

New developments in the campaign against unwanted workplace banter.

MIDDLEMISS, S.

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New developments in the campaign against unwanted workplace banter

Abstract

Banter has been defined by the Cambridge Dictionary as “conversation that is funny and not serious.”¹ This suggests that it is a form of dialogue or conversation that is; jokey, non-threatening and wanted by the recipient. However, in reality this is often not the case and this article will consider the impact of unwanted and harmful banter in the workplace on its victims. It will also consider the efforts made by the UK Government and supportive agencies to help in dealing with banter where it is threatening or oppressive to the recipient. Having, analysed the current developments in the campaign to protect victims of banter recommendations will be made for improving the situation.

Recent Developments

Various commentators have covered the background and legal nature of this workplace problem in earlier articles so it is not my intention to repeat what was covered there.² Instead I will provide an update on recent developments in this area.

The following quote identifies what the issue is: “workplace banter is often part of the verbal and written interaction in most workplaces and can often be justified by employers as a necessary element of social interaction and team dynamics. Where the comments are positive in nature it can lead to a better workplace but, if they are negative this is likely to create a threatening and/or

¹ <https://dictionary.cambridge.org/dictionary/english/banter>

² Wilcock, A James, P Cooper, K (2019) Larking Around or Malicious Malarkey? The Impact and Management of workplace Banter 18th PORTUGAL International Conference on Arts, Business, Law and Education (ABLE-19) Lisbon Palmer, S When is 'just banter' not just banter? People Management 23 Jan 2020 <https://www.peoplemanagement.co.uk/long-reads/articles/when-just-banter-not-just-banter> Middlemiss, S “Another nice mess you’ve gotten me into” employers’ liability for workplace banter (2017) International Journal of Law and Management, Vol. 59 Issue: 6, pp 916-938

unwelcoming working environment.”³ Some kinds of language, gestures or jokes may be tolerable to some people, but, not to others. Surveys⁴ have found a high level of banter in workplaces and identified the nature and effect of unwanted banter. They have also found a general inability or unwillingness of employers to recognise the unacceptable nature of banter and tackle the issue.

However, a new study into banter by the Institute of Leadership & Management⁵ showed that it is a problem that needs to be addressed by employers as much as harassment and bullying. The researchers surveyed more than 1,000 people and found 4 per cent of them had left a job because of negative banter. The report also found that women were twice as likely as men to have been negatively affected by workplace banter. One in 10 women cited it as a cause of mental health issues. Despite the recent heightened media awareness over inappropriate behaviour at work engendered by the global #MeToo movement and others campaigns it was shown when the behaviour became intolerable women, were still less likely to challenge inappropriate behaviour than male colleagues (only 55 per cent of women would directly challenge banter compared with 73 per cent of men). The study also revealed that those workers at the midway point in their careers (31-40 years old) are most affected by banter and suffer poor mental health as a result. Younger workers are also suffering, with graduate trainees most likely to avoid work socials than any other group to escape bearing the brunt of inappropriate banter. There is no doubt that workplace banter is widespread and it has largely gone unchallenged in the past but, there is a growing awareness of the issues and a willingness of some employers to try and combat the behaviour. New guidance

³ Ibid Middlemiss p 917

⁴ E.g.’s Research undertaken by Ronin Research Services in 1997 available at: www.eurofound.europa.eu/observatories/eurwork/articles/social-partners-look-for-solution-to-bullying-at-work Also Allen & Overy LLP conducted a quantitative survey with 1,163 UK adult workers via YouGov. Discrimination at work – Part One: Office banter 05 February 2013 available at: www.allenoverly.com.

