Should employers only deal with formal bullying complaints which cross a certain threshold?

On 21 April 2023, Dominic Raab resigned as Justice Secretary and Deputy Prime Minister after an independent investigator found that he had bullied civil servants. In this article we consider the learning points for employers and how complaints of bullying should be managed.

Why is bullying in the news again?

Bullying in the upper echelons of Government has hit the headlines once again.

Back in December 2020 news broke that a Cabinet Office inquiry had found evidence that the then Home Secretary, Priti Patel, had bullied staff and broken the Ministerial Code. It later emerged that she had a history of such behaviour when in previous roles. The alleged behaviour included shouting, swearing, belittling people and making unreasonable demands. The Cabinet Office inquiry found that Ms Patel was "action orientated", could be "direct" and felt justifiably frustrated with civil servants on occasions. However, this manifested itself in "forceful expression, including some occasions of shouting and swearing" which had upset staff. It concluded that her behaviour had breached the Ministerial Code, even if this was "unintentional".

Fast forward to 2023 and an independent investigator has concluded that Dominic Raab committed acts of bullying when he was Foreign Secretary and Justice Secretary. The report found that Mr Raab was "persistently aggressive" in meetings and had abused or misused his power in a way which could undermine and humiliate colleagues. It also emerged that he had acted in an "intimidating" manner, had described colleagues' work as "utterly useless" and "woeful" and had threatened disciplinary action. Mr Raab resigned in response to the findings. He apologised for any "unintended" stress or offence felt by colleagues but expressed concerns that the "threshold" for bullying had been set too low.

Why is this of interest to employers?

What is interesting in these cases is that the senior perpetrators viewed their own behaviour as robust management rather than bullying. Further, the behaviours in question were tolerated by multiple colleagues for some time before formal investigations were triggered. It is easy to see how similar scenarios could arise in the workplace.

Unless perpetrators are made aware of the impact of their oppressive behaviour, they will be unable to take steps to correct it. Therefore, it is important for employers to support employees to come forward with bullying complaints. A frequent problem that employers face in these situations is that victims do not want to "rock the boat" – particularly where the perpetrator is very senior. If a victim *is* prepared to speak up, they tend to want to do so on an informal or "off the record" basis.

This puts an employer in a difficult position. On one hand,

it is now on notice of the alleged bullying and may be exposed to risk if they do nothing. On the other hand, the victim does not want to take any formal action.

How should employers respond to informal complaints of bullying?

There is no "one size fits all" answer to the question of how an employer should respond to such a complaint. In practice, employers will need to grapple with a number of preliminary questions in order to decide upon a suitable response.

Is it bullying?

Dominic Raab said that the "threshold" for bullying had been set too low. Is there a threshold before behaviour qualifies as bullying? In contrast to the related concept of discriminatory harassment, there is no legal definition of bullying. The non-statutory Acas Guide for Managers and Employers on Bullying and Harassment at Work offers a wide-ranging definition of bullying as: "Offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient". It does not matter whether or not the perpetrator deliberately *intended* to bully. It is also not necessary for such treatment to be related to a protected characteristic under the Equality Act 2010.

Typically, internal policies will usually spell out what types of behaviour may be viewed as bullying and will often seek to distinguish this from behaviours associated with active management of staff. However, things like speaking in an

aggressive and threatening way, shouting, swearing, mimicking, making comments that belittle or humiliate employees, levying excessive and undue criticism, and/or making unwarranted threats of disciplinary action will usually fall on the wrong side of the line.

Is it a grievance?

The statutory Acas Code of Practice on Disciplinary and Grievance Procedures (**Acas Code**) defines grievances as: "…concerns, problems or complaints that employees raise with their employer". This broad definition means that *any* disclosure by an employee that they are (or someone else is) being bullied at work would be viewed as a grievance for the purposes of the Acas Code.

Employers should not be tempted to avoid dealing with a complaint simply because it is felt that an overly sensitive employee is merely "venting" or looking for moral support. However, it may lead an employer to favour an informal response. Where matters are minor and/or the employee over-sensitive, resolution with the support of HR may be all that is required to get things back on track.

