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Abstract
Harassment, even of a verbal nature, can pollute the working environment and can destroy the health, confidence and the self-esteem of the victim. Of course, it is up to the claimants in these verbal harassment cases to establish that the behaviour of the employer is unwelcome and unsolicited and that it is offensive to them personally. It is this latter requirement that has caused most difficulty for claimants in these cases. This aspect of obtaining protection against long-standing harassment will be discussed in this article in light of a new decision that considerably broadens the legal protection for victims of harassment.

Keywords
Legal, liabilty, employers, long-term, verbal, harassment

Introduction

In *Munchkins Restaurant Ltd and another v Karmazyn*[1] the claimants were waitresses who had alleged they had been subjected to persistent unwanted sexual conduct for up to five years by the controlling shareholder of the restaurant in which they worked. This included his: inappropriate conversation of a sexual nature on an almost daily basis;

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enquiries about their sex lives and insistence they wear short skirts. The issue here was could the behaviour in what was primarily a verbal harassment claim constitute sufficient detriment to underpin a claim for harassment, particularly in circumstances where the claimants had taken part in the verbal dialogue that formed part of the claim.

Background

In a string of cases (dealing with verbal sexual harassment), starting with *Wileman v Minilec Engineering Ltd*[2] and finishing with the case under consideration, *Munchkins Restaurant Ltd and another v Karmazyn*,[3] the issue of proving verbal harassment, often in an atmosphere of regular sexual banter, has been given consideration by courts and tribunals. It is not this writer's intention to give the issue of verbal harassment detailed consideration here, although it will be touched upon in the light of the cases being considered.[4] This short article is about the recent decision in the *Munchkins Restaurant* case (hence the title) and its impact on harassment cases generally.[5] Before considering this case in detail it is necessary to outline the background to this type of harassment (that is long-standing and verbal in nature) and identify the most relevant aspects of the previous law.

Recent research

It is outside the scope of this article to give detailed consideration to why harassment occurs and why it is often allowed by employers to be perpetuated over a long period of time against their employees, although recent research offers some insight into this. As the following quote suggests, harassment and bullying are inextricably linked with the inequality of power between the parties and organizational failure to deal with the issue. Both these key aspects are considered in the context of the *Munchkins Restaurant* case below.

> Sexual harassment and bullying ... are explicitly linked to the power relations within an organisation. It is argued that sexual harassment represents an abuse of power where members of one group of people, generally women, may be systematically disempowered and at risk of abusive behaviour. Sexual harassment, bullying and physical violence can all be seen in terms of 'organisational violation'. This is where the culture of an organisation makes it possible for individual employees to be treated abusively or with disrespect. Hierarchical and managerial power are central to understanding why such a workplace culture develops. As the climate of disrespect within an organisation increases, the more likely it is that certain inappropriate behaviours are taken for granted, leading to the creation of an 'incivility spiral', where uncivil behaviour becomes routine and regarded as the norm.[6]

This to some extent explains why in the *Munchkins Restaurant* case the long-term verbal harassment perpetrated against a number of women went unchecked by the employer, in some cases for a period of several years.

With respect to verbal harassment, this is very common in the workplace and because it is viewed as less serious behaviour by the victims themselves they tend to tolerate it. However, recent research in the armed forces carried out by Rutherford et al.[7] discovered how widespread this behaviour is in certain occupations. They examined, amongst other things, the nature and extent of the experiences of sexual harassment by females working

in the armed forces.[8] What was remarkable was that sexualized behaviours, defined as jokes and stories, language and other material, were found to be widespread in all of the Services. Almost all (99 per cent) of the servicewomen who responded had been in situations where they experienced such behaviours in the previous 12 months and 52 per cent had been in a situation they found offensive.

Previous legal position

The tribunals and courts in the early cases were not always sympathetic to victims of verbal harassment particularly in cases where the victim had failed to complain to their employer about the behaviour and had tolerated it for a considerable time. The assumption of the tribunals and courts was often that victims of verbal harassment had not suffered sufficient detriment to be protected by the law. In *Wileman v Minilec Engineering Ltd*[9] , a case similar to that being considered, the applicant complained to an industrial tribunal that she had been sexually harassed by a director of the employer's company continuously during the four years of her employment and that, accordingly, she had been discriminated against and subjected to a detriment contrary to what was the Sex Discrimination Act 1975.[10] The industrial tribunal upheld her complaint of sexual harassment but found that although the discrimination subjected her to a detriment in the sense that it was an irritation, it had not caused her any real distress.[11] They rejected the applicant's claim for exemplary damages and awarded her the nominal sum of £50 compensation.

