

legal

The bullied may bite back

When does robust management become harassment? A code of conduct will protect employers and staff, says Sarah Rushton

Under the Protection from Harassment Act 1997, a person must not pursue a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment. Damages can be awarded for, among other things, anxiety caused.

The act was originally aimed at combating stalking and other forms of criminal harassment, but was put to imaginative use in *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34. Majrowski successfully argued that the bullying and harassment he had allegedly suffered from a manager was sufficient potentially to create a liability under the act for his employer and that, as a consequence, he should be entitled to damages.

The Protection from Harassment Act (PHA) presents opportunities to make claims where they might not have existed before. Generally, an employee needs one year's service to bring an unfair dismissal claim. Under the PHA, length of service is irrelevant.

Claims for unfair dismissal and discrimination generally have to be brought within three months, but for the PHA the limit is six years.

Under the PHA the motivation for the harassment is irrelevant, whereas under discrimination legislation the harassment will be unlawful if it is on prohibited grounds.

Damages are recoverable for "anxiety", which arguably has a lower standard of proof than that needed in a personal injury claim.

The reasonableness of the employer's conduct is irrelevant, whereas it could provide a statutory defence to discrimination claims.

Employers were concerned because claims could be brought years after the events complained of, when witnesses' memories might have faded and when employers might reasonably have thought that there were no risks of claims from an employee, and also because such claims were seemingly hard to defend.

Fortunately, the Court of Appeal has given further guidance in *Sunderland City Council v*

Conn [2008] EWCA Civ. In this case, the county court had found that two instances of a manager's conduct towards an employee amounted to harassment and Conn had been awarded modest damages under the PHA plus 75% of his legal costs. The employer appealed.

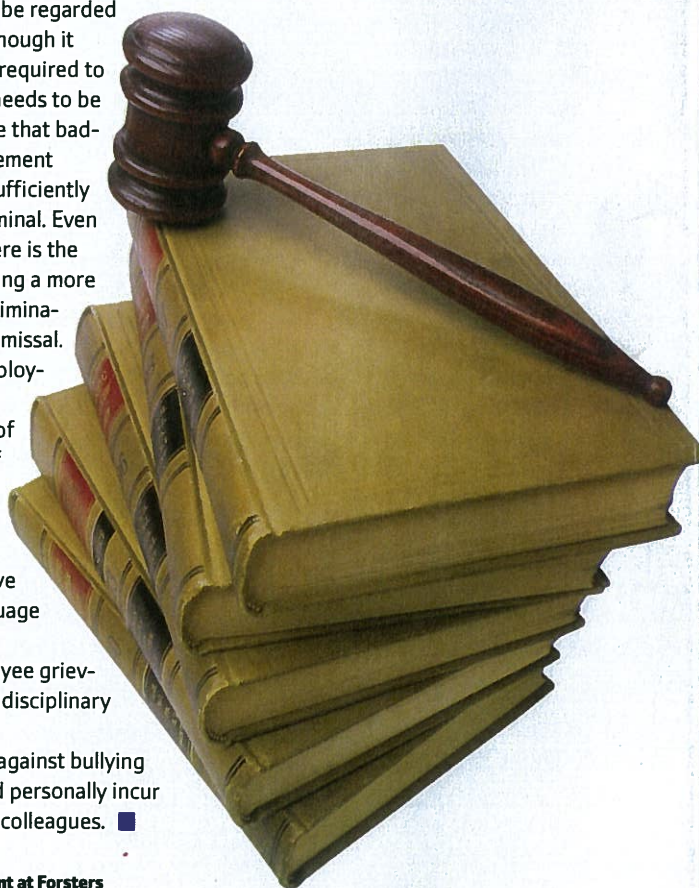
Overtaking the decision, the Court of Appeal held that the manager's conduct, though regrettable, was not oppressive as it was not sufficiently serious to be regarded as criminal. The court thought the context of the conduct important: what might not be harassment in the barrack room could well be harassment in a hospital ward.

Conn should not, however, be regarded by employers as a victory. Although it emphasises that the conduct required to bring a claim under the PHA needs to be serious, it is not inconceivable that bad-tempered, aggressive management might tip over into conduct sufficiently serious to be regarded as criminal. Even if the PHA does not apply, there is the risk that the employee can bring a more traditional claim such as discrimination or constructive unfair dismissal.

With this in mind, good employers should:

- have clear written policies of the conduct expected of staff and enforce the same
- have a written complaints procedure
- discourage overly aggressive management styles, bad language and aggressive behaviour
- promptly investigate employee grievances and if appropriate take disciplinary action
- remind managers to guard against bullying
- remind staff that they could personally incur liability if they bully or harass colleagues. ■

Originally aimed at stalkers, the Protection from Harassment Act presents opportunities to make claims where they might not have existed before



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