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“Another nice mess you’ve gotten me into”[1] Employers Liability for Workplace Banter

Abstract

Banter has been defined by Merriam-Webster in their dictionary as “to speak to or address in a witty and teasing manner. ”[2] This suggests that it is a form of dialogue or conversation that is; welcome, non-threatening and appreciated by the recipient. However, this is often not the case and this article will consider the legal rules dealing with banter where it is threatening, unwanted or oppressive to the recipient. Where there is a discriminatory aspect to the banter the protection provided under equality law will be considered. Banter can be directed at workers with different characteristics disability, age, religion, sex, race or sexual orientation and this article will concentrate on discriminatory banter whatever the basis.

The different types of dialogue falling under the term banter will be analysed and the extent to which legal protection is in place to deal with it will be considered. The statutory legal rules dealing with harassment and bullying in the UK are the most relevant to controlling workplace banter and accordingly will be given primary consideration. Finally recommendations will be made for improving both management practice and the law in this area.

Introduction

The difference between verbal harassment and normal workplace banter is seen when the comments are of a sexual nature (or offend anyone of a number of protected classes of worker under the Equality Act 2010). [3] If any conversation between workers contains a sexual component and one worker objects, this can conceivably be judged a case of verbal harassment and must be dealt with in the appropriate

[1] An amended version of the famous saying of Stan Laurel
[2] https://www.merriam-webster.com/dictionary/banter
[3] The Equality Act 2010 prohibits harassment on the grounds of race, sex, disability, age, sexual orientation and religion/belief.

manner. Some kinds of language, gestures or jokes may be tolerable to some people, but, not to others. Members of the latter group may feel that the banter is aimed at them personally, due to a particular characteristic of theirs and may find such verbal behaviour offensive and an assault on their dignity. There was considerable interest recently concerning the derogatory comments made on air by Sky Sports presenters Andy Gray and Richard Keys about a female referee and her ability to do her job. Both of the presenters were suspended and when further allegations of sexist behaviour came to light it resulted in the former person being dismissed and the latter resigning his job.[4] While this is a high profile example of sexist banter it does illustrate the harmful nature of the behaviour in the workplace and the serious consequences for the perpetrators. [5] 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 unwelcoming working environment. [6] As the following quote suggests there can be a plus side to workplace banter. "Sexualized encounters in some work situations actually can contribute to building camaraderie in a workforce. " [7] However, inappropriate or misplaced banter can be perceived by some employees as offensive.

While sexist banter is traditionally thought to be primarily directed by men against women (as in the case above) recent research has shown that banter can often be directed at men by women. [8] To assist

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[4] Sky Sports Presenters in Sexism Row over off-air comments about female linesman The Telegraph 21.03.14 www.telegraph.co.uk

[5] More recently Top Gear presenter Jeremy Clarkson has been in trouble with the BBC concerning highly offensive racist banter which he made off air. He has subsequently been let go by the BBC due to more extreme action on his part.

[6] See article at www.pressreader.com/Canada/the-globe-and-mail-metro.../TextView

[7] A study by Kari Lerum, an assistant professor of sociology and interdisciplinary studies at the University of Washington in 2005 examined sexual banter and power in the workplace. It found that within certain cultural and organizational contexts, these encounters can help create a sense of belonging and help people to have some control over their working conditions. http://www.washington.edu/news/2005/02/23/sexual-banter-in-workplace-may-have-its-benefits-study-shows/

[8] Research undertaken by Ronin Research Services in 1997 reviewed at https://www.eurofound.europa.eu/observatories/eurwork/articles/social-partners-seek-solution-to-bullying-at-work

in understanding this topic what follows is consideration of all the recent research undertaken in the UK into this form of workplace behaviour.

Research

A survey undertaken by the insurance firm Hiscox [9] found that workplace banter was widespread and often was of a racist or sexist nature. The researchers separately questioned bosses of 248 small and medium sized enterprises and 1,000 of their workers about the behaviour in the workplace. In comparing the responses from both sample groups of employers and employees it revealed a considerable gap in attitudes between them concerning office banter. The study found that two-thirds of workers swear in the workplace while more than one in three employees will laugh at sexual innuendo or regularly hear jokes of a sexual or racist nature. The study also found that 70% of UK workers claim that bad behaviour is rife in their place of work and admitted that the regular occurrence of racist jokes, arguments and bullying could offend colleagues. Questionable workplace conduct reported in the survey included: use of nicknames for colleagues (61%); swearing (59%); use of pet names such as ‘love’, ‘babe’ and ‘hon’ (47%); hugging (42%); banter of a sexual nature (35%); arguments/shouting (33%); jokes of a religious, racial or sexual nature (28%); discussions about most/least attractive colleagues (16%) and bullying (15%). Seven out of ten SME bosses surveyed said they were unconcerned about the threat of legal action. However, more than half (55%) of the employees surveyed claimed they would consider legal action if they thought that office behaviour had crossed the line. Alarmingly around half of the managers said that they find it acceptable to display sexy celebrity calendars in the workplace or rate the relative attractiveness of their colleagues (49%). Almost nine in ten (87%) of SME bosses said their staff needs to be grown up over office antics, with a remarkable eight in ten (82%) believing there is nothing wrong with office banter. Also over forty

[9] The research which was commissioned by Hiscox was undertaken by Redshift between 9 and 14th November 2009

percent of employers believed that it is not their role to regulate questionable workplace conduct. In contrast around half of the employees surveyed disagreed with this view and believed that managers should do more to deal with this type of behaviour. What this research illustrates is there is a stark divide between employer and employee attitudes to this behaviour and the vast majority managers and employers generally don't see it as a workplace problem.

Another study by the law firm Peninsula found that 85 per cent of employers admitted that they take complaints of sexual harassment from male employees less seriously than complaints brought by women. There is some evidence that men are often victims of workplace banter and when they complain about it they are not given the same level of support as females in a similar position. Of the 2,300 men surveyed, two-thirds of them said sexual banter was inappropriate at work. One member of the firm that undertook the research concluded that: "many workers are under the opinion that sexual banter is an acceptable norm in the work place. But not everyone is happy with these types of jokes and the situation is a consistently growing problem for employers. The balance has shifted and it is now women who are aiming sexual banter at male workers. The majority of men don't feel that gender discrimination applies to them, and tend to just accept any banter aimed at them. Male employees should not feel they can't report incidents to their employer. It is an employer's responsibility to investigate harassment claims, whatever the employee's gender." [10]

Scant research has been done into this workplace problem and what analysis there is identifies the gulf between employers' and employees' perception of the problem. It also identified that both men and women can be victims of unwanted banter. However, men are much less protected in the workplace than women. A survey by Ronin research services [11] into cyber bullying (or flame-mails) found that staff often receives abusive messages via internal electronic mail systems and men were most commonly the perpetrators of cyber bullying as well as the victims. They discovered that men were

[10] David Price of Peninsula

[11] Supra 8

five more times likely than women to send this type of mail and twice as likely to receive them. A worrying finding was that the most common response to cyber bullying was to reply with another similarly abusive message. A third of the respondents said that they actually stopped communicating with colleagues and one in 70 people said that they had left their jobs because of the messages. The legal firm Allen & Overy (A&O) in 2013 conducted research into workplace banter. [12] It claimed that despite 80% of over 1,000 respondents claiming that they could easily identify unlawful comments, their answers to the hypothetical scenarios presented to them showed otherwise.[13]

Legal Background

One of the difficulties of dealing with unwanted banter in an organisational or legal sense is that unless a worker expresses his or her concerns to their employer about the content or tone of the banter then the perpetrator can and will continue unchallenged to make unacceptable comments for a considerable time. This was the situation for a group of women in the case of *Munchkins Restaurant Ltd and anor v Karmazyn and ors* [14] considered below. Workplace banter is part of verbal and written dialogue in many workplaces. However, inappropriate or misplaced banter can be perceived by some workers as offensive. [15] In a practical sense for the victim it can be particularly awkward to deal with especially, where the perpetrator is their manager, as in the *Munchkins* case. [16] The victim will often fear they will not be believed or that the employer will support the manager over them. They may also fear some form of victimisation for raising a complaint. However, the case law (considered below) illustrates that

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[12] Allen & Overy LLP conducted a quantitative survey with UK adult workers via YouGov**.** Discrimination at work – Part One: Office banter 05 February 2013. All figures, unless otherwise stated in the report were from YouGov plc. The total sample size was 1163 adults.

