



A-Z OF EMPLOYING

Harassment and Bullying

Our guide for Employers and Managers

**SUPPORTING,
FACILITATING &
REPRESENTING
BUSINESS**

Business**Central** 

Harassment and Bullying

Our guide for Employers and Managers

Contents

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Overview	3
Introduction	3
Harassment	4
Sexual harassment	4
Racial harassment.....	5
Union and employees association membership	5
Human rights and protected disclosures	6
Liability In Employment.....	6
Choice of procedures.....	6
Human Rights Act 1993	6
Employment Relations Act 2000	7
Bullying.....	8
Prevention - Policies And Procedures.....	9
Management - Policies And Procedures.....	9
Complainant.....	9
Harasser/Bully	10
Confidentiality.....	11
Co-workers	11
Conclusion	12

Harassment and Bullying

Our guide for Employers and Managers

Overview

Harassment can take many forms. Any form of harassment that is defined by law may be best approached according to that law, however if the harassment is not defined by law then it may well be lawful conduct in employment.

Harassment can occur in a variety of ways. Any behaviour that is motivated by a desire to threaten or intimidate a person for any reason can amount to harassment.

Bullying is a term that has not been specifically defined in legislation or case law. However it is a term that is often used to describe repeated behaviours that are perceived to be inappropriate, abusive and/or offensive to the recipient.

Employers are obliged to protect their employees, and others entering the work site, from harassment and bullying arising out of employment. Furthermore, if harassment has occurred, employers are obliged to manage the situation in a manner that prevents and discourages recurrence.

Bullying and harassment policies should outline what behaviour(s) may constitute harassment or bullying, and should clearly state that such conduct will not be tolerated. The policy should outline how a complaint should be made, the process of investigating the complaint, what sanctions may be taken against employees who are found to have harassed or bullied another person, and how the victim will be supported by the employer.

Introduction

Harassment generally is unwanted and repeated behaviour towards a person that is intended to cause that person to feel intimidated or threatened. Harassment that occurs in the employment arena may also give rise to civil (in the District Court) or criminal proceedings under the provisions of the Harassment Act 1997; however this Act will not be discussed further in this guide. The term “bullying” does not have a legislative definition and despite a number of cases that deal with workplace bullying, there is no specific definition of what behaviours amount to bullying.

The Employment Relations Act 2000 and Human Rights Act 1993 deal specifically with certain forms of harassment and discrimination (for example sexual or racial harassment), however there is a wider range of behaviours that can also be deemed offensive or inappropriate by an employer. For the purpose of this guide the term “harassment” will be used to refer to the behaviours outlined in legislation. The term “bullying” will be used to denote the other behaviours that may be deemed to be unacceptable.

Harassment and bullying may be:

- ▶ Person to person
- ▶ Electronic
- ▶ Pictorial
- ▶ Social

And it may be expressed by:

- ▶ Words and terms
- ▶ Pictures

Harassment and Bullying

Our guide for Employers and Managers

- ▶ Signals
- ▶ Non-cooperation
- ▶ The threat of or actual verbal or physical violence (bullying)
- ▶ Nit-picking
- ▶ Exclusion

Where any harassment complained of has either a sexual or racial orientation, union membership or employee association orientation, or focuses on a person's intent to use, promote, or support theirs or another's rights under either the Human Rights Act 1993 or the Protected Disclosures Act 2000, then the harassment may be more appropriately treated according to the laws on those.

Under the Health and Safety at Work Act 2015 all employers, being PCBU's are under an obligation to provide a safe workplace; this means that they have an obligation to protect all their workers (and volunteers, sub-contractors and visitors) from harassment. For the purposes of the information provided, harassment is treated as a behaviour that can occur between:

- ▶ Employers and employees;
- ▶ Employees and employees; and
- ▶ Employees and other persons in a workplace.

In the employment environment, you are primarily responsible for the prevention and management of harassment and bullying because it is you who sets the policy of what is and is not acceptable behaviour in the workplace.

Harassment and bullying that is the result of behaviour by a person outside your control does not reduce an employer's obligations towards their employees; it merely impacts on the way in which an employer can manage the effects of that harassment on the employee.

Harassment

Sexual harassment

The definitions of sexual harassment found in the Human Rights Act 1993 and the Employment Relations Act 2000 differ only slightly; however both may differ from common understandings prevailing at any time about what sexual harassment means.

