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Re: Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work

First and foremost, we would like to thank the HSA and WRC for preparing the draft Code of Practice. The jointly developed Code is to be welcomed as it made very little sense having the two separate codes of practice that are currently in existence.

Definition of Bullying

Notably, the Draft Code seeks to clearly differentiate the definition of bullying from the definition of harassment. This is an important distinction and given how the terms 'bullying' and 'harassment' are often used interchangeably and conjunctively, it is very much welcome that the Draft Code has clarified the two terms.

Following on from the Supreme Court's decision in Ruffley -v- The Board of Management of Saint Anne's School [2017] IESC 33, it is noted with approval that the Draft Code goes into detail as to what is bullying, but also what is **not** bullying at work. This is a welcome addition and is useful for employers and employees alike.

Balancing the Rights of the Alleged Victim and the Alleged Perpetrator

The Draft Code provides useful detail on the effects of bullying on the alleged victim of same, but also the impact to the alleged perpetrator when they have been accused of bullying. This is to be welcomed because the former assists with tackling actual bullying, and the latter assists in tackling the tendency of employees to utilise the terms "bullying and harassment" too easily and, indeed, incorrectly. Indeed, the Code goes into detail on "vexatious" complaints of bullying which is very useful for employers and employees.

Logical Structure

The Draft Code has a strong structure as it has put policy drafting, preventative measures, and how to resolve issues locally front-and-centre with the external claims process coming thereafter. This can be contrasted with the IHREC's draft Harassment Code of Practice which appears to put the external claims process front-and-centre before moving on to addressing such issues locally.

In this respect, it is also noted with approval that the Draft Code specifically notes the "role of employees" in addressing bullying at work. From both a health and safety perspective and a human resources perspective, the focus placed on what is expected of employees is very important for employers in managing such issues and in introducing preventative measures.

Consultation with Employees?

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We would note that the Draft Code states that "*a proper workplace anti-bullying policy should be developed, in consultation with employees*". Does this then mean that if an employer fails to consult with its employees on the drafting of an anti-bullying policy that it will not be considered "*a proper workplace anti-bullying policy*"? Is the employer in breach of the Code for not consulting? For example, would an employer's claim that they took all reasonable steps to prevent bullying in the workplace on the basis that they had an anti-bullying policy be weakened by the fact that they failed to consult with the employees on its content at the drafting stage?

Recommendation: It is our position that the words "*in consultation with employees*" should be removed from this Code of Practice. It is submitted that there is no requirement to consult with employees on the terms of the policy and to include this term unnecessarily introduces an obligation on employers to agree the terms of the policy with the employees.

Instead, employers should be able to draw instruction from the Code of Practice itself as to what should be included in the policy to prevent bullying at work. Indeed, the Draft Code even has a template policy and that should be sufficient as of itself without also needing to consult with employees. It should be sufficient for employers to draft a policy in keeping with the Code and to then communicate the anti-bullying policy to its employees once it has been finalised.

Secondary Informal Process

The Code has introduced a new middle ground means of resolving bullying complaints. Interestingly, this Secondary Informal Process does not give a right of representation for either employee. This is particularly noteworthy for the accused employee as the process could lead to the adverse conclusion that they had engaged in bullying. Additionally, this Secondary Informal Process does not prohibit the progression of the matter through formal disciplinary proceedings after the Secondary process has concluded.

Thus, if the employee was deprived of the right to be accompanied in the Secondary Informal Process, or was notified that representation would be permitted, and there is a finding against them of bullying at that stage, and they are subsequently disciplined (up to and including dismissal) then there may be an inherent procedural unfairness in this Draft Code.

This in turn could deny the employee of the right to natural justice during this procedure and could leave the employer exposed to an unfair dismissal finding or even an injunction notwithstanding the fact that they adhered to the Code of Practice.

Recommendation: The Draft Code needs to clarify in more detail the remit of the investigator who is chairing the Secondary Informal Process. In this respect, the Draft Code should specify whether or not the Secondary Informal Process can definitively determine if someone has engaged in bullying. If such a finding can be made then consideration needs to be given to whether or not this process is compliant with the rules of natural justice, particularly in circumstances where the employee is subsequently invited to a disciplinary hearing and dismissed.