[13] www.allenovery.com

[14] (2010) ALL ER (D) 76 (Jun)

[15] E.g. unwelcome remarks about a person's age, dress, appearance, sexual orientation, disability, race or marital status.

[16] 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

if banter is perceived as offensive by the recipient it can often lead to complaints of harassment or bullying.

In the UK, for some time there has been a general awareness of the problems and risks associated with workplace bullying and harassment. This has been accompanied by an acceptance amongst some employers that the issues need to be addressed through their; management culture, policies, procedures and overall conduct.

Nonetheless, legal claims for bullying, harassment and stress are on the increase, especially in the context of cyber bullying and the social media. In the main, these claims are: actions for negligence for stress related illness caused by bullying; [17] claims for harassment under the Equality Act 2010 (in relation to the protected characteristics) and actions for constructive dismissal. [18] There have also been a few claims for work-related harassment successfully brought under the Protection from Harassment Act 1997 which will be considered later.[19] Bullying and harassment has become a global phenomenon which is often dealt with a breach of health and safety rules where there is no discriminatory aspect to the case. In 2011 a Monster Global Poll surveyed workers worldwide, asking "have you ever been bullied at work?" Of the 16,517 respondents 64% answered that they had been bullied, either physically hurt, driven to tears, or had their work performance affected and 16% answered that they had seen it happen to others. Of the European respondents 83% reported that they had been physically or emotionally bullied. Other findings were 65% in the Americas had been bullied and 55% in Asia. Although the precise number of these cases that involve workplace banter is unknown it seems reasonable to assume the figure is high.

Under workplace health and safety legislation, employers in most countries have a duty of care to provide a safe work environment for employees. This requirement is increasingly interpreted to require ensuring persons in the workplace are both mentally and physically safe at work and that their health

[17] *Sutherland v Hatton* (2002) IRLR 263
[18] Section 95 of Employment Rights Act 1996
[19] *Majrowski v Guys and St Thomas NHS Trust* 2006 UKHL 34

is not adversely affected by work, and has been also interpreted to require a workplace free from bullying.[20]

The Canadian province of Ontario imposed obligations on employers to protect workers from psychological harassment in the workplace. An employer must have a written workplace policy with respect to harassment and violence and must provide a worker with information and instruction on the contents of the policy. An Ontario court awarded $1.46 million to a former Walmart assistant manager in 2012 for mistreatment by her boss, the highest such award in Canadian history. [21]The assistant manager brought an action after feeling forced out of the company where she had worked for 10 years. She claimed for; intentional infliction of mental suffering, sexual harassment and discrimination and assault. The jury found that she suffered daily abuse from her manager who would berate her with profane and insulting language over six months, often in front of others.

Australia has introduced anti-bullying jurisdiction to the Fair Work Commission as of January 2014. A worker in Australia who reasonably believes he/she has been bullied at work may apply to the Fair Work Commission and if an investigation determines that workplace bullying has occurred they will have a remedy. [22] The Fair Work Commission can issue stop orders to the perpetrators of bullying but does not award compensation. However, other actions are available to claim compensation namely; personal injury, breach of contract and breach of statutory duty at common law. Earlier this year the Supreme Court of Queensland found that an employer breached its duty of care to a former assistant manager through bullying and caused her injury and awarded her just under $240,000. In this case having an anti-bullying policy was not enough. Harassment and bullying is contrary to various statutes

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[20] Pinkos Cobb, E Bullying, Violence, Harassment, Discrimination and Stress - Emerging Workplace Health and Safety Issues" provides a global overview of laws and developments in over 50 countries in Europe, the Asia Pacific Region, the Americas, the Middle East and Africa, and the US.

[21] Boucher v. Wal-Mart Canada Corp., 2014 ONCA 419 (CanLII)

[22] Worker includes an individual who performs work in any capacity including; an employee, a contractor, a subcontractor, an outworker, and an apprentice.

most notable of which are: the Racial Discrimination Act 1975 (Cth) (RDA) which prohibits discrimination in employment, the Sex Discrimination Act 1984 (Cth) (SDA), the Disability Discrimination Act 1992 (Cth) (DDA) and most recently the Age Discrimination Act 2004 (Cth) (ADA). Each of the States and Territories have also introduced their own protection which may overlap and extend the protection afforded under the federal regime.

A poll in 2010 carried out by Zogby and commissioned by the Workplace Bullying Institute in the United States showed that 35 percent of Americans reported being bullied at work and another 15 percent reported having witnessed it. This is about half the figure for Europe as a whole as reported in other polls. Significantly 68 percent of the reported bullying in the 2010 poll was undertaking by someone of the same gender.[23] There is no specific US law that protects workers rights' to dignity at work. The protections afforded to targets of workplace harassment provide some level of protection for employees experiencing bullying but, in reality these harassment laws often fail to address the majority of bullying incidents**.** Harassment in the US is unlawful under title VII of the Civil Rights Act of 1964 as amended, the Age Discrimination in Employment Act of 1967 (ADEA) and the Americans with Disabilities Act of 1990 (ADA). [24] Many forms of workplace harassment are also actionable under state tort law. Further, common law claims such as invasion of privacy and intentional infliction of emotional distress may also provide some protection for employees' dignity at work but, not much. There is no current federal or state law in the United States expressly prohibiting workplace bullying. This may change shortly as 25 states have introduced legislation that would make workplace bullying illegal. It is uncertain whether any of these bills may be enacted into law, however the widespread introduction of bills that are against bullying in the workplace demonstrates that state legislatures are paying attention to concerns raised by victims of bullying.

[23] Workplace Bullying Institute, Results of the 2010 and 2007 Workplace Bullying Survey (2010): http://www.workplacebullying.org/wbiresearch/2010-wbi-national-survey/.

[24] The Equal Employment Opportunity Commission (EEOC) has issued guidelines interpreting the scope of prohibited sexual harassment, as well as enforcement guidance on employer liability for harassment by supervisors.

Workplace banter and harassment and bullying

Workplace banter can represent harassment or bullying and can be perpetrated by someone in a position of authority over the victim such as a manager or supervisor [25] or, by a colleague or group of colleagues [26] in the workplace. Whatever form the behaviour takes it will often be unwarranted and unwelcome to the individual or others around them. Harassment or bullying in this context will often occur face to face and involve unwanted verbal comments e.g. openly critical comments, offensive language or cruel jokes. However, it can also be carried out through written communications, phone calls, email messages and inputs on someone's personal profile on social network sites. [27] Where it is verbal comments that is the basis of the claim it will be difficult for the claimant to prove that they were made unless they were overheard by others in the workplace. They will need to convince a tribunal that their evidence about what happened is more credible than the respondent's version of events.

