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LEGAL UPDATE ON BULLYING, HARASSMENT AND STRESS IN THE WORKPLACE

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Introduction

SESSION 1: 10am – 11 am

- (1) Legal backdrop,
- (2) Nature of claims and statutory basis for claims.
- (3) Recent case-law

SESSION 2: 11.20 am – 12 pm

- (4) Systems and measures to investigate and deal with claims
- (5) Practical issues that arise;
- (6) Recommendations as to management of liability.



BULLYING AND HARASSMENT

Bullying and harassment

- European Foundation Survey (2000) - 15 Member States of the European Union
- 9% of workers reported being subject to intimidation in the workplace and 2% of respondents reported sexual harassment.
- ESRI study (2007)
- 7.9% of workers experienced bullying in the workplace in the previous six months in Ireland.



- Women were twice as likely to experience bullying in the workplace compared to men, with 10.7% of women having experienced bullying in the workplace in the previous six months compared with 5.8% of men.
- Deutsche Bank case (UK) - award of €1,200,000 for bullying in the workplace.



LEGAL BACKDROP

Workplace Bullying:

“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 reasonably be regarded as undermining the individual’s right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but as a once off incident is not considered to be bullying”.

Bullying actions must be repeated - a one off incident is not considered to be bullying.



BULLYING AND HARASSMENT

Harassment: discriminatory treatment of one person by another because of a particular characteristic which is protected by the Employment Equality Acts 1998 to 2007

- “Bullying” vs “Management”
- The 2007 Code of Practice



NATURE OF CLAIMS & STATUTORY BASIS FOR CLAIMS

Legal Remedies:- types of claims which may be brought:

1. Rights Commissioner Claims:

- a. Industrial Relations Acts 1946 – 2004 – usually complaint about Company's procedure or outcome of procedure
- b. Safety Health & Welfare at Work Act 2005 – claim related to failure to provide safe place of work (no monetary cap on compensation)



2. Discriminatory treatment claim or Discriminatory dismissal:
 - Employment Equality Acts, 1998 to 2008 – claim related to harassment or sexual harassment, up to and including constructive discriminatory dismissal
 - Burden of Proof: Prima facie case of discrimination
 - Equality Tribunal
 - Circuit Court



3. Constructive Dismissal: Unfair Dismissals Acts 1997 to 2007 –
 - 2 years remuneration, reinstatement or re-engagement
 - Constructive dismissal: *“because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer”*.



4. Personal Injuries Claim in Civil Courts - claim for damages for the effects of the treatment in the workplace. Usually work related stress/psychiatric damage.



Non Work- related events

“in the course of employment”

2002 case of *Maguire v North Eastern Health Board*, employer liable for discriminatory comments made to an employee at a staff Christmas Party.

Ms O’N –v- An Insurance Company (2004) “for the purposes of or in furtherance of work”.



CASE EXAMPLES

Constructive Dismissal

Liz Allen –v- Independent Newspapers (Ireland) Limited 2002 awarded 78 weeks remuneration, including an assessment of future loss.

Harrold –v- St. Michael’s House (2008) failure to engage with the employer’s procedures meant that his behaviour was not reasonable and his claim for constructive dismissal failed.



Harassment

Monica Murphy –v- Iarnrod Eireann (2010) awarded Ms Murphy €126,000 (two years' salary) for discrimination – access to promotion
€63,000 (one year's salary) for distress caused by victimisation after she made her complaint.



Psychological damages

Curran – v- Cadbury (Ireland) Limited (2000)

Employer liable for compensable injury which was reasonably foreseeable and arose from the company's failure to take care for the safety of its employees.

Applying this to bullying or harassment claims – If the employer:

- (a) is aware that the employee is at risk of bullying/harassment
- (b) and fails to have adequate protective systems in place
- (c) and the employer is informed of psychiatric condition – eg stress certificate from doctor
- (d) then the employer will be liable.



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Psychological damages

High Court case Quigley –v- Complex Tooling & Moulding Limited (2005) awarded €75,773 as damages for psychiatric injuries (depression) suffered by the claimant.

UK case of Walker –v- Northumberland Co. Co. [1995]

Employer duty of care to provide safe system of work, not to cause the employee psychiatric damage by reason of the volume or character of the work.

Supreme Court reversal of Quigley finding – medical reports did not support causative link



Work related stress

Supreme Court decision in the case of Berber – v- Dunnes Stores (2009)

High Court (Laffoy J) (2007) had upheld his claim - €40,000 general damages and €32,622 as special damages.



Maher –v- Jabil Global Services Limited (2005)Clarke J

tests:

- “(a) has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress;
- (b) if so is that injury attributable to the workplace; and
- (c) if so was the harm suffered to the particular employee concerned reasonably foreseeable in the circumstances”.



Work related stress

Supreme Court approved tests in Court of Appeal judgment in the case of *Hatton –v- Sutherland* (2002) liability for negligence depends on three inter-related requirements:

- the existence of a duty to take care;
- a failure to take the care which can reasonably be expected in the circumstances; and
- Damage suffered as a result of that failure



Factors considered by Supreme Court in Berber:

- Forseeability
- Causation Reasonableness of employer's actions



PRACTICAL ISSUES IN MANAGEMENT OF CLAIMS

The Codes of Practice

- code of practice on bullying, developed under the Safety, Health and Welfare at Work Act, 2005 is the Code of Practice for Employers & Employees on Prevention and Resolution of Bullying at Work, 2007 (Health & Safety Authority). (Copy available at www.hsa.ie).
- The code of practice published by the Equality Authority recommended procedures which should be followed in the context of claims of harassment (including sexual harassment). Copy available at www.equality.ie

Maureen Keane –v- Western Health Board (1990) – Employee not aware of grievance procedure



HEALTH AND SAFETY

- Health and Safety issue
 - Risk factors for bullying:
 - (a) high turnover of staff, high absenteeism or poor morale
 - (b) constitution of the workplace – where there are a high number of part-time or casual employees
 - (c) hierarchies – including traditional grading differentials
 - (d) changes in the workplace
 - (e) gender/age imbalance
 - (f) cultural integration issues
 - (g) Management of relationships in the workplace



PROCEDURES/MEASURES

- Employer Assistance Programme
- Informal Process
- Mediation
- Investigation
- Confidentiality



Practical challenges in management of process

- (a) Fitness of Complainant to participate in the process
- (b) Representation
- (c) Delay



RECOMMENDATIONS/CONCLUSIONS

1. Review systems – introduce dignity at work policy and implement it with training as required;
2. Carry out risk assessment for Health & Safety purposes but consider issues such as work systems, workplace constitution etc.
3. Ensure that the IT usage and communication policy is adequate – should proscribe all harassment by electronic means (to include mobile phone texting etc).
4. Training of managers is key – how to carry out an objective performance appraisal. Ensure that the performance management system allows a right of appeal.



5. Provide HR support to managers in dealing with employees and also in defending their management process against allegations of bullying;
6. Keep work pressures and work hours under review;
7. Some form of employee assistance programme to assist with personal issues;
8. Allow employees an effective “voice” and a method by which employees can refer grievances;
9. Develop a bullying and harassment policy and ensure that it works and is understood.



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