A solution may be for the Draft Code to clarify that the investigator's remit at this stage to recommend steps to resolve the issue (e.g. mediation) but that in the circumstance where such steps are deemed inappropriate or the parties are unwilling to engage that the investigator's remit is then simply to clarify whether or not the accused employee has a case to answer on the balance of probabilities and/or whether or not the Formal Process or internal disciplinary procedures should be invoked.

Formal Process

Under the current Bullying Code the investigator is encouraged to make "*findings*" and to identify if "*the complaint is well-founded*". As a general rule of thumb, this is inherently risky in terms of procedural fairness. This is very evident from the plethora of High Court case law including the decision in Lyons -v- Longford Westmeath ETB [2017] IEHC 272, but also in respect of decisions of the WRC, EAT and Labour Court.

For example, if you consider the Unfair Dismissal case of *Sheridan -v- Ampleforth Ltd.* (UD273/2010), the claimant here was a deputy general manager of a hotel who was subjected to allegations of "*harassment, including sexual harassment*" from a colleague. The hotel conducted an investigation which, from the details of the EAT's decision, appears to comply with the existing Harassment Code as the investigation concluded as follows: "*Following your recent complaint of sexual harassment and bullying against [the claimant] we have now completed our investigation. We have **upheld** your complaint of sexual harassment but not your complaint of bullying.*" The word "*upheld*" is used which complies with the Harassment Code. The claimant subsequently went through a disciplinary process and was dismissed. The claimant won his unfair dismissal claim, and was reinstated to his job by the Employment Appeals Tribunal notwithstanding a positive finding that he committed acts of sexual harassment, with one of the reasons being that "*[i]t is clear to the Tribunal from this statement … that the respondent had predetermined the outcome of the disciplinary such that the dismissal was procedurally unfair.*" The fact that an employer could comply with a Code of Practice, dismiss an employee for bullying or harassment, and be exposed to that employee winning compensation or even reinstatement due to a procedural flaw built in to the Code is not a satisfactory position and hardly assists the employer or the victim in preventing bullying or harassment in the workplace.

It is for the above reason that we welcome the fact that the Draft Code explicitly states that "*The outcome of an investigation may eventually, separately lead to a disciplinary process being instigated in respect of the person complained of, but the investigation itself will be a fact-finding one with the focus on what occurred or did not occur.*" This is a very important change which would bring the Bullying Code of Practice more into line with the Disciplinary Code of Practice and general rights to fair procedure.

A difficulty, however, is the following sentence in the Draft Code: "*The investigation will consider all material and evidence before it and a decision will be made on balance of probability, as to whether the complaint/s are **upheld**.*" We appreciate that the alleged perpetrator is entitled to be accompanied during the Formal Process and this may mitigate any concerns about procedural fairness. However, the vast majority of Disciplinary Policies in operation throughout the country will cite that a finding that an allegation is upheld will not

be made until after a disciplinary hearing and certainly not before one. To quote the EAT in Smith -v- RSA Insurance (UD1673/2013) "*One might expect to see such findings following the conclusion of the disciplinary process but most definitely not at the beginning of it*".

Additionally, the Draft Code is silent on the issue of cross-examining witnesses during the Formal Process and in light of the consistent judgements of the High Court in this area it would be extremely risky to uphold an allegation of bullying after an investigation process in circumstances where the alleged perpetrator did not have the right to cross-examine and challenge the evidence.

We would also note that the sentence that "*The investigation will consider all material and evidence before it and a decision will be made on balance of probability, as to whether the complaint/s are **upheld***" is wholly inconsistent with other detail in the Draft Code, most notably:

- "*The scope of the investigation should indicate that the investigator will decide based on the facts before them whether the behaviour complained of may, on the balance of probabilities have occurred. The investigator **should not uphold** or dismiss the allegations and/or suggest or impose sanctions.*"

It is difficult to contemplate a circumstances where an investigator can comply with the requirement that they "*should not uphold*" the complaint in circumstances where they are required to determine "*whether the complaint/s are upheld*".

Recommendation: As such, it is submitted that compliance with the Draft Code could occasion serious difficulties for employers and employees in terms of procedural fairness. It is submitted that the sentence "*The investigation will consider all material and evidence before it and a decision will be made on balance of probability, as to whether the complaint/s are **upheld***" should be removed and replaced with the following:

- "*The investigation will consider all material and evidence before it and a decision will be made on balance of probability, as to whether the accused employee has a case to answer in respect of the complaint/s*"

In addition, it would be useful if the Draft Code specifically outlined that the Investigator has the right to recommend that the disciplinary procedure is invoked to consider the issue further. As such, the following sentence could also be added:

- "*If the investigation concludes that the accused employee has a case to answer on the balance of probability then the investigator may recommend whether or not the organisation's disciplinary procedure should be invoked*".

