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Howes, VS

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# The Law of Harassment in the UK: A Growing Concern

Victoria HOWES\*

*This article considers recent changes to legal provisions governing harassment at work, in particular sexual harassment, in the UK, in the light of EU Directive 2002/73/EC, and the remedies available in the courts and employment tribunals. This article then provides a statistical profile of a total of 21,335 sex discrimination cases brought to nine employment tribunals in the UK between 2003 and 2008, highlighting the fact that the claims submitted by employees are successful in only a small percentage of cases, due to the fact that many cases are withdrawn or settled out of court, and the fact that many claimants do not have legal representation, whereas nearly all of the defendants have the benefit of legal representation in hearings at the employment tribunal, enabling them to present their evidence in a more effective manner. This is particularly important in cases of this type, where witness credibility is crucial to successful outcomes, as highlighted by the cases cited by the author.*

## 1. INTRODUCTION

One of the objectives of the European Community Strategy for 2007 to 2012 on health and safety at work is to make progress toward the prevention of harassment in the workplace, which suggests that harassment at work remains a persistent and widespread problem.

There are a number of particular issues that relate to harassment at work: harassment can take a variety of forms, which can be subtle and disguised; there is no clear definition of harassment; workers can be fearful of bringing a complaint; the English law of harassment is complicated; and it is difficult to establish a case. Claims regarding harassment at work are usually brought under existing anti-discrimination laws where, as part of a discrimination claim,<sup>1</sup> the claimant also claims that he/she has been harassed because of his/her race, sex, disability, sexual orientation, religion or belief, or age. Although a special section on harassment was recently introduced in each piece of anti-discrimination legislation to accommodate claims of harassment, these claims are often seen as discrimination claims. To some extent, this is because Employment Tribunals do not separate harassment claims from other cases, or indeed mention any such claims at the case allocation stage.

It must be noted that in recent years cases of harassment have been brought under other 'available' provisions, including the Protection from Harassment Act (PHA) 1997,

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\* Senior Lecturer, Salford Law School, Salford University, UK.

<sup>1</sup> For example, a sex discrimination claim.

and employers' breach of duties under tort of negligence and contract. However, these provisions are not as widely exercised as provisions under anti-discrimination laws.

This article will consider a number of problems relating to harassment claims brought under anti-discrimination laws. It will examine recent cases in the light of these problems and consider the difficulties of claiming under existing laws from the position of a potential claimant.

## 2. DIFFICULTIES WITH ESTABLISHING HARASSMENT

The meaning of harassment is the first problem that a person subject to harassment is faced with. Each piece of legislation refers to it as a conduct, including an unwanted conduct<sup>2</sup> or merely a course of conduct.<sup>3</sup> Conduct is usually associated with a process, rather than a one-off incident. Under PHA 1997, it is even made clear that 'a course of conduct' must involve conduct on at least two occasions and that reference to harassing a person includes alarming the person and causing him or her distress.<sup>4</sup> In some exceptional situations, individual acts may amount to harassment under current anti-discrimination legislation.<sup>5</sup>

Giving an initial definition of harassment is reasonably straightforward: it is unwelcome and unwanted behaviour that has an adverse affect on an individual's health, personality, and self-esteem. However, this definition is quite broad as there are many forms of behaviour that can fall into this category. Tina Stephens, for example, refers to various types of behaviour that can amount to harassment, which include violence, deliberately ignoring someone, jokes, offensive language, gossip, slander, sectarian songs, letters or rhymes, sarcasm, unfounded criticism, setting unattainable targets at work, posters, graffiti, obscene gestures, coercion for sexual favours, pestering, spying, and stalking.<sup>6</sup> Some of these behaviours are easier to categorize as harassment than others. To some extent, this is because the same conduct and behaviour can be perceived differently by different people in a situation when it is not obvious that the conduct amounts to harassment from an objective point of view. For example, the same statement can be seen by one person as an innocent joke and by another person as an insulting comment. Should this statement then be considered from the point of view of a reasonable third party? On the one hand, the law says that what is important and what should be taken into account is the effect that such conduct has on a particular person, not on a person who can assess the situation objectively. Accordingly, the personal characteristics of a person should be taken into account. 'It is the perception of the recipient which is important – that person

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<sup>2</sup> Anti-discrimination legislation.

<sup>3</sup> Protection from Harassment Act 1997.

<sup>4</sup> *Ibid.*, s. 7(3).

<sup>5</sup> *De Souza v. Automobile Association* [1986] ICR 514, *Bracebridge Engineering Ltd v. Darby* [1990] IRLR 3, *In situ Cleaning v. Heads* [1995] IRLR.

