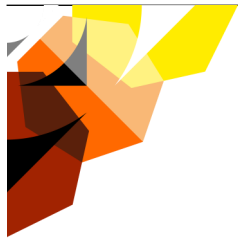


# Bullying and harassment



## ► Inside

- Defining bullying and harassment
- What claims can workers bring?
- Who is protected?
- Avoiding and reducing liability
- Contents of policies



## Introduction

Dignity at work has become increasingly recognised in recent years 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.

In addition, workplace harassment and bullying in the workplace can expose employers to a variety of different types of damaging legal action – for example, constructive dismissal claims, complaints of discriminatory harassment and actions 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.

There are several definitions of bullying and harassment in circulation, 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
- berating a colleague 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" – see below) which has the purpose or effect of:

- violating a person's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for them

This is a wide definition that also protects a person against harassment based on someone else's protected characteristic, or on the

perception that they have a protected characteristic.

The "protected characteristics" are the victim's (or another person's) age, disability, gender reassignment, race, religion or belief, sex or sexual orientation.

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:

- physical conduct of a sexual nature, ranging from unnecessary touching or brushing up against a colleague to sexual assault
- 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

## Why should employers take action?

Bullying and harassment in the workplace can cause serious problems for employers, including significant financial implications. For example:

- poor workplace morale and employee relations
- reduced performance and lost productivity
- high absence levels and staff turnover
- reputational damage
- risk of legal claims being brought by workers

## 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 assert a breach of an implied term of the employment contract – e.g. 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 either the harassment was related to a protected characteristic (i.e. age, disability, gender reassignment, race, religion or belief, sex or sexual orientation) 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.)

#### 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).

#### 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 fully fledged '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.

#### Employer 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.

#### Avoiding and reducing liability

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).

In addition, 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. Finally, IT usage policies should 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 following measures are 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
- 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

- 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
- 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
- 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

---

### Contents of policies

Most anti-harassment and bullying policies will include at least the following:

- Clear definitions of bullying and harassment, including the legal definition of 'harassment' for the purposes of the Equality Act
- Illustrative examples of behaviour that may constitute bullying and harassment
- A statement that workers are encouraged to report behaviour they think may constitute workplace bullying, and a commitment from the employer to a reprisal-free complaints procedure
- Confirmation that the policy also applies to work-related situations outside normal office hours or off-site, e.g. after-work drinks
- Clear procedures for workers to report harassment and bullying. Workers should be able to report bullying and harassment to a variety of colleagues, not just their manager (who may be the harasser/bully)
- 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 – e.g. warnings; relocation to a different role; withdrawal of management responsibilities; attendance at counselling or behavioural training; or dismissal

For further information on this subject please contact:

**Carolyn Soakell**

**Partner**

+44 (0) 20 7074 8225

[carolyn.soakell@lewissilkin.com](mailto:carolyn.soakell@lewissilkin.com)