

WHAT ARE YOUR LEGAL AND PRACTICAL OPTIONS IF (1) THOSE BEING BULLIED DON'T WANT TO MAKE A FORMAL COMPLAINT BUT DO 'WANT IT NOTED' OR (2) THE BULLYING IS RAISED ON BEHALF OF OTHERS INFORMALLY?

AMANDA STEADMAN, KNOWLEDGE LAWYER, BDBF LLP

1. It's challenging for employers to know how to respond to informal complaints of bullying. On one hand, the employee has indicated that they do not wish to proceed with a formal complaint and their wishes are important. On the other hand, the fact that the employee has raised the matter in the first place, and the troubling subject matter of the complaint, should raise a red flag for employers. Sometimes, this will mean that employer must ignore the employee's wishes and proceed with a formal investigation into the complaint.
2. In this paper I will attempt to set out guidance for employers facing this problem. I discuss the importance of assessing the complaint and the associated risks and using this information to inform the response. I then look at the different options available to an employer in practice.

UNDERSTANDING THE COMPLAINT AND THE ASSOCIATED RISKS

3. There is no "one size fits all" answer to the question of how an employer should respond to such a complaint. In practice, employers will need to grapple with a number of preliminary questions in order to decide upon a suitable response. These questions are as follows:
 - a. is it bullying and is it a grievance?
 - b. what is the employee trying to achieve?
 - c. what legal claims could the employee have?
 - d. what other factors are important?

Is it bullying and is it a grievance?

4. In contrast to the related concept of discriminatory harassment, there is no legal definition of bullying. The non-statutory Acas Guide for Managers and Employers on Bullying and Harassment at Work¹ (**Acas Guide to Bullying**) offers a wide-ranging definition of bullying as: "*Offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient*". It is not necessary for such treatment to be related to a protected characteristic under the Equality Act 2010.
5. The absence of a formal legal definition poses a challenge for employers, since notions of what qualifies as bullying will vary according to the context and the perceptions of those involved. Whilst most will agree on what counts as serious bullying, there will be grey areas where parties take different views of the treatment. For example, what may be considered as firm management action by a line manager, may be viewed as bullying by his or her subordinate. For this reason, it is good practice for employers to give specific examples of what counts as unacceptable behaviour within their

¹ [Acas Guide for Managers and Employers on Bullying and Harassment at Work](#), June 2014

organisation in appropriate policies. However, any such list will not be exhaustive. The Acas Guide to Bullying offers some examples of behaviour that would amount to bullying:

- a. spreading malicious rumours;
 - b. insulting someone by word or behaviour;
 - c. picking on someone;
 - d. setting someone up to fail;
 - e. cold-shouldering or exclusion;
 - f. unfair treatment;
 - g. overbearing supervision or other misuse of power or position; and
 - h. making threats about job security without foundation.
6. The statutory Acas Code of Practice on Disciplinary and Grievance Procedures² (**Acas Code**) defines grievances as: “...*concerns, problems or complaints that employees raise with their employer*”. This very broad definition means that any disclosure by an employee that they are (or someone else is) being bullied at work would be a grievance for the purposes of the Acas Code. This is important, since a subsequent failure to comply with the provisions of the Acas Code could lead to an uplift in compensation of up to 25% in a related Employment Tribunal claim. It’s also important to remember that once an employee has articulated a grievance to the employer, there is an implied contractual term requiring the employer to afford a reasonable opportunity to the employee to obtain redress³. A failure to do so would amount to a breach of contract.
7. The learning point is that even an informal complaint about bullying will amount to a grievance requiring some form of response from the employer. This point is underlined in the Acas Guide to Bullying, which provides that: “*If employees complain they are being bullied or harassed, then they have a grievance which must be dealt with regardless of whether or not their complaint accords with the standard definition [of bullying]*”. In appropriate cases, it may be that the response is limited to informal resolution (this is discussed at paragraphs 58 to 61 below). However, what an employer should *not* do is park the matter and hope that it blows over. Action of some sort will almost always be required to protect the employer from legal risk.

What is the employee trying to achieve?

8. In deciding upon the right strategy, it’s helpful for the employer to try to understand the employee’s underlying motivation for raising a complaint that they say they simply want “noted” by the employer.

