

# Bullying and Harassment



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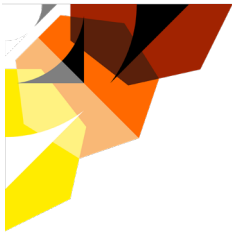
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Dignity at work has become increasingly recognised as an important issue for employers to address. Taking action to prevent bullying and harassment at work can be crucial in avoiding increased levels of stress and absenteeism, low staff morale, high turnover and decreased productivity.

Workplace harassment and bullying in the workplace can expose employers to a variety of different types of damaging legal action – including constructive dismissal claims, complaints of discriminatory harassment and action under the Protection from Harassment Act 1997.

This Inbrief summarises the legal background and examines how employers can develop effective policies which will both reduce legal exposure and create a healthy, respectful and supportive working environment for their staff.

### Defining bullying and harassment

There are several definitions of bullying and harassment, and many employers adopt their own formulation in a “dignity at work” policy. Generally speaking, the common theme is an acknowledgement that when a worker is bullied or harassed, something has happened to them which is unwelcome, usually unwarranted and has a detrimental effect on them.

### Bullying

There is no precise legal definition of bullying, but examples would include:

- ▶ whispering or gossiping campaigns;
- ▶ “picking on”, taunting, teasing, or ostracising a colleague;
- ▶ shouting at or humiliating a colleague, or berating them in public;
- ▶ aggressive or excessive unjustified criticism of a colleague, or setting them up to fail;
- ▶ undermining a colleague’s ability to carry out or take credit for their work – e.g. overloading them with menial tasks, taking their work away from them, or stealing or copying their work;
- ▶ intentionally blocking a colleague’s promotion, training or other career opportunities.

Bullying can often be an accumulation of many small incidents over a long period of time, each of which in isolation may appear to be trivial. For this reason, targets may find it difficult to acknowledge to themselves and others that they are being bullied.

### Harassment

In contrast, there are precise legal definitions of harassment. The Equality Act 2010 states that harassment is unwanted conduct related to a “protected characteristic”, which has

the purpose or effect of violating a person’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

The “protected characteristics” are the victim’s (or another person’s) age, disability, gender reassignment, race, religion or belief, sex or sexual orientation (for more information, see our Inbrief on Equality at Work).

This is a wide definition that also protects a person against harassment based on someone else’s protected characteristic – for example, if a worker is teased because she is married to someone from a different religion. It also applies to harassment based on the perception that a person has a protected characteristic – for example, if homophobic comments are made to a worker because he is mistakenly perceived to be gay.

Harassment also covers unwanted conduct of a sexual nature, such as verbal comments or physical conduct, which can range from unnecessary touching or brushing up against a colleague to sexual assault. In addition, it is unlawful to treat someone less favourably because they have rejected or submitted to conduct of a sexual nature, or unwanted conduct relating to sex or gender reassignment. For example, refusing to promote someone because they have refused sexual advances from their manager.

Clearly, there is a big overlap between bullying and harassment. If a type of bullying behaviour listed above is connected to one of these protected characteristics, it is likely to amount to harassment for discrimination law purposes. Sometimes, it is obvious that behaviour is linked to a protected characteristic, for example:



- ▶ display of pornographic or sexually suggestive pictures, objects or written materials;
- ▶ “outing” a colleague who does not wish their sexual orientation to be made public;
- ▶ mimicry or imitation of a disabled person;
- ▶ telling jokes or indulging in banter based on a protected characteristic.

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### What claims can workers bring?

There is no specific claim of “bullying” that workers can bring. A legal challenge to alleged bullying in the workplace can only be mounted indirectly. In contrast, workers can bring a specific claim that they have suffered “harassment”, as defined either in the Equality Act or the Protection from Harassment Act 1997 (as appropriate).

The more common claims workers can bring if they have been bullied or harassed are summarised below.

#### Constructive dismissal

Employees may claim that the treatment they have suffered, coupled with the employer’s failure to prevent it, is sufficiently serious to amount to a “fundamental breach” of their contract of employment. If so, they are entitled to resign and claim constructive unfair dismissal. This claim can only be brought in an employment tribunal.

Sometimes, employees will be able to point to a breach of an express term of their employment contract. More often, they will say there has been a breach of an implied term of the employment contract – such as the duty of mutual trust and confidence, the duty to provide reasonable support to employees, or the duty to provide a safe place of work.