⁵ The Institute of Leadership and Management (2018) Banter Just a bit of fun or crossing the line? <https://www.institutelm.com/resourceLibrary/banter-just-a-bit-of-fun-or-crossing-the-line.html>

setting out steps for preventing harassment and victimisation in the workplace has been issued by the Equality and Human Rights Commission (EHRC).⁶ The advice includes developing effective policies, training and knowing how to deal with complaints. In time, the new guidance will become a statutory measure enforceable by the law. The EHRC said there was an overwhelming need for tougher action on harassment in the workplace and its guidance explains the different forms that harassment and victimisation that can take place under the Equality Act. It also reiterates that certain types of behaviour such as physical gestures, jokes or pranks, banter and physical behaviour towards a person or their property can amount to harassment or sexual harassment even if that is not what was intended by the perpetrator. Harassment can include offensive, humiliating, intimidating, hostile or degrading behaviour relating to sex, race, age, sexual orientation, gender identity, disability or religion. In October 2019 a report was prepared for UNISON by the Labour Research Department (LRD) on reducing the likelihood of sexual harassment at work.⁷ It found there were certain factors that were often inter-linked that were likely to increase the chances of sexual harassment taking place. These included: male-dominated environments; industries where sexual harassment was generally viewed as part of the job; lone working; insecure contractual relations; unfavourable organisational culture; large power differentials; weak oversight of middle management and lack of encouragement to report incidents. The starting point is to have up to date and comprehensive Equality and Diversity and Anti-Bullying and Harassment policies in place. It is necessary that an employer has a clearly worded policy that underlines that employees must not harass, bully or intimidate other employees for reasons related to one or more of the protected characteristics set out in the Equality Act 2010. Employers then need to demonstrate that they live

⁶ <https://www.equalityhumanrights.com/en/our-work/news/new-guidance-calls-employers-step-and-protect-staff-harassment>

⁷ <https://www.unison.org.uk/content/uploads/2020/02/25965-1.pdf>

by these policies in practice. As a minimum this should include equality and diversity training for all employees, and specific training for those in management positions. Employers should also demonstrate that employees are encouraged to raise concerns where they arise and that these are investigated and dealt with appropriately for example via the employer's disciplinary and grievance procedures. Also, it would be useful to point out and that harassing or bullying behaviour may amount to gross misconduct.

Unlike most conflicts at work, workplace banter is often a long-lasting conflict where one person is systematically harassed or bullied by one or more colleagues or supervisors often resulting in damage to the victim's psychological and physical health. In most cases an allegation of verbal bullying will be disputed. At very best it will be admitted but, will often be downplayed by the employer as a harmless case of workplace banter. In a survey in 2018 of 1,000 lawyers and other employees working in the UK's top 100 law firms ⁸ the researchers found that 42 per cent of women said they had experienced sexual harassment at work. This ranged from suggestive comments to propositioning and unwanted physical contact. Many of the women said they felt unable to confront senior male colleagues because they were so critical to their futures. Law firms have also been accused of trying to cover up an endemic culture of chauvinism and protect their partners where they are harassers or bullies by making severance pay for victims who have had to resign conditional, on them signing a non-disclosure agreement (NDA). There are plans on the part of the UK Government following a consultation in 2019 that the use of gagging clauses such as NDAs should be controlled and restricted in the case of harassment and bullying cases. This will

⁸ The Lawyer which is a trade publication <https://www.thelawyer.com/metoo-lawyers-sexual-harassment-survey-2018-2/>

be included as part of whistleblowing provisions in the Employment Rights Act 1996⁹ which is going through parliament at the present time.¹⁰

Legal Developments

While there are a number of possible legal actions which could be available to victims of unwanted banter¹¹ currently the most likely action to be brought by a victim of workplace banter is an action for harassment under section 26 of the Equality Act 2010.¹² The claimant will need to establish that the harassment is perpetrated against them because they have a discriminatory characteristic such as; age,¹³ disability, gender reassignment, race,¹⁴ religion or belief, sex or sexual orientation.

The participation of the victim in the workplace banter does not preclude an employment tribunal finding that the victim of banter has suffered sexual harassment.¹⁵ Increasingly employment tribunals have recognised the harmful effects of long-term verbal harassment and the invidious position that victims are placed in (often on a daily basis) and have provided a remedy for persons subjected to unwanted and unwelcome banter.

