

Psychological harassment at work and the law Wanted : an integrated whole-workforce approach in workplace health policy

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New legislation on psychological harassment¹ at the workplace is on the agenda in a number of EU countries. Sweden led the way with its 1993 regulations. France and Belgium have now just passed laws to stop workplace bullying. Draft legislation is in the works in countries like Spain, the United Kingdom, Portugal and Italy. In September 2001, the European Parliament adopted a resolution on the problem, calling both for national measures to combat psychological harassment and Community initiatives either through a clarification or extension of the scope of the 1989 Framework Directive or through the adoption of a specific directive.

"Psychological harassment" is not an easy concept to pin down. For one thing, it implies an ongoing process: harassing is a drip-by-drip action that builds up to cause what may seem unexpectedly serious harm when seen in relation to each individual act alone. What the adjective "psychological" does is to draw what may be a tricky line with sexual harassment, and to indicate that the harm is not chiefly to the harassee's physical integrity, although psychological harassment may include physical violence and can also seriously undermine the individual's physical health.

A successful series of books, the setting up of victim support groups in some countries, a rash of collective actions like strikes directed specifically against psychological harassment reflect two inseparable trends: the spreading dehumanisation of work, which ultimately

cannot be squared with the emotional wellbeing and dignity of the workers concerned, and the way workers perceive it. Without getting ensnared in linguistic hair-splitting, the term "psychological harassment" is a useful tag for describing a common occurrence, naming a special kind of torment which is not like others forms of work-related mental upset, and for creating a pigeonhole in which to slot what are, on the face of it, a wide range of situations.

Countless explanations have been offered. From a trade union and preventive angle, psychological harassment is intimately linked to changes in work organization. To be effective, any legislative response must take account of this whole-workforce dimension. In short, before looking at "harassers" and "harassees", we need to cast a glance on changes in work organization.

Hamid suffered a serious work injury - a fall resulting in a fracture and torn ligaments - which kept him off work for a year. "When I got back, I found I had been put in No Division. I couldn't believe that I wasn't given my mechanic's job back, but instead set to doing odd jobs, which I'm still doing. My areas now are the open spaces, the waste area or just nothing, whole days doing nothing just hanging around". Hamid spends these endless days "in the big managers' and supervisors' office. They sit me on a chair at a table and act as if I wasn't there, except when they need my place. The most humiliating thing is that even then, they don't talk to me. They just tug my sleeve to make me understand that I have to move". Just like dozens of other employees who have been through the No Division system - which the strike's main achievement so far is to have got scrapped - since it was introduced.

Newspaper report from the *Journal d'Alsace* on the strike at the Daewoo factory in Mont-Saint-Martin near Longwy, 24 June 1999.

Employers back bully boy tactics

Italy's draft anti-bullying legislation has met fierce opposition in employers' circles. The human resources director of Zanussi (a subsidiary of the Swedish Ericsson Group) said in a debate organized by the Rai 2 TV station on 17 January 2000: "However unpleasant, stressful, painful and distasteful it may be, harassment is an exceptional tool for selection, the judgment of the medieval God, which strengthens and selects the best. It's learning the hard way, through fatigue and anger. In a way, harassment is what a workplace is all about (...). There is not one successful person who has not encountered and overcome harassment, and come out the stronger for it..."

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¹ "Psychological harassment" is the term most used in this article as a blanket term for all the various manifestations of what is also variously called in the literature and elsewhere "workplace bullying", "victimization", "mobbing", etc. These terms are also used where appropriate.

Psychological harassment : a whole-workforce issue to do with work organization

Are we seeing a sudden outbreak of unreasonable workplace behaviour, or is there something about work organization that is receptive to, encourages or even causes individual unreasonable behaviour? The latter possibility seems more likely.

Harassment situations can arise in non-work contexts: between family members, between neighbours, at school (between pupils, or between pupils and teachers), in a community group, sporting club or even between performers and fans. But the dynamics of these situations are very different from those of workplace harassment.

Three things bear further scrutiny here :

- The key role of domination/subordination in employment contracts: work relations are not a sphere in which free will operates. There is substantial constraint, but it is not usually abused. By and large, it has the tacit support of the workers, who find meaning, dignity and scope for self-fulfilment in their work. Psychological harassment often falls in a grey area between outright coercion by line management, and demanding support for management's objectives from the whole workforce and each individual worker.
- Time: work relations are a prime opportunity for exposure to repeated acts.
- Individuals invest much mental and emotional energy in their work, and that greatly influences workplace inter-personal relations. That is part of the reason why affronts to dignity are so upsetting.

