

Lockwood, Rosenthal, & Budjanovcanin
**Sexual Harassment Litigation in Britain:
A Window on the Socially Irresponsible Workplace**

Graeme Lockwood, Patrice Rosenthal and Alexandra Budjanovcanin
Department of Management, King's College London, UK

ABSTRACT:

Sexual harassment is a widespread organizational phenomenon and an evolving legal issue. There is a growing literature on sexual harassment, but a dearth of research on claims that have been pursued in the courts, especially outside the US context. The paper explores the organizational and legal context in which parties to claims are operating and presents a preliminary analysis of the population of sexual harassment cases heard by Employment Tribunals and Employment Appeals Tribunals 1995-2005. Core findings relate to the imbalance of power between parties to claims; an over-representation of claims from women in paraprofessional occupations; a notable proportion of owners or proprietors involved in cases, pointing to problems in small businesses; the predominant nature of claims clearly reflecting sexual harassment as an operation of power; and a range of outcomes relating to initial complaints of SH and to subsequent litigation. Policy and further research implications of these preliminary findings are discussed.

INTRODUCTION

Sexual harassment (SH), as a widespread organizational phenomenon and an evolving legal issue, clearly is relevant to analysis of social responsive and socially responsible workplaces. Corporate social responsibility has become a new buzzword (Carron 2006: 2). An important device for improving the ethical performance of an organization is the deployment of diversity policies designed to tackle discrimination or harassment in the workplace (Jenkins 2002). Sexual harassment has been recognized in most countries as a form of sexual discrimination. By some accounts, it touches the lives of 40 per cent to 50 per cent of working women (European Commission, 1999, Fitzgerald *et al*, 1995). Organizations should strive to improve policies in this domain because morally and legally it is the correct approach. It constitutes good organizational citizenship and failure so to do can have significant costs to individuals and to organizations (Dansky and Kilpatrick, 1997). A wide variety of literature has identified the detrimental impact of sexual harassment in the workplace (Crull 1982; Crull and Cohen 1984; Loy and Stewart 1984; Gutek and Koss 1993). Research has found a wide range of

psychological and work-related harms, including diminished work performance, lower job satisfaction, absenteeism, career interruptions, job loss, depression and health problems (Gutek, 1985). Economic effects to organizations have been assessed in US studies as \$6.7 million on average per company per year, **excluding** the litigation costs (Dansky and Kilpatrick, 1997) that probably represent the greatest perceived risk from a managerial perspective.

Litigation as a Focus of the Study and its Importance to Organizational Theory

The paper explores the organizational and legal context in which parties to claims are operating and presents an analysis of the population of sexual harassment cases heard by Employment Appeals Tribunals 1995-2005. For a problem that receives widespread attention by lawyers, academics, policy-makers and management, surprisingly little is known about SH litigation in Britain. There is no systematic understanding of the extent, nature or outcomes of SH cases reaching tribunal hearings in Britain. Such records are available, but heretofore have not been analyzed systematically. This is a significant lacuna in the literature; as such knowledge

would strengthen organizations understanding of SH and how to tackle it. The research is relevant to organizational studies because it is important that the employer responds adequately to a complaint of SH, carries through a proper investigation and takes remedial steps (Lynn Bowes and Sperry). It is the responsibility of organizations to set the climate of behavior in the workplace and make it clear that individual employees must not be treated abusively or with disrespect. Hunt *et al.* (2007: 6) observes that if management allow a climate of disrespect to exist within an organization this makes it more likely for certain inappropriate behavior to be taken for granted, leading to the creation of a 'incivility spiral'

The research will also clarify the ground from which the law is refined and developed and the manner and contexts in which individuals use this mechanism for the enforcement of employment rights. The detailed case record could provide numerous avenues of contribution, not least a window on the operation of SH in organizations - in behavioral and/or perceptual rather than legal terms. The narratives captured in tribunal cases can in general terms reflect how SH 'works' in practice. That is, they can say something about this day-to-day enactment of power in organizations beyond the strictly illustrative or anecdotal accounts currently available in the literature.

