

# Russell Brand and Workplace Sexual Harassment—What Obligation Does an Employer Have?

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☞ Celebrities; Employers' liability; Employers' powers and duties; Sexual harassment; Third party harassment

The chilling allegations made against Russell Brand in the recent Channel 4 *Dispatches* Documentary, and the fresh accusations that have appeared since, have rocked the mainstream media leading to uncomfortable questions being asked of Brand's former employers Channel 4, production company formally known as Endemol and the BBC.

Brand's out-of-office wrongdoing may have overshadowed the behaviour described in the documentary that occurred in the workplace but is nevertheless shocking and has drawn attention to the role that employers play in preventing sexual harassment. One Channel 4 showrunner alleged that the TV presenter exposed himself to her and made aggressive sexual advances towards her in his dressing room. Whilst live on his BBC Radio 2 show, Brand threatened to sexually assault a colleague, offered to take his assistant, naked, to Jimmy Saville during an interview in 2007 and would frequently strip naked in the studio himself.<sup>1</sup> Since the documentary aired, a woman who worked in the same building as the BBC in Los Angeles said that Brand followed her into the bathroom and declared that he

was going to have sex with her. When she refused, Brand allegedly exposed himself to her and then minutes later boasted about the encounter on-air referring, incorrectly, to the woman as "the receptionist".<sup>2</sup>

Brand was only encouraged to step down from his position at the BBC in 2008 after, again on-air, he called *Fawlty Towers* actor Andrew Sachs and left a voicemail message bragging about having a sexual relationship with the actor's granddaughter.<sup>3</sup>

The revelations about Brand's conduct come in the wake of a report published in the *British Journal of Surgery* that exposed the extent of sexual misconduct in the NHS's surgical profession<sup>4</sup> and just months after ITV was accused of turning a blind eye to Philip Schofield's affair with a junior member of staff.<sup>5</sup> Since the *Dispatches* documentary aired, a British Army service inquiry into the suicide of 19-year-old Royal Artillery Gunner Jaysley Beck found that the sexual harassment that she was subjected to by her immediate line manager was likely to have been a "causal factor" in her death.<sup>6</sup> An onlooker had reported a previous incident where a warrant officer had sexually assaulted Beck; however, on this occasion "the appointed Investigating Officer did not carry out his own investigation"<sup>7</sup> and the matter was not referred to the police.<sup>8</sup> The warrant officer was told to write a letter of apology to Beck. When Beck was later "exposed to an intense period of unwelcome behaviour from her immediate line manager" her family, speaking on *BBC Breakfast*, said that Beck had told colleagues but had been reluctant to report the behaviour formally, believing that her concerns would not be taken seriously.<sup>9</sup>

This is not the first time this year (2023) that the BBC has had to defend itself. In May, a 24-hour hotline was launched as part of an inquiry into what the corporation knew about allegations of sexual misconduct against DJ Tim Westwood.<sup>10</sup> An update on the BBC's internal review into the allegations admitted that the corporation was aware of some allegations of sexual misconduct in 2012 but that the review "has not found any evidence about whether any safeguarding or similar measures were taken in light of the allegations".<sup>11</sup>

<sup>1</sup> Channel 4, *Russell Brand: In Plain Sight: Dispatches*, Directed by Alice McShane and Imogen Wynn-Mayow.

<sup>2</sup> R. Hart, "Russell Brand Accused Of Exposing Himself To A Woman And Then Laughing About It On Radio" *Forbes*, 22 September 2023 at <https://www.forbes.com/sites/roberthart/2023/09/22/russell-brand-accused-of-exposing-himself-to-a-woman-and-then-laughing-about-it-on-radio/?sh=6eae041171e5>.

<sup>3</sup> N. Badshah, "Russell Brand: media personality is no stranger to controversy" *The Guardian*, 16 September 2023 at <https://www.theguardian.com/culture/2023/sep/16/russell-brand-media-personality-is-no-stranger-to-controversy>.

