

**Wellbeing and Stress –  
The legal obligations and challenges from a Safety, Health and Welfare  
perspective.**

**PUBLIC AFFAIRS IRELAND ANNUAL HUMAN RESOURCE CONFERENCE 2022**

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## Introduction.

The legal position in relation to the legal obligations of an employer are quite simple. The Safety, Health and Welfare at Work Act 2005 provides that an employer is obliged to provide a safe working environment.

The issues which are arising in workplaces currently relate primarily in this area to bullying and harassment.

Section 60 of the Safety, Health and Welfare at Work Act 2005 empowers the Health and Safety Authority to prepare and publish Codes of Practice with respect to Safety, Health and Welfare at work for the purposes of providing practical guidance to employers and employees.

The HSA and the Workplace Relations Commission jointly produced a Code of Practice.

Bullying at work.

The Code retains the definition of bullying as contained in previous codes. Bullying is defined 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 be reasonably be regarded as undermining the individuals right to dignity at work”*

The Code itself must be read in light of the case of ***Ruffley -v- Board of Management of St Ann’s School 2017 IESC33***. In that case Mr Justice O’Donnell noted that in order to be considered workplace bullying:

*“Conduct must be repeated, not merely consist of a number of incidents, it must be inappropriate not merely wrong, and it is not enough that it be inappropriate and even offensive. It must be capable of being reasonably regarded as undermining the individuals right to dignity at work”.*

With regard to whether the behaviour constitutes “repeated” behaviour Mr Justice O’Donnell stated that:

*“What must be repeated is inappropriate behaviour undermining the personal dignity of the individual”.*

When dealing with the issue of inappropriate behaviour Mr Justice O’Donnell noted that the test *“looks to the question of propriety in human relations, rather than legality”.*

In that case it was noted that dignity at work is a distinctive component of workplace bullying.

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

While the Code of Practice does not deal with the issue of harassment there is nothing to stop an employer, including in their policies, procedures to deal with both harassment, including sexual harassment and discrimination and bullying as part of dealing with issues which can create a toxic working environment.

### **So, what is Bullying?**

The code sets out a non-exhaustive list of what is bullying.

This can include:

- An exclusion with negative consequences.
- Verbal abuse/insult.
- Being treated less favourably than a colleague in similar roles.
- Belittling a person's opinion.
- Disseminating malicious rumours, gossip or innuendo.
- Social excluding or isolating a person within the workplace.
- Pestering, spying or stalking.
- Intimidation/aggressive interactions.
- Excessive monitoring of work.
- Withholding information necessary for proper performance of a person's job.
- Repeated manipulation of a person's job content and targets.
- Blaming a person for things beyond their control.
- Use of aggressive and obscene language.
- Other menacing behaviour.

It is also useful to look at what bullying does not include and again this is not exhaustive but bullying does not include:

- Expressing differences of opinion strongly.
- Offering constructive feedback, guidance or advice about work related behaviour which is not of itself welcome.
- Ordinary performance management.
- Reasonable corrective action taken by an employer or supervisor relating to the management and direction of employees.
- Workplace conflict where people disagree with or disregard the others point of view.

Often the issue will arise as to whether an issue comes within the range of behaviour which will be deemed bullying or whether it does not. For example, you may have an employee who believes that their opinion is being belittled, whereas the manager or supervisor may regard it as simply expressing differences of opinion strongly.

This is actually one of the issues which comes up. It is one which we come across. The difficulties usually arise because the employer has their very nice policy relating to workplace bullying but the issue is who has been trained in respect of it. I will be going back to this issue later but for any policy relating to bullying working,

it is absolutely imperative, and this cannot be stressed too much, that the training must be from the very top of the organisation to the very bottom of the organisation, by this I mean it is from the most senior individual in the organisation to the newest recruit. This is not once off training, this is continual training.