The litigation record can also help in an understanding of how/when SH does not 'work' - in other words, cases in which the target's response to perceived harassment has not been submissive or passive but direct, formal and litigious. An understanding of who has brought and sustained cases against what kind of respondent, in which kinds of occupations and organizations can aid in an understanding of reactions to SH. In particular, a comparison of these data against the existing research on incidence of SH (where and against whom it is more prevalent) could help illuminate understanding of obstacles to the filing of claims.

Finally, a detailed understanding of the litigation record can also provide value of a more practical kind. Policy makers and managers need an understanding not just of abstract legal issues, but also of the individual and organizational factors associated with litigation - that is, whether particular sectors, occupations and work relationships are particularly prevalent. This can help managers in assessing their risk and in a more general movement towards responsible workplaces - not merely to avoid legal liability, but to reduce the incidence of SH in the first place.

The paper is structured as follows. In the first section, the legal framework in which claims are pursued is outlined. In the second part of the paper, we identify the empirical shape and detail of litigated cases over time in Britain. In the final section, we consider some practical and further research implications of this analysis for organizations.

SEXUAL HARASSMENT: THE LEGAL FRAMEWORK

Since 1986 UK tribunals and courts have interpreted section 6(2)(b) of the Sex Discrimination Act 1975 (SDA) in a manner which recognizes that sexual harassment may constitute a 'detriment' on grounds of sex, against which protection is available under the SDA (*Porcelli v Strathclyde Regional Council* [1986] IRLR 134). Section 41 (1) of the SDA states that an act done by an employee in the course of employment shall be treated as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval. For an employer to avoid liability for acts of sexual harassment by its employees, section 41(3) SDA provides that it is necessary for the employer to prove that it took such steps as were reasonably practicable to prevent the employee from committing in the course of his employment, an act of harassment. An employer cannot avoid responsibility for harassment merely by arguing that there was nothing it could have done to prevent it. That argument will only succeed where the employer has laid the groundwork in advance

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by adopting, implementing and disseminating a sound anti-harassment policy.

An employer may respond to an allegation of sexual harassment by: relying on the s.41 (3), statutory defense, denying the claims by the respondent, or by arguing that the actions complained of do not constitute sexual harassment. Denial that the alleged harassment took place appears a favored argument of employers. This is unsurprising, since the extant literature has revealed the evidential difficulties faced by applicants in proving claims of sex discrimination in employment tribunals (Earnshaw 1993; Hows and Drummond 2006).

A person who considers that they have been discriminated against can make a claim to an employment tribunal. Such a claim must be made within three months of the act complained of. An appeal from an employment tribunal on a question of law or a mixed question of law and fact can be made to the Employment Appeal Tribunal (EAT).

SEXUAL HARASSMENT CASES HEARD: 1995 - 2005

Research Design and Method

The population of individual Employment Appeals Tribunal (EAT) case records with a sexual harassment component was accessed via the BALII database for the period 1995-2005. These case records were content-analyzed using a framework of variables developed for the study. In addition to the core data on EAT cases, we also report some findings relating to first hearings Employment Tribunal (ET) cases. These data, which are interesting in context setting for the EAT analysis, were collected from analysis of secondary data provided by the Equal Opportunities Commission, who receive material on discrimination cases from the Employment Tribunal Service.²³

RESULTS AND DISCUSSION

²³ We are grateful to the EOC for their assistance with the research and the Leverhulme Trust for its financial support.

We present the findings on SH litigation in three main sections. First, we set **background and context** to the core analysis of EAT cases by reporting on the extent of such litigation (numbers of cases reaching tribunals) and the additional (to SH) claims brought in the cases. Second, we present findings relating to the **detailed content of the cases** themselves, namely a) the characteristics of the claimant and respondent and the workplace and organizational context from which the litigation arises, b) the nature of the SH being claimed and c) some core legal aspects of the litigation. Third, we report on **outcomes**, these relating a) to the alleged SH and b) to the litigation itself.