<sup>6</sup> T. Stephens, *Bullying and Sexual Harassment* (Institute of Personnel and Development, 1999), 3.

defines what is offensive to them. Behaviour which one individual may regard as acceptable may be unacceptable to another person.<sup>7</sup>

On the other hand, the court has to assess the situation objectively and make judgments on evidence presented by the parties. The credibility of often conflicting evidence and the court's objectivity in assessing it are crucial in this process. A claim will very often fail when, based on the evidence, the court decides that the claimant's perception of his or her treatment is wrong, despite the fact that the claimant genuinely believed that the treatment amounted to harassment (or indeed discrimination). In one such case, a tribunal ruled as follows:

We are of course not qualified to reach a conclusion about the deep psychological motives of witnesses and parties who give evidence before us... It is perhaps unnecessary in our decision for us to state firmly whether the Claimant may have believed it in her own mind or that she has deliberately invented it. Whatever may be the final truth on that issue, so far as our proceedings are concerned, we simply state the conclusion that the Applicant has not established that there were any facts which could raise even a prima facie case that (the Respondent) was guilty of sexual harassment.<sup>8</sup>

Harassment, especially if it occurs persistently over a long period of time, can have harmful and long-lasting effects on individuals. The signs and symptoms of these effects include fear, stress and ill-health, loss of confidence, anxiety, and depression. Harassment at work can affect not only particular individuals but also the workplace as a whole. The effects are usually clear from poor performance, resignations, conflicts, poor morale, high labour turnover, accidents, and absenteeism.<sup>9</sup>

### 3. WHICH ROUTE TO TAKE?

In general, the UK law relating to harassment at work cannot be found in one particular provision of either statutory or common law, and claimants have a difficult dilemma as to which legal route to take.

There is no common law tort of harassment, although rules of employer's liability can apply when damage is suffered by the claimant as a direct consequence. Although anti-discrimination legislation now provides a specific protection from harassment, claims can only be brought when it is closely connected to a particular type of discrimination. There is also statutory protection available under PHA 1997. However, since the original nature of the Act was criminal and the purpose of it was to protect people from stalkers, it is rarely used in the workplace context.<sup>10</sup>

<sup>7</sup> <[www.lbp.police.uk/freedom-of-information/publications/HR/2%20Harassment.htm](http://www.lbp.police.uk/freedom-of-information/publications/HR/2%20Harassment.htm)>, 20 Feb. 2008.

<sup>8</sup> Cases 2301985/2004 and 2304227/2004, unreported, London South ET, para. 54.

<sup>9</sup> Stephens, 2.

<sup>10</sup> The only known harassment case decided under the PHA 1997 is *Majrowski v. Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224.

Clearly, the claimant should use the law and procedural rules that are the most relevant and applicable in his or her case, including the time limit, liability, defenses, and remedies.

The time limits allowed for bringing claims are different under different laws. Under anti-discrimination legislation, the claimant should bring a claim within three months of the date of the incident of harassment. However, since often there can be a continuing act of harassment, the advice is usually to file an ET1 form<sup>11</sup> as early as possible. The tribunal may also extend the time limit if it sees that it was just and equitable to do so in the circumstances.<sup>12</sup> In action under tort of negligence, the time limit is three years. It runs from the date of knowledge<sup>13</sup> of the injury, which is the first date the claimant became aware of the following facts:<sup>14</sup> the injury was significant; the injury was attributable to the alleged harassment; the identity of the defendant. Finally, under PHA 1997, the claimant has six years starting from the date of the act complained of.

The issue of liability is also important to consider. For example, a comparison can be drawn between PHA 1997 and anti-discrimination legislation. This was discussed in *Majrowski v. Guy's and St Thomas's NHS Trust*.<sup>15</sup> In general terms, both types of legislation prohibit harassment, albeit differently defined. As established under PHA 1997, the employer can be vicariously liable for the harassment committed by his employees 'in the course of employment' even when this is not foreseeable. This liability is strict. It was held by the House of Lords that 'acts done by an employee in the course of his employment were to be treated as done by his employer, subject to the employer being able to show he had taken all reasonably practicable steps to prevent his employee doing such acts',<sup>16</sup> where acts refer to discrimination and/or harassment.

An advantage of PHA 1997 is that the victims do not need to show that harassment was based on a particular ground, whether sex, race, sexual orientation, religion or belief. However, under PHA 1997 the claimant must show that the harassment<sup>17</sup> by another employee committed in the course of employment was at the same level as the criminal offense.

There is a trend for claimants to bring actions under several provisions in one claim, for example, under the tort of negligence and PHA 1997, or under the tort of negligence and breach of contractual duty, since all of them must be brought in civil courts. Claims for breaches of anti-discrimination provisions are usually brought together with claims for constructive dismissal in employment tribunals. The advantage of this method

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<sup>11</sup> The ET1 form is an application form that must be completed by the applicant who brings a claim to the employment tribunal.

<sup>12</sup> See, for example, s. 76 of SDA 1975.

<sup>13</sup> Limitation Act 1980, s. 11(4).

<sup>14</sup> Limitation Act 1980, s. 14(1).

<sup>15</sup> [2006] UKHL 34, [2007] 1 AC 224.

