

Coping with the law

There's a financial as well as a psychological price to pay for bullying and harassment at work. **Neil Goodrum** clarified key points in the relevant legislation at the 2007 ACW conference

The words 'bullying' and 'harassment' can often turn up in workplace disputes. From a legal point of view these expressions have particular implications and therefore to begin with we must, inevitably, define our terms.

Discrimination, in the employment context, is unlawful on certain specified grounds: sex, race, disability, religion or belief, sexual orientation and age. Harassment on these grounds is also unlawful. In the discrimination legislation harassment is broadly described as follows:

A subjects B to harassment where, on one of the protective grounds, A engages in unwanted conduct which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

In this article reference to harassment is, except where stated otherwise, in this context.

Slightly confusingly, under the Protection from Harassment Act 1997, which does not apply just in the employment context, it is specified that:

'A person must not pursue a course of conduct which amounts to harassment of another which he knows or ought to know amounts to harassment of another.'

For these purposes, a person ought to know that their conduct is harassment if a reasonable person with the same information would think that it was. Significantly, a course of conduct includes alarming another person or causing them distress on at least two occasions.

So far as bullying is concerned there is no formal statutory definition. In its guidance entitled *Bullying and harassment at work; a guide for managers and employers*, ACAS describes bullying as:

'Offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient.'

Having described our terms we can now look at the legal framework that applies. Broadly this falls under five main headings:

1 Unlawful discrimination

2 Health and safety at work

3 A civil duty of care – negligence

4 The Protection from Harassment Act 1997

5 The contract of employment.

Discrimination

Looking first at unlawful discrimination, the relevant definition of harassment in relation to the six areas of unlawful conduct is set out above. One important practical question in tribunal proceedings is often who has responsibility for proving a particular point. It is for the employee to show first of all that there are facts that could amount to harassment based on discrimination. If the employee is able to show these facts, it is then for the employer to show that unlawful discrimination played no part in what happened. In practice, this is a significant issue and employers quite often get into difficulty because they do not have recorded adequate evidence to rebut the employee's case.

Before leaving unlawful discrimination claims, which would be pursued in the employment tribunal, it should not be forgotten that employees are protected from suffering a detriment, which would obviously include harassment, on a number of specific grounds which include being an employee representative, making a request for flexible working or raising working time regulations issues.

Health and safety

A further area of legislation that may be relevant in bullying and harassment cases relates to health and safety at work. Under this legislation the employer has an obligation to carry out risk assessments to identify and deal with hazards in the workplace. Although possibly not initially envisaged as being relevant to bullying and harassment, the significance of these regulations may be more apparent when the Health and Safety Executive Management Standards for Work Related Stress, launched in November 2004, are taken into account. These standards identify six key areas that employers need to have regard to, including dealing with 'relationships'. Employees may support claims against employers for damages arising from bullying by referring to health and safety legislation and these standards.

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‘Employees who are subjected to bullying and harassment potentially have significant claims against employers’

Civil claims for personal injury

Employers can face civil claims that originate in bullying. These are claims for personal injury, pursued in the county court or high court rather than in the employment tribunal. In most cases an employer is going to owe to their employee a duty to take reasonable care to avoid them suffering injury. To succeed in a claim for compensation an employee would need to prove firstly that they had suffered from bullying and secondly that they had suffered an injury. In these circumstances ‘stress’ is, broadly, insufficient to constitute an injury and the employee would need to show that they were suffering a recognised psychiatric illness, for example depression.

Often more difficult for the employee is to

demonstrate that, thirdly, the injury was caused by the employer’s breach of their duty to take reasonable care and that, fourthly, the employer could foresee that, in the circumstances, an injury would follow.

If the employee has reasonable prospects of establishing these factors any court proceedings for personal injury must normally be commenced within three years. Before embarking on such a case it is essential for the employee to give serious consideration to the costs issues, how the case is to be funded and what their prospects of success are.

In some cases that have been before the court, perhaps most notably in *Green v DB Group Services (UK) Limited*, personal injury claims have included claims for harassment under the Protection from Harassment Act 1997. Such claims are also brought in the county court or high court. There are a number of advantages for the employee. It is not necessary to prove the reason for the harassment, in contrast with the discrimination legislation; they have six years in which to bring a claim; the question of the employer being able to foresee consequences for the employee is not relevant; in terms of injury it is simply necessary to establish ‘anxiety or distress’. The disadvantages are that it is necessary to show there has been a course of conduct, being more than one incident. It is also necessary to establish the employer’s vicarious liability; the same costs rules apply as in personal injury cases. The meaning and significance of vicarious liability is referred to below.