The issues which we see coming up are often due to the fact that the employee does not understand what bullying is but equally the supervisor or manager equally is unaware of what bullying is. When these complaints arise and we have acted for both those who claim to have been bullied and for those whom the allegation is against and it is invariably is the position that even where there is a policy in place neither party really has ever been trained or fully understands matters. In the case of employees, often complaints will go in which are not bullying. In cases which involve bullying it is often only a portion of their claim which they have described as bullying. When it comes to the managers or supervisors the level of ignorance relating to policies and procedures relating to bullying is quite staggering.

### **Who is involved in bullying at work?**

The code effectively covers everybody from managers/supervisors to employee, employee to supervisor/manager, one employee to another or group, customer/supervisor/manager to business contact, or, client/customer to employee.

This raises some issues in itself in that very often organisations do not see that bullying can be to a service provided, an employee of a service provider or to an employee from a client or customer.

In reality most complaints of bullying relate to what we could call downward bullying by which I mean bullying by a manager or supervisor of an employee. The other one is more often than not not a single employee but a group of employees together bullying another employee who is at their same level.

### **Management of Bullying.**

The most important issue in relation to managing bullying in the workplace is its prevention. Again, some people believe that bullying is one where there is only an employer role but there is also an employee role.

The employer role would include:

- To act reasonably to prevent workplace bullying.
- Making sure a complaint is properly dealt with in accordance with the Code.
- Having a safety statement under Section 20 of the Safety, Health and Welfare at Work Act 2005.
- In drafting any code to get input from employees.

The employee obligations are under Section 13 of the Safety, Health and Welfare at Work Act 2005 to include:

- To comply with effectively the statutory requirements and to protect their own health, safety and welfare and that of other persons who may be affected.
- To cooperate with their employer to comply with any bullying policy.
- Not to engage in any improper conduct.

### **Why would you want to have an inclusive bullying policy?**

For employers bullying can result in a dysfunctional work environment, low morale, lost time and when wearing my solicitor's hat, litigation.

It is well known and recognised in the Code that the risk of bullying at work is:

- High turnover of staff, absenteeism and poor morale.
- Mismanagement or poor management of relationships in the workplace will result in bullying being more likely to arise.
- Gender/age/status imbalance.
- A possible history of tolerance of unacceptable behaviour or lack of adequate procedures or no adherence to procedures.
- Absence of clear reporting structures and clear job role descriptions.

### **So, what can be the effect of bullying at work?**

There are two issues which come up in this. The first is that the organisation will have a significant number of complaints under their grievance process or their bullying policy in relation to complaints of bullying. This therefore involves a considerable amount of time and resources to deal with those investigations. Very often this will involve engaging outside individuals. That is a cost. Where internal investigators are involved, there is the cost of training them to properly investigate complaints.

The difficulty with internal investigators in larger organisations is that they are often seen as anything but impartial and it is sometimes seen by employees in particular that this is a process that has to be gone through before bringing a claim to the WRC.

In many Government Departments there will be assigned Mediators. There is clearly an issue in relation to those Mediators often as to whether they are following the relevant Codes from the various Mediation Bodies. In mediation the role of a Mediator is as a facilitator. The Mediator is not there to give their opinion. They are not there to adjudicate. They are not there to judge. Their role is to be completely independent. Their role is to see if an agreement can be reached between parties who have a complaint but at all stages to obtain absolute confidentiality as regards anything that is said to them which they do not have liberty and have got specific consent to disclose to another party.

Where mediation does not work and the internal processes do not work, then cases can end up in the WRC and subsequently on appeal to the Labour Court.

