

Harassment - Employers with a dispersed workforce take note

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With the ongoing challenges facing businesses across Ireland and abroad, and with many employees now working from home, and that set to continue to some extent going forward, harassment or sexual harassment may not currently feature prominently in the minds of senior managers. However, it is imperative to ensure that *dignity at work* and other policies are reviewed periodically to ensure fitness for purpose and that staff are appropriately informed. Employers should undertake this exercise to ensure compliance with current best practice. In this ezine we briefly address harassment as well as developments in related areas, to include the new Code on Prevention of Bullying, which employers should now consider.

Harassment is defined in the *Employment Equality Acts* as any unwanted conduct related to any of the discriminatory grounds under those Acts. Sexual harassment is any unwanted verbal, non-verbal or physical conduct of a sexual nature. It is essential to remember that these are defined subjectively and each individual determines what is unacceptable to them.

When is an employer liable for such behaviour by its staff?

The widespread use of virtual platforms can blur the distinction between what occurs "*in the course of employment*", for which the employer may be liable, and other types of interaction and contexts. The Workplace Relations Commission ("WRC") and Labour Court have long highlighted that harassment can occur through emails, text messages and through the use of virtual and social media platforms.

*An International Sales and Marketing Executive v A Fashion Company*¹ concerned various complaints, including of sexual harassment by way of text message and email. The Complainant made it clear that these communications were not welcome. The WRC found the company liable for these actions and awarded redress at the maximum level (€64,999.92, representing 104 weeks' remuneration). It noted the serious and persistent nature of the sexual harassment which culminated in the hacking and disseminating of personal and intimate photographs. It also noted the absence of evidence of any reasonably practicable steps to prevent the occurrence of harassment.

The Labour Court case of *Dublin Bus v McCamley*² concerned online derogatory comments on Facebook. The Court considered these to have been harassment in the employment context. There must be a "*discernible connection between the harassment and the victim's employment in that the victim suffered harmful effects of harassment while he or she was engaged in activity authorised by the employer*". Interactions with or about colleagues outside normal working hours and outside the workplace can be "*in the course of employment*". In this case the posts were related to the Complainant being an employee representative. Ultimately, the employer's policies, which, broadly speaking, prohibited inappropriate conduct, were considered to constitute sufficient preventative steps in all the circumstances and the employer was not held liable.

In 2020 in the case *CA-00019596-001* an award of 1.5 years' pay was made following a patient having sexually harassed a number of carers, illustrating clearly how an employer can be liable for the behaviours of non-employees when connected to the workplace.

What are employers required to do to protect employees from harassment?

In order to successfully defend claims of this nature employers are required to have in place adequate preventative measures which include, among other things, appropriate policies. Employers should not risk their policies and practices falling short of the standard required. The statutory duty here for an employer is not just to address complaints if and when they arise, but to:

1. take such steps as are reasonably practicable to prevent harassment from occurring in the first place and then where harassment does arise to
2. investigate complaints of harassment in an effective way; and
3. take steps to reverse the effects of harassment.

The remote workplace

Employers must be prepared and remain vigilant, including in a virtual workplace. This presents a challenge where employers meet their staff much less frequently, and sometimes not at all, over many months and only when organised through the use

of digital platforms. An employer is less likely to pick up on signs which might otherwise be apparent.

What next?

Employers must therefore modernise their policies and processes. There must at a minimum be a clear anti-harassment policy in place before the harassment occurs and that policy must have been effectively communicated to staff along with information sessions and training on harassment.

Crucially, there is a newly revised *Code of Practice on Bullying at Work*. It is true that there is not yet a correspondingly updated code concerning harassment. However, allegations of bullying and harassment very often go hand in hand. Employers' policies tend to deal with both, either in one comprehensive policy or in related policies. This should continue to be the case. The revised Code on Bullying includes, as one would now expect, specific references to home working: it applies "to all employments in Ireland irrespective of whether employees work at a fixed location, at home or are mobile". The same can be said of course in connection with harassment. Employer policies should explicitly reflect this position. There are specific steps to be considered in undertaking a policy review and many of these are identified in the relevant codes.

For further information or assistance, please contact the authors or one of the Dublin Employment Team.

¹ADJ-00020222, 25 November 2019.

²EDA164

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