However, the context in which the banter occurs can still be important and the background circumstances including the culture of banter in the workplace can in certain circumstances assist

⁹ Specifically, amendments to section 43J and an additional clause to section 47B

¹⁰ <https://s3-eu-west-1.amazonaws.com/public-concern-at-work/wp-content/uploads/images/2019/11/05160222/Protect-Whistleblowing-Bill-Nov-2019.pdf>

¹¹ Supra 3 Middlemiss

¹² Harassment is where (1) A person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic and (b) the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

¹³ *Clements v Lloyds Banking plc and others* EAT/0474/13

¹⁴ *Leader v Leeds City Council* 1808211/2018 *Hoch v Thor Atkinson Steel Fabrications* Case No: 2411086/2018 *Karavadra v B.J. Cheese Packaging Limited* ET/1305782/2018

¹⁵ *Middlemiss, S Follow the Yellow Brick Road: Munchkins Restaurant Ltd and another v Karmazyn*, Liability of employers for long term harassment *International Journal of Discrimination and Law* (2011) Vol. 11 Part 3 pp 140 – 149 see *Minto v Wernick Event Hire Ltd* ET/2340643/09, *Prewett v Green King Services Ltd* ET/1800566/19

in the defence of an employer in a discrimination claim.¹⁶ A recent European Court of Justice (CJEU) decision emphasised that employers must also be careful with their comments outside the workplace e.g. on the radio or television or through social media.¹⁷

Conclusion

In 2019 the chief executive of the Equality and Human Rights Commission (EHRC)¹⁸ wrote directly to the bosses of 400 top UK companies and called on them to do more to combat sexual harassment in the workplace (including workplace banter). The letter pointed out they needed to increase action against misconduct and called for ‘a dramatic shift in workplace cultures.’ New guidance on sexual harassment in the workplace issued by the EHRC will become a statutory code of practice in due course.¹⁹ It reminds employers that unwanted ‘banter’ in the workplace could amount to harassment or sexual harassment. It states that: ‘What one worker or even a majority of workers might see as harmless fun or ‘banter’, another may find unacceptable. The guidance also highlighted that unwanted behaviour that happens outside of the office, such as in the pub or online, could still be considered as happening in the course of employment. Ann Francke the chief executive of the Chartered Management Institute caused a furore when she said managers should make workers cut back on workplace chat about football or cricket, raising questions around inclusivity.²⁰ So workers who had no interest in these things should not be exposed to discussions about them in the workplace on a regular basis. This could be said to interfere with worker’s

¹⁶ Evans v Xactly Corporation Limited UKEATPA/0128/18/LA

¹⁷ NH v Associazione Avvocatura per i diritti LGBTI (Case C-507/18).

¹⁸ Rebecca Hilsenrath,

¹⁹ EHRC (2020) Sexual harassment and harassment at work: technical guidance

<https://www.equalityhumanrights.com/en/publication-download/sexual-harassment-and-harassment-work-technical-guidance>

²⁰ Don’t kick workplace banter into touch February 3, 2020 <https://www.fnlondon.com/articles/the-careerologist-dont-kick-workplace-banter-into-touch-20200203>

freedom of speech but, employers need to protect the working environment of all workers which could represent an acceptable defence.

This issue has achieved increased significance as more research is showing that this behaviour is commonplace and widespread and legal actions are being brought on the basis of a number of equality grounds. There is still a reluctance on the part of employers and management to accept that it is a real issue and further research, improved guidance issued such as that produced by the EHRC and more specific legal protection might help overcome employers' reluctance to take action and improve the position of its victims. The following quote neatly summarises the process needed to be undertaken. "Just because a problem is difficult or has been around for a long time does not mean it is intractable...Trade unions, employers and the government all have a role to play in stamping out sexual harassment...Recognising the extent of the problem is a first step. The next step is to take action to remedy the problem."²¹

²¹ TUC Survey (2016) Still just a bit of banter? p 27
<https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>