A shoulder to cry on

9. Employers should not be tempted to avoid dealing with a complaint simply because it’s felt that an overly sensitive employee is “venting” and looking for moral support. However, it may lead an employer to favour an informal response. Where matters

² [Acas Code of Practice on Disciplinary and Grievance Procedures](#), 11 March 2015

³ *WA Good (Pearmak) Ltd v McConnell and anor* 1995 IRLR 516, EAT; *Sweetin v Coral Racing* 2006 IRLR 252 EAT.

appear to be relatively minor, and the employee over-sensitive, resolution with the support of HR may be all that's required to get things back on track.

10. Yet employers should exercise caution when making such assessments and ensure that they build up a full picture of what has happened. As the Acas Guide to Bullying highlights: *"People being bullied or harassed may sometimes appear to overreact to something that seems relatively trivial, but which may be the last straw in a series of incidents"*.
11. Indeed, in the case of **Green v DB Group Services (UK) Ltd⁴ (Green)** the High Court held that the cumulative effect of the alleged conduct had to be considered, rather than individual incidents. In that case, Ms Green was subjected to a long-term campaign of mean and spiteful behaviour which included actions such as blowing raspberries as she walked by, telling her she "stank", removing her image from the company intranet and hiding her work. In isolation, acts of this nature may seem relatively minor but, together, they will expose the employer to significant risk if no action is taken. In Green, the bullying campaign led Ms Green to have a nervous breakdown and she was awarded £817,000 in damages.

To nip the behaviour in the bud and move on

12. The employee may simply want the employer to intervene to stop the treatment complained of and then move on. A complaint of bullying treatment does not necessarily mean that the relationship between the victim and the alleged perpetrator cannot be repaired. The alleged perpetrator may not be aware of the impact of their behaviour. Indeed, the Acas Guide to Bullying notes that: *"...bullying actions can range from unintentional misunderstandings and lack of awareness through to deliberate and malicious acts"*.
13. In appropriate cases, an informal discussion with the alleged perpetrator may be all that's needed to turn things around. It may also flush out any reasons behind their behaviour (e.g. if they are suffering from some form of personal and/or work-related stress). Depending on the reason, there may well be a role for the employer to play in helping the alleged perpetrator correct their behaviour (e.g. the provision of counselling or communications training).

To help their case (or that of others) if the bullying continues

14. Where an employee wants something "noted" by the employer, but no action taken, it may be that the employee is preparing the ground for a future formal grievance if the behaviour continues. The ability to refer to earlier examples of bullying behaviour would strengthen a future complaint by helping to demonstrate that there has been a campaign of bullying. The employee might do this to protect their own position (if they are continuing to work with the alleged perpetrator) or to help others. For example, an employee might raise the issue in an exit interview, where any remedial action would not directly benefit them, but could help their colleagues if they were subjected to bullying by the alleged perpetrator in the future.

⁴ [2006] EWHC 1898 (QB)

15. An informal approach may still be appropriate in this situation, provided that the complaint is the first such complaint that the employee (or anyone else) has made about the alleged perpetrator. However, where previous complaints of bullying have been made about the alleged perpetrator, or the complaint is very serious, then a formal investigation is likely to be needed (this is discussed further at paragraphs 62 to 68 below). A failure to do so will increase the legal risk for the employer since they will have been on notice of an ongoing issue and failed to take action.

Unfounded complaints

16. As discussed above, complaints may stem from the fact that the employee is being over-sensitive or from a genuine misunderstanding. With support, these matters should be able to be resolved informally. However, there may be rare situations where the employee makes a complaint which is completely unfounded. An employee might do this as a result of poor mental health. For example, in ***Martin v Devonshire Solicitors***⁵, an employee raised multiple false grievances, including for harassment, as a result of “auditory hallucinations” caused by her mental illness. In such cases, the employer would need to obtain medical advice in the first instance and then consider taking disciplinary action against the employee who raised the unfounded complaint.

17. Alternatively, the employee might make an unfounded complaint out of malice, in order to cause trouble for the alleged perpetrator. For example, in ***Marks v Southend Borough Council and others***⁶, the employee made a malicious complaint about his manager’s style of management as an act of retaliation for her having given evidence against him in earlier disciplinary proceedings. The employer in that case was criticised by the Employment Tribunal for investigating the malicious complaint noting that the employer was “...at best, colluding in [his] retaliation”. The Acas Guide to Conducting Workplace Investigations⁷ (**Acas Guide to Investigations**) suggests that where the employer suspects a complaint is malicious, they should usually give the employee the benefit of the doubt. However, if it is decided that the complaint is clearly malicious then disciplinary action should be taken against the employee who raised the unfounded complaint.