#### Discriminatory harassment

As mentioned above, employees who suffer harassment have specific remedies under the Equality Act if the harassment was related to a protected characteristic or was of a sexual nature. Normally, an employee can bring such a claim in an employment tribunal if they have suffered harassment on just one occasion.

The employer has a defence to claims of discriminatory harassment if it can show it has taken reasonably practicable steps to prevent the harassment. It is not enough merely to have an anti-harassment and bullying policy. Employers would be expected actively to follow their policy, train managers and staff on it and react promptly to any indication that an employee is being harassed. (See further below.)

Following a consultation process on sexual harassment, the government has said that it proposes to introduce a new duty for employers to prevent sexual harassment and harassment by third parties (such as customers and clients) in the workplace. No timescale has been given for this and there is no draft legislation as yet.

#### Protection from Harassment Act

The Protection from Harassment Act 1997 was introduced in order to tackle the issue of stalking, but it has also been used by employees in the context of workplace harassment and bullying. Any claim under this Act must be brought in the civil courts.

This legal route has some advantages for employees, who may find it easier to demonstrate they have been “harassed” under this Act than under the Equality Act. There is, for example, no need to prove that the bullying or harassment happened for a particular reason. Also, unlike under the Equality

Act, employers cannot rely on the defence of having taken reasonable steps to prevent the harassment occurring.

#### Negligence

Workers usually bring a legal action for negligence against their employer in the context of personal injury, where they have suffered an accident at work. But the law of negligence can also be used where bullying and/or harassment have resulted in physical or psychiatric injury, by an employer either subjecting a worker to such treatment or failing to prevent it. Negligence claims must be brought in the civil courts.

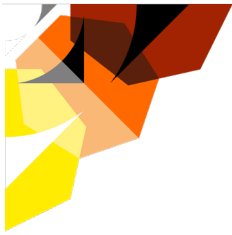
This can be a difficult claim for workers to pursue. They have to establish a genuine psychiatric injury, rather than mere anxiety or distress, and that this was a reasonably foreseeable consequence of their employer’s actions (or failure to act).

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#### Who is protected?

The Equality Act protects not just employees, but a wide range of other workers too - including agency workers and self-employed individuals such as independent contractors and consultants. But not all the types of claim discussed above can be brought by such a wide range of workers. For example, only full “employees”, with a contract of employment, can claim constructive unfair dismissal.

In general, however, organisations would be well advised to assume that they have a duty not to bully or harass any of their staff and to protect all their staff from suffering bullying and harassment in the workplace, whether those individuals are employees, agency workers, self-employed persons or any other category of worker.



At the moment, there is no specific legal obligation to protect workers from harassment by third parties, such as customers or clients. There are currently proposals to re-introduce this obligation (after it was removed a few years ago). Nevertheless, it would be good practice to take action if staff are harassed or bullied by a third party. It may also be a breach of trust and confidence, harassment or discrimination if an employer refuses to take action - for example, if the employer would only protect staff with some types of protected characteristic but not others.

### Avoiding and reducing liability

Workers who are the victims of bullying or harassment by a colleague may be able to bring legal claims against the harasser or bully directly. However, employers are also normally liable for the actions of their employees – the legal term for this is “vicarious liability”.

Employer liability potentially extends not only to harassment in the workplace itself, but also while employees are attending work-related activities - for example, after-work drinks or away days.

As already mentioned, employers have a defence under the Equality Act if they take reasonably practical steps to prevent harassment taking place. In practice, an employer’s first step is to ensure it has policies in place for protecting dignity at work that are appropriate for the organisation. These will include an equal opportunities policy and an anti-harassment and bullying policy (either separate or combined), which clearly distinguish between the different forms of harassment.

Employers should also review their disciplinary and grievance procedures

to ensure they are appropriate and effective. For example, a grievance procedure normally confirms to whom a grievance should be sent, e.g. a line manager. However, since this individual may be the harasser or bully, the policy should specify an alternative.

Disciplinary policies often list examples of gross misconduct, so serious or persistent harassment and/or bullying should be included. IT usage policies should also set out what is legitimate and acceptable email and internet use and confirm that workers should not use these systems to engage in harassment or bullying.

