A Thorogood Special Briefing

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# Chapter 1
# Discrimination – general

## Introduction

Discrimination in employment could be defined in non-legal terms as *'unjust, unfair or unmerited prejudice or treatment, and/or insulting or demeaning behaviour including harassment and bullying, which* (within the context of this Report)*, takes place on one of the following grounds:*

- Sex
- Sexual orientation (including gender change or 'gender reassignment')
- Race
- Religion (and/or religious belief)
- Disability and
- Age; as well as
- Expired criminal record and/or
- Resulting from the disclosure of an illegal act (or because information about an illegal act is being concealed).

It addition a non-legal use of the word discrimination applies if there is non-justifiable treatments being given to:

- Part time employees compared to full timers
- Fixed term employees compared to permanent employees
- Home-workers compared to those working in the main workplace, and
- Agency workers (colloquially referred to as 'temps') compared to permanent employees.

These last four being subject (or proposed to be subject to the EU's 'comparability' principle where the subject is doing the same or broadly similar work as the comparator – unless any differences in treatment can be objectively justified).

Such '*unjust or prejudicial treatment'* is usually the result of ignorance, immaturity, arrogance, lack of training or simple downright rudeness – or any combination of any of these, on an almost accidental basis. However, in a sizeable proportion of instances such actions are deliberate. Since it is responsible for the workplace and thus, what goes on in the workplace, normally an employer will be liable for the acts of its employees, unless it can show that it took all reasonable steps to prevent such discriminatory acts (or did not know, or was not informed of such acts), or it took steps to stop it (and apply sanctions to the perpetrator) immediately it did become aware.

The regime which prohibits discrimination on the above legal points has grown over the past 35 years, starting in the 1970s with the passing of legislation to prohibit sex and race discrimination and culminating in October 2006 with legislation outlawing possibly the most wide reaching area – age discrimination. Despite this legislative regime having existed for nearly two generations there are still a large number of successful tribunal claims for sex and race (as well as the other forms of) discrimination every year. One has to wonder where the perpetrators of the illegal acts that are the bases of such cases have been for the last 35 years during which the whole ethos of society has changed whilst apparently their antediluvian practices and attitudes have not. Unfortunately, as far as employers are concerned, if such reactionary attitudes are evinced in the workplace, unless they can:

- Demonstrate reasonable efforts have been made to train their workforce not to discriminate, bully and/or harass etc, and
- Show that they provide detailed rules and procedures aimed at preventing breaches, and
- Prove that they would apply and/or have applied genuine sanctions against those that breach the rules prohibiting such behaviour then they could be required to pay substantial amounts of compensation to those who prove their cases against others of their employees (whose actions the employer may genuinely disown). Unlike unfair dismissal compensation which is capped at a figure reviewed each year, compensation for discrimination, bullying and harassment is unlimited and there have already been several instances where compensation well in excess of £1 million has been awarded. Whilst these large settlements are the exception, most cases being settled for a few thousand pounds, the average settlement (excluding the very large items) is in excess of £20,000. In addition, employers must fund the defence of these claims and, if required, legal advice etc which costs could easily more than double the average amount of compensation.

To put the above in some degree of perspective:

- There are over 25 million people in employment in the UK.
- The relatively few successful discrimination cases reflect the problems of a tiny proportion of the total number of employees.
- When the Age discrimination legislation became effective in October 2006, there were predictions, since that legislation protected everyone (whereas the previous anti-discrimination legislation protected 'minorities' in the widest sense of the word), that there would be an avalanche of cases lodged with the Employment Tribunal system – it didn't happen (although the number of such claims is now increasing).
- In early 2009, Trevor Phillips, Chairman of the relatively new Equality and Human Rights Commission, stated that the UK was the least racist country in Europe, whilst an IPSOS/MORI poll confirmed that Britons are '*increasingly at ease with racial diversity*'.

Conversely on virtually the same day that Trevor Phillips made his comment:

- Cardinal Comac Murphy-O'Connor, primate of the Roman Catholic Church in Britain stated that the British Broadcasting Corporation had become an 'unfriendly place' to the religious (prompted possibly by its Director General suggesting that the BBC needed to treat Islam more sensitively than Christianity – a comment which itself is surely tantamount to discrimination). In fact many people in the UK now feel that religion is a more seriously divisive issue than race.
- The National Society for the Prevention of Cruelty to Children claimed that 50 children were suffering sexual abuse each day – an extreme form of discrimination (and one with the potential for greater distress and hurt than most of the tribunal claims) which, whilst it may be covered under criminal law, is not part of the mass of anti-discrimination legislation which if, and until the new Equality Act is implemented, currently consists of 35 Acts of Parliament, 52 statutory instruments, 13 codes of practice and 16 EU directives – totals about 4,000 pages of legislation in all.

