

# **Bullying, Harassment, Occupational Stress**



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Three main areas relevant to bullying at work in law

## **1. Employment Tribunal Cases**

Cases where there is bullying or harassment against an individual who is part of a particular group *and* the harassment is because of a discriminatory reason

Applies to employees who are harassed on grounds of

- sex,
- race,
- religion or belief,
- sexual orientation or
- age

E.g. .

### **Harassment on grounds of religion or belief**

**5.** - (1) For the purposes of these Regulations, 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.

(The Employment Equality (Religion or Belief) Regulations 2003)

("religion or belief" means any religion, religious belief, or similar philosophical belief.)

Similar provisions in the legislation for other groups

Remedy: a claim for damages via an Employment Tribunal - as soon as the discrimination has occurred or shortly after it has ended

### **Defence**

*"It shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description"*

## **Time limits**

Any claim to the Employment Tribunal has to be within three months of the last act or series of acts complained of. However, under the **Dispute Resolution Regulations** the employee must raise a grievance within three months of the “last act” and then wait for 28 days before filing a claim. Raising the grievance within three months extends the time limit for bringing a claim to the Employment Tribunal to six months in total.

## **Drawbacks**

- What about the rest of the workforce?
- Clearly, the groups where there is specific legislation are at particular risk
- But large amount of bullying not for those specific reasons

Potential remedies:-

**‘Common law’ negligence**

**Protection from Harassment Act 1997**

## **2. Negligence claim for personal injury**

Same as for other areas of occupational stress – very difficult to prove, very few successful cases

*Hatton v Sutherland* - Lady Justice Hale's 15 principles (see Appendix), these have [mostly] been interpreted very restrictively

### **Factors needed to succeed with an occupational stress negligence claim**

- Has to be an injury – i.e. recognised psychiatric condition
- Has to be clear foreseeability that the bullying would cause an injury – distress is not enough
- Has to be a breach of the employer's health and safety duties
- Breach of duties has to have caused or 'materially contributed' to the injury

N.B. *Green V DB Group Services (UK) Limited* [2006] – one of few successful cases specifically relating to bullying

This case gives examples of behaviour that might amount to harassment which was sufficiently serious to be a breach of employers' duty. Interestingly, the judge thought that "*it is the cumulative effect of the conduct which has to be considered rather than the individual incidents relied on*"

The allegations in *Green* were that a group of fellow employees had harassed the claimant. The acts complained of included:-

*Ignoring me or staring silently at me, often with their arms crossed. This was done in a way that was plainly intended to intimidate and unnerve me;*

*Greeting and acknowledging other members of the .... Department in a very overt manner, in order to highlight the fact that they were not speaking to me;*

*Excluding me from conversations with other member of the ... department by either talking over me or pretending they could not hear anything I said;*

*Excluding me from group activities to which every other member of the ... department would be invited, typically when booking restaurants for departmental lunches;*

*Waiting for me to walk past the area of the office in which they sat before bursting out laughing;*

*Making crude and lewd comments that made me feel uncomfortable ...*

*Interfering with office administration by removing my name from circulation lists, hiding my post from me and removing papers from my desk.*

*Standing inches away from my chair and chatting very loudly out loud, making it difficult for me to make or receive telephone calls. There was no need for [the harasser] to stand this close to me other than as a means of harassing me;*

*Making raspberry noises with each step I took, if I was walking from one part of the office to another;*

*Shouting to the other women "err what's that stink in here?" and then saying "its coming from over there" (referring to the claimant)".*

The judge commented that *"Many of the incidents that she describes when viewed individually would amount to no more than minor slights. But it is their cumulative effect that has to be considered... much of the behaviour in question might seem childish and petty, but dealing with it on a daily basis had a cumulative effect"*

N.B. recent case of *Dickens v O.2 Plc* [16/10/08]

Court of Appeal Guidance on an overwork case, but generally helpful on suggesting the indications of 'impending harm' to an employee do not have to be as clear cut as previous decisions suggested, and also that a referral to a counselling service is not a panacea which means that an employer can discharge its duty to an employee merely by offering this

### **Time Limits**

3 years from date when the injured person knew or ought to have known that they had a 'cause of action'

## **3. Protection from Harassment Act 1997**

Purpose - anti stalking Act

Leading case *Majrowski v Guy's and St Thomas' NHS Trust*

Decided that the act could be used for harassment in workplace situations

In *Majrowski* a Judge describes the workplace as *"the very place where harassment is often encountered and from which its victim is often powerless to escape. It is thus likely to be a risk incidental to employment"*.

Why use the Protection from Harassment Act?

### **Advantages over common law and Employment Tribunals**

- Not restricted to a particular group
- Enough to show the bullying has suffered anxiety and stress – no need to show a recognised psychiatric injury (although cases where there has been as psychiatric injury are not excluded)
- Hence, no need to show foreseeability of psychiatric injury. Under the Act you still have to prove foreseeability that the behaviour is objectively

oppressive but do not have to prove foreseeability of injury, i.e. the emphasis is on the behaviour, not the result of the behaviour.