It is submitted that the above proposed change is necessary for the Draft Code to be conversant with the rights to natural justice and procedural fairness and to ensure that the Draft Code is reflective of how issues like bullying are addressed in practice in the workplace through disciplinary proceedings.

4.2.3 Appeals

The Draft Code introduces an Appeals Process after the Formal Process has concluded. It is submitted that this automatic right of appeal after the Formal Process should be removed/amended. As detailed above, if it is determined that the alleged perpetrator has a case to answer then this is most likely going to be progressed through a formal disciplinary process. If the Draft Code retains the Appeals Process in its current form then this would mean that there would be:

1. An Investigation in keeping with the Formal Process set out in the Draft Code.
2. A Right of Appeal in respect of any findings reached during the Formal Process.
3. A Disciplinary Hearing
4. A Right of Appeal of any findings and sanctions issued after the Disciplinary Hearing.

This clearly results in both the employer and the employee having to carry out a protracted process through at least four meetings to discuss exactly the same subject matter. In the context of SMEs, it is highly unlikely that many employers will have the layers of management required to ensure that an impartial is available to conduct the process internally. Additionally, the Code of Practice obliges the employer to ensure that whomever is dealing with a bullying complaint "*should have appropriate training and experience and be familiar with the procedures involved*". Even if an SME had the layers of management required to deal with each element of the process, it seems highly unlikely that each member of management would have the required level of training and experience. Thus, it is highly likely that the majority of SMEs would need the assistance of third parties to carry out the process and this adds an additional cost to the employer in circumstances where a three-stage process (as detailed below) would equally vindicate the accused employee's rights to natural justice.

Furthermore, the Draft Code specifically states that "*The investigator **should not uphold** or dismiss the allegations and/or suggest or impose sanctions.*" Notwithstanding the point made above about the Draft Code being inconsistent on the issue of upholding the allegations, if the investigator does not uphold the allegations and/or simply makes findings of fact (as recommended by the Code) then there is no definitive finding of guilt at this point. If the employee is then progressing through disciplinary procedures they would have the right to challenge any findings of fact at that disciplinary hearing stage with a right of appeal thereafter. It is suggested that it is wholly unnecessary to have a formal investigation, then a right of appeal, then a disciplinary process, then another right of appeal. Instead, there should be a three-stage process:

1. An Investigation in keeping with the Formal Process set out in the Draft Code.
2. A Disciplinary Hearing
3. A Right of Appeal of any findings and sanctions issued after the Disciplinary Hearing.

However, in the event that the matter does not progress to a formal disciplinary hearing, it is acknowledged that there is merit in a right of appeal arising after the Formal Process, particularly if it is concluded that there is no case to answer and the alleged victim is unhappy with this outcome.

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Recommendation Accordingly, it is submitted that this right of appeal should be amended along the following lines:

- "*In the event that the Formal Process concludes that the person complained of has a case to answer, or that the complainant has made a vexatious complaint, and that the organisation's formal disciplinary procedures will be invoked as a consequence, the right to an appeals process will only come into effect at the conclusion of the disciplinary process*".

This amendment retains the right of appeal for both persons at the end of the Formal Process when the matter is concluded and there will be no further proceedings. However, it avoids an extra layer of unnecessary procedure in the event that the matter will be dealt with further through formal disciplinary proceedings.

Confidentiality

The Draft Code specifically states as follows: "*For the avoidance of doubt, specific details of disciplinary action to be taken against any party are confidential and other parties are not entitled as a matter of course to receive this information as part of the outcome.*" This is to be welcomed as the complainant employee often demands to know what disciplinary action has been taken against the person complained of. The disclosure of such information clearly raises data protection concerns and it is very useful for the code to have clarified this.

Conclusion

Overall, the changes made in the Draft Code are positive and represents a step forward from the current codes of practice. However, as detailed above, we would have concerns with how some aspects of the Draft Code will interact with the rights to natural justice and fair procedures in the context of disciplinary sanctions. It is essential that employers should not be exposed to a finding that they breached an employee's right to natural justice simply because they complied with the Bullying Code of Practice.