## Diversity

Traditionally, progressive employers have devised (and tried to ensure adherence by their employees at all times to) policies entitled 'equal opportunities', mainly since the first attempt to eradicate discrimination attempted to ensure that (usually) women doing the same or similar work to that undertaken by men were not exploited by being paid less than the rates being paid to their male colleagues doing comparable work – the Equal Pay Act. Whilst considerable progress may have been made on this basic endeavour, it is somewhat alarming to read the results of a recent survey that 16% of those surveyed were still unlawfully discriminating against their female workers by paying them less than the male comparators. Similarly only 30% of employers have carried out an equal pay review which some would argue is an essential concomitant of the move towards 'equal pay for equal work'. (A declaration of comparative pay would be a requirement of the current Equality Act (if implemented) for all organisations with 250 or more employees.)

As a result of the equal pay legislation, the construction of 'equal opportunities' policies were appropriate for some years, but this title may not encompass all that is required to be addressed nowadays. It has become more commonly realised that trying to treat everyone 'the same' may be neither the best practice nor practical or achievable. Many practitioners feel it may be more logical to recognise that since people are different and some differences cannot be reconciled, the aim should be to treat them all **fairly** and with dignity. Indeed if everyone was treated fairly by everyone else – or in the same way that they themselves would like to be treated (that is what we can call the '*doasyouwouldbedoneby*' concept) – there should be no need for the legislation at all. Ideally an employer should be capable of using a diversity of employees of races, genders, religious beliefs and ages etc. within their operation and treating them all fairly – and ensuring that they are all treated similarly by their colleagues. Increasingly the term '**dignity at work**' has come to be used both as a concept, an attitude and as the title for a revised 'equal opportunities' policy, not least since the prohibition of bullying, harassment, horseplay etc (the outlawing of all of which should be specifically addressed) fits far more easily under a 'dignity at work' heading rather than one of 'equal opportunities'.

The Employment Appeal Tribunal (EAT) is on record as stating that in all discrimination cases, during the hearing, a tribunal should ask to see an employer's policy on the subject (regardless of its name). Whilst not having such a policy may not lose the case, an employer who lacks one may find it difficult to defend the claim. Of course it is not simply a case of having a paper document – employers

would also need to be able to prove they have brought such requirements to the attention of their workforce and have applied, or have the procedure to apply, sanctions for any break. In a tribunal claim, both employer and the employees involved may have a liability to an employee (or ex-employee) claiming to have been injured by discrimination. Employers need to be proactive to ensure everyone knows, understands and above all abides by their policy. In addition, for the employer to be able to defend a claim, they must be able to show that they regularly checked compliance and took firm and prompt action in the event of any transgression.

It has been suggested that employers should adopt a 10-point action plan to make dignity at work an automatic and integral part of their operations and to try to ensure that everyone complies with the requirements of the anti-discrimination legislation

### *A 'dignity at work' checklist*

1. Develop a policy (and keep it updated – an annual review may assist)
2. Review recruitment, selection and promotion procedures regularly
3. Draw up clear and justifiable job criteria
4. Devise an action plan, including targets
5. Monitor progress in achieving such objectives
6. Train staff responsible for recruiting and selecting employees to avoid all discrimination
7. Consider the organisation's image whenever there is a failure to comply
8. Use flexible working (particularly for those returning from maternity leave and/or with family commitments) including the provision of special equipment and facilities for the disabled*
9. Link with local schools and community groups (the education system tends to be to the fore in understanding and promoting diversity and equality)
10. Provide pre-recruitment training to prepare potential applicants if selection tests are used.

** Under the Access to Work scheme employers are able to obtain grants of up to 80% of the cost of obtaining equipment etc. to help enable the disabled to work, or 100% to enable an existing employee who becomes disabled to continue to work.*

# A dignity at work policy

Wording of a draft or suggested policy follows. Each employer may require somewhat different wording and thus this draft must be customised to fit the exact requirements of the individual workplace before being used.

*Example of policy*

## A. Dignified treatment

1. [The organisation] is committed to the policy of equal treatment of all employees and applicants, etc., and requires all employees, of whatever grade or authority, to abide by this general principle and the requirements of the various Codes of Practice now under the jurisdiction of the Equality and Human Rights Commission.
2. [The organisation] will not tolerate discrimination on any of the following grounds:
    a) By treating any individual on grounds of their gender or sexual orientation, race or colour, marital or civil partnership status, age, nationality or ethnic or national origin, religion, disability or membership or non-membership of a Trade Union, less favourably than others
    b) By expecting an individual solely on the grounds stated above to comply with requirement(s) for any reason whatsoever related to their employment, which are different to the requirements for others
    c) By imposing on an individual requirements which are in effect more onerous on that individual, than they are on others – e.g. applying an unjustifiable condition which makes it more difficult for members of a particular race or sex etc to comply, than others not of that race or sex, etc.
    d) By the victimisation of an employee
    e) By the harassment and/or bullying of an employee (see ancillary section of this policy below)

f) By any other act, or omission of an act, which has as its effect the disadvantaging of an employee or applicant against another, or others, purely on the above grounds

3. [The organisation] will on notification of an alleged act of discrimination immediately investigate it and, where such is found to be the case, require the practice to cease forthwith, make good any damage or loss (if applicable) and investigate any employee accused of acting in a discriminatory manner.

4. Any employee found guilty of discrimination will be instructed and required to desist forthwith. Since all acts of discrimination are against company policy, any employee offending and committing such acts will be dealt with under the disciplinary procedure. Unless assurances of future non-discriminatory actions, speech and attitudes are forthcoming, an offending employee may be dismissed. Any employee who re-offends may be dismissed.

