Bullying and Harassment - Legal Position and Complaint Resolution Procedures

1. Introduction

Processing complaints of sexual or other forms of harassment or bullying can be fraught with legal, procedural and human relations difficulties. It is therefore essential that there is clarity in relation to, inter alia, the legal responsibilities of the employer, the legal rights of individual employees, the role of the Union (especially in avoiding any conflict of interest situations) and the procedural and practical arrangements within the Union to facilitate the representation of members in such cases. The purpose of this practitioners guide is to help chart the way in bullying and harassment cases to ensure that all sides get a fair hearing and have their rights protected.

2. Employers Legal Responsibilities

Employers have a duty of care to their employees. This arises both from common law and from statute law. In a 1932 UK case[1] the court found under common law that a "***duty of care is owed by one person to another not to cause harm to that other person or to place him or her in a situation where such harm would be caused***". The tests of the court were those of "reasonable care" and/or to "reasonably foresee". In an Irish case[2] in 1994 the court found that "***in the absence of express statutory provision the law in this country in relation to the liability of an employer for the tortuous acts (including statutory torts) of his employee is perfectly clear – an employer is vicariously liable where the act is committed by his employee within the scope of his employment***".

The employer has legal statutory responsibility to ensure a workplace free of sexual harassment and to deal appropriately with cases where they arise. Employment Equality legislation[3] has extended this legal responsibility to prevent harassment on the grounds of marital status, family status, sexual orientation, religion, age, disability, race, colour, nationality, ethnic or national origins and membership of the travelling community. The Safety, Health and Welfare at Work Act 2005[4] places a general duty of care on every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees. While there is no specific statutory entitlement to freedom from bullying, as in the case of harassment under the Employment Equality Acts, cases may fall within the scope of that Act.

It is vitally important that the union or its representatives, in helping members to process or defend complaints in relation to any form of harassment or bullying, do not muddy the waters in respect of the employers' legal responsibilities. In no circumstances can we allow ourselves to take over the role or responsibilities of the employer even where both parties are Union members. This would not be doing any favours to any of the parties involved – the complainant, the accused, the employer, the Union, the Union representative(s) – and may in fact make a bad situation more difficult to resolve.

3. Bullying

The Safety, Health and Welfare at Work Act 2005, which updated and replaced the earlier 1989 Act, imposes a duty of care on a statutory basis on employers both in relation to their employees

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[1] Donoghue and Stephenson, 1932, AC562)
[2] Costello J., High Court, The Health Board and B.C. and the Labour Court, 1991 no. 6855P, 19/1/1994
[3] Employment Equality Acts 1998-2004
[4] Section 8

and to other persons who have occasion to visit the employers premises. Section 8 (1) of that Act provides that "***Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees***". The Act sets out examples of what this duty means in practice and includes managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees. Employees are required by Section 13(1) (e) not to "***engage in improper conduct or other behaviour that is likely to endanger his or her own safety, health and welfare at work or that of any other person***".

Reasonably practicable is defined by Section 2 (6) as follows: "***For the purposes of the relevant statutory provisions, "reasonably practicable", in relation to the duties of an employer, means that an employer has exercised all due care by putting in place the necessary protective and preventive measures, having identified the hazards and assessed the risks to safety and health likely to result in accidents or injury to health at the place of work concerned and where the putting in place of any further measures is grossly disproportionate having regard to the unusual, unforeseeable and exceptional nature of any circumstance or occurrence that may result in an accident at work or injury to health at that place of work***.".

The act also defines "***personal injury***" as including any injury, disease, disability, occupational illness or any impairment of physical or mental condition, or any death, that is attributable to work.

Section 60 (1) of the Act allows the Health and Safety Authority to publish Codes of Practice and/or to approve codes published by other bodies to provide "***practical guidance to employers, employees and any other persons to whom this Act applies with respect to safety, health and welfare at work, or the requirements or prohibitions of any of the relevant statutory provisions***". Breach of a code of practice is not of itself an offence. However, Section 61 of the Act allows such codes to be admissible as evidence in criminal (but not civil) proceedings where it appears to the court to give practical guidance as to the observance of the requirement or prohibition alleged to have been contravened.