Although the Employment Appeal Tribunal (EAT) upheld this decision in the course of its judgment it set out important principles relating to evidence in sexual harassment cases. It recognised that in determining the detriment caused by sexual harassment for the purpose of awarding compensation for injury to feelings, employment tribunals have to be very careful to ensure that, in situations where no complaint has been made, it recognises that the matter may have been borne with increasing irritation and distress by the claimant because she was frightened to complain.

The guidance given by the EAT in *Wileman* concerning the approach to cases of long-standing harassment was clearly taken to heart in the *Munchkin Restaurant* case. As will be seen in that case, the employees claimed constructive dismissal on the basis of verbal misconduct on the part of the employer directed at them over a number of years. Although the complaint was mainly concerned with verbal harassment, which is undoubtedly the least serious form of harassment, it took account of the cumulative effect of the behaviour on a group of women over a number of years. Interestingly, in *Lewis v Motorworld Garages Ltd*[12] the court considered the circumstances under which an employee might resign and successfully claim constructive dismissal in similar circumstances. In explaining what has now been described as the last-straw principle, one of the judges said:

> ... breach of this implied obligation of trust and confidence may consist of a series of action on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? This is the 'last straw' doctrine.[13]

Another judge in the case affirmed this as follows:

> . . . it is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.[14]

So following this decision in any case where there is no serious breach of the implied term of trust and confidence but there is a series of minor incidents of a similar nature (harassment) capable of cumulatively representing a serious breach, then a constructive dismissal claim can follow based on a breach of that term.

What also might appear on reflection as an unsatisfactory judgment arose in *Snowball v Gardner Merchant*[15], which concerned the type of evidence that can be brought forward in these cases. This case was particularly relevant to the case in hand. The employee claimed that she had been sexually harassed by her manager. In the course of giving her evidence the employers sought to cross-examine her as to her general attitude towards sexual matters, based on events that had occurred during the course of her employment. She denied the allegations that were put to her. The employers then sought to call evidence to establish the truth of those allegations and the employee objected. The evidence the employer asked to be included related to conversations she had with her colleagues where she had revealed her attitude to sexual matters. The Tribunal decided in the employer's favour holding that the evidence ought to be called as (save insofar as it went only to establish an atmosphere of prejudice) it was relevant both to the issue of credibility and to the issue of the extent of the alleged detriment and injury to feelings sustained by the employee. Fortunately for applicants in harassment claims nowadays it is unlikely that this type of evidence would be allowed. In the *Munchkin Restaurant* case, although it was shown that the applicants had engaged in sexual banter with their employer, it was accepted by the EAT that this was done only to deflect any sexual attention away from them.

Another important and leading case dealing with verbal harassment was *Insitu Cleaning Co Ltd and another v Heads*,[16] in which the EAT rejected an employer's argument that a single act of verbal harassment cannot amount to sexual harassment. The employee said on three previous occasions that Brown, a colleague, had made grossly offensive remarks to her of a sexual nature and then on the fourth occasion, in the presence of a director and another employee, he said, 'Hiya big tits'. She found this remark very distressing. Neither of the other two people present heard the remark, although the other employee remembered her complaint to him immediately afterwards and the state she was then in, and the director remembered that she had made a complaint to him shortly after he returned to the room. Brown categorically denied making any such remark. The EAT were not satisfied that the previous incidents had occurred but believed the evidence of the female employee regarding the sexist comment made to her in front of others. The EAT ruled that a single remark about a woman's breasts subjected her to a detriment and was unlawfully discriminatory.

In the case of *Reed and Bull Information Systems Ltd v Stedman*,[17] also a verbal harassment case, the EAT recognised that the effect on the victim in each case of harassment had to be looked at separately as it could prove instrumental in determining the employer's liability in a case.[18] However, shortly after this decision the EAT in *Driskel v Peninsula Business Services*[19] went further when it held that behaviour which in isolation may not amount to a discriminatory detriment may become such if it is persistent. They went on to say that tribunals in sexual harassment cases should not lose sight of the significance of the sex of both the complainant and the alleged discriminator. Sexual badinage of a heterosexual man by another man cannot be completely equated with like badinage by him of a woman. In the *Munchkins Restaurant* case the employer was liable for the sexist badinage of their senior manager with other employees even where the women who were the victims of it for a long time were also involved in the discourse themselves.