<sup>16</sup> *Ibid.*, paras 34 and 36, and s. 32 of the Race Relations Act 1976.

<sup>17</sup> Note that only harassment that amounts to 'a course of conduct' rather than a one-off incident is prohibited under the PHA 1997.

is that it is usually cheaper to bring a claim in the tribunal where legal representation is optional, rather than in the civil courts, where proceedings can be very expensive.

The case of *Green v. DB Group Services (UK) Ltd*<sup>18</sup> is an example in which the claimant brought a claim under both tort of negligence and PHA 1997. The outcome of being successful under both heads of law meant that both provisions were taken into account in calculating damages.

Monetary awards are also an issue that the claimant should consider when bringing a claim. Under the tort of negligence, the person subject to harassment is entitled to damages, which include general damages for the injuries suffered, for example, depression, compensation for the degree of the increased vulnerability to future depression and pre-existing psychiatric vulnerability; and damages for past and future losses.<sup>19</sup> The overall award in damages can be quite significant.<sup>20</sup>

Under anti-discrimination legislation, a victim of harassment is entitled to be compensated through a number of remedies. The amount of compensation is calculated on the same basis as damages in tort and includes injury to feelings, personal injury, and financial loss. The most significant here is the compensation for injury to feelings as the claimant can claim this irrespective of whether he has suffered any direct financial loss. The size of this award depends on the particular case and takes into account the degree of hurt, distress, and humiliation caused.<sup>21</sup> Similar calculation relating to injury to feelings applies when the claimant leaves his/her employment as a result of harassment and claims constructive dismissal, so that the overall award under anti-discrimination legislation can be substantial and amount to hundreds of thousands of pounds.<sup>22</sup>

Under PHA 1997, awards of damages for anxiety are normally modest<sup>23</sup> and it is assumed that the consequent financial loss is not substantial either, as the person does not suffer an injury that would remove them from the market for a long time. Understandably, such small awards may deter claimants from bringing claims under this Act.

#### 4. HARASSMENT UNDER UK ANTI-DISCRIMINATION LAWS

As already noted, the most common vehicle for bringing a claim of harassment is anti-discrimination legislation.<sup>24</sup> However, specific provisions relating to harassment within

<sup>18</sup> [2006] EWHC 1898 (QB).

<sup>19</sup> *Ibid.*, paras 177, 179, 181, 183, and 188.

<sup>20</sup> In *Smith v. Manchester Corp* [1974] WLR 41295, the Court of Appeal held that the damages awarded for loss of future earnings should be substantial not notional.

<sup>21</sup> Some guidance was provided in *Vento v. Chief Constable of West Yorkshire Police (No. 2)* where the Court of Appeal set out three broad bands of compensation: the top band that applies to the most serious cases is GBP 15,000 to 25,000 where the top figure should be awarded only in exceptional cases; the middle band that applies to serious cases that do not merit an award in the highest band is GBP 5,000 to 15,000; and the lower band that applies for less serious cases, such as isolated one-off incidents, is GBP 500 to 5,000.

<sup>22</sup> <[www.legaldaily.co.uk/lexnex/clo260603.htm](http://www.legaldaily.co.uk/lexnex/clo260603.htm)>, 13 Mar. 2008. On 30 Jun. 2003, Kent Employment Tribunal awarded nearly GBP 180,000 to a trainee sales executive at a car showroom, who worked there for only a week before the conduct of a salesman forced her to leave.

<sup>23</sup> *Majrowski v. Guy's and Thomas's NHS*, HL, para. 29.

<sup>24</sup> Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act, and so forth.

this legislation are quite new. They came into force in domestic legislation on 1 October 2005 as a result of the implementation of Directive 2002/73/EC. Since then, all anti-discrimination legislation in the UK has contained a special provision prohibiting harassment. In all pieces of anti-discrimination legislation, harassment is defined as follows: a person harasses another person if he or she engages that person in unwanted conduct that has the purpose or effect of violating that person's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment for that person and this conduct is based on one or a number of discriminatory grounds, namely on that person's sex; race or ethnic or national origin; religion or belief; sexual orientation; age; or disability.<sup>25</sup>

In addition to this (common) definition, the Sex Discrimination Act 1975 provides for a specific type of sexual harassment in section 4A(1)(b), which states that a person subjects a woman to harassment if 'he engages her in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her'.