Both Acts distinguish between sexual harassment that are requests for sexual intercourse, contact or activity in exchange for either the promise of preferential treatment or the threat of detrimental treatment and hostile environment sexual harassment such as unwelcome sexually oriented behaviour that has a detrimental effect on the recipient in their employment.

Sexual harassment is any unwelcome behaviour of a sexual nature that may be communicated:

- ▶ Person to person
- ▶ Electronically
- ▶ Pictorially
- ▶ Socially

Harassment and Bullying

Our guide for Employers and Managers

Sexual harassment is not friendly or light hearted exchanges if those are welcomed and enjoyed. The behaviour that may constitute sexual harassment will range from verbal comments to physical conduct towards another person of an unwelcome sexual nature. It happens to people of any gender by people of any gender.

Racial harassment

As with sexual harassment, the definition of racial harassment is found in the Human Rights Act 1993 and the Employment Relations Act 2000 Both Acts address racial harassment as an environmental issue: hostile, hurtful and offensive racially oriented behaviour that has a detrimental effect on the recipient. The Human Rights Act 1993 also addresses Racial Disharmony; this is unlikely to apply in the employment context and so is not dealt with here.

Racial harassment is any unwelcome behaviour with either colour, or race, or ethnic or national origin content that may be communicated:

- ▶ Person to person
- ▶ Electronically
- ▶ Pictorially
- ▶ Socially

Colour, race and ethnic or national origins are separate prohibited grounds of discrimination under the Human Rights Act 1993. The behaviour that constitutes racial harassment will range from verbal comments or racist jokes, to racially motivated violence. It happens to people of any race or ethnicity, by people of any race or ethnicity.

In the employment environment the employer is primarily responsible for the prevention and management of racial and sexual harassment. Under one or both of the relevant Acts (the Human Rights Act's reach is significantly wider than that of the Employment Relations Act 2000) the scope of that responsibility extends beyond employees to clients or customers, and to contractors or other workers, including unpaid workers. It may in some circumstances extend beyond the workplace to other premises.

Union and employees association membership

Harassment that is motivated either by a person's membership or non-membership of a union or by a person's membership or non-membership of an employees association, may be duress. Duress is defined by the Employment Relations Act 2000 and is a separate ground for a personal grievance. It is only applicable where the harassment complained of is behaviour of an employer towards an employee; however a failure to protect one employee from the harassment of another employee may also constitute duress where the harassment occurs in employment.

Refer to the A-Z Guide on **Undue Influence and Duress** for more information.

Harassment and Bullying

Our guide for Employers and Managers

Human rights and protected disclosures

Harassment that is motivated either by a person's intent to assert, promote or support their rights or another person's rights under the Human Rights Act 1993, or, by a person's intent to assert, promote or support their rights or another person's rights under the Protected Disclosures Act 2000, may be victimisation.

Victimisation is defined by the Human Rights Act 1993 and is a ground for a complaint under that Act of unlawful discrimination. It is generally applicable where the harassment complained of is behaviour of an employer towards an employee; however a failure to protect one employee from the harassment of another employee may constitute victimisation where the harassment occurs in employment.

Refer to the **A-Z Guides on Discrimination in Employment, and Protected Disclosures Act 2000.**

Liability In Employment

Choice of procedures

There is considerable overlap between the Human Rights Act 1993 and the Employment Relations Act 2000 in respect of sexual and racial harassment but the disputes resolution processes under each regime are substantially different. An employee must choose one of the two regimes in which to advance a complaint of discrimination; an employer is protected from potential double jeopardy where circumstances could give rise to a complaint of unlawful discrimination under the Human Rights Act 1993 and a personal grievance under the Employment Relations Act 2000.

The choice is made when an employee either:

- ▶ Makes a complaint under the Human Rights Act [this refers to section 92B when civil proceedings may be commenced either by the person aggrieved or the Human Rights Commission]; or
- ▶ Applies to the Employment Relations Authority for a resolution of the grievance [this refers to the action of filing a Statement of Problem].

A complaint that relates to bullying conduct, rather than harassment relating to sexual or racial orientation, union membership or employee association orientation, falls within the scope of the Employment Relations Act 2000 only for determination.

Human Rights Act 1993

The Human Rights Act 1993 treats racial and sexual harassment as prohibited forms of discrimination.

