

Unwanted shoulder massages at work did not amount to harassment

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Unwanted shoulder massages at work did not amount to harassment

In the era of #MeToo, employers are under increasing pressure to stamp out sexual harassment in the workplace. Faced with a

more knowledgeable and vocal workforce, employers must ensure that the workplace culture does not encourage or tolerate inappropriate conduct, with managers expected to model exemplary behaviours. That being the case, the recent decision in *Raj v Capita Business Services and anor* may seem surprising. However, it reminds us that the context in which alleged harassment takes place is a vital part of the jigsaw and may, on occasion, mean that no unlawful conduct has taken place.

What does the law say?

The Equality Act 2010 prohibits harassment at work on certain grounds. This covers unwanted conduct of a sexual nature or related to sex which violates the worker's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment.

Claims can be brought against both the individual perpetrator of the harassment and the employer. Even where an employer doesn't know about the harassment, it will be vicariously liable unless all reasonable steps had been taken to prevent such conduct from happening.

What happened in this case?

Mr Raj was employed by Capita Business Services Ltd for about a year. His employment was terminated during the probationary period on the grounds of poor performance. He went on to bring a suite of claims, including one for sexual harassment and/or harassment related to his sex. Mr Raj complained that his Team Leader, a Ms Ward, had massaged his shoulders, neck and back on several occasions at work. Mr Raj's former colleagues gave evidence that they had witnessed this take place.

What was decided?

The Employment Tribunal found that the massaging had occurred

on two or three occasions and had made Mr Raj feel uncomfortable. Yet they rejected the claims for the following reasons:

- The massaging did not amount to conduct “of a sexual nature” because of the context in which had arisen. It was limited, had taken place in an open plan office and had been accompanied by “jokey” expressions of praise from Ms Ward. This was not consistent with sexual behaviour. It was also pertinent that Mr Raj had not reported the matter to his union representative at the time.
- The massaging did not amount to harassment “*related to*” the fact Mr Raj was a man. The Tribunal accepted that the conduct was unwanted and had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. They noted that some physical contact at work would obviously amount to harassment, but this case was “*very difficult to assess*”. Ultimately, they decided there was insufficient evidence to say that the conduct related to Mr Raj’s sex. Instead, it was best characterised as “*misguided encouragement*” from a manager towards an under-performer, involving contact with a “*gender neutral*” part of the body in an open plan setting.

Mr Raj’s appeal to the Employment Appeal Tribunal was dismissed on the basis that the Employment Tribunal had made detailed findings about the context in which the massaging had occurred and was entitled to reject the claims.

What are the learning points?

We should not interpret this decision as approving shoulder massages or similar physical contact at work. The employer (and Ms Ward) avoided liability here due to the specific context in which the touching arose. In a different scenario, similar types of touching could amount to harassment.

Employers must ensure they have taken all reasonable steps to prevent inappropriate behaviour at work. This means having a policy in place, communicated to all staff, setting out examples of unacceptable behaviour and clarifying that breaches will result in disciplinary action. Alongside this, employers should deliver regular dignity at work training and be confident that they know how to deal with complaints of sexual harassment in line with the [best practice guidance](#) issued by Acas.

Employers should also monitor developments in this area closely as significant reforms are on the horizon. The Government has announced the imminent introduction of a statutory code of practice in this area. It has also recently [consulted](#) on a range of measures designed to eradicate sexual harassment at work, including introducing a statutory duty on employers to protect employees from harassment. That consultation closed on 2 October 2019 and the Government's response is awaited.

[Raj v Capita Business Services and anor](#)

If you would like to discuss any of the issues raised in this article, please contact [Amanda Steadman](#) on 020 3828 0363 or email amandasteadman@bdbf.co.uk.

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