- No 'reasonable steps' Defence. Importantly, there is no defence available to an employer that they took reasonable steps to try to stop harassment occurring. There is a defence under the act that '*the course of action was reasonable in the particular circumstances*', for example "*reasonable and proper criticism of an employee's poor performance*".
- 6 year time limit to bring a claim (such cases are, of course, likely to present significant evidential problems)

### **What Has To Be Proved in a Protection from Harassment Act case?**

1. There must be a course of action, **not just a single incident**<sup>1</sup>
2. There must be **conduct amounting to "harassment"**.
3. **The person carrying out the harassment** does not have to know that they are harassing; it is enough if they "**ought to have known**". The test for this is whether a reasonable person would regard the course of conduct as harassment
4. **The harassment must:-**
  - (a) **be targeted at the individual who is bringing the claim**
  - (b) be 'calculated' to have the effect of causing "alarm or distress" or some similar result (i.e. **distress or alarm was actually foreseeable or ought to have been foreseen**).
  - (c) **be objectively oppressive and unreasonable**
  - (d) **actually cause alarm and distress or some similar problem**  
(although the fact that alarm and distress have been caused does not mean that harassment has occurred)
  - (e) if it is an employers' liability case in the workplace, the Act must **be within the course of the harassing employee's employment**.

Main area of uncertainty for lawyers – how Courts would interpret the definition of harassment. House of Lords was clearly very unhappy about 'opening the floodgates' of claims against employers

Answered by the 1<sup>st</sup> case to come before the Court of Appeal

#### *Conn v The Council Of The City Of Sunderland [2008]*

Claim for both negligence and under Protection from Harassment Act 1997 because of the aggressive acts of the Claimant's foreman  
(Claimant lost negligence claim because he couldn't prove his psychiatric injury had been caused by his employers' negligence)

However, the Trial judge considered that two (out of the five incidents cited by Claimant) were harassment under the Protection from Harassment Act 1997.

1<sup>st</sup> incident.

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<sup>1</sup> Section 7 (3).

Foreman asked Mr Conn, (who was a paver) plus two other employees to name people who had been leaving site early. ('shopping his colleagues'). When Mr Conn refused, foreman became angry and threatened to punch out the windows of the cabin and have them up before the personnel dept.

## 2<sup>nd</sup> incident

Foreman lost his temper (he was shaking with rage) and said that he would give Mr Conn a good hiding and didn't care if he lost his job over it. He then swore at a witness to this behaviour

The Judge thought that *"The language and actions used went well beyond those which would normally be regarded as acceptable, even in that environment. They were potentially intimidating, and on the 2nd occasion, very personal toward Mr Conn"*.

## Court of Appeal view

They decided that even though the original judge had heard the evidence in person, he was quite wrong in his conclusions.

They decided that

- different standards might apply to different types of workers
- only very serious conduct could be harassment came within the Protection from Harassment Act 1997

*'It seems to me that what ..... crosses the boundary between unattractive and even unreasonable conduct and conduct which is oppressive and unacceptable, may well depend on the context in which the conduct occurs. What might not be harassment on the factory floor or in the barrack room might well be harassment in the hospital ward and vice versa. .... the touchstone for recognizing what is not harassment ..... will be whether the conduct is of such gravity as to justify the sanctions of the criminal law.'*

They were uncertain about whether the 2<sup>nd</sup> incident was 'harassment within the Act and completely sure that the 1<sup>st</sup> incident was not. They decided it was only referring to property; the remarks were addressed to three people and not just to Mr Conn so he was not individually targeted. Although Mr Conn became agitated, neither of his two other work colleagues who were present were troubled by it

*'what on earth is the world coming to if conduct of the kind that occurred in the {1st} incident can be thought to be an act of harassment, potentially liable to giving rise to criminal proceedings punishable with imprisonment for a term not exceeding six months, and to a claim for damages for anxiety and financial loss? It falls so far short below the threshold that we are in my judgment fully entitled to interfere with the judgment of the recorder'*

In essence *Conn* looks likely to limit the remedy for employees under the Protection from Harassment Act 1997 only to very clear and serious cases.

## Appendix - Lady Justice Hale's propositions from Hatton V Sutherland

From the above discussion, the following practical propositions emerge:

(1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do (para 22). The ordinary principles of employer's liability apply (para 20).

(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (para 25).

(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large (para 23). An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability (para 29).

(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health (para 24).

(5) Factors likely to be relevant in answering the threshold question include:

(a) The nature and extent of the work done by the employee (para 26). Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department?

(b) Signs from the employee of impending harm to health (paras 27 and 28). Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?

(6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers (para 29).

(7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it (para 31).

(8) The employer is only in breach of duty if he has failed to take the steps which are 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 practicability of preventing it, and the justifications for running the risk (para 32).

(9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other



employees and the need to treat them fairly, for example, in any redistribution of duties (para 33).

(10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this (para 34).

(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty (paras 17 and 33).

(12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job (para 34).

(13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care (para 33).

(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm (para 35).

(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras 36 and 39).

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event (para 42).