A closer look at the new duty to prevent sexual harassment in the workplace

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The Worker Protection (Amendment of Equality Act 2010) Act 2023 established a new duty on employers to prevent sexual harassment of their employees. The New Duty, which comes into force in October 2024, will give lawyers and their clients food for thought.

By now, employment lawyers will be familiar with the New Duty's main plot points, such as its dual enforcement by the EHRC and individuals; the ability of employment tribunals to uplift compensation by up to 25% for contraventions; the initial plans for it to mirror the 'all reasonable steps' defence under s.109(4) Equality Act 2010; and the 11th-hour decision to circumscribe its scope by removing the word 'all'.

But these headlines do not tell the whole story. On closer reading, lurking within the New Duty, are surprises, tensions and ambiguities – many of which, it seems, have yet to be fully aired. The hope of this article is to start that conversation and to indicate some (though not all) of the issues to which lawyers and their clients may wish to give further thought, pending updated guidance from the EHRC.

Unless otherwise indicated, references to sections below are to sections of the EqA.

The New Duty: s.109(4) in disguise?

To recap, the New Duty is set out in new s.40A(1): 'An employer (A) must take reasonable steps to prevent sexual harassment of employees of A in the course of their employment.'

Section 40A(2) clarifies that 'sexual harassment' for these purposes means the kind of harassment described in s.26(2), ie unwanted conduct of a sexual nature.

A recurring theme during the development of the New Duty was the perceived desirability of couching it in terms of pre-existing EqA concepts. As mentioned above, the Government took as its inspiration the 'all reasonable steps' defence under s.109(4) with which, according to the Government, employers should already be familiar and compliant.

However, despite their overlaps, the New Duty and s.109(4) are not clones of each other; and their differences go beyond the fact that s.109(4) requires '*all* reasonable steps' and is not limited to instances of sexual harassment. Employers may therefore sleepwalk into difficulty if they assume that s.109(4) will automatically steer them towards compliance with the New Duty.

Section 109(4) provides as follows:

> *'In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A –*
> *(a) from doing that thing, or*
> *(b) from doing anything of that description.'*

Accordingly, one difference is what the employer's 'reasonable steps' should be designed to prevent. To rely on s.109(4), an employer needs to show that it took all reasonable steps to prevent its employee, A, from *doing* a particular thing (ie contravening the EqA). Under the New Duty, the employer needs to show that it took reasonable steps to prevent its employees from *being subjected to* a particular thing (ie sexual harassment). Put another way, the employer is trying to control *behaviour* in the former and *experience* in the latter.

That may not sound like a marked difference, especially since one obvious way of preventing employees from experiencing sexual harassment in the workplace is to stop them from subjecting each other to it. Still, formulating the New Duty in this way – ie towards *protecting* employees – implies that employers should be trying to prevent sexual harassment perpetrated by *third parties*, as well as by their own staff. Indeed, both Wera Hobhouse MP, who introduced the Private Members' Bill that led to the New Duty, and Baroness Noakes, claimed as much during the New Duty's Parliamentary stages.

For Baroness Noakes, it was important to narrow the ambit of the New Duty, by removing the word 'all' from the original drafting, because an employer's duty to prevent sexual

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harassment 'now applies to third parties for the first time for some considerable time'.

If correct, that is perhaps a surprising outcome, not least because the Government explored reintroducing employer liability for third-party harassment during the same consultation which yielded the New Duty. But the idea was ultimately rejected, with the House of Lords citing the threats posed to freedom of speech, and the regulatory burdens placed on employers, as reasons (among others) to do so. Yet, in requiring employers to keep employees safe from sexual harassment, regardless of origin, the New Duty has seemingly (re-)introduced an element of liability for third-party sexual harassment by the backdoor (albeit short of a standalone cause of action).

A second difference concerns the individual(s) in respect of whom reasonable steps ought to be taken. Under s.109(4), an employer will be judged according to its efforts in relation to a particular individual, 'A'. For instance, an employer may struggle to establish the s.109(4) defence if, despite taking all reasonable steps with the rest of its workforce, those steps did not extend to the specific individual who ended up contravening the EqA. Likewise, all reasonable steps may include training staff on how to deal with an individual with a propensity for discriminatory behaviour.

