Weinstein and the workplace

The recent Harvey Weinstein trial and verdict are landmarks of cultural and legal significance, Edward Henry QC argues. Those in positions of authority, as well as compliance, risk and HR professionals should heed its warning

Harvey Weinstein's dramatic fall reminded me of Ernest Hemingway's description of bankruptcy. It happens "gradually and then suddenly". Gradually, because the allegations, once they emerged in 2017, had stripped him of the pervasive power he once enjoyed. He was perceived (and perception is important) to be no longer invincible. Following the revelations of harassment and sexual misconduct, more and more women felt able to come forward to speak about their experiences at his hands. Then came the trial, constructed on the premise that his coercive and domineering personality, allied to vast power and privilege, enabled him to control his victims. As in his days of pomp and fame, so it was in his downfall: denial and disbelief that anyone could accuse him of anything.

When the verdict was returned, his stunned expression was accompanied by him mouthing the words "but I'm innocent". Many of us had anticipated that moment, but the endgame was as sudden and brutal as the crimes he was convicted of. Shortly afterwards, Cyrus Vance Jnr, the embattled District Attorney who brought the case, told reporters, "It's a new day because Harvey Weinstein has finally been held accountable for crimes he committed."

Some might disagree with Vance. Some would say that Weinstein was convicted not for the offences upon which he stood trial, but was instead condemned for the infamous multitude of time-barred allegations that could never be brought to court. Such speculation can be objected to on the precisely the same grounds that Donna Rotunno, his attorney, faced criticism. Like her aggressive cross-examinations, this theory fails to take on board the dynamics of power, placing too much reliance on old stereotypes of sexual behaviour, whilst assuming that matters of consent are binary in nature, unqualified by ambiguity, or even regret, and simply a question of yes or no. This has important implications for those who owe a duty of care to their co-workers or subordinates. The two victims in the trial had complicated and difficult stories to tell, replete with contradictions, and inconsistencies, which made them vulnerable to attack in cross examination. Their accounts, which might be considered bizarre and at times unconvincing can only be understood when one recognises the immense power Weinstein wielded. "He did not invent the casting couch" (his previous attorney's quip to laugh the case out of court) but his omnipotence in the film industry was such that his victims were placed in a position (for all their acquiescence) of duress, paralysed by the fear that he would annihilate their careers.

There were, inevitably, a number of 'easy wins' for the defence. For example, both women made no attempt, physically to resist his advances, each kept in contact with him after the attacks, and they even had consensual sex with him in the months that followed. This is not evidence that usually accompanies a conviction, but it would be wrong the suggest that the jury convicted because of sympathy or prejudice. In fact, their decision reflects a degree of discriminating judgement, and sophistication, which reflected the complexities that underly human sexual behaviour. These verdicts can therefore teach us a lot about why conduct and culture in the workplace has changed, and must change still further. A discerning observer will take away from this trial the necessity of seeing the 'warning signals', and giving proactive guidance on risk, by paying more than mere lip service to a cultural shift in our society.

Where there is inequality of power, or status (classically found in the film industry, but existing whenever an unequal relationship of employment, tutelage or authority exists) one must acknowledge that consent is not the same as submission. That absent real equality, there is a danger of exploitation. In consequence, behaviours which were once tolerated and seemingly welcomed, must now be carefully scrutinised. The classic example is the drink fuelled office party. Anything untoward happening in the workplace or its premises (whether or not at a social gathering) can clearly be the subject of both employment and disciplinary proceedings. And what of behaviour outside the usual ambit of work, between colleagues? Should conduct

outside the workplace become the subject of regulatory investigation and disciplinary proceedings? In the context of the legal profession this is a novel development. On one side of the debate there is the argument that regulators have a duty to uphold confidence in the legal profession, but there is the concern that the SRA may be encroaching far too far into the lives of those they regulate, placing increased pressure on law professionals. The question arises as to what is to be reasonably expected of legal professionals, or should they be held to a more onerous sense of propriety? Where does one draw the line, ensuring that standards are upheld, whilst acting proportionately so as to avoid unreasonable intrusion?

A recent example of the problem concerned a former 'Magic Circle' partner who was fined £35,000 plus £200,000 costs for professional misconduct after he went back to the home of a junior colleague following post-work drinks in 2016. The SRA alleged he had initiated and or engaged in sexual activity where he ought to have known his conduct was unwelcome and that the other party was intoxicated to the extent she was vulnerable with her faculties impaired. The SDT on 30th January 2020 found he had caused harm to the profession by breaching his obligations as a solicitor but posed no future risk to the public. He was not struck off and thus allowed to keep practising. The SDT said his misconduct was the result of a "lapse in his judgement that was highly unlikely to be repeated." The decision pivoted on his duty of care to a more junior colleague. In reaching this conclusion, the SDT rejected arguments that the case was an unwarranted incursion into the lawyer's right to privacy.

It is important to stress that no finding on consent (or lack of it) was made by the SDT, as the SRA did not seek to establish whether consent was given or not, yet another aspect of its case that drew criticism from those representing the lawyer, who argued that if the complainant had consented he should not face any proceedings at all.

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The matter is currently being appealed, but even if the original finding is ultimately set aside, it shows that regulators, especially in this post-#MeToo world will pursue such cases vigorously, with an impact on reputation management, D&O premiums, and employment claims. The aggressive approach of the SRA follows in the wake of other regulators, such as the GMC. It seems undeniable that the Weinstein scandal, unleashing the huge power of the #MeToo movement; leveraged by the digital media, had a causal effect in prompting some businesses to implement preventative strategies to avert such risks, or (in crisis mode) to act ruthlessly in order to neutralise the entwined threats of outraged departing customers, and a collapse in share value. Take, for example, Ray Kelvin, the hugely respected designer and retail guru, having to stand down at the helm of Ted Baker in 2019 because of myriad claims concerning the alleged touching and hugging of staff. The brand, which was almost synonymous with Kelvin, was in imminent danger of being severely damaged. Corporates are therefore increasingly aware of the destruction such allegations can inflict upon their capitalisation. In the past, complaints would routinely be caught and killed with severance packages, compromise agreements or NDAs. Not anymore.

This is unsurprising after these strong arm tactics came under the parliamentary spotlight. Parliament in its 2019 Report on the use of NDAs in discrimination cases took a dim view of them, stating that, while it is usual for each party to pay its own costs in the UK, tribunals may only make costs orders requiring one party to pay the other's costs where there has been "unreasonable conduct", but such orders are rare. Citing Professor Dominic Regan's evidence that "pressure can be exerted on claimants by threatening to pursue costs if an offer was not accepted and, at the hearing, the claimant recovered less," Parliament noted that whilst the use of such tactics should be less common at tribunals, it had "heard that such threats are being used, even though they may be unenforceable. Claimants who do not have legal representation may be particularly vulnerable to such tactics."

Sexual misconduct is a serious issue and vigorous action is needed to alter behaviour and instil a culture of respect. This begins by creating an environment that safeguards and upholds common values, and by challenging sexually motivated misconduct from the outset. If litigation, regrettably, cannot be averted, it might be advisable to conduct it in a manner that does not alienate the tribunal, without compromising the proper defence of any contested allegation.

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