5. [The organisation] recognises the right of an employee to belong to, or not to belong to, a Trade Union, and membership or non-membership of such a Union will not be taken into account in any way during the career of the employee.

6. [The organisation] commits itself to the employment of disabled personnel whenever possible, and will treat such employees in aspects of their recruitment and employment in exactly the same manner as other employees, the difficulties of their disablement permitting, assessing and making reasonable adjustments wherever necessary. Assistance will be given, wherever reasonable and possible, to ensure that disabled employees are helped in their journeys to and from their place of work, in access to their workplace, in gaining access to the facilities on company premises and in progressing in their careers.

   Appropriate training will be made available to such personnel who request it. [The organisation] wishes to hear ideas and suggestions whereby its facilities and procedures can be made more user-friendly for the benefit of the disabled.]

7. All employees are required to treat everyone they come into contact with in the execution of their duties in an age-neutral fashion. That is, on no account should there be any jokes, comments, rude (whether intended or not) assertions, age-based words or descriptions which could insult or hurt another person on an ageist basis.

8. No-one working on a part time basis should be treated in a less favourable manner than a person doing comparable work who works on a full time basis, neither should a person working on a fixed term contract be treated less favourably than a person doing comparable work on a permanent contract basis.

9. Every manager should be made aware of their personal responsibility for ensuring adherence to this policy and reporting any perpetrator in order for sanctions to be considered.

10. Anyone reporting a breach of any of the above matters, or any other matter which breaches legislation etc, will be protected by the organisation. Anyone becoming aware of such a breach is encouraged to report the matter to [nominated person] who will investigate the matter. Disclosure of the name of the person reporting the matter will not be made without that person's prior authority.

[Note: The anti-discrimination legislation not only protects the subject of any actions but also anyone who intervenes to try to prevent discrimination. Thus the Disability Discrimination Act states it is illegal to victimise any employee because of their efforts to help ensure the rights of the disabled. Further, employers are permitted to discriminate in favour of a disabled employee. Under the Equality Act, if there are several equally-rated candidates, an employer will be allowed to offer a job to (say) a disabled applicant if the numbers of such employees are under represented.]

## Harassment and bullying

Harassment and bullying on any basis are legally prohibited and are not only breaches leading to gross misconduct allegations under the disciplinary procedure, they could also lead to criminal investigation and, if found guilty, to fine and/or imprisonment. Harassment is legally defined as *'unwanted conduct which has the purpose of (a) violating [a person's] dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for that [person].*

1. The following actions are entirely unacceptable (whether effected in a face-to-face encounter or remotely, e.g. using electronic or other means) and will be treated with severity as they are regarded as gross misconduct:

    a) Harassment – that is foisting one's unwelcome attentions on another employee (usually but not exclusively) with sexual intent

b) Bullying in whatever form and by whatever means and whether adjacent to or remote from the victim (e.g. by using telecommunication means)

c) Victimisation for whatever reason including calling into question or ridiculing a person's gender, age, race, religion or religious belief, sexual orientation, disability, dialect or accent etc

d) The operation of initiation or leaving ceremonies of any description

e) Unjustified criticism.

[Note: The Criminal Justice Act 1994 created the criminal offence of harassment. This means, in addition to disciplinary action generated by their employer, employees who harass or bully can be fined (up to a maximum of £5,000) and/or imprisoned (for up to 6 months). These sanctions were considerably increased by the Protection from Harassment Act which applies just as much to workplaces as in the street or other public places.]

2. Managers and supervisors are required to act and react to all employees (and any other persons with whom they interface) with respect and dignity (i.e. to treat them as they would wish to be treated themselves).

3. Managers and supervisors are also required to ensure those under their control act in a similar way in their relationships with each other. To this end, they should immediately correct, and apply sanctions against, any unacceptable behaviour.

4. Managers and supervisors are expected to know and apply both this harassment section of the policy and the whole Dignity at Work policy and the complaint procedure and to ensure that the organisation's complaint procedure is known to all. They must deal immediately with such complaints objectively and fairly, trying at all times to appreciate the outlook of the complainant

   [Note: In discrimination complaints, the view of the victim can be more important than the intent of the perpetrator. The suggestion by a perpetrator as an excuse that it's *'just a bit of fun'* is unlikely to be successful in trying to avoid culpability – what is *'fun'* to the perpetrator may be nothing of the sort to the victim.]

5. Managers and supervisors should:

   - Encourage concerns to be expressed rather than sublimated

- Endeavour to stamp out Victimisation and/or retaliation, and, above all,
- Make employees aware that under the Criminal Justice Act 1994, harassment is a criminal offence punishable by a fine of up to £5,000 and/or a prison sentence of up to 6 months, penalties which were considerably increased by the Protection from Harassment Act 1997
- Be aware that harassment does not necessarily need physical presence – electronic and/or paper based messages etc., generated remotely can be a source of harassment and bullying.