What legal claims could the employee have?

18. Although there is no express legal claim for bullying, there are a suite of other legal claims available to an employee who has been the victim of bullying (as well as a number of claims available to a complainant who is not the victim). When deciding on how to respond to an informal complaint, the employer should, as far as possible, consider its legal exposure to these claims. The more serious the complaint, the higher the legal risk and the more likely it is that the employer will need to pursue a formal approach.

⁵ [2011] ICR 352

⁶ ET/3202635/11

⁷ [Acas Guide to Conducting Workplace Investigations](#), June 2019

Failure to make reasonable adjustments

19. Research by Acas⁸ has shown that employees who are subjected to bullying are vulnerable to a range of psychological and physical health problems, which may lead to sickness absences from work entitling them to sick pay. Where these health problems are serious and persistent, there is an increased risk that the employee will be disabled for the purposes of the Equality Act 2010. In the case of ***Lamb v Garrard Academy***⁹, an employee developed reactive depression in response to alleged bullying. She raised a grievance about the bullying and went off sick. Later, she argued that the employer had failed to make reasonable adjustments for her as a disabled person. The Employment Appeal Tribunal (**EAT**) concluded that the employer did not know, and could not have been expected to know, that she was disabled at the outset of the sickness absence. Indeed, it was reasonable to think that the grievance might resolve her depression (which was caused by the alleged bullying under investigation in the grievance process). However, they said that when the grievance process had stalled and she had been off sick with depression for four months, a reasonably diligent employer would have investigated matters further and discovered that she was, by that point, disabled.
20. Where an employee is disabled, they will be protected from direct and indirect discrimination and discrimination arising out of their disability. They will also be protected from harassment related to their disability and from victimisation. Importantly, the employer will also be under a positive duty to make reasonable adjustments to the workplace. In the recent case of ***Hill v Lloyds Bank plc***¹⁰, the EAT held that the duty to make reasonable adjustments extended to the provision of an undertaking to an employee that she would not have to work with her alleged bullies ever again and, if that could not be achieved, that she would be paid a guaranteed severance package. This was the case even though the employee's grievance about bullying had been rejected.

Negligence - personal injury

21. 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.
22. Where a court accepts that an employee has been bullied, it may be more willing to accept that it was reasonably foreseeable that such behaviour would cause a psychiatric injury. For example, in ***Moore v Welwyn Components Ltd***¹¹, an accountant took early retirement as a result of a depressive illness caused by a two-year campaign of bullying by a senior employee. The judge said the behaviour was "appalling" and "...exposed any employee of reasonable fortitude to the risk of

⁸ [Seeking better solutions: tackling bullying and ill-treatment in Britain's workplaces](#), 1 November 2015

⁹ UKEAT/0042/18

¹⁰ UKEAT/0173/19

¹¹ A conjoined case in *Hartman v South Essex Mental Health & Community Care HHS Trust and others* [2005] EWCA Civ 6

psychiatric illness". The employee's vulnerability (or, conversely, their robustness) will also be relevant to the issue of foreseeability.

23. Employers may be primarily liable for the personal injury if they knew (or ought reasonably to have known) that the employee was being bullied, that this would cause an injury and they could have taken steps to avoid this. In *Green*, the employer was found to be primarily liable for Ms Green's psychiatric injury because managers knew, or ought to have known, about the campaign of bullying and "*collectively closed their eyes*" to what was happening. They should have intervened and taken steps to stop the bullying, for example by disciplining the perpetrators and moving them to a different department.
24. An employer may also be vicariously liable for the acts of their employees, including the perpetrators of bullying, provided that there is a sufficient connection between the employment and bullying such that it would be just and reasonable to impose liability.

