

Dismissal OnDemand  
Hints, Tips and Solution-Focused Answers for Employers in Scotland  
Simon Allison: 11 November 2021

*“When – actually – is a robust management style bullying and harassment e.g. they belittle me, ignore me, over-ride me, are rude to me?”*

I intend to split this presentation into three parts. Firstly, I want to talk about the definitions of bullying and harassment. Secondly, I want to talk about the risks involved as an employer if you permit bullying and harassment. Thirdly, I would like to address the five questions you should ask yourself – as an HR professional or manager – before you take action against the alleged bully or harasser.

Bullying and Harassment

The ACAS Bullying and Harassment at Work: A Guide for Managers and Employees (“the ACAS Guide”) defines bullying as *“offensive, intimidating, malicious or humiliating behaviour or an abuse of power or authority which attempts to undermine an individual.”*

The ACAS Guide talks about bullying causing a person to feel frightened, less respected or put down, made fun of or upset. The Guide also talks about “upward bullying” which can happen from staff towards a more senior employee. Examples of upward bullying can include showing continued disrespect to the manager, refusing to complete tasks or doing things to make the manager seem unskilled or unable to do the job properly. The Guide notes that it can be difficult if you are in a senior role to realise when you are experiencing upward bullying from your staff.

The definition of harassment is contained in section 26 of the Equality Act 2010. Harassment is defined as *“unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating an individual’s dignity or creating and intimidating, hostile, degrading, humiliating or offensive environment for that individual.”* It is important to note the protected characteristics which are specified in this section include age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

The ACAS Guide includes the following examples of bullying: spreading a false rumour, being put down in meetings, being given a heavier workload than others and prevented from joining social events. Importantly, bullying does not include constructive criticism, asking for an explanation for poor performance or reprimanding an employee for misconduct.

It is important to note that harassment, unlike bullying, is unlawful. Employers are responsible for preventing both bullying and harassment but are only liable in law for harassment. Importantly too, an

employee who complains of harassment must possess one of the relevant protected characteristics to pursue such a claim.

### Risks to the Employer if it Permits Bullying or Harassment

*Constructive unfair dismissal:* When dealing with claims for bullying or harassment, the most obvious claim an employee can make is one for breach of contract or constructive unfair dismissal. With bullying, an employee is entitled to rely on the implied (unwritten) duty of mutual trust and confidence and/or to provide a safe work space. If an employee can demonstrate that he or she has suffered a material breach of these implied rights, has resigned in relation to this breach (or these breaches) and has not delayed too long after the alleged breach(es), the employee is entitled to allege that he or she has been constructively dismissed. The employee is entitled to raise contractual and/or statutory claims.

In the case of *Horkulak v Cantor Fitzgerald International* [2003] IRLR 756, Mr Horkulak was a senior employee earning close to half a million pounds a year. After his promotion to the position of Senior Managing Director, he was subject to regular bullying. The Judge found that Mr Horkulak's Manager dictated to employees, instead of having discussions with them. He regularly used extremely foul language as part of his dictatorial style. He swore at Mr Horkulak and threatened him with the sack on a number of occasions. Finally, Mr Horkulak's manager told him over the telephone that he had prepared a bonus schedule incorrectly and used other abusive expressions. Mr Horkulak resigned and lodged a claim of constructive unfair dismissal. The Respondent's solicitors tried to argue that the Manager's conduct was acceptable, bearing in mind his frustration at the alleged repeated and serious shortcomings in Mr Horkulak's performance. The Judge found that, whilst Mr Horkulak's manager was entitled to express disapproval of Mr Horkulak's performance, he should have done that through a discussion, rather than threats couched in foul language. Mr Horkulak was awarded one million pounds in damages on the basis that the Manager's deliberate course of conduct had breached the term of mutual trust and confidence. The legitimate demands arising from what was a difficult and demanding workplace had to be balanced against a system of fair enforcement.

In the case of *WA Gould (Pearmak) Ltd v McConnell and Richmond* 1995 IRLR 516, the employer was in the business of the wholesale distribution of watch attachments and jewellery sundries. Mr McConnell and Mr Richmond were salesmen employed on a salary and commission basis. Originally their method of selling was very much directed to individual retail outlets. However, following a reorganisation on the retail side, sales became focused more on centralised buying units. The salesmen noted that their take home pay had dropped. Around this time, a new MD was appointed. Shortly after his appointment, the employees asked for some action to be taken over the problem. They were given a negative response. A month later, the employees' solicitor wrote a letter to the MD, threatening to raise a claim of constructive dismissal unless the company was prepared to make acceptable proposals. The following month, the two salesmen met with the MD and the MD proposed a minor salary increase. This was rejected by the salesmen. The following day, the MD said that he would do his utmost to solve the

problem however nothing could be done immediately. Having taken further advice, the two salesmen pressed for an interview with the Chairman (the MD's boss). They were told that an appointment had to be made through the MD. The two salesmen resigned the following day. The Judge ruled that, in the absence of any grievance procedure in the contract of employment, the employees' grievances, instead of being considered and dealt with properly, were allowed to fester in an atmosphere of prevarication and indecision. The Judge held that the employer had materially breached the implied duty of mutual trust and confidence, and awarded compensation.