Under the current Act, racial harassment and unlawful discrimination on the basis of colour, race and ethnic or national origin or sexual harassment and unlawful discrimination on the basis of sex (and sexual orientation) are dealt with separately; they do not mean the same thing and do not cover the same unlawful conduct.

Refer to the **A-Z Guide on Discrimination in Employment** for more information.

Harassment and Bullying

Our guide for Employers and Managers

The concern is that under this Act an employer is potentially liable for racial or sexual harassment that they have no knowledge of; the duty is on employers to protect employees (and other persons) from the chance of sexual harassment arising out of your workplace and employment relationships.

Under this Act both the employer and the harasser (employee or another person) may be liable for racial or sexual harassment. An employer's liability under this Act may be defended where it can be shown in that all **steps as were reasonably practicable** to prevent the harassment complained of and/or such steps as were reasonably practicable to prevent the repetition of the harassment complained of were taken.

What is reasonably practicable will differ according to the circumstances of the case. However, the case law indicates that the failure to have a policy outlining the company's stance on sexual harassment and how it will be treated if it occurs could be regarded by the Human Rights Review Tribunal as a failure to take reasonably practicable steps. Certainly, the failure to prevent a repetition of the behaviour complained of will be regarded as a failure to take reasonably practicable steps.

Liability under the Human Rights Act is limited to the complainant, whereas under the Employment Relations Act 2000 liability may arise in relation to the complainant and the harasser, if they are both employees. Refer to the **A-Z Guide on Human Rights** for information about the complaints process under the Human Rights Act 1993.

Employment Relations Act 2000

The Employment Relations Act 2000 treats both racial and sexual harassment as distinct grounds for a personal grievance that may be raised by an employee with an employer and brought before the Employment Relations Authority for a determination.

Liability under this Act is addressed within the confines of the employment relationship; an employer may be liable for racial or sexual harassment they know about and either condone, or do nothing to prevent recurring. Employer liability under this Act is a double-edged sword because on one hand there is the complainant to protect and on the other there is the person about whom the complaint has been made, who has the right to be treated fairly.

Refer to the **A-Z Guide on Discipline** for information on fairness of procedure while investigating harassment or bullying complaints in addition to the information that follows.

A personal grievance under this Act is not limited to sexual and racial harassment, duress, and discrimination; an employee may also have a personal grievance on the grounds of an unjustified action. A finding that your failure to address a complaint related to bullying constitutes an unjustified action may result in the consequential finding that the employee was either unjustifiably disadvantaged in their employment or unjustifiably dismissed (constructively or actually).

Where one of your employees lays complaint with you, you are bound to respond to that complaint. If you ignore that complaint you may be subsequently found to have failed in your duty to maintain the relationship of trust and confidence that exists between you and that employee, thus giving rise to an employment relationship problem or a personal grievance.

In *Waikato District Health Board v Clear* [2010] NZCA 305 the Court of Appeal upheld the Employment Courts findings that the District Health Board had failed to provide a safe workplace

Harassment and Bullying

Our guide for Employers and Managers

and disadvantaged Ms Clear's employment by not properly investigating and responding to her complaints surrounding workplace bullying.

Where you receive a complaint of harassment but fail to address it, and the harassment recurs causing your employee to resign, you may face a personal grievance for unjustified constructive dismissal. You could then face a second personal grievance, also for unjustified dismissal, if upon the resignation of the harassed employee you summarily dismiss the harasser without inquiring into the complaint against them in the proper way.

Refer to the **A-Z Guides on Discipline & Personal Grievances** for more information about procedural fairness.

Bullying

"Bullying" is not specifically defined in legislation or in case law however it is often a term used to describe repeated and unreasonable behaviours that the company perceives inappropriate or offensive but is not sexually or racially motivated. Bullying conduct may include threatening or intimidating or derogatory or abusive behaviour, bad language, or any other conduct that is inappropriate or causes others to be offended or feel unsafe.

Worksafe New Zealand has developed a guideline document called "*Preventing and responding to workplace bullying*". This guide replicates the Safe Work Australia definition of bullying which is: "Workplace bullying is repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety.

- ▶ Repeated behaviour is persistent and can involve a range of actions over time.
- ▶ Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person."