In the discussion below, we use the terms claimant and applicant to refer to the individual employee bringing the tribunal case. We use the term respondent to refer to the organization and/or the named individual against whom the case has been brought.

Background and Context

Extent of SH Litigation

In the period 1995-2005, approximately 914 claims alleging SH reached 'full merits' hearings of employment tribunals.²⁴ In 832 of these cases, the litigation ended with the tribunal judgment. In another 82 cases, this judgment was appealed (by either the claimant or the respondent) and heard by the EAT. These 82 cases form the first tranche of data for the study and the focus of this paper.

Table 1 presents the extent of litigation identified above along with the rate of success and failure of the first hearings claims. These ET data indicate that claimants reaching a tribunal hearing have a little less than 1 in 2 chance of winning their cases.

²⁴ This figure is an approximation based on analysis of raw data provided by the EOC, in turn provided by Employment Tribunals in Great Britain. These data are incomplete as not all case data are provided by Employment Tribunals to the Commission.

Table 1: Extent and outcome of sexual harassment litigation (First hearings) 1995-2005

	Number of cases to reach court 1995 - 2005	% of successes (for claimant)	% dismissed (for claimant)
Employment Tribunal	832	48.0	52.0
Employment Appeals Tribunal	82	46.0	54.0

Additional Jurisdictions
Our data suggest that applicants do not claim SH on its own when bringing cases against their employer. 80% of cases included at least one further type of complaint, as outlined in Table 2. Table 3 presents the types of additional complaint

brought by workers in our cases. Unfair dismissal was the most common additional claim brought by workers alleging SH, followed by victimization.

Table 2: Number of additional claims brought with sexual harassment litigation

Number of additional claims brought	Percentage
0	20.5
1	53.8
2	19.2
3	5.1
4	1.3

It should be noted that the vast majority of tribunal filings are dismissed, settled or otherwise dropped prior to full merits hearings. According to Department of Trade and Industry research (Survey of Employment Tribunal Applications, 2003), just 27% of claims filed with an ET (across all jurisdictions) make it to a full merits hearing.

that SH is not claimed in the absence of other claims) requires further consideration. It likely relates to the costs of filing claims (which may encourage applicants to maximize the number of claims made in a case) and also to the particular nature of SH as an operation of power - likely therefore to be implicated in a wider range of harms, such as victimization, dismissal and so forth.

The significance of the finding of multiple types of complaints in cases involving SH (ie

Table 3: Jurisdiction of additional claims brought

Jurisdiction of additional claim	Percentage
Unfair dismissal	41.0
Victimisation	28.2
Sexual discrimination	16.7
Breach of Contract	9.1
Race Discrimination	7.7
Pay-related claim	3.8
Disability discrimination	3.8

The Content of EAT Claims

A key focus of the analysis concerned the detailed content of EAT cases, relating to the individual characteristics of claimant and respondent, the workplace and organizational contexts giving rise to the litigation and the nature of the SH being alleged. We also report some key legal aspects of the cases, including the nature of the defenses relied upon by employers.

Characteristics of Parties, Relationships and Contexts Associated with Tribunal Cases
Who brings cases to tribunal?

The vast majority (96%) of workers bringing claims of SH were female. Our data suggest that claimants were more likely to be single than married. Of the cases in which the claimant's tenure with the organization was available, this ranged from a few days' service to a high of 13 years. 28.4% had

been employed one year or less and 31.9% two years or more when the alleged SH occurred.

Claimants' occupations ranged across a wide spectrum, however a number of occupations appeared repeatedly in the cases. These included bar staff, secretary, cleaner, administrator, police constable and sales assistant. We also coded occupations according to the Standard Occupational Classification 2000 (SOC) as used in the Labor Force Survey and other analyses.

Table 4 demonstrates that the largest proportion of claimants work in the associate professional and technical occupational category, followed by administrative and secretarial roles.

