

05/2023

BULLYING AND HARASSMENT



Definition

Characteristics of workplace
bullying
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Responsibility

Employers are responsible for the
protection of their employees and,
to this end, report to and liaise
with the employee representative
committee
P. 4

Victim's rights and support measures

New measures established under the
Labour Code
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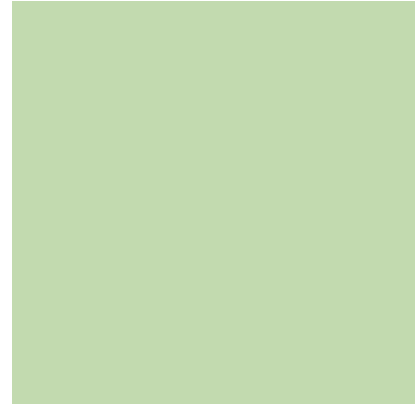
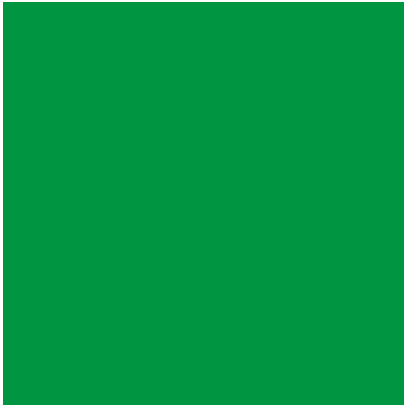


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Sources:
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ITM
Code du Travail



Bullying



Definition

Under the Labour Code, workplace bullying is defined as any repetitive or systematic conduct that is detrimental either to the dignity or to the mental or physical wellbeing of a person.

Workplace bullying is deemed to occur whenever a person is repeatedly or systematically mistreated by an internal actor of the company (line manager or colleague), a customer or a supplier.

All employees, interns, apprentices and pupils or students on work experience during the summer holidays are protected under the provisions of the Labour Code.

Characteristics of workplace bullying

According to the Labour Code, business trips, professional training, any work-related communication even outside working hours are an integral part of their professional duties.

Both employers and employees should refrain from engaging in any form of workplace bullying. The same applies to any customer or supplier of the company.

A distinction should be made between 2 common forms of bullying:

- direct bullying, where one person, the perpetrator, deliberately targets and treats another, the victim, in a way that is detrimental to his dignity, adversely affects his physical or mental wellbeing, destabilises his working conditions or undermines his professional prospects by creating an intimidating, hostile, demeaning, humiliating or offensive environment;
- bullying by management, where an entity employs bullying tactics to manage the organisation, even if that approach is not necessarily intentional from the outset. While the acts are perpetrated by groups, their effects are felt by individuals, such as continuous, abusive and malicious pressure that is detrimental to the dignity of the victims involved.

Examples of bullying include:

- isolating and ostracising individuals;
- treating an employee unequally without reason;
- an abuse of disciplinary power;
- failure to communicate useful information;
- discrediting an individual in front of his peers;
- allocating an unreasonable amount of overtime;
- successive changes in professional roles.

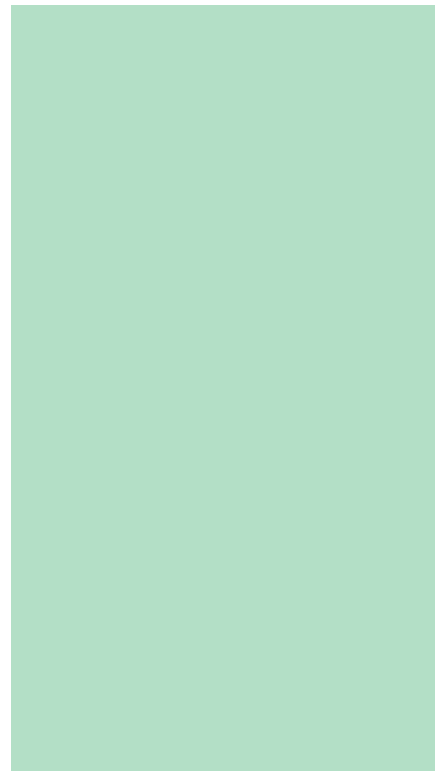
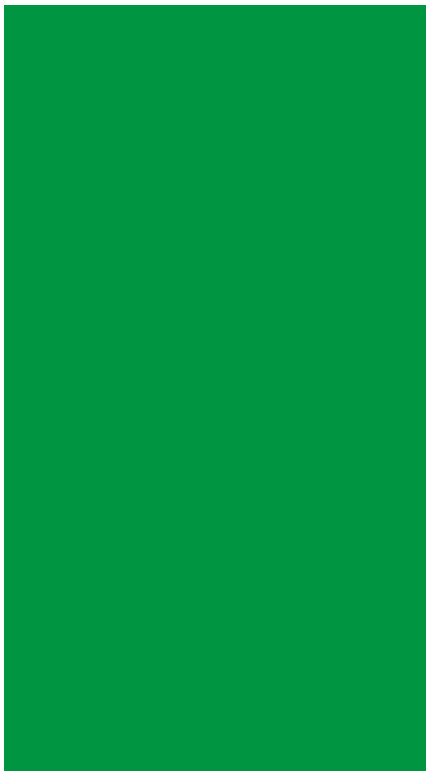
However, bullying should not be confused with an everyday stressful situation, strained relations at work or the exercise by employers of their power to control and monitor the output of their employees during working hours. A person is only culpable of an act of workplace bullying if he abuses his authority to mistreat others in a professional environment. The scope of workplace bullying does not extend to the following:

- management decisions, by which an employee is rightly or wrongly entitled to feel aggrieved, taken by a business in response to everyday demands and circumstances, and often affecting the status quo;
- the measures taken by an employer to monitor the condition of an employee, in conjunction with his physician, during the period in which he is declared unfit for work;
- the normal exercise of the power to monitor and criticise an employee for failing to perform a specific task to the required standard.

Employer's responsibility

Employers are responsible for immediately stamping out any form of bullying that comes to their attention.

So, an employer, despite not engaging in an act of bullying, will be held liable as head of the company. As such, it is in the employer's own interest to prevent and take disciplinary action against any form of workplace bullying. The same will apply if an employee, a line manager, a customer or a supplier has engaged in an act of bullying.



Employer's obligations

After reporting to and liaising with the employee representative committee or, alternatively, the entire workforce, an employer is required to put in place special measures to protect employees from workplace bullying. The measures, depending on the nature of the operations and the size of the business, include, but are not limited to:

- making sure that victims have the support, assistance and guidance they need; managing their situation carefully; developing a special return-to-work plan; and putting them in contact with the employee representative committee;
- promptly and impartially investigating acts of bullying;
- briefing employees and managers on the definition of bullying, the procedures in place for dealing with incidents and the corresponding disciplinary action;
- informing the employee representative committee or, alternatively, the entire workforce of the employer's obligation to prevent workplace bullying;
- organising awareness campaigns and training initiatives for employees.

Employers are advised to develop an internal policy which sets out, particularly though not exclusively, to:

- make clear that the company has a zero-tolerance approach to any form of bullying or violence, and that every member of the company is expected to comply with the policy;
- identify the measures taken to prevent bullying;
- define a procedure for dealing with bullying and violence;
- make clear the disciplinary action taken against anyone found to have engaged in an act of bullying;
- highlight the measures taken to protect the victims of and witnesses to acts of bullying or violence.

Under no circumstances should the victims of bullying be prejudiced by the measures taken to stamp out the misconduct.

Employers are responsible for introducing measures to immediately stamp out any form of workplace bullying that comes to their attention. Moreover, they are required to conduct an internal assessment to review the effectiveness of preventive measures already in place and the possibility of introducing further preventive measures across the company. They are also required to review procedures for dealing with bullying and reporting channels open to employees. Employers should not conduct this assessment and subsequent reassessments until they have consulted with the employee representative committee or, alternatively, the entire workforce.



Victim's rights and support measures

Many victims of bullying choose to suffer in silence and do nothing about the situation. However, this submissive attitude will not make the problem go away. Some victims visit their physician and are often declared to be unfit for work. Yet, the likelihood is that a prolonged absence from work on medical grounds will result in the termination of their employment, either at the employer's instigation following the 26-week statutory period, or automatically following a 78-week period of incapacity for work.

Seek advice

Victims should initially take stock of their situation and, where possible, gather evidence of the treatment to which they are subjected. Victims should then confide in third parties, either to officially report the bullying, or at least to seek advice about how to proceed.

Victims may particularly approach:

- their line managers or the HR manager;
- if applicable, the person designated by the company to oversee the "procedure for dealing with bullying";
- employee representatives, especially members of the employee representative committee, who will be able to provide assistance or act as intermediaries in discussions with the employer;

- organisations which, despite their inability to intervene, may have the expertise to help victims through their ordeal;
- the occupational physician, who has the opportunity to visit the company and advise the employer on how to adapt the workplace accordingly;
- the Inspectorate of Labour and Mines (ITM), whose role is to enforce rules on workplace health and safety;
- a union or a solicitor who will assess the situation from a legal standpoint.