Current position

Under section 26 of the Equality Act 2010 harassment is defined as: (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. Section 26 (4) states that 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.

In *Munchkins Restaurant Ltd and another v Karmazyn and others*[20] the EAT considered a variety of substantive and procedural issues in the context of a claim for sexual harassment and constructive dismissal. Miss Karmazyn and three other female European migrants worked in the Munchkins Restaurant as waitresses. They alleged that the 73-year-old controlling shareholder, Mr Moss, made them wear short skirts and subjected them to talk of a sexual nature including frequently asking them questions about their sex lives. One of the important (but hardly unique) features of the case was the considerable length of time (between one and five years) that the claimants had put up with the 'intolerable' conduct before resigning.[21] The waitresses tried to complain to him directly about his behaviour but advised that this caused him to get angry with them. There was a female assistant manager at the restaurant who acted as a kind of intermediary between the claimants and Mr Moss, which helped them to continue in employment. However, the waitresses were all migrant workers with no certainty of continued employment. Following the departure, due to ill health, of the female assistant manager who had helped them, the waitresses all resigned over a period of three months as their positions had become untenable.

The EAT found that even though the claimants had tolerated the conduct and even initiated talk of a sexual nature as a coping strategy, this did not mean that the behaviour was not unwanted. As a result, it was not perverse to find that their putting up with the behaviour should not negate their ability to claim unfair dismissal. It was held that 'putting up with it does not make it welcome'. The EAT at an earlier stage had upheld the claimants' claims for sexual harassment and constructive dismissal, making Mr Moss

and the company jointly and severally liable for paying each waitress £15,000 for injury to feelings plus £1,000 in aggravated damages due to the 'inappropriate and excessive' way in which the case had been conducted by the respondent's representative. This part of the judgment was also upheld by the EAT.

They also ruled that when employment tribunals are making a joint and several award against multiple respondents in a discrimination case they are not obliged to set out the extent of each respondent's contribution. They considered that 'where there is an award of joint and several liability the respondents or any one of them is liable for the full extent of the damages to the claimant'.

This decision does not break new ground as such. Its significance lies in the judicial recognition of the fact that people will continue to work in an oppressive workplace (characterized by harassment or bullying) for considerable periods, but this does not mean they are willingly experiencing the behaviour; in fact, the opposite will often be true. Although the manager in the case was clearly acting unlawfully and pursuing a line of behaviour that the company he worked for would not approve of, it is appropriate that the employer should be vicariously liable for his actions.

Vicarious liability

The principle of vicarious liability applies in discrimination cases and is premised on the fact that an employer should be responsible (in most circumstances) for the discriminatory acts of their supervisors and in more limited circumstances for their general employees. Under section 109 of the Equality Act 201022 it states that: (1) anything done by a person (A) in the course of A's employment must be treated as also done by the employer and (2) anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. It further states under section 109(3) that it does not matter whether that thing is done with the employer's or principal's knowledge or approval.

Since the decision in *Jones v Tower Boot Co. Ltd*[23] and subsequent decisions, the terms *in the course of employment* has been interpreted by the courts and tribunals in a broad and everyday sense, which has resulted in the employer being liable for most behaviour of an employee that can be associated or connected with his work. Under section 109(4) of the Equality Act the real defence for an employer is presented in the following terms: 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. In the context of harassment taking such steps as were *reasonable* would involve: having specific policies and procedures (including those for making a complaint) dealing with all forms of harassment; training of all staff on the nature of the behaviour and unacceptableness,[24] but in particular to those staff in a supervisory position; putting support mechanisms in place for employees who are victims of harassment and ensuring adequate levels of supervision are provided for staff at all levels.[25] The vicarious liability of the employer was not an issue in the *Munchkins Restaurant* case because, amongst other things, the perpetrator was a senior manager of the company, the behaviour

was widespread and had gone unchecked for a number of years and there was no system in place for effectively dealing with complaints of sexual harassment.