Because of the novelty of anti-harassment provisions, it is not surprising that there are not many tribunal cases that refer directly to these provisions. The fact that the ET1 form,<sup>26</sup> which should be submitted by the claimant to the tribunal, does not include a section on harassment is also an indication of some lack of awareness or acceptance of these provisions. However, the Employment Appeal Tribunal (EAT) has been quite proactive in making sure that these provisions are properly exercised. In the recent case of *Love v. Alexander Le Skerne Ltd*,<sup>27</sup> the EAT held that all the materials were there upon which the Employment Tribunal (ET) could have made a finding on the application of section 4A relating to sexual harassment if it had considered that statutory provision at all.<sup>28</sup> Although the EAT acknowledged that the general rule that should be followed as laid down by J. Arnold in *Kumchyk v. Derby City Council*<sup>29</sup> is that a party should not be allowed to depart from what her representative had decided to do, this did not apply to the present case because:

(a) the ET1 makes it clear that there is an allegation of sex discrimination. We note that there was no specific place on the form ET1 for an allegation of sexual harassment. The appropriate parts of the form simply refer to discrimination; ... (c) the Employment Tribunal clearly thought that the allegations of sex discrimination was one of sexual harassment both in its findings of fact and in its conclusion to which we have already referred.<sup>30</sup>

Therefore, even when it is not explicitly stated in the application form, the tribunals are required to apply statutory provisions relating to harassment if the material in front of them clearly indicates that the claimed discrimination is based on harassment.

<sup>25</sup> SDA, s. 4A(1)(a); RRA, s. 3A(1); DDA, s. 3B(1); RB Regs, Reg 5(1); SO Regs, Reg 5(1); Age Regs, Reg 6(1).

<sup>26</sup> The application form that is submitted by the complainant to the employment tribunal.

<sup>27</sup> [2007] WL 1157971.

<sup>28</sup> *Ibid.*, para. 10.

<sup>29</sup> [1978] ICR 116.

<sup>30</sup> *Ibid.*, paras 14 and 15.

Unlike provisions relating to direct discrimination where the claimant has to show a comparator or, in other words, has to show that he or she was less favourably treated in comparison with another person who was of different sex, race, religion, and so on, the requirement for a comparator was removed from anti-harassment provisions. However, it was argued that it was indirectly reintroduced by the wording ‘on the grounds of’ as the claimant has to show that the act was committed on the prohibited ground, for example, on the ground of sex.<sup>31</sup>

This issue was challenged in the High Court in *Regina (Equal Opportunities Commission) v. Secretary of State for Trade and Industry*.<sup>32</sup> The Equal Opportunities Commission (EOC) contended that the use of the words ‘on the grounds of her sex’ in section 4A(1) (a) impermissibly introduced an issue of causation in the concept of harassment contrary to the Council Directive 76/207/EEC Article 2(2), which does not require or allow it. The Directive uses the words ‘an unwanted conduct related to the sex of a person’, which means it is *associated* with the sex of the person, rather than *caused* by it.<sup>33</sup> It follows from here that ‘a complainant may be harassed by conduct which is directed at a man or another woman’.<sup>34</sup> The wording ‘on the grounds of sex’ is ‘the appropriate definition for discrimination, where causation or ratiocination is required, but that harassment is distinct, and cannot be defined in the same way, dependent as it is simply on a connection or association with sex’.<sup>35</sup>

As a result, section 4A(1)(a) of the Sex Discrimination Act (SDA) 1975 was amended by the Sex Discrimination Act 1975 (Amendment) Regulations 2008<sup>36</sup> and as from 6 April 2008 the definition of harassment in SDA 1975 prohibits ‘unwanted conduct satisfying the statutory test which is “related to” the complainant’s sex or the sex of another person’.<sup>37</sup>

It was also accepted in this case that if section 4A incorrectly defines the concept of harassment in the sphere of sex, then the equivalent provisions of the other discrimination statutes or regulations<sup>38</sup> are also unlawfully formulated as not implementing the relevant Directives.<sup>39</sup>

However, no changes have been made to the definition of harassment in other areas of anti-discrimination legislation. Thus, if the employment tribunal was not satisfied that harassment took place on grounds of race, religion or belief, sexual

<sup>31</sup> L. Clarke, ‘Harassment, Sexual Harassment, and the Employment Equality (Sex Discrimination)’, *Industrial Law Journal* 35, no. 2 (2006) 161-178.

<sup>32</sup> [2007] EWHC 483 HC.

<sup>33</sup> *Ibid.*, para. 3.

<sup>34</sup> *Ibid.*, para. 3.

<sup>35</sup> *Ibid.*, para. 6.

<sup>36</sup> SI 2008/963.

<sup>37</sup> C. Pigott, ‘Equal but Different’, *New Law Journal* 158, no. 7323 (2008): 766.

<sup>38</sup> Section 3A of the Race Relations Act 1976 (as inserted by Regulation 5 of the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626)), s. 3B of the Disability Discrimination Act 1995 (as inserted by Regulations 3(1) and 4(2) of the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673)), Regulation 5 of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), and Regulation 5 of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661).