Also, a typology of the purposes of specifically work-related psychological harassment can be worked out from empirical observation.

Personal gratification may sometimes appear to be the main aim, but others are more commonly found :

- Forcing a worker's resignation without having to go through formal dismissal procedures.
- Hitting back at a worker perceived as disrupting the company authority structure. Bullying is often used as an instrument of union-bashing nowadays.
- A workforce management strategy (management by fear, destruction of workers' collective identities and the formation of a pack mentality which will turn on any individual who in any way challenges the constraints of the work organization).

Psychological harassment and work organization

But none of the foregoing explains why workplace bullying has become such a headline-grabber. Its rapid rise as a big workplace health issue is down to changes in work organization. One backlash of the dogma of competitiveness is the creation of inter-worker and inter-departmental rivalries. It takes little working out to see that a "dog eat dog" ethos allows not to say encourages the worst kind of attitudes. Without going into these in detail², some aspects should be singled out :

- Autonomy held in check and collective solidarities destroyed: part of the coercion is applied directly among the workers.
- The personal commitment to work demanded by most companies means that individual needs must always take second place to the dictates of production (in the broad sense).
- Work intensification means squeezing out "idle time" (from the viewpoint of short-term financial gain) which are also spells of work-related time vital for the workers to have the work activity properly in grip.
- Work intensification causes very different illness responses in different people. Some may "crack", producing a sort of "rejection" effect among their colleagues who themselves feel under threat and end up in denial of the problems.

The Dublin Foundation's survey of working conditions finds evidence of a close correlation between new work management methods and psychological harassment. Véronique Daubas-Letourneux and Annie Thébaud have worked out a typology of work organizations based on the main survey parameters³. It is in what they characterize as "flexible work" situations that bullying of both men and women is rife and associated with very high levels of stress. The distinguishing features of this type of work are highly flexible working time, a profit-driven (client or user demand-focused) work pace, and quality control procedures.

Psychological harassment and social determinants

Work organization is also connected with more general social determinants which it incorporates into the way the company works. There are often close correlations between psychological harassment and these determinants.

- The gender division of labour: psychological harassment is frequently sexist even if not necessarily sexual (as to purpose). Some authors see it as part of the social

² For an analysis of changes in work organization, see T. Coutrot, *L'entreprise néo-libérale, nouvelle utopie capitaliste?*, Paris : La Découverte, 1998 and T. Coutrot, *Critique de l'organisation du travail*, Paris : La Découverte, 1999.

³ V. Daubas-Letourneux, A. Thébaud, *Organisation du travail et santé dans l'Union Européenne*, Dublin, 2002 (in French only). The full text of the report is downloadable from URL : www.eurofound.ie/publications/files/EF0206FR.pdf

construction of male power and authority at the workplace. The empirical evidence is that women are more often victims of psychological harassment than men (9% against 7% according to the findings of the Dublin Foundation's survey of working conditions⁴). There is some correlation between the sectors most affected (general government, retail, banking, etc.) and the gender division of labour.

■ Job insecurity: as with all other workplace health issues, casualized workers (temporary agency staff, fixed contract workers, etc.) seem less able to erect defensive strategies and are probably prime victim material. But the issue is probably less to do with their legal status than problems of breaking into the working world, or the fear of being unemployed.

■ Other factors of discrimination. In France, half of all racist incidents reported to the national helpline (114 number) are work-related, against 10% involving the police or schools. Anti-gay discrimination help agencies also report that the workplace is still the main area of anti-gay and -lesbian discrimination⁵. Obviously, not all discrimination takes the form of psychological harassment, but it remains a prime way of undermining the discriminated person's position and dignity.

Swedish legislation

Sweden led the way, enacting the first regulations on psychological harassment in 1993.

The regulations set out to tackle workplace bullying as part of the employer's general prevention obligations. The 1977 Working Environment Act gave the labour inspectorate specific regulatory powers. On 21 September 1993, it enacted an Order on Victimization at Work.

