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EMPLOYMENT LAW

How the new sexual harassment provisions will play out in the workplace

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Reweti Kohere

The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act 2023 has been praised for giving sexual harassment victims more time to raise an employment personal grievance. But employment barrister Catherine Stewart says more could be done to address loopholes in the Employment Relations Act 2000.

While the Act permits personal grievances for racial and sexual harassment, it still lacks specific grievances for bullying or general harassment.

Yet all reflect an imbalance of power that exists between employers and employees, says Stewart, who is also convenor of the ADLS Employment Law committee.

The new legislation, which came into force on 13 June, gives sexual harassment victims more time to consider what might have happened to them before deciding whether to raise a personal grievance with their employer.

This has been achieved by extending the residual 90-day timeframe for all other kinds of personal grievance to 12 months, but only for sexual harassment.

"If you're being sexually harassed by the person who pays your wages, for example, and on whose discretion your livelihood depends, then it's very difficult to bring a claim against that person without fear of losing your job or some other form of retaliation," Stewart, says.

"That's why sexual harassment falls into this category of inherent and intrinsic employee vulnerability. If the employer is the one who's bullying you, it's very difficult to raise that without fear of losing your job."

Sensibility and pragmatism

From an access-to-justice perspective, Stewart says it makes sense to extend the timeframe for other types of grievance that involve a similar power imbalance in those situations.

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Simon Schofield, who teaches employment law at the University of Auckland, says some of the barriers that are unique to employees bringing sexual harassment personal grievances, such as guilt and shame, aren't as persuasive in the context of bullying, where there are stronger arguments for raising a personal grievance earlier to avoid evidence being destroyed or difficulties associated with failing memories.

The new law, introduced as a private member's bill submitted by Labour's Dr Deborah Russell, enjoyed cross-party support as it progressed through Parliament, particularly for its narrow focus on extending the timeframe only for sexual harassment personal grievances.

"Given that bullying is not expressly a ground for a personal grievance under the Employment Relations Act 2000 and is usually pleaded in the broad category of an unjustified disadvantage, there is a degree of sensibility and pragmatism in Dr Russell's approach," Schofield says.

Insidious, shaming, traumatising

At the bill's second reading, Russell said the proposed amendment recognised the special nature of sexual harassment.

"It is insidious. It is shaming. It occurs because of a power differential. It is traumatising…because the person who experiences it is disregarded, is treated as an object and is treated as being of no worth – or, if they have worth, it is only their sexual value that matters. That is why it can be important to have the longer time available."

Many submitters asked the Education and Workforce select committee to go further, though. More than half of the 43 submissions on the bill wanted other types of serious discrimination, such as bullying and racial harassment, included within the longer 12-month period. Others wanted the timeframe extended beyond 12 months.

Labour MP and committee member Camilla Belich acknowledged the submissions raised important issues.

"There are additional challenges within our employment relations system in relation to other forms of discrimination. But Dr Russell was very clear that this bill addresses one thing and that is sexual harassment and so that is why we have kept this bill limited to claims of sexual harassment," Belich said at the bill's second reading.

"I know that might be disappointing to some people, some submitters, but I would encourage them to think about how beneficial this change will be and the fact that we are able to have this cross-party support to get this through the House."

While supporting the bill, Green MP Teanau Tuiono said the party was "very open[,] still open" to extending it to lengthen the timeframe and include racial harassment too.

National's Paul Goldsmith said the party didn't support broadening the timeframe beyond sexual harassment out of concern for making the operating environment for businesses more uncertain. Act's Chris Baillie said the bill's sole focus on sexual harassment was a "good compromise" in recognition of the nature of sexual harassment.

Good faith gesture

The new timeframe starts from the date the incident occurred or came to the employee's attention, whichever is later, and applies where an employee has been sexually harassed during their employment.

Employment agreements entered on or after 13 June must refer to the two different timeframes in an updated employment relationship problem resolution clause, which outlines how employers and employees will handle any difficulties.