Harassment and bullying

It is important to outline the legal rules dealing with harassment and bullying because currently this is most likely avenue for legal redress for victims of workplace banter. Unacceptable and/or unwanted workplace banter often represents unlawful harassment under the Equality Act 2010 (where it is a response to a characteristic of the person [28] which is protected) or a breach of the Protection from Harassment Act 1997. [29] Section 26 of the Equality Act 2010 defines harassment as 'unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.' As this suggests harassment is unwanted conduct affecting the dignity of employees or workers in the workplace and must relate to a protected personal characteristic of an individual

[25] *Munchkin Restaurant and another v Karman* [2010] EWCA Civ. 1163
[26] Sometimes referred to as mobbing
[27] E.g. cyber bullying
[28] The protected characteristics are; age, sex, race, disability, religion or belief or sexual orientation.
[29] Bullying can also represent the basis for these legal actions.

employee or worker covered by the Equality Act 2010. [30] Under section 26 (2) of the Equality Act 2010 additional protection is provided for victims of sexual harassment as follows: A also harasses B if

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).[31]

(3) A also harasses B if

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b),[32]

and (c) because of Bs rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct. Additionally section 11 of the Equality Act defines sex as" in relation to the protected characteristic of sex (a)a reference to a person who has a particular protected characteristic is a reference to a man or to a woman; (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex. The harassment may an isolated incident or a few instances (e.g. persistent behaviour over time which often escalates in seriousness). [33] Under section 26 (4) a key consideration is that the action or behaviour undertaken by an individual or group is regarded as demeaning and unacceptable to the recipient (or witnesses) of the behaviour. A comment or action that is offensive to one person at work may be innocuous to another. It usually depends on the circumstances in which the banter takes place and the particular sensitivities of the victim. Equally important is that the tribunal considers the other circumstances of the case and whether it is reasonable for the conduct to have the effect of harassment. The employer can also be held liable where an employee (or a group of employees) harasses a fellow employee. This liability attaches to the employer even when he knows nothing about it [34] provided the harassment took place during the course of the employment of the harasser/s. The term 'course of

[30] Supra 22

[31] S26 (1) (b) the conduct has the purpose or effect of (i) violating Bs dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

[32] Ibid

[33] *Insitu Cleaning Co. Ltd v Heads* (1995) IRLR 4, EAT

[34] Section 109 of the Equality Act

employment' was broadly defined by the Court of Appeal in *Jones v Tower Boot Ltd*.[35] The employer may be held liable for harassment which takes place off the employer's premises. [36] However, they will not normally be liable for third party harassment.[37]

To defend a claim of harassment it is often important for the employer to be able to argue that, even if the harassment took place during the course of the harasser's employment, they had taken all reasonable steps to prevent it. [38] Whether liability should be imposed is essentially a question of fact for the employment tribunal hearing the case to decide. Where a harassment claim is successful the primary remedy is unlimited compensation which can include a financial element for injury to feelings which is particularly relevant to these type of cases. [39] The case must be brought within three months of the alleged discriminatory act taking place. If a person wants to make a claim after that period it is at the tribunals' discretion whether they allow them to do so and this will only be forthcoming when it is 'just and equitable' in the circumstances. [40]

Bullying is not specifically defined in law but, Acas, in their advice leaflet for employees, provides the following definition: "bullying may be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient." [41] The benefits of this definition are that it does not require intentional behaviour on the part of the perpetrator and it rightly focuses on the impact of the behaviour on the recipient. [42]

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[35] (1997) IRLR 168, CA
[36] Chief Constable of Lincolnshire Police v Stubbs (1999) IRLR 81
[37] The provisions dealing with 3rd party harassment in the Equality Act 2010 were repealed by the Enterprise and Regulatory Reform Act 2013.
[38] S 109
[39] S 124
[40] S 123 Where the conduct in respect of a claim under the Act continues over a period of time, the time limit starts to run at the end of that period. Where it consists of a failure to do something, the time limit starts to run when the person decides not to do the thing in question. (See explanatory notes of the Equality Act 2010)
[41] See the ACAS Advice leaflet (2010) Bullying and harassment at work: a guide for managers and employers

[42] In this latter respect it is similar to the definition of harassment set out in S. 26(1) of the Equality Act 2010.

Bullying behaviour has a serious impact on its victims. It is often an abuse or misuse of power which upsets, intimidates, undermines or mentally and/or physically harms the recipient. In respect of banter the bullying will most often take the form of verbal comments of a critical or demeaning nature. Bullying, has been recognised as a breach of an employee's (victim's) contract of employment [43] and breach of an employer's duty of care under tort that is owed to an employee. [44] Where there is a discriminatory nature to the bullying it will also form the basis for a discrimination case. What follows is an analysis of the case law dealing with banter in the workplace.

Equality Law

The relevant case law on workplace banter mainly derives from harassment law. [45] In considering verbal or written banter in the workplace it is important to remember that a single incident can be sufficient to constitute unlawful harassment. In a sexual harassment case involving a verbal comment *Insitu Cleaning Co Ltd and another v Heads* [46] the employer had employed Mrs Heads, who was 43 years old, as an area supervisor. Mr Brown who was a much younger man than her (and the son of two of the company's four directors) had made grossly offensive remarks of a sexual nature to her. She claimed he had said to her, in the presence of a director and another employee, Hiya, big tits. This remark had severely distressed her. After an unsuccessful attempt at resolving the issue internally Mrs Heads resigned and complained to an industrial tribunal of unlawful sexual discrimination and constructive dismissal. The EAT upheld the industrial tribunal's decision that the woman had suffered sexual discrimination from a single sexual remark made to her by her employer's son. In *Clements v Lloyds Banking plc and others* [47] the claimant was an employee in his 50s. His manager had concerns about his performance and said to him during a conversation "you are not 25 anymore" and he

[43] The implied term of trust and confidence
[44] Waters v Commissioner of Police of the Metropolis (2000) IRLR 720 HL
[45] Middlemiss S Liability of Employers for Verbal Harassment in the Workplace Irish Employment Law Journal (2009) Vol. 6 No. 1 pp 8 - 15

[46] (1995) IRLR 4 EAT
[47] EAT/0474/13

suggested moving him to a different role. He resigned and claimed constructive dismissal following further conduct by the bank. The employment tribunal decided he was constructively dismissed but, that the dismissal was not tainted by age discrimination. However, they decided that the comment about C's age was discriminatory which once again illustrates that a one-off comment can amount to harassment. A similar decision was reached by the Employment Appeal Tribunal in a claim for racial harassment. In *Queenscourt Ltd v Nyateka* [48] a racial harassment claim was brought by a black woman of Zimbabwean origin who worked as a team leader in a fried chicken restaurant. There was a good deal of racist banter amongst members of staff and on occasion, female employees would refer to one another as "bitch" and black employees would call each other "nigger" or "paki". However, it was not regarded as acceptable for white employees to use language of this nature and the restaurant manager, who was white, did not engage in such banter. When the employee was denied access to a meeting after she had raised concerns about her pay she asked the restaurant manager the reason for being excluded from the meeting. He responded by saying 'maybe it's because I'm being racist to a black woman'. The employee was distressed by this comment and raised a grievance. This was upheld by the company and the restaurant manager was issued with a warning. The employee brought a claim for racial harassment. The tribunal found that although the comment was meant in jest, it was more than likely delivered in a sarcastic tone and it caused the employee distress. The tribunal therefore concluded that the comment amounted to racial harassment. The company appealed, arguing that the comment could not amount to harassment in circumstances where other members of staff, including the claimant, engaged in a high level of racist and sexist banter. The EAT upheld the findings of the employment tribunal. [49] What these cases illustrate is that a single mis-directed comment can cause sufficient harm

[48] EAT 0182/06

[49] The fact that the claimant had on occasion referred to white women as 'white bitches' did not alter the fact that the manager's comment had caused the employee distress and amounted to harassment. The EAT in the Nyateka cases said that this is a question of fact and degree and that the impact of the conduct that is unwanted must be deduced from the available evidence.

to the recipient to justify a finding of unlawful harassment even in a workplace where banter between workers is common-place as in the latter case.

