



HR in the East Midlands

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In Deep with Darren

Darren Newman provides an update on Unintentional Bullying

We will probably never know exactly what was in the full report into the Home Secretary's behaviour towards senior civil servants. The Government has however published the findings of Sir Alex Allan – who was the Prime Minister's senior advisor on the Ministerial Code. He says the Home Secretary is 'action orientated' and 'can be direct'. He also says that she was justified in feeling frustrated with the Home Office leadership team. This manifested itself, he says, in 'forceful expression, including some occasions of shouting and swearing'. While it may not have been the Home Secretary's intention to cause upset, this 'has been the effect on some individuals'.

The Ministerial Code – the official rule book governing the conduct of government ministers - says that 'Harassing, bullying or other inappropriate or discriminating behaviour' wherever it takes place is not consistent with the Ministerial Code...". Sir Alex notes that it defines bullying as including 'intimidating or insulting behaviour that makes an individual feel uncomfortable, frightened, less respected or put down' and concludes that the some of the Home Secretary's behaviour met this threshold. He goes out of his way to stress that the Civil Service is not free from blame and that the Home Secretary's frustrations were often justified. What is more, she was not told of the impact her conduct was having on others. Nevertheless, her behaviour had on occasions fallen short of the standards required in the Ministerial Code and could be described as bullying 'in terms of the impact felt by individuals'. 'To that extent', he concludes, 'her behaviour has been in breach of the Ministerial Code, even if unintentionally'.

The findings are expressed with a good deal of tact, stressing the challenging situation the Home Secretary faced and the improvement in her conduct since the inquiry began. Nevertheless the fact that Sir Alex resigned soon after it became clear that the Prime Minister was standing by his Home Secretary points to the seriousness with which he regarded the conclusion that she was guilty of bullying civil servants in breach of the Ministerial Code..

The results of the inquiry led to some mockery on social media at the suggestion that any bullying was unintentional. I noticed several employment lawyers noting dryly that this excuse would not cut much ice with an employment tribunal. And indeed a tribunal may well be asked to rule on the issue. The inquiry took place after the resignation of the Home Office permanent secretary Sir Philip Rutnam, who is suing for constructive dismissal. The key issue for the Tribunal will be

whether his employer – presumably in the shape of the Home Secretary – acted in breach of the implied term of trust and confidence.

The nature of his claim demonstrates something largely overlooked in the debate about whether or not the Home Secretary is a bully. Bullying isn't really a legal concept. It's not something that you can sue your employer for. The victim of bullying (as opposed to harassment under the Equality Act) can only go to law if the bullying is so severe that it gives rise to a personal injury claim or if they resign and claim a constructive dismissal.

That involves showing that the employer has acted in fundamental breach of contract either by allowing the bullying to continue or on the basis that the bullying was carried out by someone senior enough to be acting on the employer's behalf.

It is worth noting that the findings reached by Sir Alex Allan were that the effect of the Home Secretary's behaviour on some individuals was that they felt upset. In dealing with bullying and harassment claims we often work in the basis that if someone feels offended or bullied by someone's behaviour then that is enough. As a general rule of thumb this is all very well. And it makes sense to put the onus on those in a position of power to take care that their behaviour does not harm others. As a legal position however, it does not really stand up. Even in a harassment case, tribunals have to apply an objective standard as to whether it was reasonable for the employee to view the conduct as amounting to harassment. If the question is one of bullying the question is whether, objectively, the conduct complained of amounted to a fundamental breach of contract because it was either calculated or likely to undermine trust and confidence.

Having said that, the fact that an individual did not 'intend' to harass or bully someone does not cut much ice with a tribunal. If the behaviour amounts to unwanted conduct or a breach of mutual trust and confidence then it doesn't really matter whether or not it was intended that way – it is the objective effect that matters and employers just have to take responsibility for the effect of their conduct.

But if you shift the focus from the legal claim of the victim, and think of bullying as a disciplinary matter, then obviously the intentions of the alleged bully do become relevant - as does any feedback or guidance they have been given about their behaviour. The culpability of an employee accused of bullying most certainly depends at least to some extent on their state of mind, the pressures they were under and the nature of the environment they were working in. Most bullying is in fact unintentional – everybody knows that bullying is a bad thing and few people would consciously identify as being a bully. Indeed they are likely to react very strongly against any suggestion that that is what they are. My view is that it is generally better to concentrate on what the individual actually did and whether that was inappropriate rather than in attaching a particular label to it. We can all agree that shouting and swearing at employees is wrong – whether it amounts to bullying or not. Using the B word heightens the emotion, but doesn't change the nature of what was done.

Dismissing a 'bully' who has not been given an opportunity to reflect on their behaviour and change it for the better is likely to be unfair in all but the most serious cases. Whether this should be true of government ministers as well as managers is a moot point – ministers are not employees and cannot sue for unfair dismissal. But those who point at the Home Secretary and claim that any employee who behaved as she did would be dismissed are wide of the mark.



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