By contrast, the New Duty is vaguer, requiring merely that reasonable steps be taken in respect of an employer's 'employees'. Unlike s.109(4), there is no identifiable perpetrator (or victim) from which employers can take their bearings to understand the scope of the New Duty. So, what constitutes 'employees' for these purposes? Is it the entirety of a workforce? A majority? More than one employee? In any event, it is presumably advisable that employers eschew one-size-fits-all approaches. Rather, as with s.109(4), where different steps may be appropriate for different levels of management and/or sections of the workforce, so too employers may wish to tailor their efforts under the New Duty by reference to the perceived risks that certain (groups of) employees will be sexually harassed.

The Compensation Uplift: a proportionate remedy?

When consulting on potential remedies for employees, the Government was keen to understand: (i) whether they should be limited to instances where a claimant succeeds in their sexual harassment claim; and (ii) how any compensation should be calculated. By the time of legislating, the first question had been resolved in the affirmative and the second by adopting a seemingly familiar employment law concept: a 25% uplift on compensation. Yet despite the semblance of clarity and recognisability, questions remain.

The Compensation Uplift is set out in a new s.124A:

'124A Remedies: compensation uplift in sexual harassment cases

(1) This section applies where –

a. an employment tribunal has found that there has been a contravention of s.40 (harassment of employees) which involved, to any extent, harassment of the kind described in s.26(2) (sexual harassment), and

b. the tribunal has ordered the respondent to pay compensation to the complainant under s.124(2)(b).

(2) The tribunal must consider whether and to what extent the respondent has also contravened s.40A(1) (duty to take reasonable steps to prevent harassment of employees).

(3) If the tribunal is satisfied that the respondent has contravened s.40A(1), it may order the respondent to pay an amount to the complainant (a 'compensation uplift') in addition to the compensation amount determined in accordance with s.124(6).

(4) The amount of the compensation uplift—

a. must reflect the extent to which, in the tribunal's opinion, the respondent has contravened s.40A(1), but

b. may be no more than 25% of the amount awarded under s.124(2)(b).'

First to note are the two preconditions under s.124A(1) before s.124A applies. Under s.124A(1)(a), the first is a finding of workplace harassment that 'involved, to any extent' s.26(2) sexual harassment. This would appear to mean that just one complaint of sexual harassment must be made out for s.124A(1)(a) to be satisfied. If so, it follows that sexual harassment need not be the only, or indeed main, type of claim brought by a claimant. Rather, s.124A can apply where sexual harassment forms a relatively tangential part of an overall case.

Furthermore, s.124A only applies if, in addition to there being a finding of sexual harassment, the tribunal has ordered the respondent to pay compensation (s.124A(1)(b)). In many ways, that makes sense given that the ostensible purpose of s.124A is to govern the Compensation Uplift; and seldom will a tribunal make a declaration and/or recommendation(s) in a successful sexual harassment claim but award no attendant financial compensation.

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However, it is worth noting that, in such cases (as rare as they are), employers would escape the scrutiny of s.124A(2) and any recommendation(s) made would not be informed by the tribunal's findings as to the extent to which the New Duty was contravened (discussed further below). Though unlikely to draw much attention in practice, this disparate treatment between cases in which compensation is, and is not, awarded seems somewhat arbitrary, if not counterintuitive.

Once s.124A(1) is satisfied, the tribunal is then obliged under s.124A(2) to consider:

- whether the employer contravened the New Duty and;
- to what extent.

The word 'must' signifies that the tribunal has no choice in the matter. Employers therefore face the unwelcome prospect of having their anti-sexual harassment policies, procedures and track records publicly scrutinised any time a claim for sexual harassment succeeds and compensation is awarded.

Furthermore, by virtue of s.124A(1)(a), this would appear to be so regardless of the extent to which sexual harassment was a prominent feature of the case as a whole. Section 124A(2) is thus a curious mix of a potentially onerous and prejudicial outcome that can, in certain circumstances, be triggered by a seemingly disproportionately low threshold.