Breach of contract and constructive dismissal

25. As well as the implied duty to take reasonable care of the health and safety of employees, employers are also subject to the implied duties of trust and confidence and to provide a safe workplace. Where there has been a fundamental breach of the duty of trust and confidence, an employee is entitled to resign, say that they have been constructively dismissed, and bring contractual and/or statutory claims.
26. In the case of *Horkulak v Cantor Fitzgerald International*¹², an employee constructively dismissed himself, claiming that his line manager's bullying and abusive behaviour had made his life as an employee intolerable and amounted to a repudiatory breach of trust and confidence. The employer argued that the line manager had a forceful management style and that abusive behaviour and bad language was common in the high-pressured working environment. However, the judge held that the line manager had displayed an unacceptable level of abusive language and anger and had breached the implied term of trust and confidence.
27. A claim about injury flowing from the employer's conduct in the lead up to, but independent of, the constructive dismissal is a breach of contract claim which can be brought as an alternative to a personal injury claim. Damages for such claims are uncapped in the civil courts (or capped at £25,000 in the Employment Tribunal).
28. A claim about the dismissal itself is a statutory unfair dismissal claim which must be brought in the Employment Tribunal. In most cases, two years' service will be needed to bring an unfair dismissal claim and damages are usually capped at £104,659 (until 5 April 2021).

Discriminatory harassment

29. If some or all of the bullying is related to certain of the characteristics protected under the Equality Act 2010¹³, then the employee may also be able to bring a claim for

¹² [2003] IRLR 756

¹³ Namely: sex; race; disability; religion or belief; sexual orientation; age; and gender reassignment.

discriminatory harassment. Discriminatory harassment occurs when 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 an intimidating, hostile, degrading, humiliating or offensive environment for person B.

30. Claims for harassment may be brought by the victim and/or by someone who witnesses the harassment even though they are not on the receiving end of the treatment and even where they do not possess the relevant protected characteristic themselves.
31. Claims may be brought against the individual perpetrator of the harassment and potentially other individuals, for example, a manager or member of HR who turned a blind eye to the harassment. Claims may also be brought against the employer on the basis that they are vicariously liable for their employees' actions "in the course of their employment". This covers actions which take place at work but may also cover actions occurring at work-related social events and online.
32. The employer may have a defence if it is able to demonstrate that it had taken "reasonable steps" to prevent such harassment from occurring. Such steps include:
 - a. having and implementing an equal opportunities policy and an anti-harassment and bullying policy and reviewing those policies as appropriate;
 - b. making all employees aware of the policies and their implications;
 - c. training managers and supervisors in equal opportunities and harassment issues; and
 - d. dealing with complaints effectively, including taking appropriate disciplinary action.
33. Damages for discriminatory harassment are uncapped and will include an award for injured feelings, ranging from £900 up to £45,000 for the most serious cases.

Victimisation

34. If the employee has been bullied because they have done (or may do) a "protected act" then they may have a claim for victimisation under the Equality Act 2010. Protected acts are:
 - a. bringing proceedings under the Equality Act 2010;
 - b. giving evidence or information in connection with proceedings under the Equality Act 2010, regardless of who brought those proceedings;
 - c. doing any other thing for the purposes of or in connection with the Equality Act 2010; and/or
 - d. alleging (whether expressly or otherwise) someone has contravened the Equality Act 2010.
35. In addition, if the complaint concerns bullying related to a protected characteristic (i.e. discriminatory harassment) the complaint *itself* may amount to a protected act. If so, and they were subjected to a detriment (or dismissed) because they raised the

complaint, they would have a victimisation claim. A failure to investigate or redress a grievance could be one such detriment.

36. Accordingly, the presence of discrimination should be treated as a significant aggravating factor by employers. Where the bullying itself is discriminatory and/or is in retaliation to the employee's previous protected act, it would be unwise of an employer not to pursue a formal process.

