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submission of planning applications was laid on 25 May and is expected to come into force at the end of June this year. Registers of Scotland are currently working on another order to facilitate their Automated Registration of Title to Land project, which is timetabled to deliver in 2006. This order will amend the Land Registration (Scotland) Act 1979 and the Requirements of Writing (Scotland) Act 1995. Other orders, e.g. to allow the issuing of electronic certificates under-Section 85 of the Road Traffic Regulation Act 1984, are in progress.

Conclusion

As the above shows, modernising government is about more than developing business processes and using new technology to improve service delivery. It requires careful consideration of a range of issues on the nature of public authorities. Understanding, and where necessary, challenging the existing legislation which governs their operations is absolutely vital if we are to provide our citizens with public services worthy of the 21st Century.

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Bullying and Harassment in the Workplace

Stephen Morrall and Charles Urquhart of Middleton Potts explain the meanings of “bullying” and “harassment”, discuss criminal, civil and contractual liability issues, recent and forthcoming legislation and offer advice on what organisations can do to minimise such activities at work.

Introduction

As most employers can testify, from an employment law perspective, businesses in England & Wales are now more regulated than at any other time in the UK's commercial history. Twenty years ago the pendulum had swung in favour of employers: statutory employment rights of employees were limited and employees had to rely more on the provisions of their contracts of employment – if indeed they had one at all. In today's employment environment, following the growing influence of Europe and a Labour government enjoying a second term in office, the pendulum has swung back towards the employees, who are now protected by a growing raft of statutory rights



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covering everything from employee consultation to flexible working.

With employment law playing an ever-greater role in the good conduct of businesses, and given the ever increasing rights of recourse for affected employees, it is perhaps surprising that bullying and harassment are still commonplace in businesses up and down the land. However the truth is that, if previously bullying was regarded as something that only happened in the playground or was largely ignored through fear of retribution and/or disciplinary action, employers' attention is now being focused

on this issue because the law has created new rights for employees.

Today it is clear that bullying and harassment are unacceptable in the workplace and employers are under a

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moral duty to stamp it out. They are also under several legal duties to do so, with further legislation due to be implemented in the coming months. Aside from duty, it is also in the employer's commercial interests to clamp down on bullying and harassment. The Advisory, Conciliation and Arbitration Service ("**ACAS**") identifies the following effects that bullying and harassment can have in organisations:-

- Poor morale and poor employee relations
- Loss of respect for managers and supervisors
- Poor performance
- Lost productivity
- Absence
- Resignations
- Damage to company reputation
- Tribunal and other court cases and payment of unlimited compensation.¹

So what constitutes bullying and harassment and what can employers do to prevent it arising in the workplace?

Definitions

There is no legal definition of "bullying". The closest we get is a statement by ACAS that bullying "*may be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient*".

"Harassment" (which is one form of bullying), on the other hand, has been a criminal offence since the Protection from Harassment Act 1997 but has also been difficult to define. The 1997 Act used the reasonable person test to identify conduct that would constitute harassment: Section 1(2) says that "*the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other*".

A new definition of harassment is to be found in the Regulations which outlaw discrimination on the

grounds of sexual orientation, religion or belief and race, as "*unwanted conduct that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him*".² Harassment on the grounds of disability and sex will also be expressly prohibited when the new disability discrimination and sex discrimination amending legislation comes into force in October 2004 and in 2005 respectively.

Given the very broad definition of harassment, it may not always be clear whether certain behaviour falls within it. Harassment, which may involve a physical component, is regarded as easier to spot than psychological bullying which can often go unnoticed. ACAS rightly points out that one person's "bullying" is another's "firm management". Like the proverbial elephant, bullying and harassment may be difficult to define but easy to recognise in practice. All employers can do is to identify for their workforce the types of behaviour that in their view constitutes bullying or harassment in the workplace and specify certain types of unacceptable behaviour. ACAS has provided the following non-exhaustive list as guidance:-

- spreading malicious rumours or insulting someone (particularly on the grounds of race, sex, disability, sexual orientation and religion or belief)
- copying memos containing critical and/or confidential information about one employee to others who do not need to know
- ridiculing or demeaning someone – picking on them or setting them up to fail
- making unwelcome sexual advances – touching, standing too close, display of offensive materials
- exclusion or victimisation
- deliberately undermining workers by overloading and constant criticism
- unfair treatment
- overbearing supervision or misuse of position or power;
- making threats or comments about job security without foundation; or
- blocking promotion or training opportunities.³

This list could be incorporated into a wider policy covering bullying and harassment in the workplace (see below).

Criminal Liability

Although it is not new law, many people are probably unaware that they could face criminal charges should they bully or harass others – whether in or outside the workplace. Liability arises under the Public Order Act 1986 and the Protection from Harassment Act 1997.

Under the Public Order Act 1986 a criminal offence is committed where a person intentionally harasses another by using threatening or abusive language, whether orally or in writing, which causes another person harassment, alarm or distress. This offence is punishable by up to six months imprisonment and/or a fine up to £5,000.

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The Protection from Harassment Act 1997 introduced two other criminal offences:-

1. Knowingly harassing another, punishable by up to six months imprisonment and/or a fine up to £5,000; and
2. Knowingly pursuing a course of conduct that causes another to fear, on at least two occasions, that violence will be used against him/her. If convicted of this offence, a person will be liable to imprisonment for up to five years or to a fine or both.