## Complaints procedure

When an incident is reported, managers/supervisors must:

i) Make a note of the time, date, place and any other relevant data.

ii) Make a note of any witnesses or persons in the immediate vicinity who may not have witnessed the event but may be able to corroborate that the persons involved were at the location at the time.

iii) If the harassment is proven and person generating the harassment is:

- an employee of the same or junior status, the matter should be reported to the superior of the employee suffering the harassment with an indication of required action
- superior to, but not the immediate superior of the employee suffering the harassment, the matter should be reported to that immediate superior, with an indication of required action.
- the immediate superior of the employee, the matter should be reported to (nominated person) with an indication of required action.

iv) Whenever possible the anonymity of the employee complaining of the harassment should be maintained.

v) The person to whom the complaint is made should record in writing as many details as possible.

vi) Within 5 working days the person receiving the complaint must report back to the complainant with details of the action taken and any resolution achieved. A précis of the action taken and any resolution

must be given to the complainant and a copy held on file. If the solution is satisfactory to the complainant the matter should end there and the notes passed to the Personnel/Human Resources Dept to be held confidentially

vii) If the solution is not satisfactory to the complainant, the matter should be discussed further and an alternative solution attempted to be agreed. This may require the person receiving the complaint to investigate further and to refer the matter upwards.

viii) In referring the matter upwards, it must be handled by a person not involved with the matter previously and their investigation and subsequent decision will be made known to the complainant within 5 working days. This decision will be binding and conclude the enquiry internally.

ix) If at any stage at whatever level it is proved or admitted that harassment did take place the matter must be referred to the superior of the person responsible for the harassment. Since harassment is gross misconduct, it is mandatory that the person responsible is given a formal warning. Depending on the seriousness of the act, this might be a final warning and in extreme cases dismissal may be the only available – and appropriate – sanction.

x) Counselling services on a confidential basis can be provided if required for the victim (and, in addition, if it is felt to be appropriate, the harasser).

xi) If victim and harasser normally work in close proximity, consideration should be given to relocating one or the other, or both. Preferably it should be the harasser that should be transferred, since it could compound the discrimination to transfer the victim.

Note: The obligation on employers to protect their employees from sexual harassment was extended with effect from 2008 to give protection to employees from third parties with whom they come into contact because of their employment. Whilst understandable this can place employers in a difficult position since they may not have control (or only limited control) over the third party. To some extent this results from the 'Bernard Manning case'. Manning was the speaker at a private dinner and during his speech made disparaging remarks about black waitresses (employed by the hotel) who were serving food etc to the guests of

the organisation using the hotel's dining facilities for a private function. These new requirements mean that the waitresses' employer (the hotel) could be held liable if they did not take **immediate and sufficient action** to protect their employees from such comments. Existing procedures should be reviewed to ensure anyone suffering such attention knows how to report it to gain protection.

## Coverage

Discrimination can be alleged by a person with no direct relationship with the organisation, for example a job applicant. Recruitment, selection and interviewing criteria must be examined to ensure fairness. All applications should be recorded and reasons for selection (and, more importantly, rejection) be shown. A senior person should regularly monitor records to try to ensure appointments are made on the basis of skill, experience and suitability.

### *Case study*

In ***Khan v Research Services Ltd*** (unreported), in response to a job advertisement, Mr Khan made an application which was received much later than all others and, as a result, missed being short-listed although no closing date for applications was set out in the advert. He applied again but this time using the name of a fictitious white male. He was called for interview. He attempted to claim that his first application had been ignored on racial grounds but lost the case when it was pointed out that there were two vacancies – he had been too late for the first (following which all unsuccessful applications had been discarded) but his 'alter ego's' application was in time for the second. (This may suggest that adverts should specify a closing date for applications which many private employers may feel is unnecessary, but underpins the need to keep track of all applications and the basis on which their subjects are or are not called to interview.)

The obligation is not only owed to applicants and current employees – it is also owed to past employees.

### *Case study*

During her employment, in ***Coote v Granada Hospitality Ltd,*** Ms Coote had won a sex discrimination case against her employer, and subsequently resigned to seek a position with another employer. When she was offered a job by a prospective employer, the terms of the offer were that it was 'subject to reference'. However Granada (believing they had no obligation to a past employee) refused to provide a reference because she had previously won the case of sex discrimination against them.

She claimed that this act was also discriminatory and the EAT referred the matter to the European Court of Justice (ECJ). The ECJ held that member states were required under the Equal Treatment directive to provide protection in such an instance (i.e. to past as well as present and prospective employees) so she won a second case of sex discrimination against her former employer.

(Of course, Granada could have given the prospective employer a reference which included a statement that during her employ she had won a case of sex discrimination against them – since that was a statement of fact. Had the prospective employer then withdrawn the offer of a job because of that information Ms Coote might then have had a case for action against the prospective employer on grounds of sexual discrimination had she been able to prove that the knowledge that she had previously taken an employer to tribunal for sex discrimination was the reason for them withdrawing the job offer.)

A dignity at work policy seeks to make it a term of employment (as well as being a legal requirement) that employees (as well as the employer) may not discriminate. As such, infringements can be dealt with under the disciplinary procedure. Tribunals try to preserve the anonymity of claimants in such cases and the EAT has suggested that to avoid negating the preservation of anonymity during tribunal hearings regarding sexual harassment, employers should consider protecting such anonymity during internal hearings. The fact that individual employees – as well as employers – can become personally liable to pay compensation should they discriminate, harass or bully, should be made clear to the workforce, as this may assist the prevention of these offences.

