



#MeToo

Regulatory and disciplinary issues arising out of sexual harassment in the professional services sector

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Ben Hubble QC

Call: 1992 Silk: 2009



"His advocacy is fantastic." "Absolutely at the top of his game and a pleasure to work with." – Chambers & Partners

Ben is top rated and cited in the Directories as **one of the "big beasts" of the professional liability world**. He has been recommended by one client as the lawyer to instruct if you were stuck on a desert island and needed to work the law to get off it. Ben has a long track record in all aspects of professional liability claims, especially those with a commercial element. He also has extensive experience in multi-party litigation (the *TAG Litigation*, the *CLE Litigation*, *Innovator* and *Right to Buy Litigation*). Ben is heavily involved in claims arising from the failure of tax-advantaged investment or film schemes. He regularly acts for both high net worth individuals, as well as accountants, tax advisers and IFAs.

Ben was nominated for the **Chambers UK Bar Professional Discipline Silk of the year in 2017**. Ben is particularly experienced in regulatory and professional disciplinary issues in the legal and financial sectors. Ben advises a number of city law firms on regulatory and compliance issues, as well as acting on disciplinary claims before the SDT. On the financial disciplinary side, Ben has longstanding expertise having acted in many of the large accountancy enforcement proceedings of this decade. Ben is adept at providing strategies to address the various regulatory and compensatory risks that arise from a breakdown in compliance or corporate governance.

Clare Dixon

Call: 2002



"She has good judgment and is technically excellent", "She is very down-to-earth, a great communicator, and inspires confidence in the client." "She provides a first-class service" – Chambers & Partners

"She mixes great commercial acumen with an excellent grasp of black letter law", "Responsive bright and provides excellent advice" – Legal 500

"A brilliant advocate" – Who's Who Legal

Clare is rated in the Directories for professional liability and insurance and in 2018 was nominated for the Chambers & Partners Professional Negligence Junior of the Year. She believes in taking a tough but commercial approach to litigation and relishes advocacy in all its forms. Clare has appeared in all levels of Court (including twice in the Supreme Court) and in arbitration and disciplinary proceedings.

Clare has extensive experience of professional regulation and disciplinary matters. She is often instructed to advise when an issue has arisen and then works with the firm to ensure that a potential regulatory problem doesn't become a disciplinary issue. She has extensive experience of appearing before the SDT and at appellate level, and is a prosecutor for the Bar Standards Board.

#METOO:

REGULATORY AND DISCIPLINARY ISSUES ARISING OUT OF SEXUAL HARASSMENT IN THE PROFESSIONAL SERVICES SECTOR

Ben Hubble QC and Clare Dixon

February 2019

1. In 2017 the #metoo movement began to spread on social media. In a social media age it was a means by which sexual harassment and assault in the workplace could and would be called out.
2. Professional services may not have the glamour of Hollywood but, like many industries, it is not immune to problems of sexual harassment. Gender imbalance, power/status imbalance and, sometimes, a failure to appreciate that what might have been ignored in 1979 will not be in 2019, all feed into the problem.
3. In July 2018 the Women and Equalities Committee in Parliament published a report into sexual harassment in the workplace. Over the following months there was reaction from number of bodies involved with professional regulation:
 - a. The SRA stated that incidents of reported harassment had doubled in seven months to October 2018 and that there was also an increase in reports about the improper use of Non-Disclosure Agreements (“NDAs”). As we will look at, it has since published a warning notice and guidance on NDAs; and
 - b. The FCA’s executive director of supervision stated that the FCA did not consider that “gagging orders” prevented an individual’s ability to blow the whistle to the FCA and that there had been instances where the FCA had found an individual not to be “fit and proper” on the basis of their non-financial conduct; and
 - c. The BSB announced in October that it was shortly to publish its own guidance on the use of NDAs although they have not done so yet.
4. This talk is going to look at sexual harassment from a regulatory point of view. Obviously it can have other ramifications (criminal, employment etc) but the focus of our talk is going to be on how the various stakeholders who become involved when an allegation is made should respond and the regulatory consequences if they get that wrong.
5. In order to do that, we are going to address the following:
 - a. What is sexual harassment?