Whistleblowing detriment

37. It's possible that the employee may also be protected by whistleblowing legislation. If the employee has been bullied because they had previously made a "protected disclosure", then it's likely that they could bring a claim for whistleblowing detriment. Indeed, the Whistleblowing Commission's Code of Practice¹⁴ provides examples of possible detriments and this includes bullying and harassment.
38. As with discriminatory harassment, this claim could be brought against both the individual perpetrator and/or the employer on the basis that it is vicariously liable for the actions of its employees. The employer will have a defence to such a claim if it can show that it took all reasonable steps to prevent such detrimental action occurring. In the case of ***Royal Mail Group v Jhuti***¹⁵, the employee made several protected disclosures to her line manager regarding breaches of internal rules and regulatory requirements. The line manager forced the employee to retract the disclosures and retaliated by bullying her and painting a false picture of inadequate performance. The employee brought a successful whistleblowing detriment claim against the employer, arguing that she had been subjected to bullying and harassment (and other detriments) because she had blown the whistle.
39. In addition, the raising of the complaint about bullying may *itself* amount to a protected disclosure. This will turn on whether the complaint amounts to a disclosure of information regarding one of six specified forms of malpractice and, at the time of making the disclosure, the employee reasonably believed the disclosure showed there had been wrongdoing and that the disclosure was in the public interest. This is fact specific issue, however, a disclosure about bullying by a perpetrator who is in a senior position and has bullied (or could bully) others would stand a good chance of meeting the required threshold. Where the protection is engaged, the employee may have separate claims in the event that they were subjected to a detriment (or they were dismissed) because of making that protected disclosure. A failure to investigate a concern could be one such detriment.
40. As with discrimination, whistleblowing should be treated as a significant aggravating factor. Where there is a risk that the bullying was motivated by the making of a protected disclosure, it would be unwise of the employer not to pursue a formal process.

¹⁴ [Whistleblowing Commission Code of Practice](#), 2013

¹⁵ UKEAT/0020/16

Protection from Harassment Act 1997

41. A bullied employee may also have a claim under the Protection from Harassment Act 1997 (**PHA**). The PHA prohibits anyone from pursuing a “course of conduct” which amounts to “harassment” and which that persons knows (or ought to know) amounts to harassment. In this context a “course of conduct” must involve conduct which has occurred on at least two occasions - a single instance of bullying will not be enough. “Harassment” is not defined in the PHA but there are references to harassing a person including alarming the person or causing the person distress. The courts have interpreted this to mean the conduct must be oppressive and unacceptable and capable of sustaining criminal liability (although the primary focus should be on whether it is oppressive and unacceptable).
42. In the case of **Veakins v Islington Ltd**¹⁶ the Court of Appeal held that an employee had been harassed for the purposes of the PHA where her supervisor had picked on and humiliated her in front of colleagues in numerous ways. This included requiring her to sign in and out of work every day, tearing up a letter of complaint without reading it and asking colleagues about the employee’s private life. The Court held that the reduction of a reasonable and robust woman to a state of clinical depression was due to conduct which had crossed the line and had been oppressive and unacceptable.
43. A claim can be brought against the individual perpetrator in the civil courts, with damages awarded for the anxiety caused by the harassment and any other financial loss. A claim can also be brought against the employer, who can be vicariously liable for harassment committed by an employee in the course of employment. Unlike discriminatory harassment, there is no “reasonable steps” defence available to employers under the PHA.
44. In *Green*, the High Court upheld a claim against the employer for harassment under the PHA which arose out of workplace bullying. No separate damages award was made as the employee had also succeeded in her personal injury claim (see paragraph 11 above). However, the anxiety caused by the harassment under the PHA was taken into account when awarding damages for personal injury.

Possible claims from a complainant who is not the victim of the bullying

45. Where a complaint has been raised informally by *another* employee on behalf of the victim, it’s important not to forget that they may also have their own claims against the employer (in addition to the victim’s potential claims listed above). Possible claims include:
- a. **Discriminatory harassment:** if the bullying was discriminatory, they may have a claim for discriminatory harassment if they can show that it created an offensive environment for them;
 - b. **Victimisation:** if they are mistreated as a result of raising a complaint which amounts to a “protected act”, they may have a claim for victimisation;

¹⁶ [2009] EWCA Civ 1288

- c. **Whistleblowing detriment:** if they are mistreated as a result of raising a complaint which amounts to a “protected disclosure”, they may have a claim for whistleblowing detriment;
- d. **Constructive dismissal:** if they are mistreated as a result of raising the complaint, they may be able to argue there has been a repudiatory breach of trust and confidence meaning they can pursue a constructive dismissal claim; and/or
- e. **Breach of contract:** if the employer failed to take any action, they may have a claim for breach of the implied contractual term that an employer must afford a reasonable opportunity to an employee who has raised a grievance to obtain redress.

What other factors are important?

