

Sexual harassment: is it fit and proper?

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Whilst Sir Philip Green has described the use of parliamentary privilege to reveal allegations of sexual harassment against him as his “worst week”, he may reflect that he is fortunate not to be regulated by the Financial Conduct Authority (‘FCA’).

Earlier in the same month that the allegations against Sir Philip were made public, the FCA announced that blowing the whistle on sexual harassment would trump any confidentiality provisions a bank might seek to impose on current and ex-employees.

After the last financial crash, concerns about “culture” and “conduct” became central to the regulators’ attempts to clean up the City and its image. This latest announcement by the FCA is clearly a response to the #MeToo movement and an attempt to ensure that serial harassers do not move unchecked from one work place to another.

Previously, allegations of sexual harassment were usually categorised as personal behaviour(s) which were not relevant to the FCA’s assessment of fitness and propriety. That has now changed. Sexual misconduct has become an explicit concern of the FCA. This means that if such allegations are proven, this may result in that individual being barred from continuing their career in the regulated financial services sector.

The FCA is responding to media commentary and senior politicians’ concerns that regulators across all sectors must do more to tackle workplace bullying and sexual harassment in the UK. However, the FCA is not experienced in assessing allegations of this sort. Many of the investigations carried out by the FCA are document heavy. The FCA is able to trawl through years of data to establish whether financial misconduct has taken place. However, there is rarely any tangible evidence of bullying and sexual harassment.

Cases of bullying and sexual harassment are usually delicate and fact sensitive. The legal definition of sexual harassment is that it occurs where:

- A engages in unwanted conduct of a sexual nature; and
- The conduct has the purpose or effect of either violating B’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

It also occurs where because B has either rejected or succumbed to A’s (unwanted) advances, A goes on to treat B less favourably than would have otherwise been the case.

An investigation into an allegation of sexual harassment involves an assessment of the victim’s perception of what happened as well as whether it was reasonable for the conduct in question to have that effect.

The FCA appears not to have thought about how it will approach its analysis of these types of allegations. It is also unclear whether the FCA now envisages that bullying and harassment claims will now be dealt with using whistleblowing processes or normal grievance and disciplinary processes. Until now, bullying and harassment claims were largely dealt with using grievance not whistleblowing policies. Indeed, most financial institutions have been at pains to keep them separate. Now that such misconduct raises questions of fitness and propriety, then it arguably fits better within a whistleblowing framework.

The FCA’s announcement also reflected the fact that many financial institutions preferred to settle claims of bullying and sexual harassment, rather than investigate and deal with perpetrators. To date, such settlements often included confidentiality provisions. Now that these provisions can be set aside, it will force employers to investigate more thoroughly and deal with poor workplace behaviour more decisively. The possibility that the FCA may disregard negotiated confidentiality provisions may also complicate the process of settling claims where there is a genuine

desire for confidentiality on each side. The important role of confidentiality provisions in employment disputes where the employee has the benefit of independent legal advice was explicitly acknowledged by the Court of Appeal in its decision to grant Sir Philip Green's injunction application.

That allegations of sexual harassment and bullying have become an explicit regulatory concern means both individual employees and their senior managers need to take steps and seek the appropriate independent legal advice:

- For any individual employee accused of such behaviour, they must consider carefully how to respond. Do they have a realistic line of defence? If they do, then such allegations must be challenged otherwise they are potentially career-ending in the regulated sector. If they resign without going through an investigation, any future employer will need to assess whether that prospective employee may have been guilty of such behaviour. This will be very difficult if the alleged misconduct happened in another workplace. Future employers might therefore decide to play safe and assume that there was something amiss.
- For any senior manager of an individual employee accused of such behaviour, those senior managers must consider the appropriate HR and regulatory responses. Do their HR managers have the right training and experience to investigate the allegations appropriately? And what is the right thing for the senior manager to do themselves given their own personal regulatory responsibilities and/or accountabilities?
- For any individual who wishes to complain about sexual harassment or bullying, the possibility that a negotiated confidentiality provision might not be binding on the FCA will have to be taken into consideration. The FCA may need to be asked to take steps to protect the identity of individual complainants.
- For any financial institution dealing with bullying or sexual misconduct, it needs to ensure that employees feel comfortable reporting concerns, that they can offer genuine assurances about protection from retaliation and that their HR team is properly trained to undertake investigations.

The stakes are high. As regulators grapple with the inclusion of harassment and bullying within the definition of fitness and propriety they and those they regulate will have to work hard to ensure they are fully equipped to assess cases in a way that is fair to the alleged perpetrator and the alleged victim.

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