Employment tribunal's have held that even where the harassment represents a minor incident where there is evidence of a number of minor incidents of harassment, the claimant is entitled to treat the cumulative effect of the behaviour as sufficient harm to substantiate a claim of harassment. This is illustrated in *Driskel v Peninsula Business Services Ltd.*[50] Ms Driskel was employed by Peninsula Business Services Ltd as an advice line consultant. After a while a new boss was appointed and she had a difficult time with him. She applied for a job which would have seen her working directly with her boss. On the evening before the interview, Ms Driskel alleged that her boss told her she had better attend the interview in a short skirt and see-through blouse, showing plenty of cleavage in order to persuade him to give her the job. She did not object to the comments at the time. When she turned up for the interview the next day, she pointed out she was not wearing either a see-though blouse or a mini-skirt to which he replied that what she was wearing would have to do. As she was subjected to appalling remarks from her boss she claimed sex discrimination. The tribunal rejected her claim because, it concluded that the various incidents were trivial and did not amount to sexual harassment. Also the claimant had not complained about her boss's behaviour at the time. Also they accepted that the remarks prior to the interview were intended to be jocular and were incapable of being taken seriously and therefore were not discriminatory. The EAT in upholding her appeal held that the tribunal was wrong to look at each incident of alleged sexual harassment in isolation. It should have considered whether the remarks overall amounted to less favourable treatment and a detriment within the meaning of sections 6(2) (a) and (b) of the Sex Discrimination Act 1975. [51] The EAT held that there is no need for the final act to be 'unreasonable' or 'blameworthy' conduct by an employer. The quality that the 'final straw' must have is that it should be an act in a series of incidents whose cumulative effect is to

[50] (2000) IRLR 151 EAT

[51] Now section 26 of the Equality Act 2010. The EAT in the Driskel case also found the employment tribunal was also wrong in treating the sexual banter suffered by the complainant in the same way as if the remarks had been made to a male employee. The tribunal should have asked itself whether the complainant was the victim of sex based treatment.

amount to breach the implied term of trust and confidence. The act does not even have to be of the same character as the earlier acts. The essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence.[52] The importance of this for victims of unwanted workplace banter is clear. It means that even where comments etc. are commonplace in the workplace and minor in their impact on the victim they can still be protected against where it is part of a pattern of unwanted comments etc. [53] . In *Minto v Wernick Event Hire Ltd*, [54]a female employee, was subjected to daily remarks that were of the same sexual nature as in the "Carry On" films. Her manager claimed that banter, including strong language, was an everyday fact of working life. However, the tribunal found that this amounted to sex discrimination and harassment. They usefully commented that "banter' is a loose expression, covering what otherwise might be abusive behaviour ...It can easily transform into bullying when a subordinate employee effectively has no alternative but to accept/participate in this conduct to keep his or her job."

Where the organisational culture is a key element of unwanted workplace banter the tribunals and courts have been more inclined to find an employer liable under equality law for the consequent harm to the victim.

Workplace banter, organisational culture and legal liability

The following cases illustrate that the existence of an organisation culture that condones workplace bullying or harassment can be instrumental in the judiciary finding an employer liable under equality law. Organisational culture is a familiar term nowadays and has been defined in the following terms: "The values and behaviours that contribute to the unique social and psychological environment of an organization."[55] It is made up of a range of things but primarily relates to the managements' philosophy

[52] *Abbey National Plc. v Fairbrother* (2007]) IRLR 320 EAT
[53] *Reed v Steadman* (1999) IRLR 299 EAT
[54] ET/2340643/09
[55] http://www.businessdictionary.com/definition/organizational-culture.html#ixzz39hHNHxW9

and behaviour. [56] This clearly influences employees' attitudes to issues such as bullying, harassment and workplace banter. [57]

The danger for employers of permitting or encouraging a culture in the workplace which is discriminatory was illustrated in the case of *Moonsar v Fiveways Express Transport Ltd.* [58] where male colleagues of the female claimant had downloaded pornographic images onto computer screens. Although she was never shown the images and had not made any complaint at the time [59] the Employment Appeal Tribunal found that this treatment would undermine the claimant's confidence and was an affront to her dignity and was therefore discriminatory. It decided that, viewed objectively, the men's behaviour could be regarded as degrading or offensive to a woman and it was therefore potentially less favourable treatment. The EAT said in a case like this it is enough that the discriminatory behaviour is happening irrespective of whether or not the claimant is affected by it directly. This suggests that provided a claimant can establish that sexist or homophobic banter took place it is not required that the claimant heard it or overheard it. [60] Further, to this it was held in Munchkins Restaurant Ltd and another v Karmazyn and others [61] that the fact that the employee has tolerated conduct for years did not mean that it cannot be unwanted. [62] The organisational culture of the employer that allowed systematic and sustained verbal harassment of employees was a factor in establishing their liability. The *Munchkins* case is also authority for the fact that even when a claimant has participated in sexual banter in the workplace, this does not preclude an employment tribunal

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[56] Ibid "Organizational culture includes an organization's expectations, experiences, philosophy, and values that hold it together, and is expressed in its self-image, inner workings, interactions with the outside world, and future expectations. It is based on shared attitudes, beliefs, customs, and written and unwritten rules that have been developed over time and are considered valid."

[57] Read more at: http://www.businessdictionary.com/definition/organizational-culture.html#ixzz39hIht6ph

[58] [2004] All ER (D) 110 (Nov)

[59] She relied on the EAT's decision in the *Driskel* case to support her view that the men's behaviour was so obviously detrimental to her that it was of no significance that she had not complained.

[60] *De Souza v Automobile Association* (1986) IRLR 103

[61] Supra 2

[62] Middlemiss, S Follow the Yellow Brick Road: Munchkins Restaurant Ltd and another v Karman, Liability of employers for long term harassment, International Journal of Discrimination and Law (2011) Vol. 11 Part 3 pp 140 - 149

finding that he or she has suffered sexual harassment. The facts were that Karmazyn and her three fellow claimants worked as waitresses at a restaurant in London known as Munchkins Restaurant. The claimants were aged between 23 and 32, and all attracted the unwanted attention of the 73-year-old controlling shareholder of Munchkins Restaurant Ltd. He would often make sexual comments to the claimants and ask them questions about their sex lives. He would also show the claimants obscene photographs he kept in his safe and catalogues of sex toys and gadgets that he brought into work. The claimants worked at the restaurant for periods of between one and five years during which time they had to put up with this behaviour. Matters came to a head when Karmazyn, who had been acting-up as assistant manager resigned because, she found working directly with the shareholder too much to bear. The other three claimants soon followed and all of them cited his behaviour among the reasons for leaving their jobs. The claimants brought complaints of sex discrimination, harassment and constructive dismissal against the shareholder and their employer. Although the respondents admitted that there had been a degree of sexualised talk in the restaurant, they contended that it had not been unwelcome and, had often been initiated by the claimants. However, the tribunal were not convinced and accepted the truth of the claimants' assertions that they had been continuously questioned about their sex lives, been subject to unwelcome sexual comments and were shown explicit photographs and catalogues. They decided the shareholder had, on the ground of their sex, engaged in unwanted conduct that had the effect of violating their dignity and creating an intimidating, degrading, humiliating or offensive environment for them. The tribunal therefore upheld the claims of each of the waitresses that they had been unlawfully discriminated against and subject to harassment under the Sex Discrimination Act 1975 and that Munchkins Restaurant Limited, as their employer, and Mr Moss as a Second Respondent who had knowingly aided the First Respondent within the meaning of section 42 of that Act, were responsible for that discrimination. The case went on appeal to the EAT but they largely upheld the

tribunal decision [63] This case illustrates the fact that employers must not turn a blind eye to workplace banter of this kind. Also where a claimant has participated in sexual banter in the workplace this does not preclude a tribunal concluding that he or she has been subjected to sexual harassment. In another recent case *Furlong v BMC Software Ltd* [64] the organisational culture was a key feature of the harassment suffered by an employee. Here an employment tribunal awarded £35,000 to a senior sales woman on the ground of sexual harassment. They decided that casual sexual remarks made by her supervisor to her and the dominating male culture in the workplace were key contributing factors to the substantial award. While this is only an employment tribunal decision it does illustrate a willingness on the part of judiciary to find an employer liable for sexual banter that represents harassment.[65] These cases emphasise the need for employers to be aware and control what message they are sending out to their workforce in respect of bullying and harassment and workplace banter.