- b. By reference to a hypothetical example: who are the relevant stakeholders, what are their rights and obligations?
- c. Investigation by the firm and reporting to the regulator – does one follow the other or should they be done at the same time?
- d. What are the problems and pitfalls of non-disclosure agreements?

What is sexual harassment?

6. Section 26 of the Equality Act 2010 has a number of parts but at its core is a definition of harassment as being unwanted conduct related to a relevant protected characteristic and which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
7. The relevant protected characteristics are: age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.
8. When determining whether an act does constitute harassment the following subjective and objective elements need to be taken into account:
 - a. The perception of the person against whom the act has been perpetrated;
 - b. The other circumstances of the case; and
 - c. Whether it is reasonable for the conduct to have that effect.
9. Law Society Guidance on "*Understanding Workplace Harassment*"¹ states:

Harassment can be verbal or non-verbal and need not happen face-to-face. Behaviours might include but are not limited to:

- *gossip or spreading malicious rumours*
- *ridiculing or demeaning someone*
- *inappropriate content or tone of an email, social media or other digital communication*
- *overbearing supervision or misuse of power or position*
- *making threats about job security without justification*
- *constant criticism or deliberately undermining someone*
- *preventing career progression by intentionally blocking promotion or development opportunities*
- *exclusion or victimisation*

¹ 19 December 2018

- *unwelcome sexual advances, including touching, standing too close, the display of offensive materials, asking for sexual favours, or making decisions on the basis of sexual advances being accepted or rejected.*

Stakeholders' Rights and Obligations

10. In order to identify the stakeholders, what rights they can expect to have protected and what obligations they have to fulfil, it is helpful to look at a hypothetical scenario.
- ABC Legal is a five partner solicitors firm. Each year it holds a marketing event at a local hotel which is attended by fee earners at all levels together with external clients.
 - In the course of that event, one of the partners, Mr Andrews approaches a junior fee earner in his department, Miss Grantham. He pulls her towards him and attempts to kiss her and then he remarks that she looks like she is *"up for it"*. Miss Grantham pulls away from Mr Andrews, laughs and leaves the event immediately.
 - Three people witness Mr Andrew's conduct but no-one says anything at the time. The three witnesses are:
 - another partner at ABC Legal, Mrs Webster;
 - a Senior Associate, Mr Daniels; and
 - a client, and local business owner, Ms Scott.
 - The following day:
 - Miss Grantham calls in sick;
 - Ms Scott telephones the senior partner and Compliance Officer ("COLP") at ABC Legal Mrs Cook. She informs Mrs Cook about Mr Andrews' conduct and that it was witnessed by Mrs Webster and Mr Daniels;
 - Mrs Webster, Mr Daniels and Mr Andrews attend work as normal and say nothing about the incident.
11. Is this a regulatory matter even though it was a social occasion outside ABC Legal's offices? This issue was considered by Mrs Justice Lang in *BSB v Howd* [2017] 4 WLR 54. The allegations related to inappropriate conduct by a barrister towards female members of staff at a marketing event in Chambers:
- The barrister argued that his regulatory obligations extended only to him when acting in his capacity as a "practising barrister" and, consequently, should not include activities at a Chambers party.
 - Mrs Justice Lang disagreed stating that the duty went *"beyond the provision of legal services and to apply also to the way in which barristers conduct themselves in chambers' business activities"*.
12. Does it matter that no complaint has been made by Miss Grantham?