Yet employers should exercise caution when making such assessments and ensure that they build up a full picture of what has happened. As the Acas Guide to Bullying highlights: "People being bullied or harassed may sometimes appear to overreact to something that seems relatively trivial, but which may be the last straw in a series of incidents". Indeed, in the case of Green v DB Group Services (UK) Ltd EWHC 1898 (QB) the High Court held that the cumulative effect of the alleged conduct had to be considered, rather than individual

incidents. In that case, Ms Green was subjected to a long-term campaign of mean and spiteful behaviour which included actions such as blowing raspberries as she walked by, telling her she "stank", removing her image from the company intranet and hiding her work. In isolation, acts of this nature may seem minor but, together, they expose the employer to significant risk if no action is taken. Indeed, in Green, the bullying campaign led Ms Green to have a nervous breakdown and she was award £817,000 in damages.

In short, the learning point is that even an informal complaint about minor bullying may amount to a grievance requiring *some* form of response from the employer. In appropriate cases, it may be that the response is limited to informal resolution. However, what an employer should *not* do is turn a blind eye or hope that it blows over. Action of some sort will always be required.

What legal claims could the employee have?

Although there is no stand-alone legal claim for bullying, there are a suite of other legal claims available to an employee who has been the victim of bullying including claims for:

- constructive dismissal;
- personal injury;
- failure to make reasonable adjustments (if disabled);

- discriminatory harassment (if the bullying relates to a protected characteristic such as sex, race, age, religion, sexual orientation);

- victimisation (if the bullying followed a protected act such as complaining of sexual harassment);

- whistleblowing detriment (if the bullying was as a result of the employee raising concerns about, for example, regulatory breaches); and/or

- harassment under the Protection from Harassment Act 1997.

When deciding on how to respond to an informal bullying complaint, employers should, as far as possible, consider their exposure to these legal claims. The more serious the alleged bullying, the higher the legal risk and the more likely it is that the employer will need to pursue a formal approach.

What other factors are important?

Employers should consider other issues such as compliance with internal policies and procedures, and also with a regulator's expectations, if applicable. By way of example, financial services employers subject to the Financial Conduct Authority's (**FCA**) Senior Managers and Certification Regime must assess senior managers and certification employees to be "fit and proper". The "fit and proper" test focuses on

honesty, integrity and reputation amongst other things. Accordingly, allegations of bullying may mean that a Senior Manager or a Certification Employee is not fit and proper. Where such allegations are raised, it is imperative that the employer investigates to decide whether those allegations are well-founded and should be reported to the FCA.

Employers should also consider the wider consequences for their organisation of leaving bullying unchecked. The Acas Guide to Bullying highlights that the problem can fester and cause serious problems for the employer including poor morale and employee relations; loss of respect for managers and supervisors; poor performance; lost productivity; absences; resignations; and reputational damage.

Conclusion: what are the employer's options?

Employers should consider all of these preliminary issues in light of the complaint, including the severity of the alleged behaviour, the length of time it has been going on, the number of victims and the seniority of the perpetrator. They will then be in a position to form a view about what steps to take in response. There are four possible options.

- **Option 1 – Note the complaint and do nothing else:** this is a high-risk option and should be avoided in most cases.

- **Option 2 – Informal resolution:** where the complaint appears minor or a one-off, a better option for the

employer would be to propose some form of informal resolution such as a supported discussion or mediation.

- **Option 3 – Formal procedure with the employee's participation:** in more serious cases a formal investigation should be undertaken. This is the only route by which the employer can reach a conclusion on whether the allegations are true or false and issue sanctions and take remedial action. The employer should apply the procedure set out in its own Grievance Policy.

- **Option 4 – Formal procedure without the employee's participation:** there may be cases where the employee is simply unwilling to pursue a formal complaint under any circumstances. This puts the employer in the difficult position of having to go against the employee's wishes. However, in serious cases the risk of doing nothing is too high. Inaction jeopardises the health and safety of the employee (and possibly other employees), fails to afford the perpetrator the chance to explain their behaviour and exposes the employer to legal risk and possibly regulatory censure.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Employer not liable for an employee’s practical joke on a colleague which caused hearing loss

In the recent case of Chell v Tarmac Cement and Lime, the Court of Appeal said that an employer was not liable for an employee’s practical joke which injured a contractor working at its site.

A strategy for dealing with informal complaints of bullying

The Home Secretary, Priti Patel, has avoided being sanctioned for bullying on the grounds that no formal complaints were made against her at the time and she was unaware of the impact of her behaviour.