The 2005 Act does not specifically prohibit bullying or harassment and neither does it define them. They are deemed to be covered under the general obligations on employers to protect the safety, health and welfare at work of its employees and others in the workplace. Bullying can arise in the workplace or elsewhere in the course of the individual's employment e.g. at a training course, conference. The bully can be a fellow employee, the employer or a client, customer, or other business contact of the employer or any other person with whom the employee might come into contact in the course of his/her employment.

The Health and Safety Authority has published a Code of Practice on the Prevention and Resolution of Bullying at Work in 2002 and issued an updated Code on 30th March 2007. This came into effect on 1st May 2007.

The Code defines bullying as:
"***Repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work***".

It also states that an isolated incident of the behaviour described in this definition may be an affront to dignity at work but, as a once off incident, is not considered to be bullying.

This Definition does not prevent constructive and fair criticism of employee's conduct or performance or legitimate and reasonable management responses to unforeseen urgent difficult situations.

The Code sets out examples of bullying, the effects of bullying on the workplace, how to prevent bullying and workplace procedures for dealing with complaints of bullying. It is clear from the Code that there is no third party, other than a civil case in the law courts[5], to which complaints can be made for decision. Complaints can be referred under the Industrials Relations Acts to a Rights Commissioner[6] and on appeal to the Labour Court. However, recommendations made in these cases are not binding on the parties.

The Labour Relations Commission has also issued a Code of Practice[7] under Section 42 of the Industrial Relations Act 1990 in relation to Bullying. The main purpose of the Code is to set out, for the guidance of employers, employees and their representatives, effective procedures for addressing allegations of workplace bullying. The Code sets out both informal and formal procedures and suggestions for investigating complaints. However, this Code of Practice is not mandatory[8] and is only one of three[9] Codes of Practice dealing with the area of bullying and harassment from three different state agencies and, other than issues specific to the particular legislation, they broadly cover the same areas in relation to prevention and procedures for dealing with complaints.

The LRC provides a mediation facility in bullying/harassment and other workplace cases on request. Agreements are not binding as in the case of Equality Tribunal Mediations but the procedures and principles are similar to those of the Tribunal set out below.

4. Harassment

The Employment Equality Acts 1998-2004 outlaw harassment on the nine grounds[10] protected by that legislation.

Section 14A (7) (a) of the legislation defines harassment as:
"(i) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds.
(ii) references to "sexual harassment" are to any form of unwanted verbal, non verbal or physical conduct of a sexual nature, being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person".

Unlike bullying, a single incident can constitute harassment. It does not require repeated behaviour before an employer is guilty of harassment contrary to the Employment Equality Acts.

Section 14A also applies in respect of employment agencies and vocational training as well as employments.

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[5] This can be very costly if the case is not successful and the person bringing the case has to prove, on the balance of probabilities, that they were bullied contrary to the Safety, Health and Welfare at Work Act 2005. The Code of Practice is admissible as evidence in criminal cases but the law is silent on its status in civil cases.
[6] But only for those employees who have access to the Rights Commissioners service e.g. excluding gardai, teachers and civil servants.
[7] SI 17 of 2002 Procedures for Addressing Bullying in the Workplace
[8] See also section of this document dealing with workplace complaint procedures
[9] Equality Authority Code of Practice on Sexual Harassment and Harassment at Work, SI 78 of 2002 (under Section 56 of the Employment Equality Act 1998), Health and Safety Authority Code of Practice on the Prevention and Resolution of Bullying at Work 2007 (Under Section 60(1) of the Safety, Health and Welfare at Work Act 2005), and LRC Code SI 17 of 2002 Procedures for Addressing Bullying in the Workplace (under Section 42 of the Industrial Relations Act 1990).
[10] The nine grounds are Gender, Marital Status, Family Status, Religion, Race, Disability, Sexual Orientation and Membership of the Traveller community

Harassment can arise in the workplace or elsewhere in the course of the individual's employment e.g. at a training course, conference. This is the same as for bullying. The harasser can be a fellow employee, the employer or a client, customer, or other business contact of the employer or any other person with whom the employee might come into contact in the course of their employment.