Constructive Dismissal

What follows is consideration of the remedy of constructive dismissal for employees suffering from unwanted banter in the workplace. Where there is no discriminatory element to a case of workplace banter and the employee in question has been forced to leave their employment due the hostile environment created by it then claiming constructive dismissal is often the best option for them.

As already stated verbal bullying or harassment of an employee will often represent a breach of implied term of trust and confidence in his or her employment contract and thus form the basis for a claim for

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[63] The appeal was allowed against the award of money in respect of wages receivable in the notice period, and against an award of aggravated damages on a basis which was insufficiently spelt out for the parties to know precisely what was complained of and how it related to the awards made. *Munchkins Restaurant & Anor v Karmazyn & Ors* UKEAT/0359/09/LA; UKEAT/0481/09/LA

[64] ET 2701283/09

[65] The employment appeal tribunal in *Smith v Vodafone* UK EAT 0054/01 found a comment made by a male employee to a female co-worker who had a punnet of melon slices on her desk that she had "got some lovely melons there" was a corny joke. The EAT held the remark was made innocently and did not affect the claimant's dignity at work.

constructive dismissal. This is illustrated by the case of *Gab Robins (UK) Limited v Triggs.* [66] Ms Triggs claimed she was overworked and verbally bullied by her manager. She was signed off work with stress and depression and subsequently raised a grievance. A meeting was held and the employer then wrote to Ms Triggs suggesting she should attend an informal meeting with her manager to resolve their differences. The employee concluded from this response that the employer had effectively ignored her grievance and she resigned as a result. The Employment Tribunal found that Ms Triggs had been overworked and this situation was made worse by her manager's treatment of her. They concluded that she had been constructively dismissed and the final straw came when the employer failed to carry out an adequate and proper investigation of her grievance. The employer appealed to the EAT on the ground that the tribunal should have first considered whether the employer's conduct of the grievance procedure fell within the range of reasonable responses of an employer. [67] The EAT concluded that the 'range of reasonable responses' test does not apply where the alleged failings in a grievance procedure are the final straw leading to resignation. The EAT found that the employer's failure to deal adequately with Ms Triggs' grievance materially contributed to the earlier acts of bullying and overwork so as to cumulatively amount to a breach of the implied term of trust and confidence. The EAT therefore denied the appeal. A constructive dismissal claim can be brought in the context of a harassment claim. This is what happened in the Karazyn case where the employment tribunal ruled that the respondent had sexually harassed the claimants, leading to their constructive unfair dismissals. What follows is an analysis of the Protection from Harassment Act and how it can protect victims of workplace banter and consider the impact of the organisational culture of the employer on the behaviour.

Protection from Harassment Act 1997

[66] [2008] EWCA Civ. 17 CA

[67] This can represent a defence for an employer in unfair dismissal cases where it can be shown that the employer's behaviour in the case fell within the band or range of reasonable responses of an employer in the circumstances. HSBC Bank plc v Madden 2000 ICR 1283

The Protection from Harassment Act 1997 (PHA) was not initially designed to deal with harassment in employment situations. However, in the case of Majrowski v Guy's and St Thomas's NHS Trust [68] the House of Lords held that an employee may use the PHA to sue his/her employer for workplace harassment where they are vicariously liable for the actions of the harasser. Section 1 of the PHA [69] states that: (1) a person must not pursue a course of conduct [70](a) which amounts to harassment of another, and (b) which he knows or ought to know [71] amounts to harassment of the other. Significantly conduct can include things said or written although it is doubtful if verbal comments would be sufficient for a claim. [72] The fewer in number and the more distant the occasions are in time from each other the, more difficult it will be to establish a course of conduct. The *Majrowski* case is a case featuring verbal harassment. The claimant felt his manager had bullied and intimidated him, was rude and abusive to him verbally in front of the other staff and was excessively critical of his timekeeping and work. Further, the manager imposed unrealistic performance targets with threats of disciplinary action if he failed to meet them and isolated him by refusing to talk to him. He felt the treatment was fuelled by homophobia as he was a homosexual. His claim was entirely based on his employer's vicarious liability for their employee's breach of the Protection from Harassment Act 1997. In line with previous cases dealing with vicarious liability, [73] the House of Lords had to be satisfied that the wrongful act was closely connected with the acts the manager was authorised to do, in order to find the employer liable for the acts. As her actions occurred in the performance of her management duties they were able to do that. It was held that these actions did amount to harassment, certainly of the sort of nature from which a claimant may be able to apply for an injunction under the Act. The House of Lords confirmed for the

[68] (2006) IRLR 695
[69] Section 8 in Scotland
[70] A course of conduct involves conduct on at least two occasions.

[71] A person 'ought to have known' if a reasonable person in possession of the same information would think the course of conduct amounted to or involved the harassment of the other.

[72] Section 7
[73] *Lister v Hesley Hall* 2001 UKHL 22, *Fennelly v Connex* (2001) IRLR 390 CA

first time that an employer can be vicariously liable for harassment by one of their employees under the Protection from Harassment Act 1997.

In this case at the Court of Appeal stage, the Court stated that "courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2." [74] This line of reasoning has been adopted by courts in later cases. When the case went to the House of Lords it was held that the principle of vicarious liability applies where an employee commits a breach of a statutory obligation whilst acting in the course of his/her employment, unless the statute in question expressly or impliedly indicates otherwise. They decided that neither the terms nor the practical effect of the PHA indicated that Parliament intended to exclude the principle of vicarious liability. The indication is that vicarious liability is available where damages are claimed for conduct by an employee amounting to harassment within the meaning of the PHA. The need for the action complained of to be serious enough to constitute a criminal act was confirmed in *Conn v Council of City of Sunderland* [75] the Court of Appeal held that a site foreman's conduct towards one of his team was insufficient to give rise to a claim of harassment under the PHA because only one of the two incidents was sufficiently serious to cross the threshold into oppressive and unacceptable conduct. This was despite threats made to an employee of a physical nature and threats to the employer's property. The court emphasised that the touchstone for recognising what is harassment was whether conduct was of such gravity as to justify the sanction of the criminal law. [76] There is some doubt whether this case was rightly decided but there is little question that a criminal element to the harassment is needed. In the highly pertinent case of *Veakins v Keir Islington Ltd* [77] a female member of staff was singled out for a hard time by her manager. The claimant had an event free and satisfactory two years at work before the new manager arrived.

