

Bullying at work – implications of the new Code of Practice

GERRY MCMAHON

Three years after the then Minister of State announced a review of existing codes, the Workplace Relations Commission (WRC) and the Health and Safety Authority (HSA) have published a new code of practice on bullying at work. Gerry McMahon teases out its implications for employment relations practitioners.

The new ‘Code Of Practice For Employers And Employees On The Prevention and Resolution Of Bullying At Work’ (S. I. No. 674 of 2020) has been described as a ‘welcome development’, as it serves to meet the original objective of having one Code, replacing the Commission’s 2002 Code and that of the HSA of 2007.

The development of this new Code was also designed to meet ‘best practice’ and ‘evolving case law’ in the area and can be accessed at: <http://www.irishstatutebook.ie/eli/2020/si/674/made/en/pdf>.

The Code adds a new layer to employers’ existing ‘informal’ resolution processes

However, it may be stretching it to conclude that the new Code is an unequivocal ‘welcome development’. Given that many employers are now preoccupied with Covid-19’s impact, have long been perplexed by the array and complexity of employment legislation and are now looking at re-writing policies based upon this new 54-page Code (that replaces two Codes that ran to a total of 40 pages), it would be understandable if there was some despair in the air. Related thereto, for most employers, this new Code entails adding a completely new layer to their existing ‘informal’ resolution process.

CODE’S RELEVANCE

Of course, the good news is that the new Code provides considerable clarity on how to minimise legal liability in respect of such claims. Whilst failure to adhere to the Code’s requirements is not actionable in itself, its provisions are admissible in criminal proceedings under health and safety legislation, as well as in proceedings before the WRC, the Labour Court etc. That is, going forward, compliance with the Code’s provisions will undoubtedly be a significant factor when it comes to responding to complaints about bullying at work.

EXPLODED

The subject of bullying and harassment at work, as a focus of public attention and legal action in Ireland, has exploded since it first surfaced in the final quarter of the last millennium. The establishment of a Tribunal of Inquiry in 2017, arising from the Sergeant Maurice McCabe fiasco in An Garda Síochána, together with the Supreme Court’s judgement in the same year in respect of allegations at a national school in Kildare, brought the thorny topic into the limelight again. This specialist publication was able to identify 20 discrete Labour Court recommendations on the matter (from mid-2018 to mid-2019) in its recent review (www.irn.ie/article/26635).

The extent of bullying at work may be reflected in the Central Statistics Office’s recent report that almost one in three of the national workforce claim to have experienced bullying or harassment

at work, whilst the list of organisations to have found themselves in disrepute from such practices reads like a 'Who's Who' of eminent employers.

Related to this, the decision of the UK's employment tribunal (in 2008) to award £19m, for bullying and harassment against F. & C. Asset Management sent shockwaves through employer ranks and far outstripped Irish headline cases on the subject. These include the Marino Institute (€500,000 settlement) and O'Callaghan Hotels (€315,000 award) cases. Whilst such sums may concentrate the mind, it is also notable that clinical psychologist Dr Mark Harrold has estimated that the annual cost of workplace bullying in Ireland is €3bn, with 100 suicides per annum also attributed to this toxic treatment.

EMPLOYER'S DEFENCE

On the subject of such responses, employers will be relieved to find that the three pillars of an effective defence remain in place. That is, where employers can show that they took such steps as are 'reasonably practicable' in such scenarios, the best approach to minimising – if not avoiding – legal exposure in the areas of bullying and harassment is to ensure that:

1. There is an up to date and readily available policy cum procedure – which provides for formal and informal resolution routes - in respect of dignity at work.
2. Staff are trained in respect of this policy cum procedure and are made fully aware of their personal responsibilities in respect of same.
3. In the event of allegations, the employer faithfully applies the aforementioned policy cum procedure.

However, to ensure adherence to these requirements, employers will need to revise their policies and procedures, bringing them into line with the new WRC/HSA Code.

CHANGES TO POLICY & PROCEDURE:

1. Whilst the new Code specifies that it does not prevent employers from having one policy/document encompassing procedures for processing both bullying and harassment cases, it clearly differentiates between bullying and harassment, directing parties to the discrete Code of Practice pertaining to the latter (see https://www.ihrec.ie/app/uploads/download/pdf/code_of_practice_on_sexual_harassment_and_harassment.pdf). Notably, this Code is also currently under review at the Irish Human Rights and Equality Commission.

2. Acknowledging technological (and common law) developments, the new Code notes that bullying behaviour may be practised via 'cyber or digital means' and 'applies to all employments in Ireland irrespective of whether employees work at a fixed location, at home or are mobile'. The new Code also acknowledges the dilemmas faced by smaller organisations in such scenarios and (broadly) reiterates the prescriptions set down in the now repealed HSA Code.

3. Whilst retaining the definition of bullying used in the repealed HSA and Labour Relations Commission (LRC/WRC) Codes, with a nod to recent court decisions, the new Code clarifies that bullying behaviour is such that it would be regarded by 'a reasonable person' as 'clearly wrong, undermining and humiliating'. The new Code also provides a range of examples as to what does (and does not) constitute bullying (e.g. performance management).

4. In addition to outlining some of the negative effects of bullying, unlike its predecessor Codes, the new Code explicitly confirms that 'the intention is not important in the identification process'.