Table 4: Claimants' and respondents' occupations according to SOC 2000

SOC category	Percentage of claimants	Percentage of respondents
Managers and senior officials	14.1	52.4
Professional occupations	6.3	19.0
Associate professional and technical	31.3	17.5
Admin and secretarial	17.2	0.0
Skilled trades	1.6	1.6
Personal service occupations	3.1	0.0
Sales and customer service occupations	9.4	4.8
Process, plant and machine operatives	4.7	3.2
Elementary occupations	12.5	1.6

The data indicates that the category of associate professional and technical workers is strikingly over-represented compared to LFS data on occupation by gender (ONS, 2002, 2005). This finding with respect to paraprofessional women has support in the US literature on sexual harassment charges (Terpstra and Cook, 1985).

Against what kind of respondent?

In many ways, the profile of respondents appears a mirror image of claimants. This is true in terms of gender (92% are men) and also in terms of organizational power. Table 4 above presents the SOC data for respondents as well as claimants. It shows that the large majority of individuals named as respondents in SH cases are managers or professional employees.

Table 5 presents the role relationship between the parties in SH claims. In 75% of claims, the alleged harasser was in a superior hierarchical position in the workplace. In over half of claims, it was the claimant's manager. And, in one suggestion of the problem of SH in small workplaces, in almost a quarter of cases, the alleged harasser was identified in the case records as the owner of the company. Colleagues and subordinates accounted for 21% and 1% of respondents, respectively. SH of workers by customers has been identified as a growing concern given the dominance of service jobs and emphases on quality and customer sovereignty (Korczynski, 2001); however, claims of SH by customers represent only 3% of EAT cases over ten years.

Table 5: Relationship between claimant and respondent

Nature of work relationship	Percentage
Senior is alleged harasser	51.4
Owner/Proprietor/Managing Director is alleged harasser	23.6
Colleague is alleged harasser	20.8
Client is alleged harasser	2.8
Subordinate is alleged harasser	1.4

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In what kind of workplaces and organizations?

The EAT cases analyzed in the study reflected a wide range of workplace and organizational settings. 77% of cases were associated with private sector organizations compared to 23% linked to public sector organizations. Analysis of the industrial sectors involved in EAT cases reveals several noteworthy findings. One is the wide range of sectors involved in SH litigation. Another is the large majority of cases located in the service sector broadly defined, as would be expected given its dominance in terms of employment. A quarter of the cases arose in sectors that could be clearly defined as 'male preserves' (Gruber, 1997), including manufacturing, police, prison/corrections and the military. Finally, only 1% of EAT cases were based in the financial sector. This contrasts with the heavy play that SH cases based in financial institutions are often given in media reports of SH.

The Nature of the Sexual Harassment Claimed

Claimants in 97% of the cases were alleging SH directly focused on themselves as individuals - as opposed to claims of a hostile environment generated by harassment directed at women as a group in the workplace. In 16% of cases, the alleged harassment was a one-off occurrence and in 42%, numerous instances taking place over a span of time were claimed. SH may also be understood in terms of the kinds of acts or behaviors involved. Table 6 presents a typology distinguishing between unwelcome acts that are verbal (eg sexual remarks or requests), non-verbal (eg the posting of obscene materials, looking up a woman's skirt), physical (eg sexual touching, etc), and assault. As shown in the table, verbal SH is the most prevalent of the types claimed, however a worrying proportion of physical acts and indeed assault, feature in the claims.

Table 6: Types of harassment reported

Harassment Type	Percentage
Verbal	78.5
Physical	40.6
Non-verbal	37.5
Assault	14.1

Fitzgerald et al's (1997) model, conceptualizes SH in three dimensions of motive and accompanying acts. The first, 'gender harassment', includes acts meant to convey degrading or insulting attitudes towards women (eg remarks, slurs, display of obscene materials, hostile acts). The second consists of 'unwanted sexual attention', where the aim is to gain sexual cooperation through verbal or physical acts. The third, 'sexual coercion', involves attempts to coerce sexual favors in exchange for

employment opportunities (eg such as keeping one's job). We used this model to analyze the narratives presented in the EAT records and found that hostile environment SH is the far more prevalent type of claim (see Table 7). Only one case alleged direct sexual coercion. Just over half of the cases alleged acts consistent with the unwanted sexual behaviour type. Yet, a substantial proportion of cases (just over 40%) alleged activities consistent with the gender harassment type. This latter finding

underscores the value of approaching SH as concepts of sexual drive). an operation of power in the workplace (in contrast to understandings grounded only in