Responsibilities of the employee representative committee

Employee representative committees are responsible for introducing measures with a view to protecting employees from workplace bullying. In this capacity, committees may propose any preventive measure they see fit.

It is within the remit of employee representative committees to offer assistance and advice to any victims of bullying. They are required to treat in confidence any information to which they are privy in this respect, unless otherwise agreed by the employee in question.

Any victims of workplace bullying are entitled to be accompanied and assisted by a member of the employee representative committee or any other staff member of their choosing during interviews conducted by the employer or the employer's representative as part of the corresponding investigation.

Matters referred to the Inspectorate of Labour and Mines (ITM) by the employee or the employee representative committee

If the measures introduced to address an act of bullying fail to put a stop to the misconduct, or if the employer fails to take appropriate action, the employee or the employee representative committee, with the employee's consent, may refer the matter to the ITM. The inspectorate will sit down to discuss the matter with the alleged victim, the perpetrator and, if necessary, any other employees involved and the employer or the employer's representative.

The inspectorate will subsequently produce a report making recommendations and proposing measures that can be introduced to put a stop to the bullying. The ITM director or his representative will submit the report to the employer within 45 days of the initial referral. According to the period specified in the report, the employer will be required to make sure that the bullying is addressed immediately.

Should the employer fail to do so, the ITM will impose an administrative fine.

Right of victims to terminate their contract of employment

Victims of bullying may discontinue and terminate their contract of employment with immediate effect on the ground of a serious breach, and seek damages from their employers whose negligence has resulted in the immediate termination.

If their contract of employment is terminated, victims of or witnesses to acts of bullying may, within 15 days of the notice of termination, petition the presiding judge of the labour court, sitting in an emergency session, once the parties have been heard or duly summoned, to invalidate the dismissal and order the safeguarding of their employment or, if necessary, their reinstatement. Responsibility for demonstrating the link between the employer's decision and the bullying incident rests with the employee in question.

If the labour court finds that an employer has unduly terminated the contract of employment, it will order the employer to pay damages to the employee not only on account of the loss caused by the dismissal, but also, if applicable, in view of the loss caused by the acts of workplace bullying.

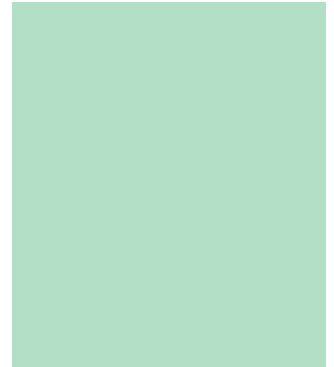
Legal action brought by victims of bullying

Victims of bullying may bring legal action to put a stop to bullying and to seek damages. Unlike sexual harassment, responsibility for demonstrating the existence of an act of bullying rests with the victim. The victim must therefore be able to show that the employer has acted negligently primarily on the basis of:

- the acts of bullying (specific actions and dates);
- despite being aware of these acts, the employer took no action to address the situation;
- loss;
- the causal link between the bullying and the loss incurred.

Victims are therefore advised to approach their colleagues, employee representatives, union members and medical personnel, and ask them to make witness statements. They should also create a detailed timeline of events and retain any correspondence that bears out the act of bullying (e-mails, warning letters, disciplinary action, etc.), in so far as it has been accessed by lawful means.

The terms “purpose or effect”, which are used to define an act of bullying, imply, nevertheless, that the perpetrator’s conscious action or malice is not a prerequisite of the act itself. An act of bullying does not, therefore, need to be intentional.



Disciplinary action, criminal sanctions and consequences

No reprisals will be taken against any employee:

- who contests or denies an act of workplace bullying;
- who acts as a witness during the investigation into the act of bullying.

Perpetrator

If an act of bullying is found to have taken place, employee representatives will be informed and consulted before appropriate measures are taken against the perpetrator. They may include disciplinary action and result in a warning or even dismissal.

Criminal sanctions

Since obsessive forms of harassment were criminalised under the Criminal Code, the various forms of sexual harassment, discrimination and bullying have been punishable under criminal law. So, it is an offence under the Criminal Code for anyone to repeatedly harass someone else, to the extent that he knows or ought to know that the action severely affects the victim’s wellbeing.

In view of this very broad definition, judges have extensive discretionary powers and may hand down both a custodial sentence and a fine, or either one separately, to anyone found guilty of such obsessive harassment.



Sexual harassment

Definition

Under the Labour Code, sexual harassment in the workplace refers to any situation where the perpetrator of a sexual or sex-based offence knows or ought to know that his actions are detrimental to the dignity of someone else, subject to the following conditions:

- the conduct is unsolicited, unwelcome, abusive and offensive to the victim;
- the refusal or acceptance of such conduct by an employer, an employee, a customer or a supplier is used explicitly or implicitly to make a decision affecting the rights of that person to professional training, employment, safeguarding of employment, promotion, salary or any other employment-based decision;
- such conduct creates an intimidating, hostile, demeaning, humiliating or offensive environment for the victim.