*Case study*

In ***Yeboah v London Borough of Hackney***, although the employer had to make a considerable payment (£380,000) to their former employee who had suffered racial discrimination, Crofton, the director who was personally responsible for the acts of discrimination, was himself ordered to pay Yeboah £45,000 plus £14,000 interest (the figures being adjusted on appeal to £32,000 plus £23,000 respectively).

## Liability

If the employer is found not to have complied with the dignity at work (or equal opportunities) requirements, they may become liable to pay compensation (which could be substantial) to prospective employees, employees and/or former employees. It is important, therefore, that policies and procedures to avoid such breaches (including bullying) are promulgated and understood by all involved and policed to ensure compliance – and, where appropriate, sanctions are applied.

The sanctions can reflect the seniority of the perpetrator, the degree of intent and whether it was a one-off instance or a series of deliberate acts. The culpability of the employer will depend on the action they took to deal with the complaint and whether they applied sanctions to the perpetrator. Where there was no remedial action both employer and employee responsible could be liable to pay damages. However, where the employer has adequate rules which are clearly explained to all employees, and the employer ensures such rules are policed and applies sanctions to those who transgress (and can prove this at tribunal), and yet harassment still takes place, it may be that the employee would be held solely responsible – a very valuable guide for employers seeking to hold themselves harmless.

*Case study*

In ***Haringey Council v Al-Azzawi***, a colleague referred to Al-Azzawi as a *'bloody Arab'*. Al-Azzawi claimed that was racist language and racial discrimination and

won such a case at a tribunal. Haringey appealed to the EAT which allowed their appeal on the basis that Haringey:

a) put every recruit through a diversity training programme requiring them to have respect for all other employees regardless of race, sex, age, religion, sexual orientation etc., and

b) immediately gave the person who uttered the words a warning and made him apologise to Al-Azzawi and commented (at least as a paraphrase) '*what more can a reasonable employer do?*'

## Bullying

Whilst harassment is normally taken to refer to sexual advances, talk or innuendo, bullying can relate to a whole range of other activities which, unless checked could result in serious injury (or even death) – and become the liability of the employer (being responsible for what occurs in the workplace). Bullying and harassment whether it is on racial, sexual, sexual orientation, religion, age and/or disability grounds is discrimination. Under the Prevention of Harassment Act 1997 these criminal penalties can be applied to offenders. Whilst the latter act has not been used to any great extent – it has been used on at least one occasion.

### *Case study*

An employer, despite prohibiting bullying can still be held liable when one employee harasses or bullies another. In ***Majrowski v Guy's & St Thomas's NHS Trust*** the Court of Appeal held that it was possible for an employer to be held vicariously liable for the acts of its employee (who in this case had harassed Majrowski for 18 months). The case was argued not under discrimination law but under the Protection from Harassment Act. This Act does not define harassment and thus the Courts have power to widen its ambit as they did in this case.

As soon as it is made aware of any bullying, harassment, Victimisation etc., an employer MUST take action – if necessary encouraging victims to make statements assuring them that this can be made without the alleged perpetrator being allowed to see the statement or know who has made it. Obviously the employer should take every opportunity to vet the veracity of the claim. In a number of

cases, tribunals and the Employment Appeal Tribunal have accepted that provided the employer has taken all reasonable steps to ensure the validity of the claims, then the statement or the identity of the author does not have to be disclosed to the perpetrator.

The number of cases in respect of bullying is reported as having increased leading to a perhaps understandable contention that bullying itself is on the increase. This is unlikely and it may be that it is the number of those prepared to complain that has increased. In either case responsible employers need to ensure it does not happen.

ACAS defines bullying as: *'a pattern of offensive, intimidating, malicious, insulting, or humiliating behaviour; an abuse or misuse of power or authority which attempts to undermine an individual or group of individuals, gradually eroding their confidence and capability which may cause them to suffer stress',* and gives as examples of bullying or harassing behaviour:

- Spreading malicious rumours or insulting someone by word or behaviour (particularly on the grounds of race, sex, disability, sexual orientation, and religion or belief)
- Copying memos (including e-mails) that are critical about someone to others who do not need to know
- Ridiculing or demeaning someone, picking on them or setting them up to fail
- Overbearing supervision or other misuse of power or position
- Making threats or comments about job security without foundation
- Deliberately undermining a competent worker by overloading and constantly criticising them
- Preventing individuals progressing by intentionally blocking promotion or training opportunities.

The list is not meant to be exhaustive.

Employers should ensure their anti-discrimination policies are revised, specifically to outlaw (if they do not do so already) harassment and bullying. It might be best to provide every employee with a copy and to remind them that such behaviour is not only a disciplinary breach, but also a criminal offence which could lead to prosecution and, if found guilty, to imprisonment and/or a fine.