The employer is guilty of harassment if he/she ought reasonably to have taken steps to prevent it. It shall be a defence for the employer to prove that he/she took such steps as are reasonably practicable to prevent the harassment.

Section 6 of the Employment Equality Acts not alone provides protection against harassment or sexual harassment for a person on any of the nine grounds but also protects people in respect of a condition or ground that exists, existed but no longer exists, may exist in the future or is imputed to the person concerned. It also applies to a person associated with another person who is treated less favourably (on any of the 9 grounds) as a result of that association. This for example means that if a person were harassed on the disability ground because of an imputed disability, even where none actually exists or existed in the past, he/she still has the protection of the Employment Equality Acts. It would also apply so as to, for example, protect a friend of a person who was harassed on the race ground if he/she was also harassed as a result of their friendship or association.

Victimisation

Section 74(2) of the Employment Equality Acts outlaws any victimisation of a person for making a complaint of harassment or a witness for giving evidence. Victimisation happens where dismissal or other adverse treatment occurs as a reaction to:

- A complaint of discrimination by an employee to the employer
- Any proceedings in respect of the Employment Equality Acts by a complainant
- An employee having represented or otherwise supported a complainant
- The work of an employee having been compared with that of a complainant
- An employee having been a witness in proceedings under equality legislation or
- An employee lawfully opposing breaches of the legislation
- An employee having given notice of intention to take any of the above actions

Complaints

Complaints may be made under any workplace complaints procedure and/or under the Employment Equality Acts. All complaints under the legislation[11] must be made in writing to the Equality Tribunal (not to be confused with the Equality Authority) or, in sexual harassment cases only and at the complainant's discretion, to the Circuit Court[12], within 6 months of the incident or, if more than one incident, of the most recent occurrence of the discrimination or victimisation. Where a delay by a complainant in referring a case is due to any misrepresentation by the employer the time limit starts from the date the misrepresentation came to the complainant's notice. If reasonable cause[13] can be shown, the time limit can be extended up to 12 months but not any longer. Either side can appeal the "extension" decision by the Tribunal or the Circuit Court as the case may be.

In all cases of harassment, the complaint is made against the employer and not against the individual employee(s) alleged to have carried out the harassment. Their role is confined to acting as witnesses, if required, at the hearings. The alleged harasser(s) are not entitled to representation at Equality Tribunal. If the case is proven the harasser may face subsequent disciplinary proceedings by his/her employer.

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[11] Section 77

[12] The Circuit Court can award compensation for the effects of discrimination or victimisation of up to six years in gender only cases. However, if as case is taken and lost in the Circuit Court, the loser is liable for his/her own and the other side's legal costs which are likely to be significant. As such, extreme caution should be exercised before embarking on this avenue of redress.

[13] It should not assume that such an extension to the time limit will be granted easily or without good cause being shown. The Tribunal and the Circuit Court both take a very restrictive approach to the grant of such time extension.

The Tribunal, and the Labour Court on appeal, will give decisions in writing[14] and usually give reasons for their decision. They are required to do so if requested by either of the parties. The decision of the Tribunal may be appealed to the Labour Court in writing within 42 days of the date of the decision. Labour Court decisions may be appealed to the High Court[15] but only on a point of law. The Labour Court may refer a point of law to the High Court[16] or to the European Court of Justice, as appropriate, and may adjourn the hearing pending clarification of the point of law.

