

A-Z Guide

HARASSMENT AND BULLYING



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Overview

Harassment can take many forms. Any form of harassment that is defined by law may be best approached according to that law. 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. The term 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 may constitute harassment or bullying, and 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 employment may also lead to civil (District Court) or criminal proceedings under the Harassment Act 1997 (this Act will not be discussed further in this guide). Neither legislation nor cases have specifically defined 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. Here “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
- Signals
- Non-cooperation
- The threat of or actual verbal or physical violence
- Nit-picking
- Exclusion

Where harassment involves 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 those laws.

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

- Employers and employees
- Employees and employees
- 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 acceptable behaviour in the workplace.

Harassment and bullying, as the result of behaviour by a person outside your control, does not reduce an employer's obligations towards their employees. It merely impacts the way 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 may differ from common understandings of what sexual harassment means.

Both Acts distinguish two types of sexual harassment:

- Sexual harassment that is requests for sexual intercourse, contact or activity, in exchange for either the promise of preferential treatment or the threat of detrimental treatment.
- '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

Sexual harassment is not friendly or lighthearted 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, being hostile, hurtful and offensive racially oriented behaviour that has a detrimental effect on the recipient. The Human Rights Act 1993 also addresses Racial Disharmony, which is unlikely to apply in the employment context.

Racial harassment is any unwelcome behaviour regarding colour, race or ethnic or national origin. It 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 has significantly wider scope than the Employment Relations Act 2000), the scope of that responsibility extends beyond employees to clients/customers and contractors/other workers, including unpaid workers. It may in some circumstances extend beyond the workplace to other premises.

Membership with union and employees' association

Harassment that is motivated by a person's membership/non-membership of a union or 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 generally applicable to employers' behaviour towards an employee, but a failure to protect one employee from the harassment of another may also constitute duress, where the harassment occurs in employment.

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

Human rights and protected disclosures

Harassment that is motivated by a person's intent to assert, promote or support their or another person's rights, under the Human Rights Act 1993 or Protected Disclosures Act 2000, may be victimisation. Victimisation is defined by the Human Rights Act 1993 and is a ground for a complaint of unlawful discrimination. It is generally applicable to employers' behaviour 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 on sexual and racial harassment, but the disputes resolution processes are substantially different. An employee advances a complaint of discrimination under one of them; an employer is protected from double jeopardy where circumstances could give rise to both.

Employees either:

- Make a complaint under the Human Rights Act, civil proceedings commencing either by the person aggrieved or the Human Rights Commission (see section 92B).
- Apply to the Employment Relations Authority for a resolution of the grievance, by filing a Statement of Problem.

Bullying conduct (rather than harassment relating to sexual or racial orientation, union membership or employee association orientation) is only covered by the Employment Relations Act 2000.

Human Rights Act 1993

The Human Rights Act 1993 treats racial and sexual harassment as prohibited forms of discrimination. Under the current Act, there is separation between racial harassment (and unlawful discrimination on the basis of colour, race, and ethnic or national origin) versus sexual harassment (and unlawful discrimination on the basis of sex and sexual orientation). 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.

A concern is that 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 show it took all reasonably practicable steps to prevent the harassment complained of, and/or reasonably practicable steps to prevent its repetition. What is reasonably practicable will differ with the circumstances of the case. However, in Human Rights Review Tribunal case law, one manner of failure to take reasonably practicable steps can include lacking a policy outlining the company's stance on sexual harassment and how it will be treated if it occurs. Failure to prevent a repetition of harassment will certainly be regarded as a failure to take reasonably practicable steps.

Liability under the Human Rights Act is limited to the complainant. In comparison, 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 racial and sexual harassment as grounds for a personal grievance, that may be raised by an employee with an employer and brought to the Employment Relations Authority for a determination.

An employer's liability under this Act is where it falls within 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 has many possible pitfalls. 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. If your failure to address a complaint related to bullying constituted an unjustified action, consequentially the employee may either have been unjustifiably disadvantaged in their employment, or unjustifiably dismissed (which can include constructively). If one of your employees lays a complaint with you, you are bound to respond to that complaint. If you ignore that complaint you may be 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 Court's findings that the District Health Board had failed to provide a safe workplace 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. If you had a kneejerk reaction and summarily dismissed the harasser without inquiring into the complaint in the proper way, you could face a second personal grievance, also for unjustified dismissal.

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. It is often used to describe repeated and unreasonable behaviours that the company perceives as inappropriate or offensive, but not sexually or racially motivated. Bullying conduct may include threatening, intimidating, 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:

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 provide some information on what kinds of behaviours can amount to bullying. In *FGH v RST* [2018] NZEmpC 60 the Employment Court unequivocally stated 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. Said 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 an impartial investigator.
- 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 and failed to get statements signed. The Authority said that the employer needs to follow their policy carefully if they have one.

Having a well-written policy that addresses how allegations of bullying will be treated, and consistently applying the policy, is an effective way of decreasing the likelihood of bullying, as employees become aware it is not tolerated.

Prevention – Policies and Procedures

A comprehensive written policy setting out what harassment and bullying is and how it will be treated will not stop the behaviour 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 workplace, 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 failed to properly communicate the steps it was taking to address her complaint and failed to provide Ms Clear with a “formal conclusion” to its investigation.

The parties (complainant and harasser) to a complaint of harassment or bullying are entitled to fair treatment.



Complainant

The complainant should understand from your policy who to go to for a complaint and how to contact them.

They should be assured that all discussions and investigations will be conducted in the strictest of confidence. However, their identity, 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, but 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.
- 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. You should explain their right to representation and your policy on harassment before proceeding. Suspension is ordinarily on pay. Refer to the **A-Z Guide on Suspension** for more information.

The formal investigation meeting precedes and determines 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. If the complaint is established at the investigation stage, you will need to initiate the disciplinary process entailed 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.

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 request that their identity be kept confidential, and that they not be named as the complainant to the bully. However, 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 counterargument to an allegation of harassment without knowing the factual details of the harassment claim. Therefore, anonymising complainants may create procedurally unfair discipline action.

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. It may not be necessary to reveal the complainant where their identity is not a relevant fact, for example where the complainant is alleging harassment of another worker rather than themselves. In such circumstances, only the identity of the other worker is relevant to the 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 to the allegations against them before a decision of termination is made, any disciplinary 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 confusion about what is going on. Co-workers should be told information that reassures them 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 2020.

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.

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 constitute a form of unlawful discrimination or duress in employment, and that may rise to a personal grievance. Regardless of the definition, 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 either among your employees or for other people affected. 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.

Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your 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.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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