For current employment agreements, the 90-day timeframe continues to apply if the sexual harassment occurred or came to the notice of the employee before 13 June.

A failure to update employment agreement templates could give rise to a penalty of up to $20,000, while giving employees a defence should they fail to raise a sexual harassment personal grievance within 12 months.

Schofield says while employers don't legally need to update current agreements, there is room for the risk-averse view that all current employment agreements, templates and applicable policies should be brought up to date.

"This is because an employee may be granted leave to raise a personal grievance out of time if the delay in raising the personal grievance was occasioned by the fact that the employee's employment agreement does not contain an employment relationship problem resolution clause, as required by the Employment Relations Act 2000," he says.

"If a current employment agreement is not updated, this leaves open the argument that a personal grievance was not raised because the resolution of the employment relationship problem clause was defective."

Stewart says the fact that the amendment doesn't apply retrospectively will make implementing the time extension "cleaner". Employers should also notify staff of the change as a matter of good practice.

"An overarching requirement of the legislation is that employers and employees deal with each other in good faith. As a good faith gesture, it would be prudent for employers to write to current employees and bring [the law change] to their attention," Stewart says.

"And then, of course, it's a matter of looking at their policies. They may wish to update and refresh their policies on sexual harassment to ensure the timeframe is reflected in any policy documents."

Catherine Stewart

Employment agreements entered on or after 13 June must refer to the two different timeframes

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Grey areas

It will take time before the courts start to clarify some of the grey areas the amendment has raised.

A potential downside of the extended timeframe is that alleged offenders or potential witnesses might have left the workplace before a sexual harassment personal grievance investigation begins or concludes.

Stewart explains that, generally speaking, former employees can't be forced to participate in the investigation, unless they choose to.

On the other hand, "if the offender has left, for example, it may be that the employee feels a little less threatened, which doesn't obviate the need for an investigation but it may make the working environment more comfortable for the employee," she says.

"But if witnesses have left, that could be quite problematic if they're not able or willing to give evidence. But some witnesses would probably be only too happy to give their point of view on something as serious as a sexual harassment investigation, even if they no longer work for the employer."

Schofield adds that one option employers can use is adding a broad litigation assistance clause into their employment agreement templates. The clause requires an employee to cooperate with any investigation and litigation after their employment ends, including by providing evidence.

"Such a clause can be drafted in a positive way so requiring the employee to notify an employer if they are involved in litigation against the employer," he says.

Crossover

Until the courts start issuing decisions, some legal uncertainties will still exist, including how the sexual harassment personal grievance timeframe might cross over with the residual 90-day timeframe under the Act.

Changes made to the bill have made it clear the extended timeframe applies only to a personal grievance of sexual harassment, as opposed to another type of personal grievance that might contain elements of sexual harassment, Stewart says.

"There is necessarily going to be some shaking down of how all of that is going to interplay...All of that is something that we need to really watch with interest and wait and see how that's going to play out."

Schofield raises the issue of an employer's actions, which would otherwise be bullying, being framed as sexual harassment.

"An example may be where an employee is given demeaning tasks or demoted in circumstances where it is unclear whether this action is taken in response to an employer's express or indirect request for sex or sexual contact," he says.

"It is certainly not uncommon for background evidence to be allowed in constructive dismissal cases where events, which could be an unjustified disadvantage, have not been raised within time but those events are then used to colour the consideration of the unjustified dismissal personal grievance, which has been raised within time.

"There is also the possibility of raising a personal grievance for ongoing breaches where the issues can be framed as an employer continuing to fail to do something such as investigate a matter," Schofield says.

Stewart says employees, and especially more vulnerable workers, should bring themselves up to speed on the law change, "because without that knowledge, they might not realise they've got this greater length of time to raise their personal grievance". ■

For info on an upcoming CPD event on the new sexual violence legislation, click here ■

Simon Schofield

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