



WORD-AGAINST- WORD

GORDONS

How do you determine the outcome in a word-against-word situation involving inappropriate behaviour on an unofficial works night out, and could you have prevented it ?

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ELEMENTS TO THE QUESTION:

1. Sexual Harassment – what is it?

2. New Duty to Prevent Sexual Harassment

3. What is the Workplace?

4. Disciplinary Processes and Decisions

WHAT IS SEXUAL HARASSMENT?

"Unwanted conduct of a sexual nature"

The Conduct has the purpose or **effect** of:

- Violating the victim's dignity; or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim



IMPACT VS MOTIVE

- The views of the victim override the alleged harasser's motives.
- The intention of the alleged harasser does not matter.
- Sexual harassment law focuses on the impact of the conduct or behaviour.



DUTY TO PREVENT SEXUAL HARASSMENT

Worker Protection (Amendment of Equality Act 2010) Act 2023]

- Effective from October 2024.
- Other people at work.
- Third Parties – e.g. customers or clients.
- Assess risks.
- Take measures.
- Stop it happening again.



EQUALITY & HUMAN RIGHTS COMMISSION GUIDANCE

Step 1:
Develop an
effective anti-
harassment policy

Step 2:
Engage your staff

Step 3:
Assess and take
steps to reduce
risk in your
workplace

Step 4:
Reporting

Step 5:
Training

Step 6:
What to do when a
harassment
complaint is made

Step 7:
Dealing with
harassment by
third parties

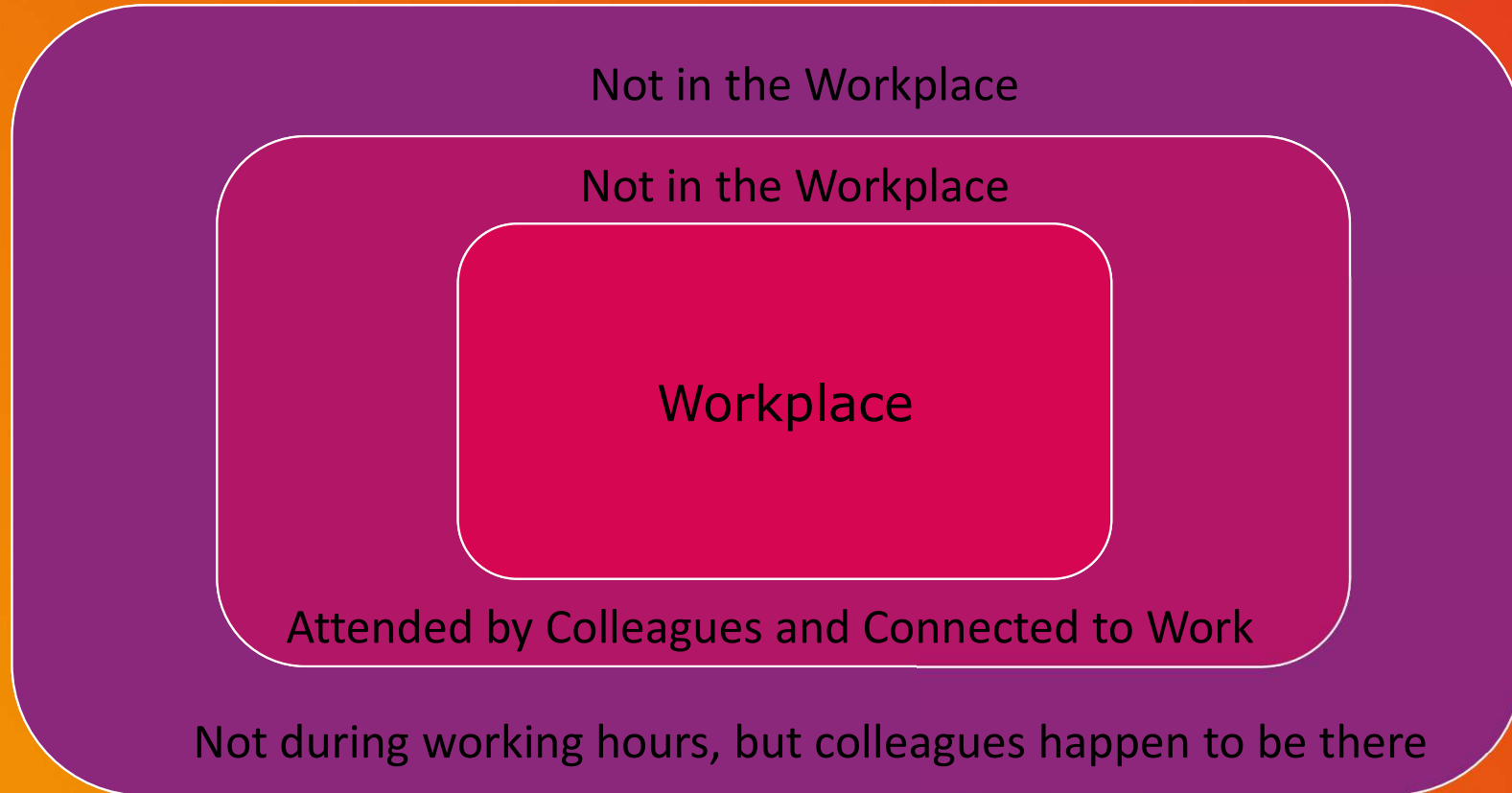
Step 8:
Monitor and
evaluate your
actions