- a. No, the absence of a complaint about the conduct doesn't mean that it didn't occur.
 - b. Mrs Cook and ABC Legal would do well to reflect on why Miss Grantham did not come forward. Firms should aim to have a "speak up" culture but it is not appropriate to put responsibility on the victim to report. In this case that responsibility fell onto Mrs Webster and Mr Daniels.
 - c. But someone within ABC Legal needs to reach out to Miss Grantham with care and consideration. The SRA now has a dedicated in-house team which handles complaints of sexual harassment and who have specialist training in how to work with vulnerable witnesses.
13. Who has rights which need protecting:
- a. Miss Grantham as (potential) victim, employee and solicitor;
 - b. Mr Andrews as the person accused.
14. Who has regulatory obligations which, if contravened, could also incur regulatory consequences?
- a. Mr Andrews for his actions;
 - b. Mrs Webster and Mr Daniels for their failure to report;
 - c. ABC Legal/Mrs Cook as COLP if matters are not handled properly.

Investigation and Reporting

Which comes first?

15. The SRA Code of Conduct provides:
- a. Outcome 10.4: *"you report to the SRA promptly, serious misconduct by any person or firm authorised by the SRA...";*
 - b. New Requirement 3.9: *"you ensure a prompt report is made to the SRA ... of any serious breach by any person regulated by them (including you) of which you are aware. If requested by the SRA, you investigate whether there have been any serious breaches that should be reported to the SRA".*
- c. In addition, the SRA Authorisation Rules 2011 provide at rule 8.5 that the COLP:

- a. Must “*take all reasonable steps*” to ensure compliance with regulatory and statutory obligations² and record any failures in compliance; and
 - b. Report any “*material*” failure “*as soon as reasonably practicable*”.
16. What is the potential serious misconduct/serious breach?
- a. The harassment itself; views might differ across the profession as to whether this amounted to ‘serious misconduct’; the writers would suggest that on a proper appreciation of the facts and the law, it plainly does;
 - b. The failure by Mrs Webster and Mr Daniels to report that harassment; again, views will differ; here, it might be argued that they were not culpable of serious misconduct because of the short-time frame, their non-participation in the events and the absence of any other exacerbating factor; Mrs Webster, as a partner, will be more at risk than Mr Daniels;
 - c. (failure in the investigation process); and
 - d. (NDA with Miss Grantham).
17. Which comes first: the investigation or the report to the SRA? The obligation to report creates something of a dilemma. Should an investigation be carried out first to determine the existence of such conduct or should the matter be reported immediately?
- a. Principle 7 states that a solicitor must “*deal with your regulator in an open, timely and co-operative manner*”.
 - b. In August 2018, the SRA opened a consultation on “*Reporting concerns*” because they had identified that different people had a different understanding of when the duty to report was triggered. In particular they noted that some firms took the view that the need to report was triggered only following an internal investigation which established the misconduct whilst others thought that it was triggered when there was information which suggested that a serious breach may have occurred.
 - c. Although guidance is awaited it is clear from the paper that the SRA wishes to be informed of matters when the reporter has a “*belief*” that the serious misconduct has happened. There might be circumstances where having this “*belief*” required an internal investigation. However, caution is required – there is little downside to early reporting. Once reported, the SRA can take a view on the extent to which it wishes to investigate or leave matters to the firm’s internal process. That said, an investigation may be required to identify who, in addition to the perpetrator, needs to be reported; for instance, an

² There are exceptions relating, for example, to the Accounts Rules.

internal investigation would seem appropriate before Mrs Webster and/or Mr Daniel were the subject of a report to the SRA.

- d. Care is necessary as to the form of report to the SRA: Who is the subject of the report? Are the events reported as facts or as reports of facts? Is Miss Grantham entitled to anonymity? What should be said about Mrs Webster and/or Mr Daniels? If anything is said, are they entitled to anonymity? What should be said about ABC Legal's response to date and the nature of the investigation to be undertaken? What commitment should be made to the SRA to revert in due course?