*Harassment:* An employee can also lodge a claim of harassment. As disclosed already, if some or all of the bullying is related to certain of the relevant protected characteristics under the Equality Act 2010, then a claim may be forthcoming. Discriminatory harassment occurs when a person (A) engages in unwanted conduct, related to a relevant protected characteristic, which has the purpose or effect of either violating person (B's) dignity, or creating and intimidating, hostile, degrading, humiliating or offensive environment for that person (B). Claims may be brought against the individual perpetrator of harassment or against the employer on the basis that the employer is vicariously liable for its employees' actions "within the course of their employment."

The employer may have a defence if it is able to demonstrate that it has taken "all reasonable steps" to prevent such harassment from occurring. Such steps include implementing an Equal Opportunities policy and an Anti-Harassment and Bullying policy, reviewing these policies as appropriate, training managers and supervisors in harassment issues, making all employees aware of their policies and implications and dealing with complaints effectively, including taking appropriate disciplinary action and determining grievances promptly.

Damages for discriminatory harassment can be uncapped and will include an award for injury to feelings, ranging from £900 to £45,600.

In the case of *Allay (UK) Ltd v Gehlen UKEAT/0031/20*, Mr Gehlen was dismissed on performance grounds with less than two years' service. After his dismissal, he lodged a complaint with the company, alleging that his colleagues had told him to "go and work in a corner shop" and that he "drove a Mercedes car like all Indians." Furthermore, these comments were made on a monthly basis and three of his colleagues, including two managers, were aware of these comments. When Mr Gehlen lodged a claim of harassment related to race, his ex-employer sought to resist the claim on the basis that they had taken "all reasonable steps" to prevent the employees from committing the harassment. Unfortunately, the Employment Judge scrutinised the company's policies and noted that the Equal Opportunities policy did not make any mention of harassment. Additionally, the Anti-Bullying and Harassment policies made no reference to "race". Furthermore, the training which had been conducted by the employers had been undertaken twenty months before Mr Gehlen commenced his employment. Worse still, in the tribunal's view, was the fact that the three employees who had all witnessed the racist remarks had not escalated the matter to HR. The Employment Appeal Tribunal stated that "brief and

*superficial training was unlikely to have a substantial effect in preventing discrimination ... If the training involves no more than gathering employees together and saying 'here is your harassment training, don't harass people, now everyone back to work', is unlikely to be successful."*

**Reasonable adjustments:** Employees who are subjected to bullying and harassment may be vulnerable to a range of psychological and physical health problems. If an employee is disabled as a result of bullying or harassment, the employer will be under a positive duty to make reasonable adjustments to the workplace.

In *Hill v Lloyds Bank plc* [2012] UKSC 11 Ms Hill was employed with Lloyds Bank as an Analyst and Business Architect for over thirty years. She was absent from work for approximately fifteen months due to stress. She told her employer that the stress was caused by the bullying and harassment which she had suffered at work. She lodged a grievance and an appeal, both of which were not upheld. Her union representative asked her employer to assure her that she would not be "*placed under the control of people with whom she cannot work.*" This was followed up in writing by the union representative requesting an undertaking that, at no point in the future would Ms Hill be required to work with or under the management of the two alleged bullies. Lloyds Bank wrote back stating, "*The Group does not want to put Suzanne in a position which might be detrimental to her personal health and wellbeing however, whilst we can make some efforts to ensure that Suzanne does not have to work with [the bullies] in future, it is not possible to provide an absolute guarantee of this for a number of reasons.*" Ms Hill lodged a claim for a failure to make reasonable adjustments on the basis that she was disabled. In order to successfully pursue a claim of reasonable adjustments, the employee needs to suggest that the employer followed a provision, criterion or practice. Ms Hill successfully argued that the employer had operated a practice of "*not offering members of staff any undertaking or comfort that it will ensure employees are not placed to work with people who have previously bullied them and/or have been alleged to have bullied them and/or have a real potential to cause further injury to the employees' mental health.*" Ms Hill was successful with her claim, even although her grievance and appeal about bullying had been rejected.

**Negligence:** An employee can also lodge a claim for personal injury. Employers are under an implied duty to take reasonable care of the health and safety of its employees. Where an employee can show that the employer's breach of that duty has caused them to suffer a reasonably foreseeable injury, they will be able to pursue a personal injury claim in the civil courts.