In proceedings under the Employment Equality Acts the onus is on the complainant to prove the primary facts of their case. The level of proof required is that of "balance of probabilities" as applies in civil cases and not "beyond reasonable doubt" as applies in criminal cases. However, once the complainant has established a "prima facie" case the burden of proof[17] shifts onto the employer to prove their innocence.

Redress
Where the Tribunal in harassment cases finds employer guilty it may order a specified course of action to be taken by the employer and/or award compensation of up to two years pay. Interest may also be awarded on the compensation in gender cases.

Mediation
The Employment Equality Acts[18] provides that the tribunal may, as an alternative to a formal investigation or hearing, and if it considers that a complaint could be resolved by mediation, refer it to an equality mediation officer, who unless one or more of the parties (complainant and employer, but not the alleged harasser who is not a party to the complaint) objects.

Mediation is an alternative method of resolving complaints, seeking to arrive at a solution through an agreement between the parties, rather than through an investigation and decision.

Mediation offers a quicker and more informal process than that of investigation and detailed written submissions. Agreements reached at mediation often meet the needs of parties in a more comprehensive way than decisions imposed by a third party, as the process facilitates persons in clarifying their relevant concerns and perspectives. Agreements reached at mediation are more likely to be sustainable. They tend to operate more successfully than decisions imposed by a third party, especially where there is an ongoing relationship between the parties.

The Mediator will arrange a mutually convenient meeting between the parties as soon as is practicable after the case has been referred to him/her. A number of such meetings may be necessary. Written submissions are not required from either party in the case of mediation.

Parties are normally seen together. However, in some cases the mediator may consider it helpful to discuss an issue alone with each or either of the parties. Should the mediator decide to do this, the conditions and procedures for this will be clarified and agreed with the parties beforehand. The mediation process is based on full disclosure and it is important that the parties at mediation share all information relevant to the dispute. However, if the mediator agrees to have discussions with each or either of the parties separately from the other, that person may, with the mediator's agreement, give him/her information which will be kept in confidence and not shared with the other party.

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[14] Section 88(1)
[15] Section 90(1)
[16] Section 90(2)
[17] Section 85A(1) reads: "*Where in any proceedings facts are established by or on behalf of a complainant from which it can be presumed that there has been discrimination in relation to him/her, it is for the respondent to prove the contrary*"
[18] Section 78

Mediation will be conducted in private, and will be directly between the parties concerned (with their advisers, if any, including union representative), with the support of the Mediator who will act as an independent facilitator. The terms of any settlement are not published. Information furnished at mediation or investigation may not be published or otherwise disclosed. Any person who discloses information in contravention of the Acts is guilty of an offence. Matters "admitted" at mediation cannot be quoted at subsequent investigation or hearing and the mediator can't be called as a witness at such an investigation or hearing to disclose anything said at mediation or privately to the mediator at a side session.

Any information disclosed to the mediator remains confidential to the Mediation Service and is not released to an investigating Equality Officer if the dispute is not resolved at mediation and the investigation is resumed.

If the mediation process results in an agreement acceptable to both parties, the Mediator will draw up a written record of the terms of the settlement for signature by the complainant and respondent. A copy of the mediated settlement will be given to both parties and a copy will be kept in the Office of the Director. Unlike Equality Officer decisions made following investigation, the contents of mediated settlements are not published and this together with the earlier access to a resolution of the issue often acts as an incentive to employers, in particular, to use the mediation option. Many settlements contain confidentiality clauses. Once signed, this agreement is legally binding on both parties. Any element of a mediation settlement that has not been fully complied with may be enforced through the Circuit Court[19]. However, the Circuit Court cannot enforce any element of the agreement that could not have been provided for by way of redress under Section 82 by Tribunal, Labour Court or by the Circuit Court itself had the case not been resolved through mediation.

Either party may withdraw from the process at any time by notifying the Mediator in writing that they wish to do so. If this happens or the Mediator decides for any other reason that the case cannot be resolved by mediation, s/he will send a notice to that effect to both parties. The complainant may then re-lodge the complaint by requesting the Director of the Equality Tribunal in writing to begin (or resume) investigation. The Director will do so, provided that the request is received within **28** calendar days after the date when the Mediator issued the notice. A copy of the Mediator's notice should be enclosed with the request.