Other legal actions

Although the claimants in the *Munchkins Restaurant* case were successful in their claim for sexual harassment and constructive dismissal they could have brought a claim under the law of tort for breach of duty of care of the employer.

Negligence

In the landmark judgment of *Waters v. Commissioner of Police for The Metropolis*[26] five UK law lords[27] unanimously granted former Metropolitan Police constable Eileen Waters the right to sue her former employers for harassment and bullying under the law of negligence and contract law. After reporting a fellow officer for sexual harassment and rape Ms Waters was subjected to four years of bullying and harassment, which resulted in her psychiatric injury and a lost career. This judgment ensured that any employee who suffers a psychiatric injury as a result of bullying and harassment could sue her employer for negligence if the harassment had been brought to her employer's attention often and he took no action. Shortly after the *Waters* case, in the case of *Lister and others v. Hesley Hall*[28] the House of Lords ruled that an employer may be vicariously liable for acts by its employees, including criminal acts, under the law of delict where the employer provides the opportunity for the employee to commit those acts and these acts are *closely connected with the perpetrator's employment and it is just in the circumstances to hold the employer liable*. The case extended the traditional test for vicarious liability under the common law considerably and consequently increased employers' potential financial exposure in cases of harassment and bullying.

Protection from Harassment Act 1997

If someone is harassed at her place of work she could decide to sue her employer for damages using the Protection from Harassment Act 1997 rather than claiming discrimination before an employment tribunal. In some circumstances this route could also be simpler than claiming a breach of contract or breach of duty of care under the law of delict. All that would be relevant in determining a legal claim under the Act is: the fact that two or more incidents of the harassment occurred; that the victim suffered damage and that the employer was vicariously liable for permitting (or not preventing) the harassment. In the case of *Majrowski v Guy's & St Thomas's NHS Trust*[29] the House of Lords held that an employer would be vicariously liable under the Protection from Harassment Act 1997 for damages arising from harassment of an employee by other employees. Mr Majrowski was employed by Guy's and St Thomas's NHS Trust as a clinical audit co-ordinator. He alleged that during his time working in that post he was bullied, harassed and intimidated by his manager. He claimed that she was excessively critical of his work and strict about his timekeeping. She also refused to talk with him and treated him differently and unfavourably compared with other members of staff.

Furthermore, he claimed that she was rude and abusive to him in front of other staff and imposed unrealistic performance targets on him, threatening him with disciplinary action if he did not meet them. Mr Majrowski brought a claim for damages against the Trust on the basis that as his employer they were vicariously liable for the harm to him (under section 3 of the Protection from Harassment Act 1997) for the harmful actions of their supervisory employee. The Court of Appeal unanimously held that employers can be vicariously liable for breaches of statutory duty as well as breaches of common law obligations, subject to the wording of the Act in question. In addition, in a majority decision the Court judged that there was nothing in the Protection from Harassment Act 1997 that prevented an employer being held vicariously liable for harassment by one employee of another, in the course of his or her employment, provided a sufficiently clear link can be established between the work and the harassment.

The case went on appeal to the House of Lords who held that in most cases courts should have little difficulty in applying the close connection test set out in *Lister*. So where the claim meets that requirement and the quality of the conduct said to constitute harassment is being examined the courts will have to recognise the boundary between conduct which is unattractive, even unreasonable and conduct which is oppressive and unacceptable. It is important to be aware of the fact that for the unacceptable behaviour to be sufficiently serious to be covered by the Act the misconduct must be of an order which would sustain criminal liability under section 2 of the Act.[30] It is unclear whether the behaviour of the manager in the *Munchkins Restaurant* case was sufficiently harmful to his victims to allow an action under the Act to succeed. This needs to be tested in the courts although the cumulative impact of harassment over a period of years may make it sufficiently harmful to give rise to a criminal claim. If the victim is successful bringing an action under this Act they could obtain an injunction preventing future harassment and in addition claim damages under section 3(2) of the Act, which allows civil courts to award damages to victims of harassment for any anxiety caused by the harassment and any financial loss resulting from the harassment. The time limit for bringing a claim for damages under section 3 of the Protection from Harassment Act 1997 is six years[31], which gives victims far longer to bring a claim than the three-month time limit for discrimination claims.[32]