<sup>4</sup> C.T. Begeny, H. Arshad, T. Cuming, D.K. Dhariwal, R.A. Fisher, M.D. Franklin, P.M. Jackson, G.M. McLachlan, R.H. Searle and C. Newlands, "Sexual harassment, sexual assault and rape by colleagues in the surgical workforce, and how women and men are living different realities: observational study using NHS population-derived weights" (2023) 110(11) *British Journal of Surgery* 1518–1526 at <https://doi.org/10.1093/bjs/znad242>.

<sup>5</sup> M. Sweny, "ITV boss denies management turned 'blind eye' to Phillip Schofield affair" *The Guardian*, 14 June 2023 at <https://www.theguardian.com/business/2023/jun/14/itv-carolyn-mccall-denies-management-turned-blind-eye-philip-schofield-affair>.

<sup>6</sup> J. Kelly, N. Puri and J. Burns, "Dead soldier suffered relentless sexual harassment—Army report" *BBC Online*, 4 October 2023 at <https://www.bbc.co.uk/news/uk-66982160>.

<sup>7</sup> "Service Inquiry into the Death of a Service Person Discovered in their Single Living Accommodation at Larkhill" Service Inquiry Army Personnel Services Group, 15 December 2021.

<sup>8</sup> G. Abdul, "British soldier took her own life after sexual harassment from boss, says army" *The Guardian*, 4 October 2023 at <https://www.theguardian.com/uk-news/2023/oct/04/soldier-jaysley-beck-took-her-own-life-sexual-harassment-army>.

<sup>9</sup> Jon Brady, "Female soldier Jaysley Beck, 19, who took her own life suffered relentless sexual harassment by superior who wanted a relationship with her, Army probe finds" *Daily Mail Online*, 4 October 2023 at <https://www.dailymail.co.uk/news/article-12592015/jaysley-beck-female-soldier-suicide-relentless-sexual-harassment-superior-salisbury-plain.html>.

<sup>10</sup> J. Draper, "Tim Westwood inquiry: 24-hour hotline launched to gather information" *The Evening Standard*, 20 April 2023 at <https://www.standard.co.uk/news/uk/tim-westwood-bbc-dj-hotline-inquiry-police-london-b1075380.html>.

<sup>11</sup> Tim Westwood: Update on the BBC Corporate Investigations team's review.

Endemol, which was bought by Banijay UK in 2020, and the BBC have both launched urgent internal investigations, about Brand's behaviour. Similarly, Channel 4 stated that even after "extensive document searches" it has "found no evidence to suggest the alleged incidents were brought to the attention of Channel 4".<sup>12</sup>

### **"Open Secrets"—should employers wait for formal complaints?**

Commentators in the entertainment industry have described Brand's behaviour at this time as an "open secret" and yet the Channel 4 showrunner that Brand exposed himself to recalled, "I didn't want to tell anyone what he had done because I didn't want to lose my job".<sup>13</sup> Employees in industries where there are acute power differentials where roles are highly sought after may not feel able to come forward if an individual in a senior position abuses their power. Employers should take proactive steps if they suspect employees are being subjected to harassment and will soon have a positive obligation imposed.

Sexual harassment in an employment context occurs when one person engages in unwanted conduct of a sexual nature and this conduct has the purpose or effect of either violating another's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>14</sup> The fact that an employee has suffered the conduct over a period of time does not mean that it is welcome.

The Equality Act 2010 (EqA 2010) will hold an employer vicariously liable for discrimination, harassment or victimisation by an employee against another. However, the EqA 2010 s.109(4) grants the employer a defence if they can show sufficient evidence that they have taken "all reasonable steps" to try to prevent the unlawful conduct or any similar conduct.