The Order (AFS 1993:17) is short and to-the-point, comprising just 6 articles⁶:

- victimization is defined as "recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community";
- the employer has an obligation to organize work so as to prevent victimization;
- the employer must adopt an explicit policy against victimization;
- he must provide for the early detection of signs of, and the rectification of "such unsatisfactory working conditions, problems of work organization or deficiencies of co-operation" as can provide a basis for victimization;
- he must take counter-measures if signs of victimization become apparent (a sort of "secondary prevention");
- he must provide support to the victim, and have

specific procedures for that.

In line with normal Swedish practice, the Order is coupled with a General Recommendation as guidance for the different players in interpreting the regulation and to achieve consistency of labour inspectorate practice. The General Recommendation focuses entirely on an analysis of the effects of work organization factors on the workforce.

French legislation

The communist group in the National Assembly (lower house) tabled a bill on psychological harassment at the workplace on 14 December 1999. The bill came out of the parliamentary debate on the industrial strife at the Daewoo factory in Lorraine, where management practices were revealed which were an affront to human dignity. Specifically, some employees were forced to spend entire days in solitary confinement with nothing to do, or set to drudge work like picking up cigarette ends (it was known as "being sent to No Division"!). Employees coming back from maternity, paid or sick leave were particularly victimized in this way⁷. The National Advisory Commission on Human Rights adopted an opinion on psychological harassment at the workplace on 29 June 2000 pressing for legislation. In April 2001, France's Economic and Social Council adopted an opinion which had a major influence on the legislation in the pipeline, which came into being as the Modernization of Employment Act of 17 January 2002.

The Act adds new provisions to the Labour Code, making the prevention of psychological harassment one of the employer's general health and safety obligations.

The definition of psychological harassment was the focus of a major debate. New article L 122-49 provides that "no employee shall be subjected to repeated acts of psychological harassment which are designed to or do bring about a worsening of working conditions likely to be detrimental to their rights and dignity, affect their physical or mental health, or harm their career prospects". The National Assembly had adopted a different wording which referred to "the acts of an employer, his representative or anyone abusing the authority which they hold by virtue of their position". The bill was amended by the Senate (upper house), where the abuse of authority provision was dropped, so that psychological harassment can equally be committed by someone of equal or even subordinate status to the victim.

Preventive provision is directed towards a whole-workforce approach. The employer must act against

⁴ The Swedish data, which relate not to the perception of psychological harassment but purely to cases resulting in an incapacity for work, stress that most of those involved are women (around 75% in 1997-98). See: E. Menckel, "Threats, Violence and Harassment in School and Work-life" in S. Marklund (ed.), *Worklife and Health in Sweden* 2000, Stockholm : National Institute for Working Life, 2001.

⁵ For France, see : C. Daumas, "Au bureau pour vivre gay, vivons cachés", *Libération*, 22 November 1999. For Italy, see the publications of the CGIL's "Nuovi Diritti" office, at : <http://www.cgil.it/org.diritti/home-page/index.htm>.

⁶ The order and its associated recommendation are on the Internet in English at : <http://www.av.se/english/legislation/afs/eng9317.pdf>

⁷ What particularly outraged public opinion about the disclosures of Daewoo's management methods was that the company had received huge official assistance grants to set up in a region hard hit by industry shakeouts.

the risk factors of psychological harassment as part of his general prevention policy. The Labour Code was amended to leave no doubt that the employer's safety obligation applied to both "physical and mental" health. Dealing with psychological harassment and proposing preventive measures falls within the remit of the health and safety committees. But the French legislation has done little to expand the role of the prevention services, merely providing that the occupational health doctor can suggest individual measures to the business manager, like transfer to another post, or appropriate changes to the job required for the worker's physical or mental health. The reason for this cursory provision is doubtless because the debate on the development of prevention services is still going on, and there is as yet no detailed regulation on the multidisciplinary composition of company health services.

The whole-workforce approach is backed up by a set of procedures to deal with individual cases. The notification procedure which employee reps can use where human rights and individual liberties are being infringed has been extended to injury to the "physical and mental health" of workers. Once the employer has been notified by an employee rep, he must immediately conduct a joint investigation with the rep and take all necessary steps to put the situation right. If he fails to do so, or the employer and rep cannot agree that there actually is a problem, the employee rep can make an emergency motion to a labour court or tribunal. The court can order any measures necessary to put a stop to the injury to health, and impose a periodic penalty payment.