In the case of *Moore v Welwyn Components Limited* [2005] EWCA Civ 6, the pursuer was employed as an Accountant for 25 years. Mr Moore began to suffer from a depressive illness in December 1997. This led him to retire roughly a year later at the age of 55. The Judge found his ex-employers liable for the illness and his financial losses (both amenity and future earnings).

*Protection from Harassment claim:* Additionally, a bullied employee may have a claim under the Protection from Harassment Act 1997 if anyone pursues a “course of conduct” which amounts to “harassment” and which that person knows (or ought to know) amounts to harassment. A course of conduct must involve conduct which has occurred on at least two occasions. This again can be pursued in the civil courts.

In the case of *Green v DB Group Services (UK) Limited [2006] EWHC 1898 (QB)*, the Respondent was a commercial bank operating in the City of London. Ms Green was employed as the Company Secretary Assistant. She began employment in October 1997. On 7 November 2000, she was admitted to hospital where she was diagnosed as suffering from a major depressive disorder. On the 13 March 2001, she returned to work, initially on a part-time basis. In October 2001, she suffered a relapse of her psychiatric illness and, at the end of the month, stopped work. She did not return to work and her employment was terminated by notice dated 8 August 2003 to take effect on 12 September 2003.

Ms Green was entitled to claim damages for psychiatric injury and consequential loss and damage as a result of harassment and bullying by her fellow employees. The behaviour of the fellow employees was within the scope of their employment and closely connected to their work so as to give rise to vicarious liability. In any event the employer was in breach of its duty of care to the employee in failing to take any adequate steps to protect her from such behaviour.

Additionally, Ms Green sought to rely on the Protection from Harassment Act 1997. She relied on the English version of harassment, however the Scottish version is similar. The claim succeeded on the basis that Ms Green “*was subjected to a relentless campaign of mean and spiteful behaviour designed to cause her distress*” and “*the connection between the nature of the employment of the women in question and the behaviour in issue was so close that it would be just and reasonable to hold the Respondent liable for it.*”

#### Five Questions to Ask Before Taking Action

##### **1. Does the manager know the effect of the behaviour on the individual?**

Occasionally, a manager does not know the effect which their behaviour is having on their members of staff. An informal discussion with the perpetrator could be conducted by the employee themselves or perhaps with the support of a colleague. Alternatively, an informal discussion can be had between the manager and the HR professional.

The ACAS Guide states that, “*...bullying actions can range from unintentional misunderstandings and lack of awareness through to deliberate and malicious acts... In some cases, it may be possible to rectify matters.*”

**2. Have any other staff witnessed the behaviour?**

There is nothing wrong with speaking to colleagues about the situation. It does not need to be in an accusatory manner, instead it can be purely factual. An HR Professional's role is to be a little nosey and may involve ascertaining whether or not other staff have issues with the alleged bully.

Also, you can consider historic exit interviews. You should review them and assess whether there is a difficulty with the perpetrator's style.

**3. Do you have a bullying policy which is separate to your grievance policy?**

Many employers have a detailed grievance policy which outlines the determination of grievances. Even if the organisation does not have a detailed grievance policy, the ACAS Code of Practice on disciplinary and grievance procedures applies to all employers, regardless of size.

Importantly however an employer might benefit from having an additional Anti-bullying or Harassment policy in place. This can be referred to the person who is alleging bullying or harassment. Having said that, the employer must have educated and trained its staff in relation to these policies.

**4. Is the individual able to coherently state their complaint?**

Take care if you have an employee who is alleging bullying or harassment and is off sick due the allegations. As an HR Professional, you will want to firstly check whether their condition is so serious that it amounts to a disability and secondly, if it is, ensure that you are making reasonable adjustments to the process.

The test as to whether an individual is disabled is whether the individual has a physical or mental impairment which has a substantial, long-term, adverse effect on the individual's ability to carry out day-to-day activities. Long-term is defined as lasting for twelve months or more or being likely to last for 12 months or more.

**5. Would a reasonable bystander objectively view the behaviour as unreasonable?**

When dealing with harassment, it is important to note the words "purpose or effect" of the unwanted conduct. It does not always matter whether or not the "purpose" was banter. If the "effect" was such that the individual was upset, then it is likely to amount to harassment.

In the case of *Richmond Pharmacology v Dhaliwal EAT/0458/08*, a Director remarked to a female manager that she might be "married off in India". This manager, Ms Dhaliwal lodged a claim of harassment on the basis of this single, ill-judged, offensive comment. The Employment Appeal Tribunal

held that an employer should not be held liable merely because the conduct has had the effect of upsetting the employee. The employee's reaction in being upset must be a reasonable reaction. If a tribunal believes that an employee was unreasonably prone to offence, even if he or she did genuinely feel his or her dignity to have been violated, there will have been no harassment. Tribunals have to take on board the employee's feelings (the subjective element) although ultimately tribunals have to decide whether it was reasonable for the employee to have experienced those feelings or perceptions (an objective standard).

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