In more serious cases workplace bullying can result in claims to the Courts. To an extent these types of claims are shoehorned into Personal Injury claims. You might wonder why I say that. There is no specific compliant in Legislation to the Courts of being bullied. The complaints that go to the Courts are Personal Injury claims. They are that an individual as a result of bullying has suffered either a physical or recognised mental illness. The most common is effectively workplace stress. The usual defence by an employer to such claims is that the employer was not aware of matters. The most serious cases of workplace bullying are normally ones where the individual has raised a complaint of bullying which has been either ignored, brushed under the carpet or not dealt with in an appropriate way. These cases normally arise where an employee has a complaint against a more senior member of management. There is often the issue that this is a trouble maker, there is a closing of the ranks, the investigator or sometimes even in organisations who have a Mediator being an internal Mediator feel under pressure to exonerate the more senior member of management. The bullying continues. Sometimes there can be a second or third complaint. The individual then suffers, normally, a form of a psychiatric illness. In some of these cases you are then dealing with a person who can be relatively young who is so traumatised by what has happened that the potential for them remaining in the workplace may be negligible and there could be substantial claims against the employer. Some will simply say that these will be very unusual cases but the issue of bullying in workplaces and the effect on organisations can be substantial. Bullying in the workplace can have a detrimental affect not only on the target of the bully but also on those who see the bullying going on, this may mean that very confident and productive employees will seek to exit that toxic working environment. It may mean that individual will wither seek to exit the organisation or will not seek promotion into a particular section because it will be known that there is a bullying culture in that section of the organisation.

### **Who are the bullies and who are the targets of the bullies?**

This is not really addressed in the Code at all but in this respect I am talking from my own experience.

Looking at the bully first, you would think that the bully is somebody like the schoolyard bully who terrorises the younger school goes to extract their lunch money, they are often perceived when you talk about bullying as the person who is going to be seen in a school yard hitting the weaker student. Therefore, there is a perception that bullying is a very public activity that others will clearly see. The reality on it is that that is not the makeup of a bully.

A bully in a workplace, particularly when it comes to a supervisor or a manager of a particular individual is often somebody who sees the target as a threat, they see this person as more competent, more intelligent, more able than they are to do their

job and therefore see this person as a threat to their position in the organisation in that if that individual goes up the management line, they could end up reporting to the particular target who will see through their bluster.

Bullies in these circumstances are not going to be overt. They are devious in how they operate it is often from senior individuals within organisations difficult to normally see immediately what they are up to. Effectively it can often be undermining the individual. One of the classics, if I can call it that, is the manager who tells the target that a particular report is needed for the following Friday when in fact they have been asked to make sure that that report is available on the Wednesday. When the Wednesday comes and their manager asks, they turn around and say that the target was meant to have it and they say "Typical of that individual", they then say that they will go and address the issue with that individual and the report is then produced on Friday. The target may never know that this has gone on and what goes up the line is that the target is inefficient and that percolates through to more senior management which undermines the potential for that individual moving up the management ladder or being promoted.

Now of course you will always get the schoolyard bully.

### **The target.**

When you look at the schoolyard the target is usually the weak or the young, if I could put it that way. They are the individual who will not be able to stand up to the schoolyard bully who comes to extract their lunch money, they will not be able to physically deal with the bully.

In the workplace you will have the situation of the very overt bullying but generally speaking it is not overt.

Very often in an organisation the target of the bullying will actually be often the last person who will recognise that they are being bullied. The classic view of those who are the targets are that they are competent, efficient, likable and hardworking individuals. They are more often than not fully committed to the organisation.

I simply put this out there to say that the general perception of bullies are that they are very evident and clear. We all know the schoolyard bully and that is why I don't particularly like the title bullying. Many people equate bullying with the schoolyard bully but that is not the psychological makeup of the average bully in the workplace.

### **Preventative measures.**

The whole issue in relation to bullying should not be focused on dealing with complaints of bullying. Yes of course that is absolutely imperative but the real basis of dealing with bullying in a workplace is to make sure that there is no bullying in the workplace. Prevention is always better than cure. So, what does this involve?