[74] *Marjowski v Guy's and St Thomas's NHS Trust* (2005) EWCA Civ 251; CA
[75] (2008) IRLR 324
[76] Supra 48
[77] [2009] EWCA Civ 1288

Within two months of the new manager arriving, she suffered from depression for which she was prescribed medication and underwent counselling however, she never returned to work. Within that two month period, the manager sought to obtain information from the claimant's colleagues about her, which included her private life, with a view to making the claimant's life more difficult at work. When, at the suggestion of a senior manager, the appellant set out her concerns in a letter to her manager and handed it to her, she tore it up without reading it and put it in the bin. When she said the senior manager had suggested the letter, the manager replied, 'I'm not interested'. [78] The employer did not contest their vicarious liability for the manager's actions if it was shown that there was a breach of the Protection from Harassment Act 1997. The Court of Appeal said that while it was right that the conduct should be of an order that would sustain criminal liability the judge had to analyse what conduct did cross the line into potential criminal liability. [79] The Court of Appeal in *Veakins* found that the straightforward and unchallenged account of victimisation and demoralisation and reduction of a substantially reasonable and usually robust woman to a state of clinical depression was not simply an account of the ordinary banter of life or just "unattractive" and "unreasonable" conduct on the wrong, non-actionable side of the lines drawn above by Baroness Hale. The Court of Appeal stated that the primary focus should be whether the conduct was oppressive or unreasonable although the court should keep in mind that the conduct should be of an order that sustains criminal liability. The Court also found that it may be possible to demonstrate malice by a perpetrator. Whilst malice is not a requirement of the Act (since there can be harassment if the perpetrator ought to have known his/her behaviour amounted to harassment) nevertheless, establishing malice would make it easier to satisfy the oppressive and unreasonable' test. Arguably this decision makes it easier for employees who have experienced workplace banter and harassment or bullying to obtain protection under the PHA.Recently in a high profile case Helen Green sued Deutsche Bank in the High Court for personal injury and consequential

[78] All this took place in the context of other incidents in which she was victimised or singled out for reprimands on issues about lateness, travel arrangements and unpaid wages. No other employee was reprimanded for similar actions.

[79] Earlier in the *Majrowski*: case Baroness Hale [79] had emphasis the discretion of the court in this respect as follows: "a great deal was left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive, unacceptable behaviour."

loss and damages and breach of the civil provisions in the Protection from Harassment Act 1997. [80] She claimed that the psychiatric injury she had suffered during her employment was the result of harassment and bullying by her fellow employees and Deutsche Bank were vicariously liable for their actions. [81] As a result of harassment and bullying she was admitted to hospital where she was diagnosed as suffering from a major depressive disorder. In March 2001 she returned to work, initially on a part-time basis but, in October 2001 she suffered a relapse of her psychiatric illness and stopped work. She did not return to work and her employment was terminated by her employer. The main claim of Ms Green was for personal injury namely that Deutsche Bank was in breach of their duty of care towards her. The High Court said that the behaviour was 'a deliberate and concerted campaign of bullying within the ordinary meaning of that term' and that the management team at the Bank was 'weak and ineffectual.' In assessing the duty of care of the bank the court reiterated the principles in the leading Court of Appeal case of *Sutherland v Hatton*. [82] The test in that case was whether psychiatric injury or illness was reasonably foreseeable. The Court of Appeal in that case held that 'foreseeability depends of what the employer knows (or ought reasonably to know) about the individual employee… an employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.' In many cases this may be a difficult hurdle for employees to overcome but, in this instance it was held that this test was met. Clearly where an employee has been off work due to psychiatric illness, and then returns an employer should be on notice of a particular problem or vulnerability.[83] Ms Green also claimed that Deutsche Bank were vicariously liable in damages under the Protection from Harassment Act 1997. The High Court cited and followed the House of Lords decision in *Majrowski* and held that an employer can be vicariously liable under the Act for harassment by co-workers of an employee and decided the employer was liable

[80] *Green v DB Group Services* (UK) Ltd (2006) All ER (D) 02
[81] Ms Green claimed that from the start of her employment onwards she was bullied and harassed by her co-workers. She claimed that her colleagues ignored her, laughed at her, made raspberry noises with each step she took and made derogatory comments such as 'you stink'.
[82] (2001) EWCA CIV 76
[83] *Walker v Northumberland County Council* (1995) 1 All ER 737

in this case. Ms Green was awarded more than £800,000 for the psychiatric injury caused by bullying at work.

The time limit for commencing a claim under the PHA is six years. [84] Employment Tribunals have no jurisdiction to hear claims under the PHA however, the claims can be pursued in the County Court and/or the High Court depending on the level of compensation sought in England and Wales. [85] The damages are unlimited and as illustrated in the *Green* case the damages awarded can be considerable. [86]

It is not likely that many cases involving *only* workplace banter will end up in a claim for harassment under the PHA because, the behaviour is not serious enough to meet the legal threshold in these cases. However, as the case law has shown where banter is part of a systematic pattern of bullying or harassment by the perpetrator then it might be covered as part of a legal action for harassment.

Given that research has shown that workplace banter is prevalent in sexual orientation cases it seems appropriate to consider this development.

Sexual Orientation and Workplace Banter

Homophobic banter in the UK is a serious issue. Stonewall, the charity representing the LGBT community recently found this through their research. [87] They discovered that in a period of five years [88] 2.4 million people of working age had witnessed verbal homophobic bullying at work with 800,000 people having witnessed physical attacks of homosexual or lesbians. Stonewall also discovered that

[84] Five years in Scotland
[85] Sheriff Court or Court of Session in Scotland
[86] The parties in a harassment case are subject to third party costs whereby the losing party pays (and is personally responsible for) the winning party's costs.
[87] Stonewall (2014) Workplace Equality Index: Five Year Review
[88] From 2009 - 2013

around a quarter of lesbian, gay and bisexual workers had not revealed their own sexual orientation to colleagues. Also around one in eight of the respondents did not feel confident in reporting homophobic abuse to their employer. [89]

Against this background it is important to consider the legal rules which protect against homophobic banter. Section 12 of the Equality Act 2010 [90] prohibits discrimination on the grounds of sexual orientation. Legal protection from discrimination and harassment [91] on the basis of sexual orientation applies to everyone, whatever their sexual orientation and includes being treated less favourably because they are: lesbian, bisexual, homosexual, transgender or heterosexual. [92] Also they will be protected if they are discriminated against because they are perceived to be of a particular orientation (even if they are not) or because they associate with someone who is a lesbian, gay, bisexual etc. such as a friend, relative or colleague. [93] Discrimination because of perception and association [94] are particularly relevant to harassment (or banter) on the basis of sexual orientation.

What follows are accounts of employment tribunal decisions where the tribunals had to deal with difficult cases of homophobic banter. In *Ditton v C P Publishing Ltd* [95] Mr Ditton was dismissed from his employment with CP Publishing after only eight days. During this time he was subjected to bullying and harassment from one of the directors, who on several occasions made comments in a 'camp' voice and suggested that Mr Ditton was effeminate. He also spoke in an aggressive manner towards Mr Ditton, on one occasion saying 'shut it you wee poof.' Following his dismissal, he was prevented from returning to work to collect his belongings and he was subjected to further insults, including the threat of violence. At a remedies hearing the employment tribunal was presented with medical evidence on the effect that the discrimination had upon Mr Ditton. It found that the discrimination had such an effect

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[89] Similar results obtained by Out Now in the research published as 2010 Out Now State of the UK Workplace Report
[90] Previously the Employment Equality (Sexual Orientation) Regulations S.I. 2003/1661
[91]Harassment is where person A engages in unwanted conduct related to the protected characteristic of sexual orientation that has the purpose or effect of violating person B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her as defined in section 26 of the Act.
[92] Section 12
[93] English v Thomas Sanderson Blinds (2009) IRLR 206

[94] As defined in section 13 of the Act
[95] S/107918/05

that he was unable to seek alternative employment for almost 18 months. It awarded compensation for loss of earnings up to the date of the hearing of £68,194. It also awarded future loss of earnings of £8,743, taking account of the lower salary in his current employment. It also found the conduct of the respondent to be high-handed, malicious, insulting and oppressive. It awarded £10,000 for injury to his feelings. Finally the award was uplifted by 30% for the employer's failure to follow the statutory disputes procedure and interest was added. The total award was £103,028.[96] This case illustrates the severe consequences for employers in serious cases of homophobic banter in the workplace. In the next case the harassment took the form of personalised, highly offensive, homophobic remarks and graffiti.