Table 7: Types of Harassment based on Fitzgerald et al.'s (1997) model

Harassment Type	Percentage
Unwanted sexual attention	51.6
Gender harassment	40.6
Multiple types	6.3
Sexual Coercion	1.5

Legal Aspects of the EAT Cases

Where appeals were brought against the SH aspect of the claim, (59 cases in total), 66% were brought by the claimant from the first stage hearing. As shown in Table 8

below, the majority of the SH appeals cases brought relied upon an error in the application of the law as the basis for the appeal, with a little over a third citing perverse findings as the basis.

Table 8: Bases for appeal in EAT cases

Basis for appeal	Percentage
Error of law	58
Error of fact/perverse finding	35
Both bases	12

Vicarious liability on the part of the employing organization was at issue in almost all the cases as indicated in Table 9. Where the organization was named as a respondent (either alone or joined with an individual as

second respondent), the organization was found to be vicariously liable for an employee's actions in 46% of cases.

Table 9: Vicarious liability in EAT cases

Vicarious liability	Percentage
Organisation not named as respondent	2.5
Organisation vicariously liable for SH	45.5
Organisation not vicariously liable for SH	51.9

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As to defenses used by respondents to avoid liability in SH cases, Table 10 demonstrates that by far the most common response, both by organizations and individuals faced with allegations of SH, is straight denial of the actions. A much smaller and roughly equal proportion of cases reflect either the statutory defense or an assertion that the actions complained of did not constitute SH.

Outcomes

The final aspect of analysis concerned outcomes of SH and SH litigation for claimants and for respondents. We look at outcomes for individuals, first in relation to having complained of sexual harassment within their organizations (i.e. prior to the tribunal filing). These are presented in Table 11 below. The most common outcome for these claimants alleging SH in the workplace was resignation or dismissal (46% each). A much smaller proportion of cases involved claimants being transferred or continuing to work in their current roles.

Table 11: Outcomes of appeals cases

Claimant Job-related Outcome	Percentage
Resignation	46.0
Dismissal	46.0
Transfer	4.3
Continuation of employment	2.9

Missing data: 16% of total dataset

These findings may have implications for understanding responses to SH. The literature suggests that outcome expectancy may (along with other factors) drive an individual's response to SH. This expectancy (Will I be believed? Will there be repercussions?) may be a powerful influence on whether individuals come forward initially. But, given the large majority of cases in which the claimant had either been sacked or resigned following the internal complaint, the filing of tribunal cases may be driven less by outcome expectancy and more by a sense of injustice or a feeling of nothing left to lose.

It is worth noting that 36% of those dismissed from their jobs as a consequence of alleging SH did not bring an additional claim of unfair dismissal despite having the tenure

to do so. Amongst those who resigned as a result of sexual harassment in the workplace, a far higher proportion (70%) brought a claim for unfair (constructive) dismissal in conjunction with their sexual harassment claim.

Of the claimants who had been dismissed subsequent to the internal complaint, 38% went on to win their tribunal case, while 63% were unsuccessful. Of those who had resigned subsequent to the internal complaint, 57% won their ET case and 43% were unsuccessful at the full merits ET hearing.

Outcomes of the appeals themselves are presented in Table 12. The data show that in SH cases, appeals generally are much more likely to be dismissed than upheld. The data further suggest that respondents from first

hearings (typically, the employing organization) do rather better at appeal. They have a lower proportion of their appeals dismissed than do the original claimants and are more likely to win a remit for a fresh hearing.

