

Dismissal OnDemand: Hints, Tips and Solution-Focused Answers for Employers in Scotland

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

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- Bullying and Harassment
- Risks to the Employer
- 5 Questions to Ask Before Taking Action

Bullying and Harassment

Definition of bullying

“offensive, intimidating, malicious or humiliating behaviour or an abuse of power or authority which attempts to undermine an individual”

The ACAS Bullying and Harassment at Work: A Guide for Managers and Employees

Bullying and Harassment (cont)

Definition of harassment

“unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual”

Section 26 of the Equality Act 2010

Protected characteristics: age, disability, gender re-assignment, race, religion or belief, sex and sexual orientation.

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Bullying and Harassment (cont)

Bullying includes spreading a false rumour, someone putting you down at meetings, your team never letting you join social events or your boss giving you a heavier workload than others.

Bullying does not include constructive criticism, asking for an explanation for poor performance or reprimanding for misconduct.

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Bullying and Harassment (cont)

Harassment, unlike bullying, is unlawful.

Employers are responsible for preventing both, but are only liable in law for harassment.

The complainant does not need to possess the relevant protected characteristic to pursue a claim of harassment.

Risks to the Employer

Breach of contract/constructive unfair dismissal

Burden on employee to demonstrate that he or she was entitled to resign and claim CUD.

The employee must demonstrate:

- There has been a breach of contract
- This breach is material
- He or she resigned in relation to that breach AND
- He or she has not delayed too long before the breach(es)

Since 29 July 2013, the maximum an employee can claim for ordinary unfair dismissal is £89,493 or one year's gross salary, whichever is the lower.

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Risks to the Employer (cont)

Breach of contract/constructive unfair dismissal

Horkulak v Cantor Fitzgerald International [2003] IRLR 756

- The claimant's manager dictated to employees, threatened to sack the claimant on a number of occasions & used extremely abusive language and expressions.
- The claim of constructive unfair dismissal was successful.
- *“The legitimate demands arising from a difficult and demanding role had to be balanced against a system of fair enforcement”*
- Don't ignore verbal abuse – even where it is common within the work environment.

Risks to the Employer (cont)

Breach of contract/constructive dismissal

WA Goold (Pearmak) v McConnell UKEAT/489/94

- Two salesman whose take-home pay dropped after a re-organisation raised their concerns with the new MD.
- The two salesmen's solicitors wrote a letter, threatening a claim. The two salesmen asked to speak with the Chairman (the MD's boss) and were told to direct their concerns to the MD.
- *“Instead of considering the claimants’ concerns promptly, they were allowed to fester in an atmosphere of prevarication and indecision” and the claims were successful.*
- ACAS Code applies to ALL employers.

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Risks to the Employer (cont)

Harassment

- “*purpose or effect*” of the unwanted conduct?
- Damages for injury to feeling are between £900 and £45,600. (Damages for discrimination are uncapped)
- The employer may be vicarious liable for acts of its employees if the employees actions are “in the course of their employment”.
- The employer may have a defence if it can demonstrate that it took “all reasonable steps” to protect against harassment.

Risks to the Employer (cont)

Harassment

Allay (UK) Limited v Gehlen UKEAT/0031/2020

- Mr Gehlen's colleagues suggested that he *“go and work in a corner shop”* and that he *“drove a Mercedes car like all Indians”*.
- The employer failed to satisfy the “all reasonable steps” defence
- *“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’, the defence is unlikely to be successful.”*
- Conduct regular training and update policies

Risks to the Employer (cont)

Reasonable adjustments

Hill v Lloyds Bank plc UKEAT/0173/19

- Ms Hill was absent for 15 months due to stress caused by bullying and harassment
- She successfully claimed that the “practice” adopted by her employers of “not offering staff any comfort” that it would protect her being bullied.
- Ms Hill was awarded £7500 for injury to feelings.

Try, as best as possible, to accommodate disabled employees who do not want to work with bullies and, if you cannot, create a paper trail, detailing the reasons why the adjustments cannot be made.

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Risks to the Employer (cont)

Whistleblowing

Royal Mail Group v Jhuti UKEAT/0020/16

- Within 2 months, Ms Jhuti made a protected disclosure to her manager on the basis of suspected improper conduct by her colleagues.
- Two months later, her line manager reported to HR that Ms Jhuti was “not up to expectations” and set a PIP for her.
- Ms Jhuti lodged a formal grievance which was dismissed but she successfully claimed detriment for whistleblowing.