It is not enough just to have these policies on paper and pay lip service to them. Employers need to ensure their policies are followed in practice. The Equality and Human Rights Commission (EHRC) has published [technical guidance on sexual harassment and harassment at work](#), which contains a useful section on taking steps to prevent and respond to harassment. We consider this guidance in more detail in our article [here](#). At the moment it is not legally binding but can be referred to in a harassment claim and taken into account by employment tribunals.

The following measures are strongly advisable:

- ▶ Train staff on the contents of the relevant policies. Best practice would be to include such training as part of the staff induction process, make sure the policies are included as part of any staff induction pack and hold regular, compulsory refresher/update sessions. This should be training tailored to the organisation and the audience, not simply a “tick box” exercise.
- ▶ Train managers on the policies before they are rolled out across the rest of the workforce. After all, it is managers who are likely to have responsibility for making the policies work in practice. This should include additional guidance on what to do upon receiving a report or complaint of bullying or harassment, investigating complaints, taking disciplinary action and supporting workers.
- ▶ Use training to foster a culture where bullying and harassment are unacceptable and workers are encouraged to support each other to prevent such behaviour.
- ▶ Ensure there are clear complaints procedures. These would typically be included in the organisation’s grievance policy.
- ▶ Ensure there are workers who are trained in providing support to individuals through the process of making a complaint about bullying or harassment, including training on particularly sensitive issues related to different protected characteristics.
- ▶ Make sure policies are easy to find and that all staff are aware how they can be accessed.
- ▶ Where an individual’s harassment/bullying grievance is upheld, ensure the culprit is subjected to disciplinary procedures.
- ▶ Consider disciplining managers who have responsibility for following the policies if they fail to do so.
- ▶ Consider surveying staff on an anonymous basis and retaining statistics on staff turnover across departments. This may help to identify particular trouble spots.
- ▶ Carry out a sexual harassment risk assessment. Risk factors may include, for example: power imbalances; job insecurity; lone



working; the presence of alcohol; customer-facing duties; particular events that raise tensions locally or nationally; lack of diversity in the workforce; and workers being placed on secondment.

### Recommended policies

The EHRC technical guidance contains a number of recommendations on effective policies and procedures. These should cover both harassment and victimisation (where someone is treated badly for raising complaints about harassment or helping others to do so). Although this is not currently legally binding, it is recommended that employers benchmark their policies against this guidance now.

Anti-harassment and bullying policies should include at least the following:

- ▶ Clear definitions of bullying and harassment, covering the definition of the different types of harassment (including sexual harassment) for the purposes of the Equality Act, the protected characteristics, and victimisation. There should be a statement that this behaviour will not be tolerated.
- ▶ Clear examples of behaviour that may constitute bullying and different types of harassment, which are relevant to the organisation and reflect a diverse range of workers.
- ▶ Confirmation that the policy also applies to work-related situations outside normal hours or off-site, e.g. after-work drinks, and conduct on social media.
- ▶ An explanation of what steps will be taken to prevent and deal with third-party harassment.
- ▶ A statement that workers are encouraged to report behaviour they think may constitute workplace bullying or harassment, and a commitment from the employer to a reprisal-free complaints procedure.
- ▶ Clear procedures for workers to report harassment and bullying. Workers should be able to report concerns to a variety of colleagues, not just their manager (who may be the harasser/bully).
- ▶ Confirmation that workers are encouraged to report bullying and harassment by their colleagues.
- ▶ Consideration of which workers are covered by the policy - for example, whether casual, agency, and freelance staff are covered. Given the scope of the applicable legislation, it is normally advisable to include such categories.
- ▶ An opportunity for staff to follow either an informal or formal resolution process. The formal resolution process should require workers to put their complaints in writing and, as appropriate, follow the grievance procedure.
- ▶ Provisions to suspend the alleged harasser/bully during the investigation process or, if this is not practicable, to allow the worker bringing the complaint to remain at home during this period.
- ▶ Confirmation that workers may be disciplined and ultimately dismissed for violating their co-workers' dignity at work and that they may also be individually liable to pay compensation.

- ▶ Specification of the disciplinary sanctions available in cases of harassment and/or bullying, up to and including dismissal.

The EHRC guidance also says that the effectiveness of these policies should be evaluated, through methods such as centralised recording of incidents, anonymous staff surveys, lessons-learned sessions once complaints are resolved, and feedback from exit interviews. The employer's policies can then be improved if this reveals shortcomings - for example, that some parts of a policy are unclear, or that certain groups require further training.

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