

Mediating Sexual Harassment – Really

By Mia Forbes Pirie and Anna Stobart

Almost 4 out of 5 people who suffer sexual harassment do not report it. That is what Frances O’Grady, Secretary General of the TUC, finds most worrying. We do too. Does the answer lie in the other statistics in the same TUC report on sexual harassment in the workplace (2016)? They show that fewer than half of the instances which are reported were dealt with satisfactorily, whilst the other half were not.

Could mediation (and coaching) be part of the solution?

“Where’s the justice in that?” we hear some of you say. Concerns over sweeping allegations under the rug and perpetrators not being adequately punished abound. We, however, believe that there is potentially plenty of justice in mediating sexual harassment cases. Hopefully, by the end of this article you will agree. Either way, we would love to hear your opinion.

Not wanting to mediate is missing the point

We were recently asked by a prominent Human Resources journal to provide an example of what a mediation around sexual harassment could look like and how it might work. We thought our example was reasonable and helpful (you can read it at: <http://www.miaforbespirie.com/blog/>). The worst thing the man in our fictitious example did was to give the woman a shoulder rub, once, when he thought she looked stressed (fair enough, that was not the only thing). The editors (respected HR professionals) came back to us and said that they all thought that such a case should not be mediated. It was a clear case for disciplinary action. The man should be fired.

We understand the sentiment – but “hang on a minute”! Like much of the important debate on around sexual harassment at the moment this misses the point on so many levels. Most importantly, perhaps, that is not the outcome the woman herself wanted. Had that been the only possible outcome presented to her, she might well have withdrawn her complaint and remained in an uncomfortable situation, which could then have escalated. That would have been a ‘victory’ at too great a cost and a failure of the system, we think.

Bringing complaints to HR can be daunting. Mia wrote, in the last edition of the UK Mediation Journal, about making HR more approachable and the role that mediation could have in that. HR needs to be a place employees can feel safe to turn to with their problems, feeling confident that they will be addressed in a way which works for them. Regardless of the merits or demerits of our particular example, this article seeks to unpack what is lost by not considering mediation in sexual harassment cases.

How can mediation help?

How can we make sure that sexual harassment is dealt with proactively and in a healthy way? Are the procedures

currently in place adequate? Do we need a new approach, and to what extent should that approach involve mediation and coaching? These are some of the questions which this article seeks to answer. Could it, in some cases, even be possible to turn a negative destructive experience into an opportunity for greater understanding and empathy, and a more empowered team and working environment? Could women, indeed, come out more empowered and men change their behaviour and attitudes? We believe that this is all possible, and that mediation is potentially the key to it.

We are not naïve enough to think that mediation will work in every case, and of course there are some cases which can only be dealt with by disciplinary action, but mediating does not have to be the last resort. In fact, in our view, it should be among the first. If it does not work, of course, then more draconian steps are still available. It is important to give the victim more choice in how she wants her allegations to be handled.

1% of women say they have been raped or seriously sexually assaulted in their workplace (TUC Report). Let us be clear, we are not suggesting mediation for those cases. In grey areas, however, mediation is an opportunity for change, increased learning and improving workplace culture. It should not be overlooked nor underestimated.

Why women do not bring complaints

The most common reason given for not reporting sexual harassment was the fear of a negative impact on working relationships (28%). Other key reasons included the fear that the allegations would not be believed or taken seriously (24%), being too embarrassed (20%), worries about a negative impact on a person’s career (15%), not knowing how to report the behaviour (12%), or indeed that it was possible (9%). (TUC Report)

That is a lot of fears. Women want something to change, but the stakes may sometimes be too high, or be perceived to be too high (which amounts to the same thing). And we seem to forget: not everyone who tries to kiss someone or does something inappropriate is all bad. Relationships are complex. Sometimes people we like and care about act in ways that make us feel deeply uncomfortable. A complainant may not want to have them fired for that.

The forgotten grey areas

There are clear cases of sexual harassment and deeply inappropriate behaviour. But in this emotional debate we seem to be forgetting that there are also significant grey areas.

The law on sexual harassment is, perhaps necessarily, difficult to interpret. Rightly, the effect that behaviour or comments have on the victim is essential. What is acceptable behaviour for one person may not be for another. Moreover,

what is acceptable, even desirable, behaviour from one person may not be from another. And then there are the power dynamics, which are often highly significant.

Harassment is defined in the Equality Act 2010 as “**unwanted** conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.”(emphasis added) This is a subjective test. The word “unwanted” is key. The individual must not want that conduct. This could be different for someone else. What that means is, you cannot know, in advance, if your behaviour is appropriate or not. It depends on the recipient’s reaction. This should give us more than a moment’s pause for thought.

The law must therefore enter the murky area of human relationships: different humans, with different sensitivities, different desires, different vulnerabilities and different feelings. There is no doubt that this is complicated and we must proceed with caution.

There are also patterns which may be occurring in the background and contributing to an environment which may lead to sexual harassment. For example, as women, many of us have experienced the kind of systemic disregard that Zoe William describes in the Guardian newspaper as being “routinely ignored in meetings until your point has been corroborated by three other men”. Most men do not have any idea what that feels like. Is that their fault? Arguably not. But would it not be nice if they could learn to understand without losing their jobs or being put through the trauma of a disciplinary process?