Contracts of employment

The final main type of claim that may arise from bullying and harassment at work relates to the contract of employment. Employment contracts are governed by the same general law that applies to all contracts, although there are some specific issues that are particular to the employer/employee relationship. A breach of contract gives the person who suffers from the breach a potential claim for damages. Where the breach is of a fundamental term that person may elect to treat the contract as discharged, so that the contract comes to an end, and a claim for damages arising from the ending of the contract arises. An employee faced with a fundamental breach of contract has an option to resign and claim both damages for breach of contract and, in appropriate circumstances, compensation for unfair constructive dismissal.

Various terms are implied into a contract of employment and the one most commonly referred to is that mutual obligation of trust and confidence. This is a fundamental term. By permitting an employee to be subjected to bullying and harassment, the employer is likely to be in breach of the fundamental term of trust and confidence.

Vicarious liability

Vicarious liability refers to circumstances in which the employer is liable to one employee for the actions of another. The basic idea applies to discrimination cases, in which this is normally referred to as 'secondary liability', and in civil claims for personal injury as well as under the Protection from Harassment Act. The essential element necessary for the employer to be liable to pay compensation is that the actions, taken by one employee towards the other, were undertaken in the course of the employment. The courts tend to take a wide approach to this so that actions which occur in events outside work, such as the Christmas party, may be considered to be an extension of the workplace. In relation to civil claims for personal injury the employer can take steps to protect themselves in general terms by recognising their obligation to take reasonable care for employees. In discrimination cases, there is a formal defence to the question of vicarious liability where an employer can show that they have taken reasonable steps to prevent the employee responsible from behaving in the way in which is unlawfully discriminatory, provided the steps are taken before the act complained of occurs. It is in this context that it is essential for employers to have clear policies on equal opportunities, bullying and harassment, but also to ensure those policies are actively followed.

Compensation

How much might all this cost an employer? In discrimination cases and in personal injury matters awards of compensation may be substantial. Claims for past and future loss of earnings will be added to claims for compensation for the injury in personal injury claims, and injury to feelings in discrimination cases. In the most serious cases, where an employee claims a substantial future loss of earnings for example, it is possible for these claims to exceed £1 million. It should be remembered, however, that in most circumstances any award is not a punishment for the employer as such, but is intended to compensate the employee for what they actually have lost.

From the above it is obvious that employees who are subjected to bullying and harassment potentially have significant claims against employers. Such employees, however, need to bear in mind the practicalities of pursuing these claims both in terms of the added emotional stress and the often significant costs. It should also be obvious that once the employer and the employee are considering enforcing their potential legal remedies a potential layer of conflict has been added often causing irreparable harm to the relationship. ■

ACW conference 2007: delegate feedback 1

Nicola Banning reports

When the cabbie picked me up at 6.30am on a dark morning in November to catch my train to London, he asked me if I was 'off anywhere interesting?' I temporarily silenced him when I responded, 'To a conference on workplace bullying'. It may not have sounded like a fun day out, but for those of us with an interest in this aspect of organisational life, the programme promised a full day and it certainly did not disappoint.

Andrew Kinder opened the conference introducing the conference's keynote speaker, Professor Duncan Lewis, ACAS Professor of Workplace Futures at the Glamorgan Business School, describing him and his work as an 'amazing force for good'. Drawing on his extensive research, Duncan's speech questioned social constructions of bullying and asked, 'Are we all talking about the same thing when we talk about bullying?' Setting the scene when it comes to current research into workplace bullying in the UK, Europe and the US, Duncan explained that the bulk of research into bullying in the UK has been carried out in the public sector. He cautioned us against deducing that this indicates that there are higher rates of workplace bullying in the public sector, and suggested that, as a result of the focus of the research, we may simply have greater knowledge of its prevalence within the public sector.

He reported how in 2005, ACAS received 45,000 calls about workplace bullying which highlighted the scale of the problem before us. Despite common perceptions that those in managerial positions are most likely to bully their staff, Duncan's research found that bullying was most likely to exist between colleagues. Interestingly, the research in the UK and across Europe consistently reports that two women to every one man report experiencing bullying and harassment. This opened up some discussion about how gender might impact on these figures, and whether, rather than experiencing less workplace bullying, men might struggle more with admitting to being bullied and therefore not report it as willingly as women. Duncan's research also revealed that there were high levels of reported workplace bullying among disabled and sexual orientation groups and

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