In *Martin v Parkam Foods* [97] the employer was criticised for failing to tackle homophobia amongst his workforce effectively. Mr Martin was employed by Parkam Foods from November 2004 until his resignation in December 2005. He was openly homosexual in the workplace and was the subject of graffiti and subjected to offensive remarks by his colleagues. The graffiti took the form of a graphic male image with the claimant's name beside it. He complained, and the company removed his name from beside the graffiti although the drawing was allowed to remain. When his name reappeared next to the drawing he made a further complaint. As a result, notices were put up warning staff against drawing graffiti but, no mention was made of homophobia. The claimant was suspended due to the stress he was suffering and to enable the organisation to investigate his ongoing complaints. He then resigned and raised a grievance. The claimant then presented an employment tribunal claim for; constructive dismissal, direct discrimination, harassment, and victimisation on the grounds of sexual orientation. With the exception of the victimisation claim Mr Martin's claims were upheld by the employment tribunal. The tribunal took the view that, despite the fact that the anti-discrimination policies and procedures of the employer were communicated to managers the policies were ineffective

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[96] Hooper v P&O Ferries (Gibraltar) Ltd Case no.1103012/06

[97] ET 1800241/06

in ensuring that graffiti did not occur and was not repeated. The warning notices put up by them dealt only with graffiti and not with the homophobia which was the root of the problem. The employment tribunal criticised the company for not apologising to the claimant for the distress and embarrassment caused to him and for failing to investigate his complaints with due diligence or treat them with sufficient seriousness. [98] Mr Martin was awarded over £17,000 by the employment tribunal which found that he was the victim of discrimination and harassment. In the next case there is strong evidence of homophobic banter and an employer's inability to deal with it appropriately. In *Yahiaoui v Aramark Ltd* [99] Mr Yahiaoui worked as a Chef de Partie for Aramark Limited. He was dismissed for gross misconduct after throwing a bowl at a work-station. Mr Yahiaoui claimed his behaviour was the reaction to a series of incidents of harassment he had experienced which were perpetrated by his manager and other members of kitchen staff on the basis of his sexual orientation. The employment tribunal held that Aramark had failed to take Mr Yahiaoui's claims seriously and failed to investigate them. The manager investigating his complaints had simply referred to the harassment as kitchen banter. The tribunal found that harassment had taken place, including sexual and homophobic banter directed at Mr Yahiaoui, in the months preceding his dismissal. The tribunal also ruled that direct discrimination had taken place because Aramark did not treat the claims as seriously as they would claims of harassment on the grounds of race or gender.[100] In *Austin v Samuel Grant (North East) Ltd*, [101]a heterosexual male employee, A, won a sexual orientation and religion or belief harassment claim after repeated inappropriate remarks were made to him by his colleagues verbally and by email.

[98] In the tribunal's view more firm instructions to employees were necessary, such as further training, ad hoc meetings or notes in pay slips. Also Mr Martin should not have been suspended because of his stress.

[99] ET/3200198/08

[100] The main finding of the ET of unfair dismissal and discrimination were upheld by the EAT at (2009) UKEAT 0115_09_3010

[101] ET/2503956/11

All these employment tribunal decisions illustrate a willingness on their part to deal with the issue of homophobic banter properly and provide a remedy for those unfortunate enough to experience it. [102]

As there is no legislation that directly relates to bullying in the workplace, cases of workplace bullying involving homophobic banter are normally pursued using other forms of legislation, including as seen above the equality legislation and the Protection from Harassment Act 1997.

If there is no element of discrimination in the bullying an employee could make a claim under the Protection from Harassment Act 1977. However, as shown earlier this type of claim cannot be brought before an employment tribunal and the behaviour complained of has to be so serious in nature as to represent a criminal act of harassment. When the behaviour only involves homophobic banter it is unlikely to be treated as unlawful harassment under the PHA. However, homophobic banter is mixed with other forms of bullying or harassment, as is often the case with sexual banter, it will more likely be treated as a case of harassment. When it is a supervisor that is the perpetrator of homophobic banter and the victim is his subordinate then he could bring a contractual claim as it might represent a breach of his contract. [103] There might also be a claim against the employer for breach of his duty of care under the law of tort. [104]

EU Law Relating to Health and Safety and Equality

At the European level, the legal framework relating to bullying and stress derives from an overriding

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[102] In Bivonas LLP v Bennett UKEAT/0254/11/JOJ a gay barrister who found references to his "batty boy mate" in a case file had a claim of sexual orientation discrimination upheld by the EAT. The claimant had worked at the law firm Bivonas at the time of the incident. He found the comment in a three-page, hand-written memorandum inside a client's file that he and another lawyer were reviewing. The employment tribunal found that the wording of the note, which the company said was supposed to be a personal 'aide-memoire' was inherently insulting to the claimant due to his sexuality. It also stated that a comment in the note that the claimant 'takes our cases to his batty boy mate' inferred that he, as a gay man, was passing on work to somebody else because they were also gay and it was a professional slur of the upmost gravity. The employee who wrote the note said that the claimant was never intended to read the comments and that he did not know how it ended up in the case file. Despite this the EAT ruled that whatever the intentions writing it down meant there was a risk of him or another member of staff reading it.

[103] Breach of the implied term of trust and confidence.

[104] Waters v Metropolitan Police Commissioners (2000) IRLR 720 HL

obligation to protect the health, safety and dignity of workers. A key component of this includes the EU Health and Safety Framework Directive (89/391/EEC) under which employers must 'ensure the safety and health of workers in every aspect related to work' including obligations to avoid workplace risks, combat them at source and carry out workplace risk assessments.

The other aspect of EU Law which has relevance here are equality measures such as Directives 2000/43 and 2000/78 on Equality of Treatment, which treat harassment as a form of discrimination, when the unwanted conduct relates to any protected characteristic and takes place with the 'purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment'. In this context, the protected characteristics are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

Where these measures appear to offer some protection for victims of workplace banter or bullying the reality is a lack of specific provisions from the European Union dealing with this means that victims are better served by relying on provisions in their domestic law for protection particularly, when they specifically cover this. However, the case of *Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [105] involved a reference to the European Court of Justice from Belgium and it raised the issue of whether verbal comments on their own were capable of representing unlawful race discrimination. It concerned whether words alone were sufficient to constitute discrimination (in that case words from an employer that he would not employ Moroccans), within the meaning of the Race Directive 2000/43/EC. According to the Advocate General in the case "a public statement made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin will be turned down, constitutes direct discrimination within the meaning of Article 2(2) (a) of the Directive."

[105] (2008) IRLR 732

European countries which have enacted laws prohibiting workplace bullying (also known as mobbing or moral harassment) include Sweden, France, Norway, Denmark, the Netherlands, and Serbia. The EU Charter of Fundamental Rights if applicable could certainly bolster any legal claim of workplace banter or bullying brought under EU or the domestic laws of the member states.

The Human Rights Act 1998

It might be difficult to envisage how workplace banter could be the type of activity that would be protected by the Human Rights Act 1998. However, there are two articles that could have a bearing on bullying or harassment where unwanted banter is the primary form of the behaviour. Under Article 8 for example workers have the right to a private and family life.

It ensures that everyone has the right to respect for his or her private and family life, home and correspondence. It seems likely that intrusive workplace banter or cyber-bullying on social network or employer's internal websites might represent a breach of the article. Also airing an employee's personal information in public in the workplace (which often happens when managers openly criticise their staff) could also be a breach. As can be seen from the case law to date this is a broad-ranging right that is often closely connected with other rights such as freedom of religion, freedom of expression and discrimination under article 14. This right is subject to proportionate and lawful restrictions. It is highly unlikely that that the perpetrator verbal harassment or bullying could rely on the protection provided by Article 10 of the European Convention of Human Rights (freedom of expression). This is because it clearly contravenes the human rights of the victim under that Article and other Articles under the Human Rights Act 1998 and can never be justified.