Cases can provide an indication as to what kinds of behaviours can amount to bullying. In *FGH v RST* [2018] NZEmpC 60 an employee made eight claims against the employer, the employee was under performance management at the time and claimed the employer failed to provide a safe and healthy workplace and felt bullied. The Employment Court made an unequivocal statement that "*workplace bullying is a very serious issue and widespread problem*" Intent is not always an essential prerequisite.

In *Hilford v The Order of St John Northern Region Trust Board* [2018] NZERA Auckland 190, Mr Hilford brought a claim for unjustified dismissal for St John's failure to investigate his allegations of bullying. Mr Hilford raised concerns of being bullied by a colleague and management. His manager was appointed as the investigator who delegated the task of speaking to witnesses. The ERA found that St John's investigation was not the action of a fair and reasonable employer. His manager was not impartial as Mr Hilford had complained of being treated unfairly by management and the investigator was management.

In *Franich v Vodafone New Zealand Ltd* [2016] NZERA Auckland 7 the employer's code of conduct set out behaviours associated with workplace bullying. The employer had procedural flaws in the investigation process where they failed to follow up on statements, did not provide interview notes, failed to get statements signed. The Authority said that an employer needs to follow their policy carefully if they have one.

Harassment and Bullying

Our guide for Employers and Managers

Having a well written policy to address how allegations of bullying will be treated by the company, and the consistent application of this policy, is an effective way of decreasing the likelihood of bullying in the workplace as employee's become aware that bullying will not be tolerated. The prevention and management of bullying and harassment is discussed in the following paragraphs.

Prevention – Policies and Procedures

Having a comprehensive written policy which sets out what harassment and/ or bullying is and how it will be treated, will not stop it occurring, but it will encourage a safe working environment. The aim of such a policy should be to eliminate any offensive behaviour, and to protect people from intimidation or abuse. The policy should make it clear that harassment is unacceptable and what sanctions may be taken against harassers where harassment is established.

Your policy should outline who is available to make a complaint to and how a complaint should be made. The policy should state the alternative complaint processes available to employees and other people; it should set out their rights under the Human Rights Act 1993 and the Employment Relations Act 2000.

The policy should take into account the work environment and the tools of trade used there; if people have access to computers, email and the internet then any policy covering the use of those should include a statement about harassment. The policy should refer to your disciplinary processes and contractual termination provisions where appropriate.

The policy and its associated procedures should be communicated to all new employees as part of their induction and training programme. Reinforcing your policy from time to time, or on a regular basis, or as part of an education programme, may be appropriate.

Management – Policies and Procedures

All complaints of harassment or bullying should be managed swiftly, seriously and sensitively.

Employers have an obligation to fully and fairly investigate any formal complaints. In *Waikato District Health Board v Clear* [2010] NZCA 305 the Court of Appeal upheld Ms Clear's claim of unjustified disadvantage for failing to correctly investigate and remedy four complaints surrounding bullying. The Court found that the board had breached its duty to take all reasonable and practicable steps to provide a safe work place as Ms Clear was required to continue working with her alleged harasser despite the Board's knowledge that Ms Clear was medically unwell due to stress. The Court of Appeal also found that the Board had failed to properly communicate the steps the Board were taking to address her complaint and failed to provide Ms Clear with a "formal conclusion" to its investigation.

The parties to any complaint of harassment or bullying (the complainant and the harasser); are both entitled to fair treatment when a complaint is made. Both are dealt with in turn.

Complainant

The complainant should understand from your policy who to go to make a complaint and how to contact that person (or people).

Harassment and Bullying

Our guide for Employers and Managers

They should be assured that all discussions and investigations are to be conducted in the strictest of confidence; however their identity (and any witnesses) and the nature of the complaint will have to be outlined in sufficient detail to facilitate the investigation with the person(s) against whom the complaint is made.

You may require complaints to be in writing; however the details of the complaint will usually be recorded in writing at some point during the investigation. Any written account recording the complaint and the identities of the people involved should be kept strictly confidential and stored securely.

The complainant should be offered the appropriate support which will depend on the circumstances of the case and person. Cultural and language differences should be taken into consideration.

The complainant should be kept informed about the progress of their complaint as appropriate and should understand what action has been taken by you to protect them against the repetition of harassment.

Harasser/Bully

It is important to remember that the alleged bully is not an actual bully until a full and fair investigation establishes that.