Sometimes, of course, there need to be disciplinary consequences. We get that. But the law of unintended consequences can potentially mean that a draconian consequence in one case means that someone does not come forward in another.. Not only that, but disciplinary procedures are not conducive to there being a genuine exchange where men learn, understand the impact of their behaviour, and in turn transform their work cultures.

The debate has become polarized: this is not helpful

Emotions run high around the topic of sexual harassment at the moment. The debate has become polarized. People are seeing things in black and white, right and wrong. As mediators, we know that although there are cases in which a party is clearly and obviously in the wrong, and should be disciplined or fired, reality is rarely that clear cut. And as lawyers and HR professionals, we understand that even when things are clear, they are rarely that easy to prove. Not only is someone more likely to come forward in the context of a potential mediation, but the other party is more likely to accept the inappropriateness of their behaviour.

It is important that women feel safe so that they can do the difficult thing: that they can come forward with whatever issues they have in this arena, without an unreasonable fear of being disbelieved but also without the fear of being swept up in a tide of righteous indignation and vitriolic rhetoric. People need to be able to air their concerns in an environment where they know they will be safe and taken seriously.

However we are also concerned that the rights of the accused are being eroded. Being wrongly accused of

sexual harassment in this climate is devastating: the stigma seemingly impossible to erase.

The passion, emotion and zeal that characterise this debate stop us from seeing clearly and exploring the complexity and nuances of interactions in the workplace. This prevents us from learning and transforming workplace cultures for the better. We risk creating more fear, and less honesty, with our righteous indignation. Whilst fear may be an effective deterrent to poor behaviour in the short term (which some will appreciate), longer term, we do not believe that this is what anyone really wants. Despite our good intentions, we may be working against ourselves.

Mediation: an opportunity for a healing conversation

We cannot help but wonder if the editors who did not think our example should be mediated came to that conclusion partly on the basis of information that would never have come to light without the ‘mediation’. It is hard to “un-know” information that you know. And, particularly, in this climate, it is easy to be shocked by human weakness.

In our example, had the case not gone to mediation, it is likely that the man (if confronted) would have denied all of the allegations. There may have been no evidence other than the complaint itself, and the situation could have been left to fester and never even been brought to the attention of the man.

Mediation provides the opportunity for a confidential, frank cards-on-the table discussion. A certain amount of confidentiality is essential. It allows people to reveal information they might not otherwise reveal. When people admit to their mistakes and apologise for them, this can be deeply transformative. The victim hears her concerns validated but also any misunderstandings can be cleared up (and there are often misunderstandings). People often learn unexpected things about each other, growing in empathy and changing their behaviour deeply. The perpetrator (if he has done something wrong) learns the impact he has had on the other person. Compensation is possible where necessary or desirable. Transferring one or both parties, or even losing one, may be possible outcomes, as will agreeing a new way forward with different behaviour and greater understanding and empathy.

When people who have not understood the impact of their behaviour suddenly gain insight into it, that can positively affect their whole behaviour and the effect they have on others in the workplace. This is one way to change workplace culture. Supplemented with coaching, where necessary, and regular check-ins, people, dynamics and teams can be transformed. If there are wider issues in the team and organisation, these can also be addressed, either directly or through training.

Other benefits of mediation compared to a more formal process include:

- It is less adversarial. The two parties are invited to give their perspective in a statement, and the mediator helps to find common ground.
- It is less formal and therefore less time consuming than the grievance and disciplinary route. This means that it is less resource-intensive and people can move on with their lives more quickly.

- It is not focused on finding fault (but the mediation approach does not preclude the harasser from facing disciplinary sanctions/consequences)
- It involves fewer stakeholders (most grievance and disciplinary processes requires representatives, and sometimes union members, present) and is therefore more likely to protect confidentiality.
- Mediation creates a level playing field by shifting the power dynamic between the alleged 'harasser' and the victim.

Somewhere between 52% (TUC) and 60% (Slater & Gordon) of women have experienced some form of sexual harassment at work, including unwanted touching, and 20% have experienced sexual advances (TUC Report). If we want to clear this up, either we need to fire a lot of men or we need to find a different solution. HR is key to literally re-writing the manual so that mediation becomes not only an option for sexual harassment cases but a potential first port of call. However, it is not enough to silently re-write the manual. The processes available, how to make a complaint and the fact that the complainant will have power over the process needs to be known and understood throughout the organisation. In addition, HR needs to become more approachable, as Mia described in her article in the last issue of this journal.

Mediation, coaching and training are essential to changing workplace culture. Harassment in the workplace is always wrong. But we hope that you will agree that mediation is not

a cop-out in these cases but a potentially valid way of dealing with complex conflicts, helping people to understand and empathise with each other and transforming work culture for the better. Either way, we are interested in hearing your thoughts on these topics. The discussion is very much alive.

Endnotes:

The authors would like to acknowledge that the article is written in line with the TUC report from with the 'assumption' that the man is the alleged perpetrator, and the woman the 'victim' of sexual harassment. This is because women are more likely to be victims of sexual harassment. The authors, however, acknowledge that men can also experience sexual harassment and that when they do, it can be as difficult, if not more (because of exacerbated feelings of shame) as it is for women.

TUC Report (in association with Everyday Sexism Project): Still just a bit of banter?

Sexual harassment in the workplace in 2016

Equality Act 2010

Sexual Harassment 101: What everyone needs to know, by Zoe Williams, The Guardian Newspaper (<https://www.theguardian.com/world/2017/oct/16/facts-sexual-harassment-workplace-harvey-weinstein>)

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