The idea that constitutional human rights such as freedom of speech could extend to protecting perpetrators of verbal harassment against legal action by their victim has been widely considered by legal practitioners in the United States but, thankfully not to date in the United Kingdom.

The Human Rights Act 1998 makes it possible for individuals to bring human rights cases in ordinary UK courts and tribunals. [106] Human rights issues can be introduced by either side in a legal dispute in employment tribunals or the courts provided the employer and employee involved in the dispute work in the public sector. Interestingly there have been a substantial number of cases brought under the Equality Act and Protection from Harassment Act but few if any of these cases have relied on human rights for an answer.

International Perspective

Management of workplace banter

As already stated the management culture of an organisation is often a material factor in an employee's inclination to perpetrate undesirable workplace banter and bullying in the workplace. As the following quote suggests the culture is made up of practices and procedures that are often developed over time and which are inherently difficult to change. "A workplace culture is a set of shared beliefs and values, indicating what is important on the one hand, and practice and norms, expressing how one is supposed to react or behave, on the other hand. " [107] The dangers of a negative culture which influences employers to act badly are well recognised and expert advice is available to help with this process and accordingly it is not my intention to go into it here. [108] However, in the context of bullying and harassment it is something that needs to be addressed as the following quote suggests "There is still a tendency to think of bullying and harassment, and even to a lesser extent, stress, as problems of the individual…This

[106] Before the HRA a claimant had to go to the European Court of Human Rights in Strasbourg to claim his or her rights
[107] Crawsghaw, JR Budhwar, P Davis A (2014) Human Resource Management Strategic and International Perspectives Sage p 62
[108] Bullying at work: beyond policies to a culture of respect Chartered Institute of Personnel and Development www2.cipd.co.uk/.../0/bullyatwork0405.pdf

article has drawn attention to the role of the culture of the organisation in defining and setting the standards for behaviour. It is therefore to the culture of the organisation that we should be looking for change and the raising of professional standards." [109] To eliminate bullying in the workplace the necessity to change organisational cultures is certain. [110] Workplace bullying is the combination of individual, organisational and contextual factors. Clear factors at the organizational level are indicated with a need to direct preventive actions against workplace bullying in …cultures. In other words, when considering activities covered by the statements of organizational culture orientations, it would be possible to reduce bullying significantly." [111]

While workplace banter can be very harmful with workers sometimes suffering serious illness as a result it can also be bad for business. Internal grievances or external claims to employment tribunals of bullying or harassment can be very time consuming and expensive and if the details of the case get into the public domain it can result in negative publicity for the business. Workplace banter and bullying if allowed to go unchecked can be particularly damaging to the workforce of a business as it can; undermine the confidence of workers, cause them stress and dramatically reduce their morale and performance. The only thing that will reduce or eradicate the problem is if an organisation changes its culture. [112] Also prevention of banter in the workplace and bullying does not just require the existence of a dignity at work policy but also a clear commitment to enforce it. It must be a clear and unambiguous policy on bullying and harassment that sets out what is not considered acceptable in the workplace.

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[109] McIvor K.M. (2009) Organisational Culture: The Common Factor in Bullying and Harassment and Stress www.bullying999.co.uk

[110] Cowie, H., Naylor, P. Rivers, I., Smith, P.K., Pereira, B. (2002), Measuring workplace bullying, Aggression and Violent Behavior, Vol. 7 No.1, pp.33-51.

[111] Tambur, M Vadi, M (2012) Workplace bullying and organizational culture in a post-transitional country International Journal of Manpower, Vol. 33 Issue 7 pp.754 - 768 at p 764

[112] Inceoglu, I (2002) Organizational Culture, Team Climate, Workplace Bullying and Team Effectiveness: An Empirical Study on Their Relationship Herbert Utz Verlag Publishing

Making sure that the policy is widely disseminated and reinforced, for example in an induction process is also important. The other steps that should be taken include; adopting an investigatory procedure for complaints of bullying or harassment which results in them being dealt with quickly and fairly and ensuring that appropriate disciplinary actions are taken in response to well-founded complaints. The procedure adopted to deal with a complaint must be confidential and the right of a defence for the alleged bully should be provided. Also employers will normally have and implement an equal opportunities policy however, they should also have an anti-harassment and bullying policy and ensure that it applies to workplace banter and covers the use of social media. It should contain specific prohibitions against misusing social media to bully or harass colleagues and should expressly cover cyber bullying. Many of the issues can be tackled earlier and more effectively where the workforce is trained in recognising and dealing with it so equality and diversity awareness training is an absolute essential in the modern workplace. According to Acas "equality and diversity awareness training could reduce the risk of potentially offensive remarks being made in the first place. A fair and effective internal grievance procedure could also save employers the expense and disruption of being taken to a tribunal..." [113] Finally the provision of mediation or a bullying advice service [114] could help to resolve bullying complaints at an earlier stage. These types of services can focus on the experiences of those involved, both the person who alleges bullying and the person accused and support both of them in creating different ways of interacting with each other within their working relationship so that the focus is on learning and change rather than resorting to disciplinary or legal action. Of course not all employers agree with the fact that it is a problem that needs to be dealt with. Too often workplace banter is seen by employers as a good thing on the basis that it encourages better relations between staff and improves communication generally within an organisation. [115]

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[113] Acas Workplace Snippets 2013 Office banter: How to draw the line

[114] Employee assistance programmes which were developed first in the US can fulfil a useful role here.

[115] The evidence for this can be seen in the way that banter is encouraged and managed in the BBC TV programme the Call Centre.

Conclusion

There are various factors which militate against victims of workplace banter and bullying having legal protection against the behaviour but the absence of statutory protection is the main difficulty for them. They can try and utilise the various statutory remedies discussed but all of them have different and usually difficult evidential requirements and varying time limits for bringing an action. Where the behaviour is capable of being dealt with as a form of harassment there are avenues of legal redress but, as seen this is often less than straightforward. While there is protection against harassment in the UK particularly, where it includes some form of discrimination bullying, struggles to be afforded a remedy. The following quote summarises the difficulty with obtaining legal protection against workplace harassment, bullying and banter: "the current situation is very confusing both for employers and employees. This lack of clarity must surely deter employees from feeling confident about their rights in courts and tribunals." [116] 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, resulting in damage to the victim's psychological and physical health. In most cases an allegation of 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.

It is this writer's view that it is the time to clarify when workplace banter is unacceptable and make it unlawful. It would also be an opportunity to legislate generally against workplace bullying. [117] This would have the advantage of providing a clear definition of what is meant by bullying in this context and others. Guidance for legislators in framing the legislation could be gleaned from; countries where

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[116] Personnel Today Head to head: Bullying in the workplace http://www.personneltoday.com/hr/head-to-head-bullying-in-the-workplace/

[117] Jo Anne Brown of the Centre Against Workplace Bullying UK states that "there is a great need for employment legislation to tackle bullying … at work…Many victims of bullying are precluded from the tribunal system because of the current legislation and some employers do not take complaints of bullying seriously. http://www.jfo.org.uk/work/sector/wblaw.htm

bullying law already exists, [118] past legislative attempts in the UK [119] and existing case law in the UK on bullying and harassment. Hopefully this article will identify the legal and management solutions to this issue, help draw attention to the insidious nature of this activity and underline the need for reform.

[118] In Australia the law has recently been changed to better protect victims of harassment (including unwanted banter) in the workplace. Under amendments to the Fair Work Act 2009 (Cth) which operated from 1 January 2014 the Fair Work Commission has the power to make orders to stop bullying. This provides a mechanism to help an individual worker resolve a bullying matter quickly and inexpensively.

[119] E.g. Dignity at Work Bill