5. Codes Of Practice

The three Codes of Practice[20] issued by the Equality Authority, the Health and Safety Authority and the Labour Relations Commission give guidance regarding the precise content and wording of the Workplace Policy and Procedures. However, the Equality Authority Code has not, at the time of writing, been updated to include the revised definition of sexual and other harassment and other changes contained in the Employment Equality Act 2004. As such, some of it is out of date and caution has to be exercised in relying on it for up to date information in relation to the legislation. The LRC has also issued a Code of Practice on Disciplinary Procedures (see below)

Status of Codes of Practice

The status of the Equality Authority Code is set out in Section 56(4) of the Employment Equality Acts 1998-2004. This provides that such a "code of practice shall be admissible in evidence and, if any provision of the code appears to be relevant to any question arising in any criminal or other proceedings, it shall be taken into account in determining that question".

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[19] Section 92(3)

[20] Equality Authority Code of Practice on Sexual Harassment and Harassment at Work, SI 78 of 2002 (under Section 56 of the Employment Equality Act 1998), Health and Safety Authority Code of Practice on the Prevention and Resolution of Bullying at Work 2007 (Under Section 61(1) of the Safety, Health and Welfare at Work Act 2005), and LRC Code SI 17 of 2002 Procedures for Addressing Bullying in the Workplace (under Section 42 of the Industrial Relations Act 1990).

This is similar to the code of practice provisions of Section 42(4) of the Industrial Relations Act 1990 which provides that such codes issued by the Labour Relations Commission "shall be admissible in evidence and any provision of the code which appears to the court, body or officer concerned to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

Section 61 of the Safety, Health and Welfare at Work Act 2005 allows Health and Safety Authority codes of practice to be admissible as evidence in criminal proceedings where it appears to the court to give practical guidance as to the observance of the requirement or prohibition alleged to have been contravened. However, the Equality Authority and Labour Relations Commission Codes are admissible both in civil and criminal proceedings whereas the Health and Safety Authority Code is admissible only in criminal cases.

LRC Code-Disciplinary Procedures

The Labour Relations Code of Practice on Disciplinary Procedures[21] sets out the basic principles to apply in all cases. Where there are no agreed written workplace procedures the employer should be guided by the LRC code.

This Code of Practice

- Outlines the principles of fair procedures for employers and employees generally and is of particular relevance to situations of individual representation
- Outlines the importance of procedures[22] in disciplinary cases
- Sets out the essential principles of any disciplinary procedure i.e. that they are rational and fair and applied consistently, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well defined and that an internal appeal mechanism is available.
- Requires in the case of any allegations, which if proven, warrant disciplinary action
  - That details of any allegations or complaints are put to the employee concerned in writing and that the source of the allegations or complaint are given to him/her
  - That he/she is given the opportunity to respond fully to any such allegations or complaints
  - That he/she is given the opportunity to avail of the right to be represented[23] during the procedure and these principles may require that he/she be allowed to confront or question witnesses[24]
  - That he/she has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

The code also sets out examples of different types of disciplinary actions.

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[21] Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 (S.I. No. 146 of 2000)

[22] Most cases that are won at the Employment Appeals Tribunal because incorrect and/or unfair procedures were used by the employer

[23] The code provides that a representative may include a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise. A refusal to allow another person e.g. solicitor or barrister to act as the accused person's representative may not stand up to legal challenge, especially in serious cases.

[24] It may be a requirement in all cases that the accused has the right to cross-examine the complainant and other witnesses but not in a manner that would be tantamount to intimidating the complainant or witnesses. The person chairing any disciplinary hearing is responsible both for ensuring that the accused gets a fair hearing and that all persons giving evidence are also treated properly by all parties.

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