Table 12: Outcomes of appeals cases

	Appeal Outcome		
	Upheld (%)	Dismissed (%)	Remit for fresh hearing (%)
Appellant: Claimant from first hearing	13	69	18
Appellant: Respondent from first hearing	15	55	30

CONCLUSIONS AND IMPLICATIONS FOR ORGANIZATIONAL STUDIES

This paper has outlined a set of results from analysis of sexual harassment cases heard on appeal in Britain 1995-2005. This research reveals some important findings that policymakers within organizations need to be aware of when developing anti-harassment policies. First, the data is reflective of the dominant scenario in social science research wherein SH is most likely perpetuated on women with less organizational power by men with more of such power. This suggests that incidence and reaction (litigation) may be broadly in synch - that lower level workers are more likely to be harassed and also more likely to file cases. This may be a somewhat heartening result given a plausible expectation that managerial or professional women with more individual resources might dominate in terms of formal SH complaints - and probably points to the importance of the support available through the EOC and other organizations.²⁵

The over-representation of paraprofessional claimants, also found in US research, may complicate the picture

²⁵ An additional possibility may be that professional and managerial women may be more likely to negotiate acceptable settlements of their cases earlier in the conciliation process. Further research would be needed to explore this possibility.

however. It may be that paraprofessional women are more likely to be harassed, given their relatively low hierarchical position and perhaps the nature of their (close but unequal) work relationships with managerial and professional men. Or, as Terpstra and Cook (1985) suggest, they may be more likely to file complaints, in that they tend to work in looser extra-organizational networks compared say, to professionals (meaning that reputation effects for making complaints would be less of an issue) and may find it easier to get alternative employment. Further research is needed to clarify this finding and its relation to incidence v reaction.

A second key finding explicitly relates to SH in small businesses. The nature of the case records throw up significant difficulties in identifying the size of the organizations involved in tribunal cases. However, the finding that a quarter of cases involve allegations of SH against the owner of the organization clearly reflects a problem in small workplaces. New legal requirements require workers to make formal written complaints within their organizations (and for those complaints formally to be investigated) *prior* to seeking redress in the tribunal system. Given the power dynamics in small business, the new regulations likely will have a chilling effect on filings in these workplaces in particular. This may rebound on individual

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workers *and* on small workplaces by increasing the hidden costs of SH in low performance, low morale and resignations.

The third key finding relates to the nature of the harassment being claimed in tribunal cases. The Fitzgerald et al model appears a useful analytical tool and the findings in this regard are important in highlighting the complex and multi-dimensional nature of SH in workplaces. In particular, the prevalence of 'gender harassment' claims, in which the nature of the offensive behaviour is *not* to secure sexual cooperation, but to insult, demean or control, particularly clarifies and supports SH essentially as an operation of power, a position argued in much of the social science literature (Welsh, 1999).²⁶

The final set of results to be highlighted relates to the outcomes of SH and SH litigation. One of the most striking findings concerns the consequence for these claimants of complaining of SH within their organizations, with 43% being sacked and another 43% resigning (and most of the latter thereafter claiming constructive dismissal). This demonstrates the importance for organizations - along with the development and dissemination of SH policy - of effective and appropriate *investigation and handling* of internal SH complaints. In particular, it may demonstrate deficiencies in procedures for dealing with complaints including absence of sympathetic counselors and independent, objective investigations. This stands as a key practical implication of the analysis so far - along with the suggestion of particular types of workers strongly associated with SH claims and the particular issues relating to small workplaces.

Finally, based on the data available to this point, it appears that claimants filing and sustaining sexual harassment cases to full merits tribunal hearings have about a 50%/50% chance of prevailing. Given the

²⁶ It is worth noting that gender harassment was the type recognized in the 1986 British case first establishing SH as a type of sex discrimination, Porcelli V Strathclyde Regional Council.

power differentials between individuals and organizations in most cases, these might not be considered bad odds.

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- ABOUT THE AUTHORS:
- Graeme Lockwood is Senior Lecturer in Employment Law.
- Hensley, D. (1998) US Sexual harassment law: implications for small businesses, *Journal of Small Business Management*, April, 36, 2, 1-12.
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- Patrice Rosenthal is Senior Lecturer in Organisational Behaviour and Ali Budjanovcanin a Research Officer.

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