Compliance with internal policies and procedures

46. Most employers will have a detailed grievance procedure which outlines how grievances can be raised and how they will be dealt with by the employer. However, many employers also elect to have a separate bullying and harassment policy, which outlines the procedure to be followed in respect of such sensitive complaints. In both cases, such policies and procedures are usually expressed to be non-contractual so that the employer has the freedom to change the content, or depart from the prescribed process, without the employee’s consent.
47. Nevertheless, employers should exercise caution about departing from their own procedures. As well as undermining trust amongst the employee population, a failure to adhere to its own policies (without good excuse) is unlikely to come across well for an employer in any related claim.
48. Such policies usually outline an informal and formal complaint process. They also typically say that the decision to progress a complaint is up to the employee, but that the employer has a duty to protect employees and reserves the right to pursue the matter independently if it is appropriate to do so. Employers should, therefore, always consult their own policies and ensure that they abide by the process they have committed to. In any event, consideration must be given to the fact that: (i) the Acas Code provides that if a grievance cannot be resolved informally then a formal procedure may need to be followed; and (ii) EHRC guidance on discriminatory harassment at work¹⁷ provides that in serious cases a victim’s wish to keep matters informal may have to be ignored and a formal procedure followed.
49. Employers should also consider whether the complaint:
- a. amounts to whistleblowing and triggers the application of any internal whistleblowing procedure;

¹⁷ [Sexual Harassment and Harassment at Work: Technical Guidance](#), 15 January 2020

- b. should be notified to the employer's insurer/s in order to be able to claim under any employer's liability insurance policy and, if relevant, any directors and officers liability insurance policy.

Compliance with a regulator's expectations

50. If the employer is operating in a regulated sector, it should check what, if any, expectations the regulator has about how to deal with allegations of bullying.
51. By way of example, financial services employers subject to the Financial Conduct Authority's (**FCA**) Senior Managers and Certification Regime (**SMCR**) must assess "senior managers" and "certification employees" to be "fit and proper". The "fit and proper" test focuses on honesty, integrity and reputation amongst other things. Accordingly, allegations of bullying may mean that a Senior Manager or a Certification Employee is not fit and proper. Where such allegations are raised, it is imperative that the employer investigates to decide whether those allegations are well-founded and should be reported to the FCA. The FCA is increasingly turning its attention on non-financial misconduct and firm culture. It has said: *"How a firm handles non-financial misconduct throughout their organisation, including discrimination, harassment, victimisation and bullying, is indicative of a firm's culture"* and *"We expect firms, and senior managers, to embed healthy cultures by identifying and modifying the key drivers of their culture"*.

Wider consequences for the organisation

52. Employers should also consider the wider consequences for their organisation of leaving bullying unchecked. The Acas Guide to Bullying highlights that the problem can fester and cause serious problems for the employer including:
 - a. poor morale and employee relations;
 - b. loss of respect for managers and supervisors;
 - c. poor performance;
 - d. lost productivity;
 - e. absences;
 - f. resignations; and
 - g. reputational damage.

WHAT ARE THE EMPLOYER'S OPTIONS?

53. The employer should consider all of these preliminary issues in light of the precise nature of the complaint, including the severity of the bullying, the length of time it has been going on, the number of victims and the seniority of the perpetrator. They will then be in a position to form a view about what steps to take in response. There are four possible options.

Option 1 - Note the complaint and do nothing else:

54. The first option would be to do as the employee asks and note the complaint and do nothing else. However, this is a high-risk option. The broad definitions of "bullying" and "grievance" mean that the threshold for having been considered to have raised a

grievance about bullying is set relatively low. Even an informal verbal complaint about apparently minor incidents will be sufficient.

55. Once an employer is on notice that an employee is being bullied, then it is under a duty to proactively address the situation (and this duty may arise even before a grievance is raised if the employer is aware that it is happening). A failure to do so is likely to amount to a breach of trust and confidence as well as the duty to provide a safe workplace¹⁸. A failure to respond to a grievance would also constitute a breach of the implied term requiring an employer to afford a reasonable opportunity to an employee who has raised a grievance to obtain redress.
56. Only if the employer is confident that the complaint does *not* amount to bullying should this approach be adopted. Even where the employer decides just to note the incident, they should diarise to follow up with the employee or complainant at a later date to check whether there have been any further incidents which warrant some form of intervention.
57. Further, it may be sensible to offer the employee access to counselling or an employee assistance programme. The Acas Guide to Bullying notes that counselling can be particularly useful where investigation shows no cause for disciplinary action, or where doubt is cast on the validity of the complaint.