IN THE COURSE OF EMPLOYMENT VS PERSONAL LIVES

- Employer is liable for harassment in the workplace
- No 'official guidance'
- Wide spectrum
- Fact Specific



WORKPLACE OR NOT ?



CASE LAW

- *Bellman v Northampton Recruitment Ltd* [2018]
- *P v Crest Nicholson plc and Crest Nicholson Operations Ltd* [2023]
- *AB v Grafters Group* [2025]



HOW TO DEAL WITH REPORTS OF SEXUAL HARASSMENT?

- Sexual Harassment Policy
- Grievance Procedure
- Disciplinary Procedure
- ACAS Code and Guidance



DISCIPLINARY PROCESS AND DECISIONS

- **Section 98 (4) ERA 1996**.....the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) **the employer acted reasonably** or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.



BURCHELL TEST

British Home Stores v Burchell [1980]

- Did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?
- Were there reasonable grounds on which to base that belief?
- Was a reasonable investigation carried out?



BAND OF REASONABLE RESPONSES

Iceland Frozen Foods Limited v Jones [1982]

“...is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.”



BAND OF REASONABLE RESPONSES

Romano v Norwich City Football Club PLC [2025]

“In this respect we are mindful that it is not for the Tribunal to substitute its view for that of a respondent, if the outcome of dismissal is harsh but within the range of reasonable responses open to a reasonable employer the Tribunal cannot interfere simply because it would have reached a different decision. However..... the decision-making process by which the decision to dismiss was reached was riddled with unfairness and it was not one which any reasonable employer would have taken.”

Four Reasons –

- Claimant’s conduct did not fall into the examples of misconduct given from policy.
- Did not consider whether conduct impacted his work.
- Did not consider long and unblemished service.
- Did not properly evaluate apology and remorse.



REASONABLE INVESTIGATION

Sainsbury's Supermarkets v Hitt [2003]

- The band of reasonable responses test applies to the investigation.
- If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice.



REASONABLE INVESTIGATION

Sellers v The British Council (2019)

- The responsibility for ensuring that there were supporting grounds for dismissal based on a reasonable investigation lies with disciplinary officer
- It is for them to review the available evidence, and to consider whether the investigation was adequate.
- *"in this case, the investigation is characterised by serious oversights and unreasonable assumptions. No reasonable employer would have failed to seek the relevant contemporaneous documentation, or to explore the circumstances of the alleged assault, or to seek relevant evidence from witnesses to the alleged incident."*
- *"I conclude that [the disciplinary officer] took a narrow view and failed to consider the relevant surrounding circumstances. Whilst she had in mind the potential importance of corroboration, including witnesses, contemporaneous documents, and contemporaneous accounts. Her narrow view contributed to her failing to ask whether the investigation was adequate."*



CORROBORATING EVIDENCE

Corroborate evidence to assist in making findings of fact-

Timeline of events



Witnesses - Gather witness statements as soon as possible, assess the witness' level of credibility



Investigation- Probe for details, inconsistencies or contradictions, utilizing technology e.g. CCTV, WhatsApp, Text Messages



Revisit Evidence as Necessary



DISBELIEF?

Salford Royal NHS Foundation Trust v Roldan [2010]

- “Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. **But they are not obliged to believe one employee and to disbelieve another.**”
- “There will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved”.



DECISION MAKING

- Do you have all the evidence before you? Do you need more?
- It is okay to make a judgment on which witness is more credible if it is reasonable.
- Determine which version of events is more likely to be true based on the corroborating evidence and the context of the allegation.
- Also ok not to be able to make a finding of fact if insufficient evidence from the evening.
- Reach a conclusion of whether the harassment is likely to have happened on the **balance of probabilities**.
- **Explain decision making process and your findings of fact in writing.**



WHY IS IT IMPORTANT TO GET INVESTIGATIONS RIGHT ?

Good for internal employee relations issues

Internal grievance/disciplinary processes and appeals require management and HR attention – Distraction to business

Reputational damage

Potential external employment tribunal proceedings – public record

Financial liability and legal costs



ANY QUESTIONS?



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