<sup>39</sup> Council Directive 2000/43/EC of 29 Jun.e. 2000 (on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin; OJ 2000 L180, 22) and Council Directive 2000/78/EC of 27 Nov. 2000 (establishing a general framework for equal treatment in employment and occupation; OJ 2000 L303, 16).



orientation, or age, for example, the claim would fail. In the recent case of *English v. Thomas Sanderson Blinds Ltd*,<sup>40</sup> the Court of Appeal, reversing the decision of the Employment Appeal Tribunal, considered a potential conflict between the UK and EU relevant provisions in relation to sexual orientation and the majority held that the UK provisions<sup>41</sup> did not need to be ‘read down in order to conform to the Directive’.<sup>42</sup> In relation to the word ‘grounds’, L.J. Sedley noted that the court has to merely answer the question ‘why did the other employees harass the claimant?’ and ‘it is not necessary to demand a logician’s or a lawyer’s answer by looking for motive or purpose or cause and effect. If the harassment was based on his sexual orientation, whether real or imagined, the question ‘Why?’ is answered’.<sup>43</sup> Accordingly, the Court found ‘a way of reading the definition of sexual orientation harassment in line with the Framework Directive’.<sup>44</sup>

A Single Equality Act,<sup>45</sup> which aims to harmonize anti-discrimination laws, does not address this issue. However, it may still be argued that the legislation will need to be changed.

#### 4.1. BURDEN OF PROOF

As in all civil litigation cases, the applicant, who purported to be discriminated against or harassed, had the burden of proof of establishing and proving that the act of discrimination or harassment took place on the prohibited ground. Undoubtedly, that was a heavy burden to bear, as the applicant, for example in the case of direct discrimination, had to establish that he or she was treated less favourably in comparison with others, find a correct comparator in order to prove that he or she was particularly disadvantaged, and show a personal detriment as a result of this treatment.

Relatively recently, the burden of proof in claims for unlawful discrimination and harassment has been reversed in anti-discrimination legislation by virtue of a number of sets of amending regulations (the first being changed in 2001).<sup>46</sup> For example, section 54A(2) of the Race Relations Act 1995 states that:

where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent (a) has committed such an act of discrimination or harassment against the complainant...the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.

<sup>40</sup> [2008] EWCA Civ 1421.

<sup>41</sup> Regulation 5 of the Employment Equality (Sexual Orientation) Regulations 2003.

<sup>42</sup> Directive 2000/78/EC (Framework Directive).

<sup>43</sup> [2008] EWCA Civ 1421 per L.J. Sedley, para. 41.

<sup>44</sup> Pigott, 766.

<sup>45</sup> The Single Equality Act Green Paper, which was published in Jun. 2007, launched the consultation, a summary of which is at <[www.communities.gov.uk/documents/corporate/doc/322984.doc](http://www.communities.gov.uk/documents/corporate/doc/322984.doc)>.

<sup>46</sup> For example, SDA 1975, s. 63A (inserted by SI 2001/2660, Reg. 5), RRA 1996, s. 54A (inserted by SI 2003/1626, Reg. 41).

As a result, the claimant has to establish a *prima facie* case of harassment for a tribunal to see that the unlawful act has been committed on a prohibited ground and then it is for the employer to prove that the treatment ‘was in no sense whatsoever on the grounds of sex’,<sup>47</sup> race, disability, and so forth, in relation to the common definition of harassment. It is a norm for employment tribunals to refer to guidelines on this point, which were first formulated in *Barton v. Henderson Investec* [2003] IRLR 332 and later modified by the Court of Appeal in *Igen v. Wong* [2005] IRLR 258. In the latter case, the Court of Appeal held as follows:

- (i) Section 54A of the RRA and section 63A of the SDA require that the Tribunal go through a two-stage process;
- (ii) the burden is on the Claimant at the first stage to prove facts from which the Tribunal could, apart from this section, conclude in the absence of an adequate explanation that the Respondent has committed, or is to be treated as having committed, the unlawful act of discrimination;
- (iii) if the complainant is able to discharge that *prima facie* case then at the second stage the Respondent is required to prove, on the balance of probabilities, that he did not commit or is not to be treated as having committed the unlawful act;
- (iv) whereas generally the Respondent’s explanation is a matter to be considered at the second stage, it is possible that the facts as found by the Tribunal to be relevant may also take into account the explanation given by the Respondent rather than relying solely on the evidence of or on behalf of the Claimant;
- (v) only if the second stage is reached and only then if the Respondent’s explanation is inadequate will the Tribunal conclude that the Claimant has been discriminated against.

It is not sufficient to prove facts from which the tribunal could conclude that the respondent ‘could have committed’ such an act. It is not sufficient for the complainant to prove only the possibility rather than the probability of those facts at the first stage.<sup>48</sup>

It is clear from the Court of Appeal’s guidelines and the statutory language itself that the onus is on the claimant to prove the factual premise of each of his or her allegations and that if he or she is unable to do so, then the burden of proof does not shift to the respondent.

However, despite the changes in the law, two trends are emerging in practice. First, it is still quite a difficult task for the claimant to establish the case, and second, it takes some time for tribunals to adjust to and implement the changes.