Option 2 - Informal resolution:

58. Where the complaint appears relatively minor, a better option for the employer would be to propose some form of informal resolution. The Acas Code of Practice and the supplementary Acas Guide on Discipline and Grievance at Work¹⁹ (**Acas Guide**) envisage the informal resolution of grievances. Similarly, the Acas Guide to Bullying states that: *"in some cases it may be possible to rectify matters informally"*.
59. The Acas Guide provides that where a grievance is raised informally, the next step should generally be to talk privately to the alleged perpetrator. It says: *"This may help clarify the situation and can help move things forward towards a resolution"*. The Acas Guide to Bullying adds that: *"Sometimes people are not aware that their behaviour is unwelcome, and an informal discussion can lead to greater understanding and an agreement that the behaviour will cease"*. This informal discussion with the perpetrator could be conducted by the employee themselves (perhaps with the support of another employee) or by a member of HR or a manager.
60. Another option would be to use an independent mediator to help resolve the matter, provided that both the employee and the alleged perpetrator agree to participate. The Acas Guide to Bullying states that *"Mediation can be a good way of dealing with bullying, discrimination or harassment situations depending on the nature of the allegations"*. The mediator could be from within the organisation or an external mediator could be engaged.

¹⁸ *Evans v Sawley Packaging*, ET case no. 33795/04; *Smith v John Lewis plc and ors*, ET case no. 2205975/16

¹⁹ [Acas Guide on Discipline and Grievance at Work](#), February 2019

61. Again, the provision of counselling to the employee and the alleged perpetrator might be helpful.

Option 3 - Formal procedure with the employee:

62. However, informal resolution will not be appropriate in more serious cases. The employer's duties towards the employee (together with any relevant regulatory obligations) will usually mean that a formal investigation should be undertaken. This is the only route by which the employer can reach a conclusion on whether the allegations are true or false. If upheld, the employer is then in a position to take disciplinary action against the perpetrator and, if relevant, notify a regulator.

63. For such an investigation to be effective, it's important for the employer to gather as much evidence as it reasonably can, with the employee's evidence naturally of central importance. Without the employee's participation, there may be insufficient evidence on which to base any future disciplinary charges. Therefore, the employer should try to persuade the reluctant employee to participate in the formal process. As a minimum, the employer should:

- a. reassure the employee that the process will be kept confidential to protect the parties involved and avoid gossip or victimisation;
- b. reassure the employee that the process will be completed as quickly as is reasonably possible to avoid aggravating feelings of stress and worry;
- c. be flexible in its approach to the process (e.g. allowing them to bring a friend or family member to meetings); and
- d. offer support to the employee to help them through the process (e.g. counselling or access to an employee assistance programme).

It may also be appropriate to alter the employee's working arrangements to minimise contact with the alleged perpetrator and/or suspend the alleged perpetrator.

64. It's possible that the employee will agree to participate on an anonymous basis. This is undesirable since it harms the alleged perpetrator's ability to defend himself or herself. Therefore, this should usually be avoided save in exceptional circumstances and, even then, no absolute guarantee of anonymity should be given.

65. Once the employee is on board, they should be asked to submit the complaint in writing and in as much detail as possible. An investigator should be appointed to investigate the complaint. This will involve meeting with the employee, the alleged perpetrator and any other witnesses and gathering together any other relevant evidence (e.g. emails, text messages, CCTV footage). If the investigator concludes that bullying has occurred, then disciplinary action should be taken against the alleged perpetrator.

Option 4 - Formal procedure without the employee:

66. Despite the employer's best efforts, there may be cases where the employee is unwilling to pursue a formal complaint. This puts the employer in the difficult position of having to go against the employee's wishes. However, in serious cases the employer will jeopardise the health and safety of the employee (and possibly other

employees) and expose itself to legal risk (and possibly regulatory censure) if it sits on its hands.

67. As discussed at paragraph 48 above, well-drafted bullying and harassment and grievance policies will usually reserve the right for the employer to investigate a complaint independently if it is considered appropriate to do so. This type of statement is helpful since it forewarns the employee of possible outcomes at the outset. However, the employer will still be able to proceed even in the absence of such a statement.

68. Pursuit of an investigation without the main witness's participation will, of course, be difficult. However, the investigator must gather as much evidence as it can from other sources, most likely from other employees who work with the employee and the alleged perpetrator. Indeed, the investigation may reveal other employees who have suffered at the hands of the alleged perpetrator and be sufficient to justify disciplinary action.

Amanda Steadman

BDBF LLP

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