Take extra caution to ensure that employees do not suffer detriment as a result of making a protected disclosure.

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Risks to the Employer (cont)

Negligence or personal injury

Moore v Welwyn Components Limited [2005]

EWCA Civ 6

Protection from Harassment Act 1997

Green v DB Group Services (UK) Limited [2006]

EWHC 1898 (QB)

5 Questions to Ask Before Taking Action

ONE: Does the manager know the effect of the behaviour on the individual?

“...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”

The ACAS Bullying and Harassment at Work: A Guide for Managers and Employees

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5 Questions to Ask Before Taking Action (cont)

TWO: Have any other staff witnessed the behaviour?

- Make enquiries with colleagues
- Be a bit nosey
- Review any historic exit interviews

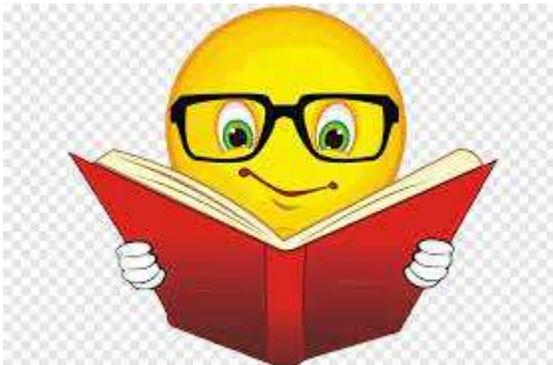


5 Questions to Ask Before Taking Action (cont)

THREE: Do you have a bullying and harassment policy which is separate to your grievance policy?

(AND have your trained employees in relation to this?)

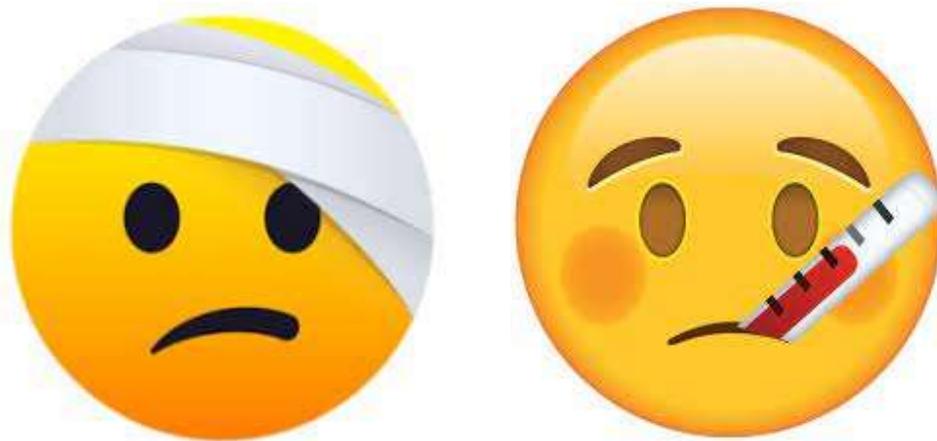
ACAS Code of Practice on disciplinary and grievance procedures applies to all employers, regardless of size.



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5 Questions to Ask Before Taking Action (cont)

FOUR: Is the individual able to coherently state their complaint?



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5 Questions to Ask Before Taking Action (cont)

FIVE: Would a reasonable bystander objectively view the behaviours as unreasonable?

Richmond Pharmacology v Dhaliwal

- “purpose or effect”
- Although tribunals have to take on board the employee’s feelings (the subjective element), tribunals also require to decide whether it was reasonable for the employee to have experienced those feelings or perceptions (an objective standard).

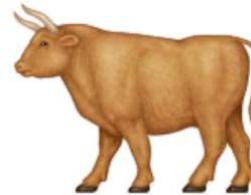
When dealing with an employee



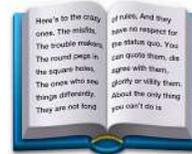
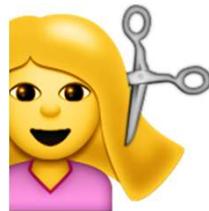
DO NOT tell them



or worse still



Instead if you



You won't be



or



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