Conduct of the Investigation –

18. Whether it has reported to the SRA or not, ABC Legal needs to proceed swiftly with its own investigation. Memories fade and institutional paralysis can set in. A failure to investigate could also be a regulatory matter. The key elements of such an investigation are: (i) Miss Grantham's right to confidentiality must be respected, and (ii) Mr Andrews' right to a fair process must be respected.
19. It is to be hoped that ABC Legal have a Disciplinary Procedure policy in place which Mrs Cook can now follow to investigate Mr Andrews' conduct. Either way, the investigation process is likely to involve at least the following steps:
 - a. Constitution of an investigation panel of sufficient seniority (likely to include one partner) and size. Given ABC Legal's size it should be possible to find people who are not in Miss Grantham and Mr Andrews' own department and ideally not in Mrs Webster or Mr Daniels'. The investigation panel will have to decide at the outset who are to be the subjects of the investigation.
 - b. Investigation comprising:
 - i. Informing Mr Andrews (and potentially Mrs Webster and Mr Daniels) as to the allegations,
 - ii. Gathering evidence and representations, and
 - iii. Giving Mr Andrews (and potentially Mrs Webster and Mr Daniels) the opportunity to respond.
 - c. Reporting on the findings (within a reasonable time frame) to Mrs Cook, Mr Andrews (and potentially Mrs Webster and Mr Daniels) and, in some form, Miss Grantham together with any recommendation as to disciplinary action.
 - d. Appeal within a specified time period to a differently constituted panel.
20. Alongside that, appropriate support should be provided to Miss Grantham.

Non-Disclosure Agreements

21. The SRA published a warning notice on NDAs in March 2018 and guidance in January 2019. The BSB has said that it is going to issue guidance on NDAs but it has not yet done so.
22. NDAs are certainly not prohibited³, but they must be drafted and used with care. For example, even proposing let alone entering into an NDA inappropriately with Miss Grantham could itself be a regulatory offence by Mrs Cook and ABC Legal. The key points arising from the warning notice and guidance are:
 - a. First, NDAs should not be used to prevent someone from reporting misconduct (be that to a regulator or the police) or seeking to influence what is reported.
 - b. Second, NDAs should not be used as a means of improperly threatening litigation for example a defamation claim where it is known that such a claim would be unsustainable.
 - c. Third, someone who has entered into an NDA must not be prohibited from keeping a copy.
 - d. Fourth, if the employee is not represented then the obligations on the counter-party are heightened⁴.
23. So, if there was a breakdown of relations with Miss Grantham, ABC Legal would need to think creatively as to the means by which the firm's position could be protected without committing misconduct. This could potentially extend to careful and appropriate use of recitals, agreed statements or non-disparagement clauses – but only as long as the overarching principle is followed, namely that the parties' ability to provide information to the SRA or other relevant public bodies is not fettered in any way.
24. Additionally, if there was a breakdown in relations and complaints were made by Miss Grantham, then ABC Legal would need to be astute not to take any steps that could amount to victimisation of Miss Grantham: see Sections 27 and 44-45 of the Equalities Act 2010.

Ben Hubble QC and Clare Dixon

4 New Square Chambers

Disclaimer: *this handout is not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.*

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³ Indeed, they were regarded as commercially important (in appropriate circumstances) by the Court of Appeal in *X, Y and Z v Telegraph Media Group Ltd [2018] EWCA Civ.*

⁴ If the NDA is part of a settlement agreement then the employee should be receiving independent legal advice under section 203 Employment Relations Act 1996.



#MeToo Regulatory and Disciplinary issues arising out of sexual harassment in the professional services sector

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Regulators' response to #MeToo



Issues Covered

1. What is sexual harassment?
2. Who are the relevant stakeholders, what are their rights and obligations?
3. Investigation and reporting – does one follow from the other or do they proceed at the same time?
4. Non Disclosure Agreements: problems and pitfalls.

What is sexual harassment?