The Criminal Justice Act defines bullying as*, 'with intent, causing a person harassment, alarm or distress by using threatening, abusive or insulting words or behaviour, or disorderly behaviour or displaying any writing, sign or other visible representation which is threatening, abusive or insulting'*. The European Union has advised that employers should adopt a policy on this problem and should take a proactive role in ensuring that it is avoided – or at least minimised.

### *EU suggestions*

1. Advise staff what constitutes harassment or bullying, and make it clear that it is unacceptable
2. Provide a complaint process
3. Ensure managers know it is their responsibility to ensure harassment does not occur
4. Ensure all employees know both policy and complaint process
5. Ensure the complaints process is clear and user-friendly (and the confidentiality and anonymity of the complainant is protected)
6. Provide counselling facilities
7. Investigate all complaints swiftly and fairly
8. Apply sanctions against those responsible.

A 'Guide to combat harassment' is available from ISCO, 5, The Paddock, Frizinghall, Bradford, BD9 4HD. The Chartered Institute of Personnel and Development (Tel 020 8971 9100) has also produced a booklet on the subject.

### *Case study*

In a tragic case concerning the NHS in Fife, Brian Gilfallen, a quiet records supervisor realised that his department were running out of certain forms, and ordered a new supply, forging his manager's signature as she was away. He was disciplined in a procedure that lasted several months and eventually summoned to a hearing '*which might result in your dismissal*'. The day before the hearing he hanged himself. At the enquiry into his suicide, the NHS was accused of acting '*shoddily*' and it was stated that had the 'breach' been dealt with rationally and proportionally his death could have been avoided (e.g. had he put 'p.p' before

the manager's name or even signed his own name he would not have broken the rules). According to the '*Health Service Journal*' bullying is rife in the NHS, costing the organisation £325 million each year.

## Avoidance or control

Since everyone must be made aware of their responsibilities, employers may need to coach employees to understand what constitutes what might normally be regarded as offensive and illegal. One company suggests the following tests in deciding whether a particular conduct or wording is potentially sexually harassing:

a) Would you say or do this in front of your parents and/or spouse/partner?

b) Would you say or do this in front of a colleague of the same sex?

c) Would you like to see a report of your behaviour or words appear in the local newspaper?

d) Does what is being done or said, need to be said or done at all?

Supervisors and managers have an obligation to ensure everyone acts in accordance with the employer's Dignity at Work policy. Thus they need to:

a) Act and react to all employees (and other persons with whom they interface) with respect and dignity

b) Correct, and apply sanctions against, any unacceptable behaviour

c) Know and apply the [organisation's] policy

d) Ensure the [organisation's] complaint process is known by all

e) Deal immediately with such complaints, objectively and fairly

f) Try to appreciate the reactions of the complainant

g) Encourage concerns to be expressed rather than sublimated

h) Endeavour to stamp out victimisation and/or retaliation.

The culpability of the employer will depend on the level of action they took to deal with the complaint and to apply sanctions to the perpetrator. Where there was no remedial action both employer and employee responsible could be liable to pay damages. However, where the employer has taken all reasonable steps to try and stop bullying or harassment then they may be able to escape liability.

Harassment and bullying offend good employment practice, detract from efficiency and productivity and could place the victim under stress which can itself be grounds for a liability claim (again with potential unlimited compensation) against the employer. The traditional concept of a bully is a strong person whilst the person being bullied is not as strong (either physically or mentally – or both). This however, is not always the case and is further complicated by the fact that some who are bullied are bullies themselves. Not all bullying is continuous – pressure or stress on a person may make them respond by bullying others – almost as an instinctive reaction. Whilst this kind of spontaneous reaction may be understandable it needs to be guarded against, although long-term and systematic bullying poses a much more difficult problem, particularly when others join the bully and are oppressive to the target. Retail organisations may need to support employees who are bullied by customers or others seeking to exploit the 'harnessed' reaction of those seeking to serve or assist them. Whilst a customer may have a legitimate complaint against the organisation, those in the direct interfacing or firing line are hardly likely either to be those who have caused the problem or, even more importantly, those who can resolve the complaint. Hence such staff should be briefed in how to handle irate and angry customers – an immediate apology and apparent intent to assist may defuse many situations, although it will be insufficient for some. Failure to accept their responsibility in this area will effectively make the management and organisation an accessory to those who seek to bully. In two cases (both settled out of court) employees won substantial sums from their employers as a result of stress caused by bullying.

### *Case studies*

From her employer, ***Liverpool City Council, Mrs Noonan*** won £84,000 for stress brought about by bullying instigated by a colleague – later her junior.

From her employer, ***Birmingham City Council, Mrs Lancaster*** was awarded £67,000 for stress brought about by her having to deal with aggressive council house tenants following her transfer without training into that department.

## Evidence

It can be difficult to obtain evidence of bullying since those suffering may be wary of giving evidence fearing (unless the instigator is dismissed) that it may make the position worse. If witnesses have such a fear, it is possible to use written statements at a hearing without identifying their source, provided the employer has checked as far as possible that the statements are true.

### *Case study*

In ***Ramsay v Walkers Snack Foods*** (a case concerning theft, although the principle is the same) three employees were dismissed for theft of money from bags of crisps used for a national promotion. The evidence was derived from a number of statements from other employees who wished to remain anonymous. The EAT held that the employer had acted fairly to balance the 'desirability to protect informants who are genuinely in fear' and providing a fair hearing for the accused employees.

