

New code on preventing and addressing workplace bullying

Effective from 23 December 2020, the new Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work (SI No. 674/2020 "the Code") provides employers with fresh legal direction on what constitutes workplace bullying and what employers are expected to do when presented with allegations of bullying.

What do employers need to know?

1. The Code replaces two earlier codes previously issued by the Labour Relations Commission (now the Workplace Relations Commission) and the Health & Safety Authority, so the Code is the up to date position on how to deal with allegations of workplace bullying.
2. Failure to follow the Code is not an offence in itself (i.e. an employee cannot bring a legal action against an employer solely on the basis that the employer is not following the Code) but the Code is admissible in any legal proceedings. Therefore lack of adherence to the Code is likely to impede employers defending constructive dismissal, personal injury or other claims arising from workplace bullying.
3. One of the key aspects of the Code is that it confirms the already established definition of bullying as *"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 be reasonably regarded as undermining the individual's right to dignity at work"* and provides some examples of bullying behaviour. Helpfully, it also confirms that disrespectful behaviour does not of itself constitute bullying and provides a non-exhaustive list of other behaviours which can often create tension in a workplace but are not considered to be bullying, such as:
 - Ordinary performance management;
 - Constructive feedback/advice about work which is not welcomed by the recipient;
 - Expressing a difference of opinion strongly;
 - Reasonable corrective or management type actions; and
 - Workplace conflict arising from a disagreement between colleagues.

4. The Code largely pulls together and restates the main provisions of the two previous codes of practice, but there are some significant new provisions:

New provision	What you should know
Mediation	Mediation is recommended as a " <i>valuable tool</i> " for resolving issues, particularly at an early stage. It is to be conducted by an " <i>impartial and competent third party</i> ". This does not necessarily mean that the mediator must be external, but the Code does state that suitably qualified mediators, whether internal or external, are to be used.
Informal process	<p>There are now two potential elements to the informal process – (i) the Initial Informal Process and (ii) the Secondary Informal Process. This two stage informal process could have the effect of prolonging what is often, a very lengthy process.</p> <p>The Initial Informal Process involves raising the behaviour with the person involved. The Secondary Informal Process can be used if the first process is unsuccessful or inappropriate. The Secondary Informal Process appears to have the hallmarks of an investigation under the Formal Process and may well lead to duplication and a more protracted process. This two stage informal process may not be suitable in all cases as it may be impractical.</p>
Scope of a formal investigation	The purpose of an investigation is to reach a determination as to whether, on the balance of probabilities, the behaviour(s) complained of have occurred, based on the facts before the Investigator. Critically (and this is a departure from the previous code of practice issued by the Health & Safety Authority) the Investigator does not decide whether or not bullying has occurred. This is an important distinction because deciding whether (i) certain incidents took place or (ii) an individual has bullied another, carries very different legal consequences. The latter question is one that should be decided in a disciplinary process, where the accused has more extensive fair procedure rights.
Employee Participation	All parties to the process have a responsibility to participate without undue delay in any investigation into a bullying allegation. This is a fairly obvious statement, but is helpful for employers who find themselves in the difficult position of trying to conduct an investigation in a timely manner while dealing with employees who are reluctant to participate in the investigation.
Appeal	The Code makes it clear that an appeal is not a re-hearing of the investigation, rather it is a review of the conduct of the investigation and adherence to fair procedures (for example, whether minutes of investigation meetings were shared appropriately, whether the parties were provided with an opportunity to explain their position to the Investigator etc). This is another helpful point for employers who will naturally be working towards concluding the investigation process, rather than re-opening or repeating the entire process at the appeal stage.
Disciplinary action	The code provides that specific details of disciplinary action against any party are confidential and other parties who were involved in an investigation into the matter are not entitled to that information. In practice it can arise that the employee who raised the bullying allegations seeks information as to what disciplinary action has been taken by the employer. This new provision provides much-needed confirmation that details of a disciplinary process (including any sanction arising from that process) are confidential.
Section 13 of the Industrial Relations Act 1969	Under existing law, an employee can, under section 13 of the Industrial Relations Act 1969, refer a bullying matter to the Workplace Relations Commission (WRC). The Code confirms that the role of an adjudication officer in hearing a section 13 case, is not to rehear the substance of the bullying allegation, but rather to consider if the employer conducted a fair investigation (similar to the guidance on internal appeals outlined above). If the adjudication officer determines that the employer did not conduct a fair investigation, he/she could recommend that the investigation be conducted again.

