

# **WRIGLEYS**

## **- SOLICITORS - EMPLOYMENT LAW FOR CHARITIES SEMINAR JUNE 2004**

### **BULLYING AND HARASSMENT - EMPLOYERS' LIABILITY**

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#### **1. Introduction**

There is really no such legal claim as one of bullying, and, until recently, protection from harassment under English law was only contained in the Protection From Harassment Act 1997, which, while creating both criminal and civil action against a person who pursues a course of conduct amounting to harassment, is not designed to protect an employee against an employer (because of the actions of another employee) since it is not designed to cover employment. Until recently, the main employment related claims for an employee who felt that they were being bullied or harassed, would be indirect, through legislation such as the Sex Discrimination Act or the Race Relations Act. However, we now have the Employment of Quality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003, both of which give an employee protection against discrimination and harassment, respectively, sexual orientation and religion or belief. Running parallel to these developments, there is a different type of claim that an employee can bring against an employer, commonly known as a stress claim. This is a claim for personal injury against an employer, either because of the employer's conduct, or certain conduct by another employee. Other less well known claims exist, such as the breach of the Health & Safety at Work Act 1974 (or Health and Safety Regulations), under which an employer has various duties relating to an employee's safety and welfare.

#### **2. What is the importance of employers and managers being familiar with the legal issues?**

Obviously there are financial implications for your charity. It is usually only the cases that get to court that we hear about, but there are many out of court settlements, a recent one being that of a further education lecturer who was offered £80,000 by her employer, Henley College in

Coventry, who, it was claimed, ignored her burgeoning work load as she had begun to develop systems of a major depressive episode. Whilst damages may often be in the region of £10,000 - £15,000, damages (for loss of earnings and as compensation for harm caused) can exceed £200,000.

There is also the problem of a loss of working days through stress related sickness absence.

### **3. Harassment, bullying and discrimination**

An employee may bring a claim in an Employment Tribunal if it relates to stress arising from harassment or bullying where there is race or sex discrimination. It is also possible to bring a claim for sexual harassment under the SDA, although sexual harassment is not defined in that legislation. Sexual harassment is really a claim of sex discrimination.

The Sex Discrimination Act 1975 and the Race Relations Act 1976 contain similar principles. Both recognise the two concepts of 'direct' and 'indirect' discrimination. Direct discrimination can be paraphrased from both Acts as

*when a person 'A' treats another 'B' less favourably than A would treat a person of the opposite sex to B when that treatment is on the grounds of B's race or sex.*

Section 6 (2) of the Sex Discrimination Act also has the following provision often relied upon by those claiming sexual harassment

*It is unlawful for a person, in the case of a [woman] employed by him at an establishment in Great Britain to discriminate against her ... by dismissing her or subjecting her to any other detriment*

Therefore, harassment or bullying might amount to sex or race discrimination if it is seen as less favourable treatment or a detriment. If an employee wanted to bring a claim under S1 of the SDA, they would usually have to point to an employee of the opposite sex and argue that the treatment they had suffered was on the grounds of their sex and less favourable than that meted out to someone of the opposite sex. A claim under S6 would need to be based on detriment. However, in the case of sexual harassment, the courts have been willing to infer a detriment and not demand a comparison with someone of the opposite sex in certain circumstances: sexual

comments or innuendo are often accepted as constituting a detriment because they undermine the victim's dignity in the workplace.

The Employment Appeal Tribunal has provided some useful general guidance in sexual harassment cases.

- Sexual harassment is a colloquial expression which describes one form of discrimination in the work place made unlawful by Section 6 of the SDA. It is a short hand for describing a type of detriment and its use, without regard to Section 6, can lead to confusion.
- The question in each case is whether the alleged victim has been subjected to detriment and, secondly, whether it was on the grounds of sex. The motive and intention of the alleged discriminator is not an essential ingredient although it may be a relevant factor. Lack of intent is not a defence.
- Whether an alleged victim of sexual discrimination (sexual harassment) has been subject to a detriment will usually be quite clear.
- The essential characteristic of sexual harassment is that it is

*Words or conduct which are unwelcome to the recipient and it is for the recipient to decide for themselves what is acceptable to them and what they regard as offensive ... it undermines the victim's dignity at work ..... and creates an offensive or hostile environment for the victim as an arbitrary barrier to sexual equality in the work place.*

- The test is subjective - it is for each individual to determine what they find unwelcome or offensive, even if the Tribunal would regard the behaviour as acceptable.
- Specific incidents would not necessarily be analysed for their effects - the impact of an accumulation of incidents may amount to harassment (discrimination) even if a separate incident does not. Once unwelcome sexual interest has been shown, an employee may

well feel bothered by such interest which in a different context might be unobjectionable. This is because it has an effect on the work environment.

- It is for each person to define their own levels of acceptance and creating a huge fuss is not necessary to indicate disapproval, provided that any reasonable person would understand the employee to be rejecting the conduct of which they were complaining. Continuation of the conduct would, generally, be regarded as harassment.
- A one off act may constitute a detriment.