The Worker Protection (Amendment of Equality Act 2010) Act 2023 (formally the Worker Protection Bill) will expand the anti-harassment provisions applicable in the workplace by inserting additional provisions into the EqA 2010. The new s.40A will impose a positive duty on employers to take reasonable steps to prevent harassment of their employees over the course of their employment. This amendment represents a shift towards prevention and away from redress once the wrong has occurred. The new s.40 of the EqA 2010 will grant employment tribunals the power to uplift sexual harassment compensation by up to 25% where an employer is found to have failed in their duty.

Reasonable steps may include implementing policies and drawing employees' attention to them, providing training to all employees so that they understand the

behaviour that is expected and can spot where behaviour falls below this expectation, implementing reporting mechanisms and conducting fair and thorough internal investigations to promote confidence. Employers could consider carrying out culture audits or surveys and risk assessments, particularly where there are teams with power imbalances. An employer should investigate even when the alleged victim has not come forward themselves as this reluctance may be as a result of embarrassment, fear of reprisal or a lack of understanding about the conduct that amounts to harassment. While all formal grievances should be investigated, informal complaints or "open secrets" should be addressed at the earliest opportunity and managers trained in how to recognise problematic behaviour and how to approach and conduct, what can be, uncomfortable conversations. When considering their reasonable steps, employers should note that the EqA 2010 protects individuals "in employment", a wider category than employees, which will include workers and some contractors and self-employed individuals, depending on the circumstances.

### **What if the harasser is not an employee?**

In its original form, the Worker Protection Bill sought to re-introduce employer liability for harassment of employees by third parties (rather than fellow employees) where the employer did not take all reasonable steps to prevent the third party from engaging in the unlawful conduct. Employer liability for harassment by third parties came to the fore in 1997 when a hotel was held liable for harassment<sup>15</sup> (in this case, related to race) when its waitressing staff were subjected to the racist jokes of the comedian Bernard Manning at a function it was hosting, although later cases limited the employer liability.

Statutory liability was first introduced by the EqA 2010 s.40 and applied a "three strikes" rule where liability arose if an employee had been harassed by a third party on two previous occasions. This was repealed in 2013 after employers said it was "confusing and unnecessary". A third party might be a customer, a supplier, a client or a contractor who is not employed by the same employer. A 2018 report published by the Equality and Human Rights Commission highlighted that employees in customer facing roles were particularly vulnerable to harassment by third parties and that, "the law is not clear in this area and employers may not be liable even if they have failed to take steps".<sup>16</sup> The report called for the reintroduction and amendment of s.40 to make the law

<sup>12</sup> I. Youngs and S. McIntosh, "BBC and Channel 4 investigate Russell Brand allegations" *BBC Online*, 18 September 2023 at <https://www.bbc.co.uk/news/uk-66836556>.

<sup>13</sup> J. Brady, "'We were basically pimps': TV staff who worked with Russell Brand tell Channel 4 Dispatches about culture of sex around the comedian who would 'have sex in BBC toilets and have runners get phone numbers from audience members'" *Daily Mail Online*, 17 September 2023 at <https://www.dailymail.co.uk/news/article-12526989/TV-staff-Russell-Brand-Channel-Dispatches.html>.

<sup>14</sup> Equality Act 2010 s.26.

<sup>15</sup> *Burton v De Vere Hotels Ltd* [1997] I.C.R. 1; [1996] I.R.L.R. 596.

<sup>16</sup> Equality and Human Rights Commission, "Turning the tables: Ending sexual harassment at work" March 2018 at <https://www.equalityhumanrights.com/sites/default/files/lending-sexual-harassment-at-work.pdf>.

clearer for employers and employees and provide effective protection, in particular, for employees in customer or other third-party-facing roles.