Conclusion

This case should give hope to long-suffering victims of (usually minor forms of) harassment that there is legal remedy for them should they decide to take legal action against their employer, specifically a harassment claim for one or more of various grounds of discrimination under Section 26 of the Equality Act 2010 and/or an action for constructive dismissal (probably under the last-straw doctrine).[33] What is also important about this decision is that it recognises that a victim of harassment can sometimes go along with harassment for a long time or even actively take part in the behaviour complained of (as in this case with sexual banter) as a coping strategy, and this does not deflect from the amount of detriment he or she has suffered. Although the case law analysed in the context of this article has almost exclusively involved sexual harassment law there is a strong possibility that a similar claim could be successfully brought under any of the

other headings of discrimination law, namely race, sexual orientation, religion or belief, disability or age, particularly in light of the harmonisation of the law of harassment under section 26 of the Equality Act 2010. Long-term harassment or bullying is finally behaviour that the courts recognise as a form of harassment that is unlawful under the equality legislation. Also, they now accept that toleration of the behaviour by its victim (because of the inequality of their bargaining position in the workplace, a prevailing culture of tolerating harassment or a lack of opportunity to effectively complain about it) does not equate with their acceptance of it or acquiescence to it as a form of workplace behaviour.

Notes

1. Appeal No. UKEAT/0359/09/LA.
2. [1988] IRLR 144 EAT.
3. Appeal No. UKEAT/0359/09/LA.
4. Middlemiss S (2009) Liability of employers for verbal harassment in the workplace. *Irish Employment Law Journal* 6(1): 8–15.
5. Provisions previously dealing with harassment were in: The Race Relations Act 1976 (Amendment) Regulations 2003 No. 1626; The Employment Equality (Sexual Orientation) Regulations 2003, No. 1661; The Employment Equality (Religion or Belief) Regulations 2003 No. 1660; The Disability Discrimination Act 1995 (Amendment) Regulations 2003 No. 1673; The Employment Equality (Sex Discrimination) Regulations 2005 5 No. 2467; and The Employment Equality (Age) Regulations 2006 No. 1031. However, the rules have now been harmonized in section 26 of the Equality Act 2010.
6. Hunt C, Davidson M, Fielden S and Hoel H (2007) Sexual harassment in the workplace: a literature review. Working Paper Series No. 59, Manchester Business School, University of Manchester EOC Publication, pp. 5–6.
7. Rutherford S, Schneider R and Walmsley A (2006) Agreement on preventing and dealing effectively with sexual harassment: quantitative and qualitative research into sexual harassment in the armed forces. Ministry of Defence/Equal Opportunities Commission. Available at: www.mod.uk/defenceinternet/home
8. A questionnaire was sent to all service women (18,178) and 52 per cent responded (9384). In addition, 29 focus groups and nine one-to-one discussions were conducted to provide qualitative data.
9. See note 1.
10. Section 6(2)(b) of the Sex Discrimination Act 1975.
11. One of the factors leading to that conclusion was that she occasionally wore provocative clothing at work.
12. [1985] IRLR 46.
13. Lord Justice Glidewell.
14. Lord Justice Neill.
15. [1987] IRLR 397.
16. [1995] IRLR 4.
17. [1997] IRLR 299 EAT.
18. This issue had been touched upon in *Snowball v Gardner Merchant Ltd* [1987] IRLR 397 over 10 years earlier.
19. [2000] IRLR 151 EAT.

20. See note 2.
21. It was four years in the Wileman case.
22. Previously section 41 of the Sex Discrimination Act 1975.
23. [1997] IRLR 168.
24. For example, incurring the disciplinary outcome of dismissal in serious cases.
25. *Croft v Royal Mail* [2003] ICR 1425.
26. [2000] ICR 1064, HL.
27. Lord Slynn of Hadley, Lord Jauncey of Tullichettle, Lord Clyde, Lord Hutton and Lord Millett.
28. [2001] IRLR 472; HL.
29. [2006] IRLR 695.
30. Section 2 creates the criminal offence of harassment. The offence comprises pursuit of a course of conduct (two or more incidents) in breach of section 1.
31. Five years in Scotland because of the law of prescription set out under the Prescription and Limitation (Scotland) Act 1973.
32. Section 123 of the Equality Act 2010.
33. As discussed, there are other legal actions under common and statute law that could apply.