However, if the claimant was merely being hypersensitive in finding conduct offensive an alleged discriminator did not perceive and could not reasonably have been expected to perceive his conduct as offensive, there may well be no finding of discrimination.

Therefore, the complainant's subjective view of the behaviour and the reasonable person's objective view of the behaviour are taken into account.

Similarly, a harassment claim can be brought under the Race Relations Act 1976, as such harassment can amount to race discrimination. There is also the offence of racially aggravated harassment, which is criminal and outside our remit.

There may also be combinations of harassment discrimination claims, such as where sexual harassment causes the complainant to suffer a disability. Apart from the sexual harassment possibly being discrimination under the SDA, dismissing an employee because her work performance has suffered due to harassment at work may be a breach of both the Disability Discrimination Act and the SDA.

#### **4. Harassment on the grounds of sexual orientation**

New legislation came into force on 1 December 2003. The Employment Equality (Sexual Orientation) Regulations 2003 outlaw harassment on grounds of sexual orientation.

Regulation 5 states

*(1) "for the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of*

*(a) violating B's dignity; or*

*(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*(2) Conduct shall be regarded as having the effect specified in paragraph 1 (a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.*

Because of the use of the word "or" instead of "and", if A has the purpose of violating B's dignity or creating a hostile environment on the grounds of the sexual orientation, then unlawful harassment will have occurred, regardless of the effect on B. If that was not A's purpose then B must prove that it had that effect, although this is not sufficient to establish liability, because Regulation 5.2 introduces a further, objective end to the test, which in effect excludes claims by "hypersensitive" employees against an unintentional harasser.

In addition, because of the use of the words "on the grounds of sexual orientation" rather than "on the grounds of B's sexual orientation", it would be arguable that if A harassed B because of A's mistaken belief that B was homosexual when B was actually heterosexual, discrimination may still have occurred.

## **5. Harassment on the grounds of religion or belief**

The Employment Equality (Religion or Belief) Regulations 2003 outlaw harassment in the field of employment and vocational training, on the grounds of someone's religion or belief.

Regulation 5(1) states :

*(1) A person ("A") subjects another person ("B") to harassment where, on grounds of religion or belief A engages in unwanted conduct which has the purpose or effect of*

*(a) violating B's dignity; or*

*(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*(2) For the purposes of paragraph 1, conduct shall be regarded as having the effect specified in sub paragraphs a and b of that paragraph if, having regard to all circumstances, including in particular the perception of b, it should reasonably be considered as having that effect.*

As with sexual orientation, the Regulations require only that the complainant show that the purpose or effect of the harassment is to violate dignity or damage the work place environment. The harassment would be unlawful unless the employer can show that he has taken reasonable steps to prevent the discrimination from occurring.

Paragraph (2) appears to cover situations where the harassment is unintentional. Again, "reasonableness" in paragraph (2) protects employers from being held liable where there is a hypersensitive complainant.

Again, because of the use of the words "on the grounds of religion or belief" rather than "on the grounds of B's religion or belief", it would be arguable that if A harassed B because of A's mistaken belief that B was a muslim when B was actually a christian, discrimination may still have occurred.

## **6. Constructive Dismissal**

Whether or not there is harassment under above equality legislation, an employer may be in breach of the term of mutual trust and confidence contained in every contract of employment and if the breach is serious enough, the employee may be entitled to resign and claim constructive dismissal. This may be linked with harassment under the above legislation, or may be because of bullying, which has no UK legislation specifically dealing with it. It is implied that both the employer and employee will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. There is also an implied term in employment contracts that "the employer shall lend reasonable support to an employee to ensure that the employee can carry out the duties of his job without harassment and disruption by fellow workers" (Wigan Borough Council –v- Davies 1979 ICR411, approved by the House of Lords in Waters -v- Commission of Metropolitan Police 200ICR1064, HL). See Abbey National and Horkulak cases later.

## 6. Bullying

Bullying is often described as offensive, intimidating, malicious or insulting behaviour, an abuse or mis-use of power to a means intended to undermine, humiliate, denigrate or injure the recipient. It can take the form of persistent attempts to belittle and undermine someone's work, persistent attempts at humiliation in form of colleague or persistent, unjustified criticism and monitoring, destructive innuendo and sarcasm, constant undervaluation of efforts, setting impossible deadlines and physical violence.

This may come from management or senior management, but can also come from colleagues.

The ACAS publication *Bullying and Harassment at Work : a Guide for Managers and Employers* gives the following examples of bullying, which may also constitute harassment:-

- Spreading malicious rumours, or insulting someone (particularly on the grounds of race, sex, disabilities, sexual orientation and all religion or belief).
- Copying memos that are critical about someone to others who do not need to know.
- Ridiculing or demeaning someone – picking on them or setting them up to fail
- Exclusion or victimisation (please note that victimisation has a special meaning in employment law and is used loosely here)
- Overbearing supervision or other mis-use of power or position, unwelcome sexual advances, making threats or comments about job security without foundation, deliberately undermining a competent worker by overloading or constant criticism, preventing individuals progressing by intentionally blocking promotion or training opportunities.