A mediation procedure has also been put in place for victims of both sexual and psychological harassment. The mediator must be appointed from a list of officially-designated names and must not be associated with the company.

Victims or their trade union, with their consent, may bring a court case. Criminal penalties have been introduced. The court may stay judgement, and enjoin the employer to introduce measures specified by it, or to work out his own measures, after consulting the workers' representatives, to put a stop to the harassment.

The onus of proof is modelled on the anti-discrimination laws. The worker must establish a *prima facie* case of harassment. The defendant must then prove that the acts in question did not constitute harassment and are justified on grounds unrelated to harassment. This onus of proof arrangement does not apply in criminal proceedings.



F. IOM Bulletin - Health and Safety

The new legislation also provides for the protection of victims and witnesses from dismissal or discrimination.

There are specific provisions for civil servants.

Belgian legislation

The Act of 11 June 2002 relates to violence, psychological harassment and sexual harassment at work. This means it has to cover a wide range of situations. In some areas, the acts covered involve relations between individuals working in the same company or workplace. In others - especially where physical violence is concerned - they will more often involve relations between workers and users, clients or simply those with access to the workplace. The Act's personal scope is also very wide. It applies to all workers (including the civil service), some school and tertiary education students, voluntary workers working under someone's authority, etc. It also applies to a limited degree to domestic staff who, in Belgium, remain excluded from the general provisions on workplace health.

The Act includes all the new provisions brought in by the Welfare at Work Act of 4 August 1996. That means that all the preventive arrangements redefined when the Framework Directive's provisions were taken over into Belgian law will now apply to psychological harassment (as well as sexual harassment and prevention of violence). This marks a clear break from past policy on sexual harassment, which favoured an individual, victim-focused approach. Experience has clearly shown how limited this type of approach is. While it may look very much akin to the French legislation, the Belgian Act is much more specific on the role of the prevention services and mediation procedures.

Psychological harassment is defined as repeated abusive conduct originating from outside or inside the company or institution which takes the form in particular of uninvited behaviour, words, intimidation, acts, gestures and writing⁸ the intention or effect of which is to injure the personality, dignity or physical or psychological integrity of a worker at work, to place their employment at risk or create an intimidating, hostile, degrading, humiliating or offensive environment.

The employer must put in place arrangements to prevent violence, psychological harassment and sexual harassment, which must include at least :

- physical adjustments to the workplace;
- a statement of the provision made for victims (specifically, the relations with the complaint resolution officer and the specialized prevention adviser);
- timely, impartial investigation of the facts;
- listening to and assisting victims;
- supporting and helping victims return to work;
- line management's obligations to prevent the situations envisaged;
- information and training for workers;

- informing the committee for prevention and protection at work (C.P.P.T.).

The employer must have a prevention adviser with skills in the psychosocial aspects of work and violence at work, psychological harassment and sexual harassment on the staff of his company prevention service. Failing that, there must be a prevention adviser on the external prevention service used⁹. The specialized prevention adviser may not be an occupational health doctor.

All firms of every size, therefore, must have a specialized prevention adviser. Employers can also appoint one or more complaint resolution officers to act as "first line" players to listen to what victims have to say and attempt an informal reconciliation.

All these measures (prevention plan, appointment of a specialized prevention adviser and complaint resolution officers) require the prior agreement of the workers' representatives, who therefore have joint decision-making power in this area.

Psychological and sexual harassment

The new legislation deals with both issues in the same context and by the same procedures. This is a big step forward.

One big limitation to existing sexual harassment laws is that the approach is too narrowly focused on a relationship between two individuals in which one is trying to force the other to submit to sexual relations. But sexual harassment is also a reflection of gender relations in the workplace, which means that prevention cannot just be about giving a sympathetic hearing and support to victims, and imposing penalties on abusers. Sexual harassment rules have not so far tended to look at work organization and the collective determinants of male domination at work.

Granted, there is a difference between psychological harassment and sexual harassment in that the ultimate purpose of sexual harassment is usually personal sexual gratification. But it can also just as often be bound up with psychological harassment, not least by reinforcing the gender division of labour, which comes through very clearly in the fervid intensity of sexual harassment in extreme male dominance situations - e.g., towards domestic staff, or in traditionally male occupations like the army, police, building trades, and some male-dominated technical occupations.