If nothing else, s.124A(2) is likely to increase litigation costs for employers, who presumably now need to be prepared to evidence their compliance with the New Duty whenever a sexual harassment claim is lodged against them. Similarly, claimants seeking a strategic advantage may look to channel borderline fact patterns into the territory of s.26(2) to exploit their employer's anxiety over the s.124A(2) inquiry.

Moving on, if a tribunal finds that an employer has breached the New Duty, it has discretion to award the Compensation Uplift under s.124A(3). If it decides to do so, the tribunal must, under s.124A(4), award an amount which, in its opinion, reflects the extent to which the employer contravened the New Duty, such amount not to exceed 25% of the compensation awarded under s.124(2)(b).

According to the Explanatory Notes, this 'discretionary uplift to compensation is intended to allow the tribunal to take the specific circumstances of each workplace into account and avoid overall awards which may be disproportionate'. However, that is perhaps a better description of the 'Acas uplift' under s.207A TULR(C)A than the Compensation Uplift. The former permits a tribunal discretion as to both whether to award an uplift and, if so, by how much (up to 25%).

By contrast, the Compensation Uplift would appear to permit a tribunal discretion only as to *whether* to award an uplift; once it decides to do so, its discretion is otherwise seemingly fettered, in that the amount of the uplift *must reflect* the extent to which the tribunal considers the employer to have breached the New Duty (up to 25%).

On this interpretation, a tribunal would presumably apply its findings from its s.124A(2) inquiry into the 'extent' of the contravention; and convert that into a percentage ranging from 0% to 25%, with uplifts of 25% reserved for total and unmitigated failures to observe the New Duty (an approach reflective of the *Susie Radin* treatment of protective awards under TULR(C)A or TUPE).

Furthermore, as the Explanatory Notes above suggest, when deciding whether to exercise its discretion under s.124A(3), a tribunal should have regard to the total compensation sum post-uplift. However, if a tribunal has no discretion as to the *amount* of the uplift, the only mechanism available to it to 'avoid overall awards which may be disproportionate' is to award no uplift at all, which arguably undermines the purpose and potency of s.124A(4). On the other hand, Compensation Uplifts which reflect the extent of the breach of the New Duty, but not the severity of sexual harassment actually suffered, may be lamented as overly punitive. Thus, the tension between the discretionary and mandatory elements of the Compensation Uplift may create headaches for tribunals trying to engineer just and equitable outcomes.

There is also a question regarding the compensation to which the Compensation Uplift should apply. According to the Explanatory Notes, it applies to 'the compensation awarded in respect of the sexual harassment claim', a view certainly shared by some. Others believe that the Compensation Uplift should be applied to all harassment-derived compensation (sexual or otherwise).

Yet neither interpretation sits squarely with the words of the statute. In fact, it could be argued that s.124A(4) requires that any uplift be applied to the entirety of compensation awarded to the claimant under s.124(2)(b), ie on all compensation awarded for contravention(s) of the EqA's workplace provisions (similar arguments could also be made regarding the source of the 'compensation' in s.124A(1)(b)). On that reading, cases which combine large sums of EqA-derived compensation, relatively minor episodes of sexual harassment, but extreme failures in relation to the New Duty, could yield spectacularly absurd results.

Conclusion

Whatever the correct interpretation, this leads to an important question: what is the primary purpose of the Compensation

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Uplift? Is it to compensate employees for being subjected to sexual harassment that could have been avoided, had their employer taken the New Duty seriously? Or, is it to penalise employers who take risks with their employees' wellbeing by contravening the New Duty, irrespective of whether those risks translate into actionable sexual harassment? Or something else?

The answer will be crucial to understanding how both the Compensation Uplift and New Duty are to work in practice. And with the clock ticking until they come into force, guidance from the EHRC that is both comprehensive, and unafraid to clarify uncertainties in the legislation, is urgently needed.

KEY:

EHRC	Equality and Human Rights Commission
EqA	Equality Act 2010
Susie Radin	*Susie Radin Ltd v GMB* [2004] ICR 893 CA
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)