidentiality clauses have a legitimate place in the employment context and are not misused in all scenarios", it was critical of the increasing use of these clauses to silence and intimidate victims of harassment and discrimination.

"At the heart of sexual harassment is an imbalance of power between the harasser and the victim"

The government has therefore proposed that it should:

- Legislate to ensure that a confidentiality clause cannot prevent an individual from disclosing information to the police, regulated health and care professionals or legal professionals. Disclosure permissions will not be extended, however, to unregulated therapists and counsellors.
- Legislate so that the limitations of a confidentiality clause are clear to those signing them. This means that the clause must be clear and specific and, for example, not give the impression that the employee cannot disclose information to the police about harassment, discrimination or other crimes.
- Legislate to improve the independent legal advice that is available to an individual when signing a settlement agreement so that it is given not only on the nature of the confidentiality requirement but also on the limitations of the clauses.
- Provide guidance on drafting requirements for confidentiality clauses.
- Introduce new enforcement measures for confidentiality clauses that do not comply with legal requirements. No details have yet been provided on what this means for confidentiality clauses in settlement agreements. In relation to confidentiality clauses in contracts of employment which do not meet the new drafting requirements, additional compensation will be available to individuals in certain circumstances. This will not apply retrospectively, however.

Are these measures sufficient?

It is difficult to be overly critical of these proposals if only because they are reasonably sensible. However, that is all they are – reasonably sensible. They are not ground breaking and are unlikely on their own to tackle the underlying problem of sexual harassment in the workplace, which requires a cultural and political shift that it is simply unacceptable.

That is because, at the heart of sexual harassment is an imbalance of power between the harasser and the victim. More often than not the harasser is more senior than the victim.

This imbalance makes it difficult for the victim to resist and make clear that the behaviour of the harasser is unwanted and/or complain about it once the harassment has taken place. Victims justifiably fear that complaining could lead to victimisation, including losing their job.

How do the measures relate to the tribunal system?

It's also difficult to see how the government's proposals sit alongside a tribunal system that is adversarial in nature and which requires a certificate to confirm that attempts at settlement have been undertaken prior to lodging a claim.

The tribunal system reflects a further imbalance – that between employer and employee. Employers will usually have resources to fight the case. Employees, particularly those who are not union members, will often not have access to legal help. The main power the employee has in these circumstances is the possibility that the case becomes public knowledge. Employers will naturally worry about reputational damage.

In the absence of an alternative system of enforcement, all that is left for an employee is to stay quiet or bring an individual case to the employment tribunal. However, that is far from straightforward. Firstly, the burden of proving the case is on the employee; secondly all litigation tends to be very stressful; and thirdly, claims of harassment can be harrowing for the victim.

Once litigation is underway, most employers will fight the case aggressively. There can, of course, be no legal compulsion on the employer to settle the case. It should also be remembered that the evidence in most sexual harassment cases is usually not cut and dry. The strongest cases may settle for a large sum of money and occasionally without a confidentiality clause, but these are the exception, not the rule.

Where the evidence is unclear, bringing a tribunal claim can amount to a lottery, in the sense that much will depend on how each party's witnesses perform on the day and how the evidence plays out on the day.

Added to this unpredictability is the stress for the employee of having to give evidence and be cross examined by experienced and highly skilled lawyers. Given these circumstances, it is easy to see why some advisors recommend that the employee accepts a reasonable financial offer with a confidentiality clause.

Should they be banned?

Banning confidentiality clauses, as some campaigners have called for, would, however, be a serious mistake. Without confidentiality clauses employers may well settle fewer cases because there is little incentive to settle a dispute that cannot be kept confidential.

Apart from anything else, some employees themselves want a confidentiality clause. Indeed, in my experience employees often want a confidentiality clause concerning a settlement.

They do not necessarily want people to know the financial terms and may also wish to have finality and not be defined by the experience of bringing a discrimination claim or being seen as a victim. In other words, they want to move on with their lives and future career plans.

What else can be done?

In my view, too much focus has been placed on confidentiality clauses, as if banning them or regulating them more will eradicate the problem. It is a real pity that the more radical recommendations in the WESC report were not accepted by the government as some have the potential to make employers take serious steps to tackle sexual harassment.