If the employer is aware of such conduct but ignores it, or fails to properly address a grievance concerning bullying, it may be liable for breach of contract and constructive dismissal.

For example, in the case of *Abbey National Plc –v- Janet Elizabeth Robinson* (2000) Janet Robinson, who had been employed by Abbey National from October 1989 until her resignation on 26 July 1998, had been bullied from about 1996 and harassed by her line manager. She lodged a formal grievance complaint in April 1997. The Bank found the complaint proved, gave the manager a written warning and required him to undergo re-training. However, by that time Ms Robinson was absent from work because she was suffering from stress as a direct result of the line manager's conduct. The Bank decided not to move the line manager from his position

and, as a result, Ms Robinson began to lose trust and confidence in the Bank. At that stage she would have been justified in treating her contract of employment as at an end because of the bank's repudiatory conduct. Ms Robinson was offered another job but declined it and continued on sick leave. The Employment Appeal Tribunal held that the Bank had failed to grasp Ms Robinson's inability to work alongside the line manager and that it was not fatal to her claim that she realised the situation had become cumulatively worse but only resigned on 26 July 1998. Even though the original repudiatory breach occurred in August 1997, it was the bank's continued failure over a long period of time to deal in a satisfactory manner with Ms Robinson that undermined and eradicated her trust and confidence in the bank and eventually drove her to leave. She had not lost her right to treat the employment contract as repudiated, because there was a cumulative affect.

This is an example of how bullying and harassment by an employee, can lead to the employer being liable for a repudiatory breach of contract. If the bullying and harassment had included sexual innuendo and lewd comments, she may also have claimed under the Sex Discrimination Act.

Senior executives can also be bullied, even in the macho world of city trading. A recent example is that of Steven Horkulak, a senior city financial executive who won close to one million pounds in damages against money brokers Cantor Fitzgerald International over bullying. He claimed that Cantor's president screamed obscenities at him on a regular basis for six months up to his constructive dismissal. He claimed his boss threatened to "break him in two" and "rip his head off".

Basically the court said that whatever the environment, however rich and powerful the boss, whatever the rewards, there are standards below which no employer should go.

If such bullied employees suffer from stress as a result they may also have made a claim for personal injury.

## **7. Personal Injury**

Compensation for personal injury can be awarded for physical and psychiatric injury caused by a breach of the Sex Discrimination Act, as part of the general claim for injury to feels and loss of earnings.

Alternatively, an employee may claim damages for personal injury in the County or High Court. The time limit for an employee to bring a personal injury claim in the courts is three years from the date of the incident which caused the injury (or three years from the date of acquiring knowledge of the personal injury unless the employee unreasonably failed to seek medical advice). This means that, unless the employee has already received damages in respect of the injury from an employment tribunal, he or she may still be in time for the County or High Court after the tribunal's three month limit.

In order to succeed in a claim for negligence, the employee has to show:

- that the employee was in breach of his duty of care, but failed to take steps which were reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicality of preventing it, and the justifications of running the risk; and
- that it was reasonably foreseeable that the employee would suffer psychiatric illness as a result of the employer's breach of his duty of care; and
- that the breach of duty caused or materially contributed to the harm suffered.

There is a clear relationship between harassment, bullying and stress. The dangers of allowing a bullying culture to subsist are explained in a Health and Safety Executive's advice leaflet *Bullying and Harassment at Work: A Guide for Employers*. An employer's liability for stress is dealt with in more detail in the Update section (section 5), but suffice to point out here that personal injury can arise out of a variety of connected claims and that there are approaches that should be taken in dealing with complaints of bullying and harassment and steps that can be taken to prevent it, or at least to show that it was not reasonably foreseeable that harm would occur because of adequate steps taken to prevent it.

### **What should you do now?**

You need to remember that your charity might avoid liability for sexual harassment, or harassment on the grounds of sexual orientation and religion or belief, if it has a policy which has been drawn to the attention of all staff. This policy should contain a non-exhaustive list of examples of different types of harassment, including potentially offensive banter and inappropriate use of emails and internet sites. It should contain an explanation of why it is a

serious issue, the effects it can have on victims, that it is unlawful, that the perpetrator could be held responsible for these unlawful acts and that they may also have disciplinary action taken against them. The policy should be kept up to date. It should be shown and explained to all staff including managers. A short training session should be considered. Publication of the policy on the charity's notice board is a good idea. There should also be a section explaining what the complaints and investigations procedure is for dealing with sexual harassment and how this fits in with the charity's general grievance procedure.

You should also be aware of the links between bullying, harassment and stress and your charity's obligations under health and safety law. Risk assessments are a legal requirement of the Management of Health and Safety at Work Regulations 1999 which state:

*Every employer shall make a suitable and sufficient risk assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work; and of the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking.*

The assessment should identify hazards and the risk of the potential harm from that hazard being realised including the likelihood of that harm occurring, the potential severity of it and the number of people that might be exposed.

If you have five or more employees you must also record the significant findings of that risk assessment.

Doing this, and implementing recommendations arising from it, will significantly reduce the chances of a court concluding that the harm was reasonably foreseeable.

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