In this regard it dovetails with the aforementioned harassment Code, which holds that the 'intention of the perpetrator ... is irrelevant' (i.e. it's the effect that counts).

5. Arguably, the most consequential revision arising from the new Code is 'where there are complaints, the employer must ... record actions'. This formalisation of the 'informal approach' may well be in line with legal obligations (e.g. data protection), but will not sit easily beside the soft skill-set required to give effect to the Code's (correct) advice that a 'prompt and informal problem-solving approach offers the best potential for addressing allegations of bullying effectively'.

Related thereto, the new Code's direction (under the informal approach) that 'the individual who perceives that they are the recipient of unacceptable behaviour should put their concerns in writing' may well aggravate a scenario that could otherwise be pre-empted via delicate diplomacy on the part of an aggrieved's trusted colleague (who is asked to intervene with the accused on the complainant's behalf).

That is, whilst the new Code correctly advises that an 'informal discussion is often sufficient to alert the person concerned to the effects of the behaviour alleged and can lead to a greater understanding and an agreement that the behaviour will stop', even when this is accompanied by a commitment to 'confidentiality', the necessity to record actions clearly has the potential to inflame matters. As a result, in practice, this provision may well be more honoured in the breach than the observance.

6. The new Code introduces a 'Secondary Informal Process' to cover those scenarios where the first (informal) approach 'is unsuccessful or if the complainant or the employer deem it inappropriate for the seriousness of the issues'. Via this secondary route, 'the employer may nominate a separate person who has had appropriate training and experience and who is familiar with the procedures involved to deal with the complaint on behalf of the organisation'. Related to No. 5 above, it is also notable that under this new secondary route or process, even if the complaint is verbal, the Code advises that 'a written note of what is complained of should be taken'.

7. Another significant change to past practice features under the new Code's 'Formal Process', whereby 'proceeding to a formal process should not be viewed as automatic and it is important that it is recognised that it is the reasonable evidence-based decision of management'. This provision may well be designed to spare resources that would previously have been consumed via the complainant's right to a full formal 'fact finding' investigation (of what may transpire to be spurious allegations). Considerable caution (on management's part) will be required to enable the appropriate use of this new provision, given that it can be the subject of appeal to an external authority.

8. The prescribed manner of investigation (under the formal process) largely replicates that of its predecessor HSA Code, culminating in the direction to the (appropriately trained and experienced) investigator that 'based on the facts before them' they must conclude 'whether the behaviour(s) complained of, on the balance of probabilities, have occurred' and whether the accused employee has a 'case to answer'. That is, the investigator 'may recommend whether or not the employer should invoke the Disciplinary procedure'. Notably, the provision for an appeal (of the investigation's findings) is also largely in line with the HSA's predecessor Code. On the sensitive subject of representation, many will mull over the new Code's provision that 'a work colleague or employee/trade union representative (provided the person has representation in line with the principles of natural justice and fair procedure) may accompany the complainant and the person complained of, if so desired'. Related thereto, the Code also commits to affording the accused 'natural justice'. Clearly however, line managers will take solace from the fact that the new Code provides for disciplinary action in the event of complaint(s) being adjudged 'malicious',

the clear differentiation between 'ordinary performance management' and bullying and that they 'should be kept informed, as appropriate, about the process in train'.

9. On the issue of information dissemination and training, the new Code advocates 'widespread policy awareness' and 'appropriate training' for 'those managing complaints and for line management'. However, the Code's appendix on 'How To Prepare An Anti-Bullying Policy' specifically advises that it 'should include commitments to staff training and supervision as identified in the (safety statement's) risk assessment on issues related to bullying at work, including the provision of training for managers, supervisors and for all staff, at induction or through appropriate awareness raising initiatives'. In a similar vein, the new Code also sees 'value in the employer nominating a person to review good practice generally in the workplace around dealing with such matters'.

10. The new Code alters the role of the 'Contact Person' from that specified in the original LRC/WRC Code, bringing it into line with the role set down in the HSA's Code, so that 'on a strictly confidential basis' their 'supportive listening and information provision' role does not extend to 'the investigation of any complaints and should not be tasked with any further involvement in the details or right and wrongs of a complaint'.

11. On the thorny topic of disciplinary action, the new Code offers welcome clarification on the matter of communication. That is, it explains that whilst the complainant and the respondent are entitled to know the investigator's conclusion(s) and the reasons for them, the 'specific details of disciplinary action' are confidential.

12. The new Code is more explicit than its predecessors in outlining the roles of the WRC and the HSA in this area. For example, in the latter case, where the HSA adjudges that an employer is failing to act reasonably with a bullying scenario, 'it can issue enforcement action in various forms' and (after investigation), forward a file with recommendations to the Director of Public Prosecution (DPP) for their decision as to the prosecution of employers 'where there is evidence that the employers have failed in their duty to protect an employee or employees from the harmful fallout of bullying'.

13. Finally, the new Code includes a detailed outline (with checklists) of what should be in your organisation's 'Anti Bullying Policy'. The incorporation of this prescription and its appropriate application at work will ensure that 'all the boxes are ticked' when it comes to bullying at work, thus minimising the employer's liability in such scenarios.

**Dr. Gerard McMahon M.B.S., M.Phil. (Labour Law) is M.D. at Productive Personnel Ltd., H.R. consultancy and training company and an Adjudicator at the WRC – ppl1germy@gmail.com*