As soon as the complaint has been laid, you (or your representative) should consider whether the allegations and the immediate circumstances warrant the suspension (or transfer) of the bully. Suspension (or transfer) may be considered where it is included in your policy on harassment and/or the contractual provisions covering discipline, and/or where the seriousness of the complaint means that there is an actual risk of harm to any of the people involved or the investigation itself.

Where suspension (or transfer) is indicated the bully is entitled to be told of the allegations against them, the details of those allegations, the reason why they are being suspended (or transferred), and what will happen next and when. They should have their right to representation and your policy on harassment explained before they are suspended (or transferred). Suspension is ordinarily on pay.

Refer to **A-Z Guide on Suspension** for more information.

The formal investigation meeting precedes and is determinative of the need to progress to a disciplinary process. The investigation process may involve a series of meetings, particularly if there are a number of witnesses or there is conflicting information. Where the complaint is established at the investigation stage then you will need to initiate the disciplinary process indicated by the seriousness of the complaint.

Refer to the **A-Z Guide on Discipline** for information about disciplinary processes.

Thorough and accurate records should be kept throughout the investigation; records will generally be kept in the bully's personnel file (unless the claim is proven false) and should be retained for the duration of the employment relationship. Where the employment relationship is terminated the records should be kept for a minimum of three months because this is the period in which a personal grievance could be raised.

Harassment and Bullying

Our guide for Employers and Managers

Where the investigation process does not result in the disciplinary process being initiated, you will need to consider whether the allegations were false and if disciplinary action against the complainant should be considered, and/or ongoing support for those involved in the investigation.

The person against whom the complaint was made is entitled to fair treatment in all the circumstances of the matter.

Confidentiality

It is not uncommon for complainants to prefer, or possibly request that their identity be kept confidential, and that they not be named as the complainant to the bully. While most employers would also prefer this, caution is advised as this may result in procedurally unfair discipline action being taken. In order for the harasser to defend themselves, they must have access to sufficient information about the allegations to be able to respond to them. An employee cannot successfully provide an explanation or counter argument to an allegation of harassment without knowing the factual details of the harassment claim.

There are two key implications of this principle; firstly, in most situations the complainant will have to be identified to the bully. It is important that the employer make the complainant aware of this fact. Situations where it may not be necessary to reveal the complainant are where their identity is not a relevant fact, for example where the complainant is alleging harassment of another worker, not him/herself. In such circumstances, only the identity of other worker is relevant to allegation.

The other implication is that the discipline process should provide the bully sufficient opportunity to respond to all the evidence in support of the harassment claim. Should the harasser not be given sufficient opportunity to respond, or rebut the allegations against them prior to the termination decision being made, any discipline action would be unjustified.

Co-workers

Harassment and bullying in the workplace is a problem that affects everyone; everyone has a right to be protected from it and has an obligation to play an active part in preventing it. Where co-workers of a complainant or harasser are affected by an investigation they are entitled to support and protection.

A complaint of harassment and the investigation that follows may be an uncomfortable time during which there may be some confusion about what is going on. Co-workers should be told information that reassures them that the company policy is being adhered to. They should not be told anything that might breach your obligations to protect personal information under the Privacy Act 1993.

Refer to **A-Z Guide on Privacy** for more information.

The conclusion of the investigatory (and/or disciplinary) process may be an appropriate time to remind the workforce of your policy on harassment and bullying and to revisit the education programme.

Harassment and Bullying

Our guide for Employers and Managers

Conclusion

Harassment is a term that covers a range of behaviour under the Employment Relations Act 2000 or the Human Rights Act 1993 that may or may not constitute a form of unlawful discrimination or duress in employment, and that may or may not give rise to a personal grievance. Regardless of how harassment may be more accurately characterised, you have an obligation as an employer to prevent it from occurring and managing it if it does occur so that it is not repeated, in respect of your employees and other people who may come into contact with your employees in the context of work.

Bullying often refers to a wider range of repeated behaviours that the company perceives inappropriate, offensive or abusive.

Whilst harassment and bullying are distinct concepts, the investigation and disciplinary process an employer must invoke following a complaint of bullying or harassment is the same.

If you have any concerns about framing a policy on harassment or require further information to help you understand the complexities of a complaint, you can contact one of our employer advisors for telephone advice and assistance: **0800 800 362**; or email the Business Central AdviceLine at advice@businesscentral.org.nz

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to Business Central Learning courses and conferences designed for those who manage employees.

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