#### 4.2. LAW IN PRACTICE

In order to have an overview of how the law is applied in practice, it was decided to look at cases of sex discrimination that have been brought to nine tribunals in different parts of the UK, namely, in Birmingham, Leeds, Leicester, Liverpool, Manchester, London Central, London South, Sheffield, and Bristol, since 2003. Many of these cases

<sup>47</sup> See Clarke and *Igen Ltd v. Wong* [2005] EWCA 142, CA, Guideline 11.

<sup>48</sup> *Igen Ltd v. Wong* [2005] EWCA 142, CA.

included claims of harassment, which were either based on applicants' sex, or seen to be of sexual nature.

This research explored how cases of harassment have been handled by tribunals in practice. The first thing that has become apparent is that cases are allocated to broad categories, such as 'discrimination on grounds of sex and marital status', 'discrimination on grounds of race or religion or belief', and so forth. There is no specific category relating to harassment. However, often claims of harassment are brought together with claims of discrimination, for example, sex discrimination or race discrimination. It is therefore quite a laborious task to locate claims of harassment from among the thousands of cases of discrimination brought to tribunals on an annual basis.

Second, as with any qualitative research, the data provided by tribunals are not always clear, accurate, or sufficient to make absolutely certain conclusions and some margin of error should be taken into account. However, as long as the margin of error does not exceed 10%, it is generally accepted by legal practice that a result (or a valuation) is accurate.<sup>49</sup>

With these considerations in mind, it appears that there have been a total of 21,335 sex discrimination cases brought to nine tribunals since 2003<sup>50</sup> with the following breakdown:

				Liver-	London	London		
Birmingham	Bristol	Leeds	Leicester	pool	Central	South	Manchester	Sheffield
2,697	1,103	3,507 <sup>51</sup>	844	1,297	2,539	3,494	5,044	810

As in other civil cases, decisions in cases of harassment, or indeed all discrimination cases, depend on evidence presented by an applicant and a respondent. Needless to say, in most cases evidence is conflicting. In the majority of such cases, the tribunal has to decide whose evidence is more trustworthy and which witness, including parties to a claim, is more credible. The following examples typify the way a tribunal approaches such a decision:

the Tribunal had no hesitation in preferring the Respondent's evidence in its entirety. The Respondent's witnesses were, without exception, credible and their evidence was at all times consistent with the documentation. The same cannot be said of the Claimant. Where there was any dispute of fact, the Tribunal preferred the evidence of the Respondent.<sup>52</sup>

In another case the tribunal said:

<sup>49</sup> A permissible margin of error is normally 10% either side of a notional 'right' figure, but it can be extended to 15% either way, or a little more, in exceptional circumstances: *Singer & Friedlander Ltd v. John D Wood & Co* [1977] 2 EGLR 84, 85 per J. Watkins.

<sup>50</sup> These data were collected in Aug. 2008.

<sup>51</sup> Note: at the time of the preparation of this paper, only 701 out of 3,507 were considered by the author.

<sup>52</sup> Case 2300553/2006, unreported, London South ET.

we found at the conclusion of our deliberations that on the very serious allegations which the Claimant made about the early state of her employment revolving around the allegations of sexual harassment and indeed on this virtually final example of her very confrontational attitude and behaviour in the last few days of her employment, the Claimant's evidence was totally unbelievable and unreliable.<sup>53</sup>

It is hardly surprising therefore that very often the claimant does not pass the first hurdle of establishing the case of harassment (or discrimination) before the burden can be shifted on the defendant.

It was found out that up to 17% of all sex discrimination claims that went to nine UK tribunals since 2003 were struck out.

*Struck Out Cases*

<b>Birmingham</b>	<b>Bristol</b>	<b>Leeds</b>	<b>Leicester</b>	<b>Liver- pool</b>	<b>London Central</b>	<b>London South</b>	<b>Manchester</b>	<b>Sheffield</b>
356	146	590	72	141	85	527	651	13
13%	13%	17%	8.5%	11%	3%	15%	13%	2%

On average, 13% of sex discrimination claims were struck out by seven out of nine tribunals with the exception of London Central and Sheffield, where these numbers were exceptionally low.

The reasons for claims being struck out include, inter alia, the following: claims have not been actively pursued, or the claimant failed to establish a prima facie case of discrimination/harassment.

The number of withdrawn cases is quite high, varying from 22% to 46% and on average 34.6% of sex discrimination claims were withdrawn from the nine tribunals.

*Withdrawals*

<b>Birmingham</b>	<b>Bristol</b>	<b>Leeds</b>	<b>Leicester</b>	<b>Liver- pool</b>	<b>London Central</b>	<b>London South</b>	<b>Manchester</b>	<b>Sheffield</b>
959	288	156	308	486	771	1,140	2,260	372
35.5%	26%	22%	36.5%	37.5%	30.4%	33%	45%	46%

There is a slightly smaller number of cases that are settled either with the help of ACAS<sup>54</sup> or privately, often on the day of the hearing. The range of settled cases varies between 20% and 36.5% as illustrated below.