The conduct may be of a physical, verbal or non-verbal nature. The intentional nature of the conduct is presumed.

Employer's obligations

Employers are required to take all necessary preventive measures to protect the dignity of every person at work. These measures should include awareness campaigns. Employers should not practice or tolerate any form of sexual harassment in the workplace. Employers are required to immediately stamp out any form of sexual harassment that comes to their attention.

Victim's rights and support measures

Under no circumstances should victims of sexual harassment be prejudiced by the measures taken to stamp out the misconduct. As such, the termination of a victim's contract of employment will automatically be null and void.

If a victim's contract of employment is terminated, he may, within 15 days of the notice of termination, petition the presiding judge of the labour court, sitting in an emergency session, to invalidate the termination of contract and order the safeguarding of his employment or, if necessary, his reinstatement.

The equality officer or, alternatively, the employee representative committee, is responsible for protecting the workforce against sexual harassment in the workplace. Acting in this capacity, the officer or committee, as applicable, may propose any appropriate preventive measures.

It is within the remit of the employee representative committee or the equality officer, as applicable, to assist and advise victims of sexual harassment. They are required to treat in confidence any information to which they are privy in this respect, unless otherwise agreed by the victim in question.

Victims of sexual harassment are entitled to be accompanied and assisted by a member of the employee representative committee during interviews conducted by the employer as part of the corresponding investigation.

Refusal to continue the contract of employment

Victims of sexual harassment may discontinue and terminate their contract of employment with immediate effect on the ground of a serious breach, and seek damages from their employers whose negligence has resulted in the immediate termination. Any employee who resigns is not, in principle, entitled to receive unemployment benefits. However, if their resignation is prompted by the sexual harassment to which they have been subjected, they may apply to the presiding judge of the labour court with a view to receiving unemployment benefits on a temporary basis.

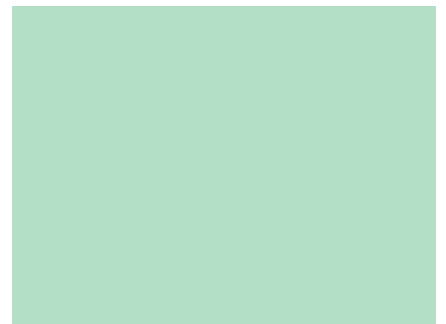
The application to receive unemployment benefits on a temporary basis will be dismissed unless the victim has previously petitioned the labour court to find that his resignation, prompted by the sexual harassment to which he was subjected, was justified in view of the employer's failure to take appropriate measures to put a stop to the sexual harassment.

Procedure for dealing with sexual harassment

All forms of sexual harassment are comparable to cases of sex discrimination. Victims need only report an incident insinuating that they have been subjected to sexual harassment (e.g., gestures or words with a sexual connotation, physical contact, etc.).

However, they will need to provide proof of these allegations or claims (e.g., witness statements or documentation).

If the perpetrator is not the employer, the victim will also need to show that the employer was aware of the sexual harassment and failed to take measures to address the situation. At which point the burden of proof passes to the employer. Employers will, in this case, need to justify their actions and prove that no sexual harassment has taken place or that they took all necessary measures to address the situation.





Discrimination

Definition

Discrimination refers to any situation in which the purpose or effect of any unsolicited conduct of a discriminatory nature, as defined by law, is to adversely affect the dignity of a person (victim) and create an intimidating, hostile, demeaning, humiliating or offensive environment.

It is an offence to discriminate on any grounds set out by law. They include, but are not limited to:

- sex, including on the grounds of pregnancy and maternity leave;
- family status;
- marital status;
- religion;
- ideology;
- sexual orientation;
- age;
- disability;
- race;
- ethnicity.

Procedure for dealing with discrimination

Employers are required to respond to a single act of discrimination, in so far as the purpose or effect of that act is to adversely affect the dignity of a person and create an intimidating, hostile, demeaning, humiliating or offensive environment. It is an offence under the Labour Code to discriminate directly or indirectly against anyone on the grounds listed above.

To the extent that the definition of discrimination encompasses conduct whose “effect” is to adversely affect another’s dignity, it is not necessary to show that the perpetrator’s actions were intentional.

If a victim reports an incident insinuating that he has been discriminated against, the perpetrator is required to justify his actions and prove that the conduct is justified and that he has not acted in violation of the principle of equal treatment.

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