What is not covered by this Code?

Anonymous complaints of bullying

It is not uncommon for employees when reporting bullying behaviour to HR, to request that they remain anonymous. This is a difficult issue for an employer, particularly where it is faced with a group of employees making serious bullying allegations, but who are not prepared to participate in an investigation where they will be identified to the alleged bully. There is no obvious solution to this problem, but it would have been helpful if the Code had addressed the issue and acknowledged that, in the majority of these situations, the employer cannot take any significant action, aside from making efforts to improve the culture of the workplace.

Sharing of minutes and other documentation

This can be a complex issue but is not dealt with in any detail by the Code. Sharing of documentation can be relatively straightforward in investigations involving two individuals, for example, where one employee accuses another of bullying. The process becomes more complicated however, when groups of employees are involved, for example: some making allegations of bullying; some acting as witnesses; and some taking on the role of both complainant and witness. These complexities are not addressed by the Code. Further, the Code does not address practicalities such as the redaction of documents, which is often necessary from a confidentiality/data protection and relevance perspective.

The role of external third parties

The Code refers to the use of independent professional bodies and external mediators but is silent on the involvement of third parties in conducting investigations. Given the relatively frequent engagement of such third parties, it would have been a relevant topic for inclusion in the Code. The quality and expertise of such third party investigators can vary greatly and it is important for employers to be aware that engaging an external investigator does not absolve the employer from its obligations under the Code and its responsibility to ensure that a fair investigation is conducted.

Conducting investigations and related matters remotely

Given the publication of the Code at the end of 2020 and just prior to the government's publication of the National Remote Working Strategy, it would have been timely to include some guidance on this in the Code. Also, it is becoming increasingly common for many employees in Ireland to be managed by, or to work with, colleagues who are based elsewhere which means that many employee processes involve some element of remote participation. The process for conducting investigations remains largely the same, regardless of whether it is being conducted in person or remotely but pitfalls can often arise relating to the recording of meetings, the secure circulation of data/evidence and the monitoring or assessing of working relationships remotely.

What should employers do now?

Update your policy

Even if your policy is relatively recent, it is likely it will need to be updated, to take advantage of the clarifications outlined above (e.g. explanation of what is not bullying, the duty of employees to participate in an investigation without delay, how an appeal is to be conducted and so on). Your policy should clarify the organisation's approach to the complexity of the two stage informal processes and how this connects to a formal process.

Mediation

Given the emphasis on mediation in the Code, employers should consider offering mediation as a way to address allegations of workplace bullying. A mediation process can be much quicker, less expensive and less complex than an investigatory process. The WRC offers a free mediation service, which might be a good first option in trying to resolve bullying type conflicts. Even if the mediation option is declined by employees, the fact that an employer was willing to engage in mediation will be a helpful factor in the employer's defence of any subsequent employment claims.

Consider appointing a contact person

The Code refers to a contact person, described as someone to listen to and offer guidance to employees on a confidential basis. The contact person cannot also play a role in addressing or investigating allegations of bullying. It is not mandatory to have a contact person, but it is a good idea for larger organisations that can support such a role, to appoint a contact person.

General and bespoke training

The Code places significant emphasis on education and training to improve workplace culture and prevent bullying. We recommend

holding regular general training sessions with all employees (the beginning of a new year is a good time to plan for these types of employee education initiatives) and providing more bespoke training at management level for managers who are often tasked with investigating allegations of bullying. Anyone who has conducted such investigations will be well aware that they are often complex and time consuming, with a wide range of applicable legal principles and competing employee rights to consider.

For more information on this topic please contact [Bríd NicSuibhne](#), Associate, [Triona Sugrue](#), Knowledge Lawyer or a member of the ALG [Employment team](#).

Disclaimer: A&L Goodbody 2021. The contents of this document are limited to general information and not detailed analysis of law or legal advice and are not intended to address specific legal queries arising in any particular set of circumstances.