<sup>53</sup> Cases 2301985/2004 and 2304227/2004, unreported, London South ET, para. 78.

<sup>54</sup> ACAS – Advisory, Conciliation and Arbitration Service.

*Settlements*

<b>Birmingham</b>	<b>Bristol</b>	<b>Leeds</b>	<b>Leicester</b>	<b>Liver- pool</b>	<b>London Central</b>	<b>London South</b>	<b>Manchester</b>	<b>Sheffield</b>
844	396	213	309	442	701	837	998	183
31%	36%	30%	36.5%	34%	28%	24%	20%	22.5%

It can therefore be seen that the vast majority of cases were withdrawn or settled. The reasons for withdrawal are hard to ascertain but may include, for example, claimants' feelings of discouragement, private settlements, or realization by the claimant that the claim does not have a good chance of success because of the lack of evidence. Taking into account that, unlike most defendants, in many cases claimants cannot afford to have legal representation, it is not surprising that they get cold feet and choose to surrender before even trying.

Ultimately, only a small number of cases were actually heard by tribunals varying from 5% to 13% of total applications. Of these a similar proportion of cases decided for either claimants or defendants, although in some tribunals the number of cases decided in favour of defendants is higher.

*Proportion of Cases Decided for Claimants (C) and Defendants (D)*

	<b>Birmingham</b>	<b>Bristol</b>	<b>Leeds</b>	<b>Leicester</b>	<b>Liver- pool</b>	<b>London Central</b>	<b>London South</b>	<b>Manchester</b>	<b>Sheffield</b>
C	96	56	35	44	67	122	174	109	39
	3.5%	5%	5%	5%	5%	5%	5%	2%	5%
D	136	80	33	43	77	185	274	134	41
	5%	7%	5%	5%	6%	7%	8%	3%	5%

A sample of around 200 cases of direct sex discrimination was closely inspected for the purpose of the study. It was found that an issue of harassment was raised in fifty-eight of these cases either as part of section 1(2)(a) relating to direct sex discrimination, or under section 4A relating to the new anti-harassment provision of the SDA 1975.

It was noted that in the majority of cases, fifty-six out of fifty-eight, the defendants were represented, usually by lawyers, whereas in quite a large proportion of cases, twenty-three out of fifty-eight, the claimants had no representation. Out of the twenty-three cases where claimants had appeared in person, in only eight cases the tribunal decided in favour of claimants in their claims of direct sex discrimination and/or harassment, whereas fifteen remaining claims were dismissed. It is worth noting that out of the above eight cases, the defendants had lay representation in five cases, no representation in two cases, and legal representation in only one case.

The ratio of successful claims where claimants had representation was quite different. Here, the number of successes and dismissals was almost equal. Out of thirty-five cases,

claimants were successful in seventeen. It can be argued that the outcome of cases was affected depending on whether there was some representation in the case. However, in order to make such an inference for certain, it is necessary to consider each case and its particular facts and evidence.

#### 4.3. USE OF EVIDENCE

As noted earlier the evidence often depended on the credibility of the parties and the tribunal had to decide whose evidence to trust. Some tribunal conclusions illustrated the difficulties here:

We have found this a disturbing case. The Claimant has cynically manufactured a case based on egregious lies. She has shown a conspicuous disregard, indeed contempt, for the truth. As for the Respondents, we were staggered by the standards which Mr M. and his management colleagues appeared to regard as unexceptionable... We have looked in vain for any evidence of a desire on the part of the Respondents' decision-makers to set standards of decency and mutual respect within the organisation.<sup>55</sup>

It would not be surprising therefore that the tribunal could find it difficult sometimes to decide whose evidence is more trustworthy and credible.

However, it is not acceptable if the tribunal cannot make up its mind as to whose evidence to trust as in the case of alleged sexual harassment in *Reedman v. Athithan*.<sup>56</sup> The case was brought before the changes to the legislation in 2005 and so the tribunal had to rely on the principles established in *Reed & Bull Information Systems Ltd v. Stedman*,<sup>57</sup> namely whether the respondent had shown a sexual interest in the claimant, which she had made clear was unwelcome and which she found offensive, which was overwhelmingly a question of fact.<sup>58</sup> The tribunal stated that they were 'unable to say that we [were] satisfied on the balance of probability with [Miss Reedman's] evidence'.<sup>59</sup> The EAT was not impressed by this and held:

The fact that the issue which the Tribunal had to decide was predominantly one of fact did not absolve the Tribunal from its obligation to explain how it had arrived at its conclusion. Where there is a conflict of evidence, it is necessary to explain 'why one version has been preferred to another'; see *Tchoula v Netto Foodstores Ltd*, 6 March 1998, cited in *Anya v University of Oxford* [2001] ICR 847 at [24]. Having said that 'it may be enough to say that... one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon'; see *English v Emery Reimbold & Strick Ltd* [2003] IRLR 710 at [19]. If, as here, the Tribunal was unable to decide whose evidence was to be preferred, the Tribunal had to explain why it had not been persuaded that Miss Reedman's version of events was true. The critical question is whether the Tribunal did that.<sup>60</sup>

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<sup>55</sup> Case 2302548/2004, London South.