The attempt by the Worker Protection Bill to reinstate the s.40 protection against third-party harassment, albeit without the need for there to have been two prior occasions, was thought by the House of Lords to curtail free speech and increase the regulatory burden on employers. Although this duty was dropped from the Worker Protection Bill in July, employers should still consider how they may make clear the expectations and standards of behaviour to be adhered to by third parties with whom their employees come into contact. Employers may also share, where possible, any policies relating to harassment with contractors, suppliers, or other businesses they share a premises with to ensure that all communications reflect the internal approach to harassment. When engaging with third parties, employers may incorporate a clause into any contractual agreement that the third party will adhere to standards of behaviour.

Similarly, while there is no obligation on an employer to prevent the harassment of employees at another company, behaviour that is contrary to an employer's policies, whoever it is directed to, should be addressed. Employees act as ambassadors of the business and reputational damage may result in unquantifiable losses. Employees may interpret inaction as an employer condoning the conduct and may start behaving this way towards their colleagues or indeed, third parties. If employers only take the minimum action required of them by law, this can breed a culture in which harassment can subsist and may mature into a situation that the employer cannot control.

### How does an employer ensure that all parties are treated fairly?

Allegations of sexual harassment can have a significant impact on all involved including the complainant and the alleged harasser as well as witnesses, and no presumption of guilt should be made. A thorough investigation should be carried out without delay and, as far as possible, the employer should ensure that the investigation into the allegations is kept confidential, while balancing the need to obtain evidence from other witnesses.

The Equality and Human Rights Commission Guide provides the following advice for employers:

- Timescales: set realistic timescales for each stage of the process and communicate these to the alleged harasser and the complainant.

- Roles and responsibilities: during the investigatory process, the roles and the responsibilities of those involved should be clearly defined with independence and objectivity ensured at each stage of the process. Where possible, people from different parts of the business, who have no or less knowledge of the people involved, should be appointed and, where necessary, employers should consider appointing an external investigator to ensure objectivity.
- Advice: Employers should ensure that investigators have appropriate expertise to investigate and that they have access to appropriate advice.
- Right to be accompanied: the complainant and alleged harasser should be informed of their statutory right to be accompanied to any formal grievance or disciplinary hearings by a trade union representative or a colleague. Employers should consider extending this right to be accompanied by a colleague or trade union representative to other meetings such as investigation meetings where reasonable or whether this right should be extended to include a non-colleague if the complainant is uncomfortable about speaking about their experience in front of a colleague.

### What now for Brand?

Brand no longer works in the mainstream media and instead posts videos on alternative media platforms about anti-establishment politics, his spiritual journey and, more recently, UFOs. In light of the allegations, YouTube has suspended Brand's ability to earn advertising revenue as it considers that he has violated its creator responsibility policy.<sup>17</sup> Brand is being investigated in connection to criminal allegations of harassment and stalking.<sup>18</sup>

Brand has issued a statement describing the "coordinated media attacks" as "baroque"<sup>19</sup> but the indiscretions caught live on BBC Radio 2 are harder to dismiss and may make it more difficult for the BBC to maintain that, as they lacked knowledge of inappropriate conduct, they were unable investigate or to defend their failure to take earlier action over what Brand said on-air because they had not received a formal complaint.

<sup>17</sup> A. Rahaman Sarkar, "Russell Brand pleads with fans to support him financially after YouTube cuts his advert revenue" *The Independent*, 30 September 2023 at <https://www.independent.co.uk/larts-entertainment/tv/news/russell-brand-rumble-fee-fans-allegations-b2421469.html>.

<sup>18</sup> J. Grierson, "Russell Brand facing second criminal inquiry after harassment allegations" *The Guardian*, 2 October 2023 at <https://www.theguardian.com/culture/2023/oct/02/russell-brand-facing-second-criminal-investigation-into-harassment-and-stalking>.

<sup>19</sup> C. Skopeliti, "Russell Brand posts video denying 'very serious criminal allegations'" *The Guardian*, 16 September 2023 at <https://www.theguardian.com/culture/2023/sep/16/russell-brand-posts-video-online-denying-unspecified-criminal-allegations>.