Accepting that some witnesses may only be prepared to speak to their employer after assurances that their names will not be disclosed, the EAT has suggested the following guidance when this occurs:

- The statements should be recorded in writing (possibly needing to be edited to preserve the anonymity of the provider)
- Time, date and place of each observation should be noted; how well the provider was able to observe, the reasons for the provider's presence, and whether the provider had any reason to fabricate evidence
- Investigate further to try to corroborate the evidence given
- Any report of an investigator should be made available during any disciplinary process
- Discreet enquiries should be made regarding the character and background of the informant
- Make decision whether to instigate/continue the disciplinary process
- A member of management should review the evidence and interview the provider personally

- The anonymous statement should be made available to the accused
- Any questions raised by the accused regarding the evidence should be referred back to the provider for further comment
- Full notes of the disciplinary process should be compiled.

Witnesses giving evidence (either in person or by writing) have no right to be told the decision of the hearing. If they ask they should be told 'the complaint was founded (if it was) but the employer cannot discuss the outcome of a disciplinary hearing'.

The Work Foundation (0207 479 2000) and the Trades Union Congress (0207 636 4030) have jointly produced a video 'No excuse: Beat bullying at work'.

## Practical implications

Harassment and bullying at work is thought to resemble an iceberg – only a small proportion being visible and complained of, whilst the vast bulk of such problems remain hidden and unreported. Even if this is so, the actions taken as a result of harassment tend to have a high profile and to attract large sums of compensation.

For some time it was believed that a person could claim compensation from their employer as a result of harassment by someone in the employer's service even if the act was a one-off (indeed, in more than one tribunal hearing this was held to be the case). However, in ***Banks v Ablex Ltd*** it was held that harassment on one occasion would not be sufficient basis for a claim – the same person had to be the victim on at least two occasions for an employer to be held liable.

## Social events

Whilst ensuring compliance by employees with the letter and theme of the Dignity at Work policy should be feasible in the workplace and during working hours (albeit posing difficulties with multi-site organisations), the liability of the employer can be extended outside the workplace and even into social activities if these are held to be *'an extension of the workplace'*.

### *Case study*

In ***Stubbs v Chief Constable of Lincolnshire police***, a female police constable was sexually harassed by a male colleague on two occasions when the team of which they both were part adjourned at the end of their shift to the local pub. Since the team invariably went to the pub at the end of the shift, the tribunal held that the pub had become 'an extension of the workplace' and the employer was liable for breaches of conduct there as much as in the workplace.

Similarly, employers can be held liable for claims resulting from inappropriate activities of employees' (and their guests) at parties, dances etc., if the only reason for the participants (or most of them) gathering is that they are employees. This can be so regardless of location and who pays for it, hence the employer could be deemed to be required to provide a 'safe place of work' there – and liable for any breach of that obligation.

In her book '***Watching the English'*** Kate Fox, a social anthropologist, reviews 'goings on' (and 'comings off'!) at workplace Christmas parties' and writes *'[people] misbehave because misbehaviour is what Christmas parties are all about: misbehaviour is written into the unwritten rules governing these events.'* However, she goes on to point out that there is nothing particularly depraved or wicked '*just a higher degree of disinhibition than is normally permitted among the English*'. Unfortunately, as far as employers are concerned, it is exactly this '*higher degree of disinhibition'* that is a matter of concern not least since as Ms Fox records in her survey, 90% of respondents admitted to some form of misbehaviour at their employer's Christmas parties!

Without wishing to restrict enjoyment it may be advisable to issue a warning memo or notice well in advance of the proposed celebrations with a reminder immediately adjacent to the timing.

### *Example of warning clause*

1. The [organisation] in sponsoring [event] hopes every employee [and guest] will find it enjoyable and that they will appreciate that the following guidance is meant to help achieve that aim for everyone. At all such events (whether the [organisation] sponsors them or not) at which the attendance is related to the fact that those present – or at

least some of them – are our employees, all employees and their guests are expected to act in accordance with this guidance.

2. At such an event the normal rules and guidelines regarding attitude and behaviour in the workplace apply – particularly rules regarding substance (including alcohol) abuse, harassment, discrimination etc.
3. Moderation and a consideration and respect for others are expected at all times.

   Breach of these guidelines cannot be tolerated and will render employees responsible subject to disciplinary action and non-employees to claims for any losses sustained by the [organisation] as a result of their actions.
4. All persons in a position of authority must remember their workplace responsibilities. Whilst being relaxed and informal, they should not act in any way such that their position and/or respect will then or subsequently be undermined.
5. Drivers are reminded of the legal requirements regarding consumption of alcohol – particularly if also taking medication.
6. Employees can be held responsible for the actions of their guests.

Note: It might be advisable to post this memo at the event so that non-employee guests have an opportunity to see it.

## Alcohol

The reminder about not driving whilst having consumed alcohol in excess of the legal limit is perhaps obvious. However, employers could be held liable if, for example they provide a 'free bar' with no control placed over the number of drinks consumed.