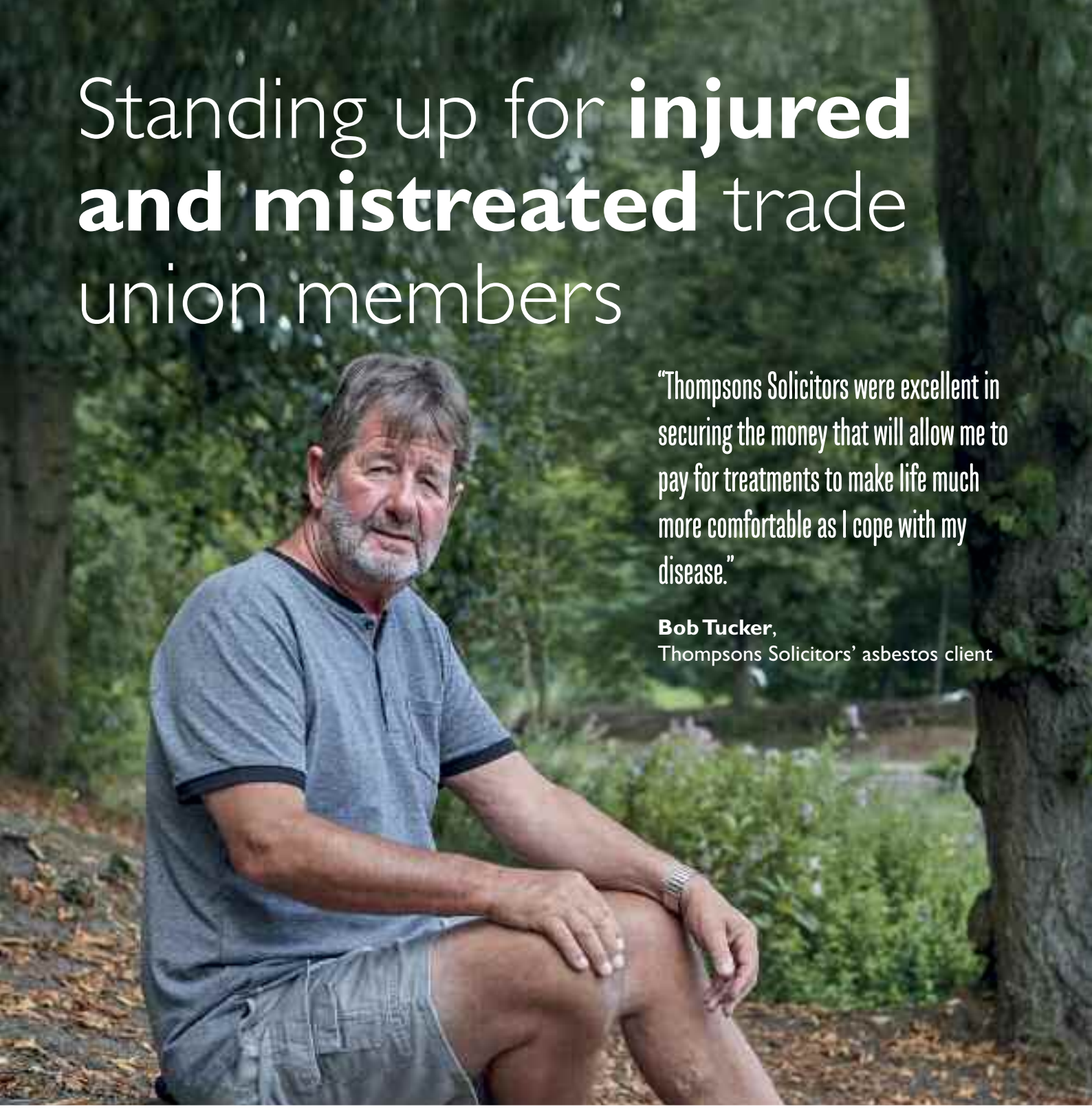
For instance, in its 2018 report on sexual harassment in the workplace, the WESC recommended that the government should "improve the remedies that can be awarded by employment tribunals by giving them powers to award punitive damages and that there should be a presumption that tribunals will normally require employers to pay employees' costs if the employer loses a discrimination case in which sexual harassment has been alleged".

This is likely to be a real deterrent and would force employers to take the problem of sexual harassment seriously.

The WESC also recommended that the government place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace.

Any breach of that duty should, it said, "be an unlawful act" enforceable by the Equality and Human Rights Commission and should result in substantial financial penalties against employers.

These are the sort of radical changes that are needed to properly tackle sexual harassment in the workplace. If employers know that the failure to deal with harassment and to have measures to prevent harassment will hit them in their pockets, they are more likely to take the problem seriously.



Standing up for **injured and mistreated** trade union members

"Thompsons Solicitors were excellent in securing the money that will allow me to pay for treatments to make life much more comfortable as I cope with my disease."

Bob Tucker,
Thompsons Solicitors' asbestos client

As the UK's leading trade union law firm, Thompsons Solicitors offers specialist and bespoke legal services to trade union members and their families. We remain committed to the trade union movement, as we always have been since our own creation in 1921, and are proud to have never worked for employers or insurance companies.

Contributors to this edition: Charlotte Moore, Rakesh Patel, Jo Seery
Editor: Alison Clarke
Design & production: www.rexclusive.co.uk

THOMPSONS SOLICITORS
STANDING UP FOR YOU

0800 0 224 224
www.thompsonstradeunion.law