It involves the promotion and reinforcement of a positive workplace culture. That is what the Code refers to. This is not just some form of words. This is actually creating

a culture where bullying will not be tolerated and that must be known from the lowest in the organisation that complaints of bullying will be dealt with properly and equally it must be recognised that those at the top of the organisation the whole way down are committed to creating a positive workplace culture. This does take time. It is not just signing a piece of paper it is actually being seen to be particularly for senior managers individuals who are seen to lead as regards promoting the culture.

There needs to be of course an effective Anti-Bullying Policy. This is not something to be written by the HR Department on their own. This involves getting input from employees. That is employees from the top to the bottom of the organisation. That can often be a challenge for both HR Departments and their personnel, and senior management. It is often seen that, well we will include the Union, for example. That is helpful but for an Anti-Bullying Policy to work it needs to be seen to have input from the employees themselves.

The next issue of course is to have awareness of the Policy. This is not sending a copy of the policy around by way of an email to everybody as, here is our new Anti-Bullying Policy. This involves training, it is training in groups at various levels. It is training where you have individuals from various levels within the organisation in the same training module.

There needs to be specific training for those managing complaints and for line managers. No line manager should be out managing a line without understanding the Anti-Bullying Policy. Effectively this is having managers being asked, how do they deal with a complaint of bullying and that they know how to apply the policy in practice.

The next issue is to have advisory support services available. This is possible in larger organisations it is not possible in smaller organisations. Where the advisory support services are being made available, those individuals have to have the authority and the independence to be able to assist a person bringing a bullying complaint or to be able to deal with an issue with a bully. Equally there needs to be individuals who are there to assist those who are accused of bullying.

The next issue is to have appropriate contact persons. There is value in appointing a contact person who acts as the first step for anyone who wants to ask about a possible bullying case. Their role is to be supportive. They are there to listen and offer guidance on the options in line with the Policies and Procedures. It must be understood at all stages that they are doing so on a strictly confidential basis. A contact person has to be properly trained to do their job. This is a job. At times organisations see the contact person as somebody who would be in the HR Department. The contact person for roles is a person who will have no role to play in relation to an investigation. They effectively need to be seen as independent of the HR Department as the HR Department will be the ones normally involved in the investigation of matters.

## **Investigations.**

I don't intend to walk through the issue of investigations as they are set out fully in the Code of Practice for employers and employees on the prevention and resolution of bullying at work. There are however some simple issues which need to be taken into account.

A person making a complaint and also the person whom a complaint has been made, must have a right of representation and this would include a work colleague or a Union Official. There is no entitlement to have legal representation. In more serious cases it can often be beneficial to give the individual a right of representation by a lawyer. I know that there will be significant resistance to this but where a person is going through an internal process and are represented, effectively it does have the benefit of the lawyer being there to make sure that the full Policy and Procedures are fully complied with and are used fully by the employee and equally where mediation is seen by an investigator as a possible outcome, again, there is the benefit of having a lawyer there representing an individual who can advise them on the benefit of mediation. It is one drawback from the provisions of the Mediation Act that the Act does not cover mediation in a matter that would be before the Workplace Relations Commission or the Labour Court. If a case involves workplace stress where there is for example a recognised psychiatric injury caused to an employee, because that matter would be before the Courts in those circumstances a lawyer is obliged to actually advise the employee on the benefit of mediation and must actually provide them with copies of the relevant extracts from the Legislation and give them this advice on the benefit of mediation in writing.

The next issue is a right of appeal. There are two effective rights of appeal. The first is for the individual making the complaint. The second is in relation to the person against whom a complaint has been made where the investigation upholds the complaints. The issue in relation to an appeal will often be thought by some as one relating to effectively a new hearing. That is not the position under the Code.

The Code is there to provide that an appeal should focus on the conduct of the investigation in terms of fair process and complying with procedures. It is not there as a rehearing of the original issues, effectively it is a procedural appeal. This is different than an appeal for example under a disciplinary matter which is effectively a rehearing.