There will be a defence under the Protection from Harassment Act 1997 where the conduct was pursued for the purposes of preventing or detecting a crime; where the conduct was pursued under any enactment or a rule of law (for example in the interests of national security); or where in the particular circumstances the pursuit of the conduct was reasonable. The commentaries indicate that harassment of others under the first offence may be reasonable if pursued by "journalists, salesmen, religious activists, debt collectors, private investigators or political canvassers"!

Under the second offence, it will only be reasonable to pursue a course of conduct that causes another to fear that violence will be used against him/her if it is for one's own protection or that of one's own or another's property. In practice, the successful use of one of these defences will be extremely rare.

Prosecutions under the Public Order Act 1986 and the Protection from Harassment Act 1997 are brought against individuals, not companies. However, companies should not underestimate the bad publicity that could follow if one of their employees, particularly a senior employee, was prosecuted for offences under the Acts.

Civil Liability

As mentioned above, harassment is already prohibited on the grounds of race, sexual orientation and religion or belief and affected employees will be able to pursue claims in the employment tribunals. This will be extended, from October 2004, to claims for harassment on the grounds of disability and, from 2005, on the grounds of sex.

In addition, where the bullying conduct amounts to direct or indirect discrimination or victimisation on the grounds of race, sexual orientation, religion or belief, sex or disability then an employee will also have a right of recourse under the discrimination legislation. In discrimination cases, tribunals have jurisdiction to award unlimited compensation, including damages for injury to feelings from £500 up to £25,000 (following the guidance of the Court of Appeal in *Vento*⁴) dependent on the seriousness of the offence. The amount of any award will reflect the victim's loss.

If there is a prosecution under the Protection from Harassment Act 1997, the Courts can award civil damages for anxiety caused by the harassment and for any financial loss.

Contractual Liability

If an employee is bullied at work, he/she may have claims under his/her contract of employment for an employer's breach of both express and implied obligations. Breach of express obligations would occur where the employer has breached a non-harassment policy set out in an employee's contract of employment or a Staff Handbook.

In addition an employer may be in breach of its implied duties to:-

- take reasonable care not to subject the employee to working conditions (which might include exposure to harassment or bullying) that are reasonably foreseeably likely to cause the employee psychiatric injury or illness; or
- preserve the relationship of trust and confidence between employer and employee.

In extreme circumstances, an employee may be justified in resigning and claiming that he or she has been constructively and unfairly dismissed; a tribunal has the jurisdiction to award compensation of up to £55,000 in these cases.

What should an Employer do?

So what can an employer do to deal with bullying and harassment in the workplace?

First, such behaviour must be identified. Examples of bullying have been provided above but employers should remember that bullying need not be "face to face". Bullying and harassment can take place in correspondence, electronic communications (referred to by ACAS as "flame-mail"), telephone and even automatic supervision methods if applied oppressively or to specific workers only (e.g. recording telephone conversations, monitoring e-mail traffic and recording attendance). High staff turnover in a particular department; high levels of sickness absence; stress breakdowns or frequent use of disciplinary procedures may all be symptoms that something is not right and should be investigated by the management.

Harassment and bullying may be endemic in the culture of an organisation, and there have been spectacular examples recently of businesses where the line between effective management and bullying may have been overstepped in certain pressurised situations. In these environments, it is even more important that management sets the example (by not bullying subordinates) and spreads the message that bullying will not be tolerated in the work place.

The favoured method of raising awareness of unacceptable behaviour is to introduce an anti-bullying policy. ACAS recommends that a policy should cover the following issues:-

- a statement of commitment from senior management
- an acknowledgment that bullying and harassment are problems for the organisation

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- a clear statement that bullying and harassment will not be tolerated
- examples of unacceptable behaviour (see above)
- a statement that bullying and harassment may be treated as disciplinary offences
- the steps the organisation takes to prevent bullying and harassment
- the responsibilities of supervisors and managers
- confidentiality for any complainant
- reference to grievance procedures (formal and informal), including time scales for action
- investigation procedures, including time scales for action
- reference to disciplinary procedures, including time scales for action, counselling and support availability
- training for managers
- protection from victimisation; and
- how the policy is to be implemented, reviewed and monitored.

Of course the wording of the policy will be of utmost importance and employers are advised to take professional advice to ensure that such policies are clearly drafted and as comprehensive as possible.

Breach of any bullying or harassment policy should be punishable in accordance with the organisation's disciplinary procedure. Currently there is no legal requirement to have a disciplinary or a grievance procedure. However from October 2004, statutory dismissal, disciplinary and grievance procedures come into force which will apply

unless the employer has introduced its own policy in the same or better terms. However it is good employment practice to introduce procedures into contracts of employment that at the very least mirror the statutory provisions.

Such procedures should make it clear that any complaints will be dealt with confidentially, as employees are only likely to report complaints of bullying and/or harassment if they believe that they will be dealt with fairly, confidentially and sensitively. If the employer does not create an environment whereby affected employees may come forward it can never hope to eradicate bullying from its offices.

Conclusion

As with most employment issues, prevention is better than cure. Employers should therefore seize the initiative and review their policies, procedures and office environments and incorporate an anti-bullying and harassment policy for their workplace. Where in doubt employers should seek advice from their professional advisors. It is surely better for an employer to encourage good behaviour by introducing a policy covering bullying and harassment and enforce it fairly rather than to incur unlimited liability for compensation (with potential criminal liability for the individuals involved). As an author in *The Times* recently wrote on the subject, "to err is an expensive error".⁵

References

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4. *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871
5. *The Times*. 20 April 2004, Law p. 9