<sup>56</sup> [2007] WL 504745.

<sup>57</sup> [1999] IRLR 299.

<sup>58</sup> *Ibid.*, para. 11.

<sup>59</sup> *Ibid.*, para. 12.

<sup>60</sup> *Ibid.*, para. 14.

The claimant, who has to establish the *prima facie* case, has to provide enough evidence to persuade the tribunal that the act of harassment took place. This is a difficult task especially in cases of sexual harassment or harassment on the grounds of the claimant's sex. For example, in the case of *Morris v. Health Zone Ltd*,<sup>61</sup> the employment tribunal concluded:

In this case the Tribunal was faced with considerable conflict of evidence about the allegations of sex harassment by the Claimant. We were troubled by the lack of any corroborating evidence before us of the incidents alleged, when in this case, unusually, some of the incidents were said to have been witnessed and capable of verification.

Although some corroborating evidence could easily be obtainable, such as video footage, as it was in this case, some evidence often requires the claimant to provide names of other witnesses. This is quite difficult to do in court because of a fear that by incriminating (often former) colleagues the claimant may put them in a delicate position, which can potentially lead to victimization.

In a different case:

the Tribunal accepted the Claimant's evidence that she had not told a single person about the alleged sexual harassment by Mr X.<sup>62</sup> It was put to her that the reason why she did not tell anybody about these incidents was because they had not occurred and she had fabricated them. The Claimant denied that suggestion and told the Tribunal that she had not spoken to anybody about the incidents because she was extremely embarrassed about them, and because she was terrified about what Mr X might do if he became aware of her allegations of sexual harassment. 'We accept that it is often extremely difficult for women who are the victims of sexual harassment to tell others about their experience, and to complain about it. However, we do not find this to be a convincing explanation for the Claimant's silence... We did not find it credible that she would shrink from making a complaint of sexual harassment'. The Claimant did not provide any satisfactory explanation about why after her months of silence she decided to make her complaint.<sup>63</sup>

Although there is no doubt that on evidence presented to the tribunals the cases are correctly decided, there are still questions of whether the claimants are required to satisfy unreasonably high demands, such as that the claimant should claim harassment as soon as it occurs, that she should use the right terms, in particular, sexual harassment instead of mere harassment, and finally she should support her claim with corroborating evidence, which is usually in the form of witness statements given by named individuals, often former colleagues. Although in theory the burden of proof is reversed, it does not seem that this makes any significant difference in practice.

## 5. CONCLUSION

It is clear that there are still many problems with the UK law relating to harassment at work. In addition to the practical difficulties that victims of harassment have to deal with, they have a number of hurdles presented by the current state of the law.

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<sup>61</sup> Case 2300468/2006, unreported.

<sup>62</sup> The name is not stated for reasons of data protection.

<sup>63</sup> 2301657/2004 and 2304101/2004, unreported.

First, a decision is needed as to which legal provisions to use and therefore which court to consider. Under current legal options, claimants tend to rely on anti-discrimination legislation and apply to employment tribunals. However, since 2003 only a small proportion of all applications, up to 13%, reached full tribunal hearings, whereas the majority of cases were either withdrawn by claimants, up to 46%, or settled, up to 36.5%.

Second, there is still a problem with the definition of harassment under anti-discrimination legislation. As stated in the case of *Regina (Equal Opportunities Commission) v Secretary of State for Trade and Industry*,<sup>64</sup> the comparator should be removed from the provisions relating to harassment as it was already done in SDA 1975.

Third, although the burden of proof was reversed in anti-discrimination laws, it is still difficult for the applicant to establish the so-called prima facie case after which the burden can be shifted to the defendant. The success of every case of harassment will depend on evidence, which is almost always conflicting, and the claimant can find it difficult to support her claim with corroborating evidence. In the majority of cases, applicants, unlike defendants, cannot afford legal representation to help them to present evidence in the best possible way. The short time allowed for bringing a claim under anti-discrimination laws is also a deterrent factor. It requires certain skills to be able to draft proper particulars of a claim, which can be supported by evidence. The high costs of bringing claims and insubstantial monetary compensation may also bar claimants from court proceedings.

In summary, it is evident that victims of harassment are still being put in quite a difficult position. In addition to being harassed, emotionally weakened, and most probably frightened, they have to face the ambiguities and complexities of the law and evidence. Positive trends have, however, started to emerge, as tribunals have become more familiar with anti-harassment provisions and use them with more confidence, making decisions that provide solid groundwork for future cases.

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<sup>64</sup> [2007] EWHC 483 HC.