### **What happens if an appeal is upheld?**

You may wonder why I ask this. The reason I am asking it is that the Code does not actually deal with what happens if an appeal is upheld. Because the Code does not deal with it in writing any policy it is as well to address this issue. If an appeal is upheld by a person whom a complaint has originally been upheld in an investigation there is effectively two choices. The first is that it has been upheld on a procedural matter. That is something that in the case of a person accused of bullying will be one they will be very happy with, you can be absolutely sure that in the event of

somebody who has made a complaint of bullying finding that an appeal has been upheld on a procedural issue that they will be far from satisfied. The second choice is effectively to go beyond the Code and provide that in those circumstances the matter will go for a rehearing.

### **Malicious complaints.**

The Code addresses this issue but equally in writing a policy it is appropriate to have it dealt with as to what happens where there is a malicious complaint. Where there is a malicious complaint, and that is not simply a complaint that is not upheld but one that is found to be malicious, because of the damage this could cause to the reputation of the person whom a malicious complaint has been made it is necessary to have in place and clearly set out in the policy that disciplinary action will be brought against an employee who makes such complaints and that is to protect an employee who has not acted in a manner which is bullying but has been effectively targeted having their reputation damaged. Now that is entirely different than somebody who makes a complaint where the complaint is not upheld. The fact that a complaint is not upheld does not mean that it is malicious.

### **The investigation process.**

The investigation process is fully set out in the Code of Practice and it is not one that I intend to deal with today.

### **The challenges.**

The challenges which any organisation or business faces when it comes to wellbeing and stress in the workplace which results in what I call bullying not being addressed are effectively twofold. The first is the damage to the reputation of the organisation itself coupled with the issue of staff retention, low morale, reduced productivity and dysfunctional organisation or part of an organisation.

The second issue is the issue of the effect of bullying on individuals. The first issue that I pointed out was in relation to the organisation itself. The second here focuses on the individual. Those individual claims are increasingly resulting in litigation. Leaving aside altogether those cases which will end up where there is a physical or psychiatric injury as a result of bullying which can result in substantial awards against an organisation you might think that because cases which will go to the WRC are brought under the Industrial Relations Act as there is no specific legal claim in the WRC for enforceable compensation for bullying that they will be heard in private and therefore the matters will not become public. That is a misconception that organisations have. An employee who brings a bullying case to the WRC will get a written decision with their name and the name of the organisation they work for on that recommendation. Yes, on the WRC website the names will be redacted. However, there is nothing to stop the employee laminating that decision and handing it out within the workplace.

As bullying can result in stress and as bullying itself is outlawed in workplaces, it is important that the safety representatives are involved in the process as well.

It might be thought that this talk today is primarily looking at what happens when there is bullying. That is not the purpose of this paper. The purpose of this paper is to hopefully highlight the benefit of having proper Policies and Procedures in place along with appropriate training and buy in from all levels within the organisation so that you create a workplace free from bullying. Putting in place appropriate policies is not just a matter of putting in place a policy or putting up nice signs or framed certificates such as the Dignity in Workplace Charter, it is actually living an anti-bullying culture on a day-to-day basis. That is the challenge for any organisation. Organisations who are seen by those working in the organisation as an organisation where bullying will not be tolerated and where appropriate action is taken and appropriate training is put in place to avoid bullying is an organisation which is more likely to attract and retain talent.

### **Conclusion.**

So finally in conclusion there is a cost in putting this in place. Yes, there is a legal obligation but cost is also always an issue. However, the cost benefit analysis of having a workplace free from bullying is often one that is going to be far more productive and when I say often, I mean always more productive than a workplace where there is bullying.

I would like to thank you for having me here today. I do appreciate being asked back. I hope that today's talk has been of some interest and that is the reason why I have produced this paper on the basis that it is here hopefully to assist. I would ask anybody who is involved in this area to read the Code of Practice for employers and employees on the prevention and resolution of bullying at work as a first step to creating wellbeing and avoiding stress.