Understanding the grey areas

Anthony Sakrouge contemplates the sometimes fine line between workplace bullying and robust performance management

Anthony Sakrouge is head of employment at Russell-Cooke

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In a recent survey carried out by the Unison trade union, 15% of the 1,300 respondents at Sutton Council considered that they had been bullied by colleagues. This statistic will come as no surprise to employment lawyers, as bullying allegations are increasingly common in employment litigation. So why does bullying appear to be on the increase, despite all the efforts to eradicate it, what are the flashpoints in the workplace, and what more can be done to prevent it?

Defining workplace bullying

There is no statutory definition of workplace bullying in England and Wales. However, the Acas guide on Bullying and harassment at work (the Acas guide) defines it as:

> ... offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient.

Definitions proposed by commentators in other common-law jurisdictions are similar. Professor David Yamada, the foremost legal expert on the subject in the US, suggests:

> The repeated infliction of intentional abusive behaviour which interferes with an employee doing his or her job, has the potential to cause physiological or psychological harm, and that a reasonable person would find hostile or offensive.

And in Australia, a proposed amendment to the Fair Work Act 2009 defines bullying as:

> ... repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety...

while recognising that the term does not apply to 'performance management conducted in a reasonable manner.'

The most likely claim for a bullying victim to bring in the UK is a constructive dismissal complaint. An important point for practitioners to bear in mind is that, for such a claim to succeed, the alleged perpetrator does not need to have intended to bully.

The Acas guide points out that, although some types of bullying are obvious and most people would recognise them as such, there are many grey areas where what appears to one person to be no more than firm management is considered by another to be bullying. Employment lawyers will know just how fine the line between the two is, and how much employment litigation this question generates. The outcome in such cases will often turn on whose evidence the tribunal has been most persuaded by – and legal teams will often be surprised at the decision reached and left with the impression that another tribunal would have decided the question differently.

Performance-related bullying

Given how fine a line this is, the best advice to give clients who are sensible enough to ask about a situation as it is developing is to tread very carefully.

The pressure on managers to meet performance targets and get the best out of staff, which only increases when the economic climate is difficult, is one of the reasons for the steady growth in the number of workplace bullying allegations. The manager accused will often have been given the task of improving results quickly, or have been hired into the organisation for that purpose. They may even have been told that one or more team members need to be 'managed out' of the organisation. Managers who have a greater

appreciation of employment rights may at least recognise the employee's right to be given an opportunity to improve. However, the performance-management process will often be handled very clumsily, even by organisations (such as law firms) that might be expected to know better.

It is worth recalling some of the examples of bullying conduct which the Acas guide suggests should be included in anti-bullying policies:

- spreading malicious rumours, or insulting someone;
- copying memos 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;
- exclusion or victimisation;
- unfair treatment;
- 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 constant criticism; and
- preventing individuals from progressing by intentionally blocking promotion or training.

Most employment lawyers will have come across all of these behaviours at one time or another and some of them (such as setting someone up to fail) with alarming regularity. Managers who are trying to manage an employee's performance, either on their own or with the assistance of a human resources team, can easily fall into one or more of these traps. Sometimes they will do so even though they are being advised by solicitors, which is why employment advisers have to be very vigilant.

Employers will often begin by explaining to their advisers that they have finally decided to take formal action against an employee who has been underperforming for a long time, but who has hitherto been allowed to 'get away with it'. If they feel that it has taken them longer than it should have done to start dealing with the problem formally, they will often be in something of an unseemly rush to reach the end point of a termination or a negotiated settlement. They will want the employee to feel that a new rigour is now going to apply and will sometimes become impatient if the advice they receive appears too cautious. In these circumstances, the fact that the employee begins complaining of bullying or mentioning stress and depression sometimes only aggravates them further.

Perceived threats to management

Sometimes the alleged bullying behaviour will result from a manager's (or management's) perception that the employee is off-message, disloyal or even maliciously intent on causing damage to the organisation. This will often be the position in cases involving allegations of whistleblowing. There have been few cases in which tribunals were prepared to find that bullying conduct constituted victimisation for blowing the whistle, but the employee will often succeed in other claims, such as constructive dismissal. Either way, the employer can incur huge fees unnecessarily because its response to such a situation has been less than ideal.

Pre-termination negotiations

The concept of 'pre-termination negotiations' was introduced on 29 July under the Enterprise and Regulatory Reform Act 2013. Employers will now be entitled to broach the subject of terminating an employee's contract on agreed terms without those discussions being admissible as evidence in any unfair dismissal claim even where there is no existing dispute.

However, this change will not give the employer carte blanche to bully the employee into leaving, as the protection will not apply where there has been 'improper behaviour' by the employer. The non-exhaustive list of conduct that might constitute improper behaviour in the Acas Code of practice on settlement agreements includes 'all forms of harassment, bullying and intimidation'.

Avoiding difficulties

Organisations hoping to avoid dealing with protracted grievances and employment litigation would be best advised to train managers to treat their workers at least as well as they treat their peers and would want to be treated themselves. It is axiomatic that people who rise to senior positions can be fairly robust and not particularly sensitive characters. Managers are also often unaware of the effects that their behaviour is having on those around them or of the impact they have merely because of the senior position they occupy. For this reason, management coaches will talk of 'holding a mirror' up to the manager in question and focus on their intensity, voice, word choices and so on.

A manager accused of bullying may well have been subjected to robust treatment in the past and regard this as character building. Those who are prepared to put in very long hours and to work under a lot of pressure may assume that there can be no objection to asking the same of their staff, and take a dim view of anyone who wants to take a different approach. They may also believe (as the employer did in *Cantor Fitzgerald International v Horkulak* [2004]) that a much more pressured environment than usual is justifiable in certain sectors, especially where the potential rewards for success, and the potential consequences of failure, are both very significant.

The Acas guide warns of some of the consequences of getting it wrong:

- poor morale and poor employee relations;
- loss of respect for managers and supervisors;
- poor performance;
- lost productivity;
- absence;
- resignations;
- damage to company reputation; and
- tribunal and other court cases and payment of compensation.

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Advisers should recommend that clients train managers to understand the different strengths of each staff member and make the most of these while offering them support to overcome any weaknesses. Employees will not all respond to the same approach. There will always be those who do not make the grade, despite being properly supported and respected, but employers who take an honest approach with their employees stand the best chance of avoiding time consuming and potentially damaging disputes. ■

Cantor Fitzgerald International v Horkulak
[2004] EWCA Civ 1287