Equality Act 2010, Section 26

- (1) A person (A) harasses another (B) if—
 - (a) A engages in **unwanted conduct** related to a **relevant protected characteristic**, and
 - (b) the conduct has the **purpose or effect** of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
 - (a) A engages in unwanted **conduct of a sexual nature**, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the **perception of B**;
 - (b) the **other circumstances** of the case;
 - (c) whether it is **reasonable for the conduct to have that effect**.
- (5) The **relevant protected characteristics** are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

Law society Guidance “*Understanding Workplace Harassment*”

Harassment can be verbal or non-verbal and need not happen face-to-face. Behaviours might include but are not limited to:

- **gossip** or spreading malicious rumours
- *ridiculing or demeaning someone*
- *inappropriate content or tone of an **email**, social media or other digital communication*
- **overbearing** supervision or misuse of power or position
- **making threats about job security** without justification
- *constant criticism or deliberately undermining someone*
- **preventing career progression** by intentionally blocking promotion or development opportunities
- **exclusion** or victimisation
- **unwelcome sexual advances**, including touching, standing too close, the display of offensive materials, asking for sexual favours, or making decisions on the basis of sexual advances being accepted or rejected.



Stakeholders: identification, rights and obligations

ABC Legal's Party

Miss Grantham: junior fee earner and victim

Mr Andrews: partner and perpetrator

Mrs Webster: partner and witness

Mr Daniels: senior associate and witness

Ms Scott: local business owner and witness

Mrs Cook: senior partner and ABC Legal's COLP. (Not in attendance at the party).



Consequences....

1. **Is this a regulatory matter or not?**
 - *BSB v Howd* [2017] 4 W.L.R. 54

2. **Does it matter that Miss Grantham has not made a complaint?**

3. **Who has rights which need protecting?**
 - Miss Grantham
 - Mr Andrews

3. **Who has regulatory obligations which could lead to regulatory consequences?**
 - Mr Andrews
 - Mrs Webster & Mr Daniels
 - Mrs Cook
 - ABC Legal

Investigation and Reporting

Reporting obligations

Outcome 10.4: “...you **report to the SRA promptly serious misconduct** by any person or firm authorised by the SRA...”.

SRA Authorisation Rules 2011, rule 8.5: the COLP must report any “**material**” failure “**as soon as practicably possible**”.

New requirement 3.9: “you ensure a **prompt report** is made to the SRA... of any **serious breach** by any person regulated by them (including you) of which you are aware. **If requested by the SRA, you investigate whether there have been any serious breaches that should be reported to the SRA**”.

Questions arising...

1. What is the potentially serious misconduct?

- Harassment itself;
- Failure of Mrs Webster and Mr Daniels to report the harassment.
- (Failures in the investigation process)
- (NDA agreed with Miss Grantham)

2. Investigate or report first?

- Principle 7
- August 2018 SRA consultation on “*Reporting Concerns*”

Conduct of the Investigation

1. **Constitution** of an investigation panel.
2. **Investigation:** informing Andrews, Daniels & Scott about allegations, gathering evidence, opportunity to respond.
3. **Reporting** on findings and recommended sanction.
4. **Appeal**

Non-Disclosure Agreements

We recognise that NDAs, including with employees, can legitimately be used to protect commercial interests and confidentiality and in some circumstances, to protect reputation. Such agreements can operate to the mutual benefit of both parties. This warning notice, and the Handbook, should not be taken to prohibit the use of NDAs. However....

SRA Warning Notice “Use of non-disclosure agreements”

12th March 2018

Key points from the Warning Notice & Guidance

1. Should not be used to prevent someone from reporting misconduct or seeking to influence what is reported.
2. Should not be used as a means of improperly threatening litigation.
3. Should not prohibit the employee from keeping a copy.
4. If the employee is not represented then the employer's obligations are heightened.

Non-Disclosure Agreements and #MeToo

“There cannot be a legal document that protects criminal behaviour. The problem is they are used abusively and within the law. There isn’t enough regulation and there isn’t a framework to protect the victims of the situation.”

Zelda Perkins

Former Personal Assistant to Harvey Weinstein