### *Case study*

A brewing company operated a residential training facility. After the day's training had finished the delegates could use the free bar on the premises. Some delegates drank too much and a fight developed during which a manager was attacked.

The company dismissed the three employees who had attacked the manager but they were able to claim successfully that this was an unfair dismissal. The point was made that if the company provides a free bar without control over consumption they can create a situation where excess consumption is almost inevitable – as will be the results.

Note: This is perhaps a classic case for an argument of contribution on the part of the employees – that is they must be held at least in part responsible for their actions. If contribution is accepted by the tribunal, the level of responsibility (0% to 100%) must be assessed by the tribunal. If it is decided there was 100% contribution any compensation is reduced by that percentage – that is, it is wiped out completely.

## Equality Act 2006

This Act introduced a duty (which has been described as a 'gender duty') which requires public bodies to take account of the differing needs of the sexes to try to ensure fairness and equality of opportunity not only as employers but also when preparing policies and providing services. The Act also established the Commission for Equality and Human Rights (referred to above) and – made discrimination on grounds of religion or religious belief unlawful for those providing goods, services, facilities, premises, education and other exercise of public functions:

- requires public authorities to promote the equality of opportunity between the sexes and to prohibit sex discrimination in the exercise of their public duties
- provides powers that will enable the outlawing of sexual orientation discrimination when providing goods, facilities and services.

## Equality Act 2010

Following Equalities and Discrimination Law reviews, the whole panoply of legal requirements in this area is to be recodified (and, at least in theory, simplified) as set out in the Equalities Act (which was passed as the 2010 General Election was announced) which, if implemented, will replace 9 Acts and 100 statutory instruments, one aim being to try to '*break the glass ceiling*' to allow women to reach top jobs.

### *Case study*

Following Allen and Overy (the UK's 4th largest law firm) analysing its working environment, it discovered that twice as many of its brightest female lawyers as their male colleagues left on the verge of partnership, one reason being that female lawyers found the prospect of becoming a partner unappealing. Although 62% of the firm's intake are female, only 15% of its partners are female. To try to encourage more women to take the top jobs, the firm is to allow partners to work part-time – initially a 4 day week and an additional 52 days leave each year for up to 8 years (presumably at an appropriately reduced remuneration package).

The Act will require further progress towards eradicating perceived inequalities of pay between the sexes for work of comparable nature. It is a matter of concern that nearly 40 years after the Equal Pay Act there are still many instances where women doing work that can be equated to work being done by men, are still not paid the same rates. Whether the current economic climate (bearing in mind that all pay increases must ultimately be paid for by the customer and pay rises of any size could sink more businesses than those already failing) is the correct time to try and ensure discrepancies are rectified may be debatable.

However, it has been decided that, recession or not, swifter moves must be made in this direction and thus the Act requires 'larger companies' to provide details of earnings of men and women doing similar jobs, i.e. compulsory 'gender pay audits'.

Under separate legislation a 'large company' is defined as one that exceeds the upper 'size' thresholds of a medium-sized company, i.e. it exceeds two of the following criteria:

- turnover £25.9 million net,
- balance sheet aggregate £12.9 million net,
- 250 employees.

Private sector companies will be given until 2013 to comply, but organisations within the public sector (the area where there have been far more equal pay tribunal claims than in the private sector – mainly at the lower end of the pay scales) will be required to report if they have 150 or more employees. There were over 44,000 Tribunal equal pay claims in 2008.

Secrecy clauses (i.e. a contract clause forbidding employees to discuss or divulge their salaries) will be made illegal.

One practical step for all employers would be to check that their Dignity at Work Policy is up to date (particularly outlawing bullying etc) and that it sets out a procedure by which complaints can be raised including a confidential route should the person being complained about be the applicant's line manager.

Whilst the Act does not go as far as legalizing '*positive discrimination*' it does enable employers, when (for example) faced with two equally qualified applicants, to choose one that represents a '*minority*' in order to make their workforce more diverse (or, as it is termed, '*positive action*'). Whilst the person not chosen will not be successful with a claim it is of concern that that will not, of itself, stop some applicants lodging a claim.

(Many HR practitioners have raised doubts about much of the main thrust of this proposed legislation; arguing for example that the required declaration of average pay perhaps disclosing a pay gap may be of interest – but doesn't of itself change anything, although the information may of course generate more claims for equal pay.)

## Questionnaires

Those who believe they may have been discriminated against can serve a questionnaire on the perpetrator. Care needs to be taken when completing such a questionnaire. Accuracy of response is necessary since if it can subsequently be shown that there are incorrect answers the strength of any defence of an accusation of discrimination may be weakened. Contrary to a somewhat widespread misinterpretation, the Data Protection Act does not preclude employers from answering questions posed by such questionnaires.

## 'But for…'

One test that an employer can apply in a potentially discriminatory situation is to use the 'but for' phrase. This idea is quite often used in tribunal hearings. If the question '**but for** this person being of a certain race/gender/sexual orientation/disabled/religion/age would we be treating them in this manner?' is put and the answer is 'no', then almost certainly that could be a discriminatory situation, and accordingly the action should not be taken or the person treated in that way.

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