⁸ The Ministry of Labour's original green paper expressly referred to methods of work organization.

⁹ In Belgium, all firms with fewer than 20 workers regardless of industry segment must have a company prevention service. Firms with fewer than 20 workers which do not have such a service, and those whose company service cannot fulfil all their statutory duties must belong to an external inter-company prevention service staffed by specialists in five areas (workplace health, safety, industrial hygiene, ergonomics, psychosocial workload).

A range of procedures are available. Victims may take their complaint through company internal procedures via the complaint resolution officer or specialized prevention adviser (of the company service if there is one, otherwise the external service). Or they can complain to the labour ministry's medical inspectorate either because company procedures have not worked or because the victim lacks confidence in them. If mediation does not work, redress can be sought through the courts either by the victim personally, or their trade union, or a

voluntary organization. Belgian legislation also provides protection against dismissal and imposed changes in working conditions for victims who have brought a substantiated complaint. The onus of proof is very similar to that of the new French legislation. ■

The United Kingdom's provision

English law at present makes very limited provision, as it focuses on the purely personal aspects of psychological harassment.

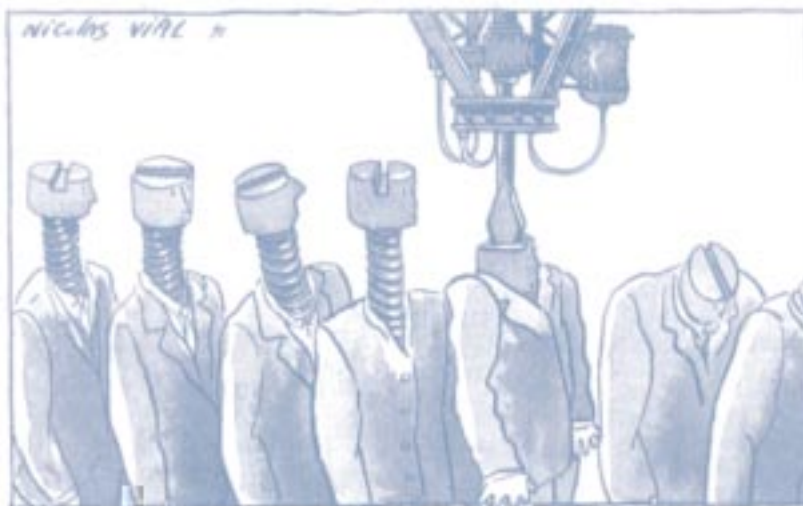
There are three aspects.

- The Protection from Harassment Act 1997 establishes a civil remedy (compensation for a tort) and two criminal offences in which the court can place an injunction or restraining order on the harasser. The Act does not expressly cover harassment at work, but nor does it exclude it. It gives a circular definition of harassment which makes it an offence to pursue any repeated conduct ("course of conduct") which amounts to harassment or which the harasser knows or ought to know amounts to harassment. Whether the acts complained of constitute harassment is a matter for the court to decide. The Act opened the floodgates for harassment proceedings (nearly a thousand convictions in 1998 according to statistics cited by von Heussen). But an examination of the case law shows that the Act is rarely used to deal with behaviour at work. A study of 168 cases in 1998¹⁰ found that most complaints related to the ending of an intimate relationship (43%), personal disputes (25%) or disputes over property or money (14%). Employment relationships do not feature as such (although the workplace may be involved, for example, where the intimate relationship ended was between two work colleagues).

- The Employment Rights Act 1996 contains a definition of dismissal (s 95 (1)) which treats as dismissal the employee's resignation with or without notice by reason of the employer's conduct.

- The case of *Walker v. Northumberland CC* (1976) is a landmark judgement on the employer's public liability for psychological disorders related to work organization.

Draft legislation to address these failings - the Dignity at Work Bill - is currently going through parliament. The bill was put together in 1997 but was blocked by the conservative government of the time. It was re-introduced in the House of Lords in December 2001. The bill does not deal with the whole-workforce or work organization-related dimensions of psychological harassment but recommends that employers should establish a policy to prevent victimization in consultation with trade union and safety reps.



Le Monde, 9 September 1992

Community legislation on the way ?

The European Parliament debated psychological harassment on the basis of a report tabled by Mr Jan Andersson written in July 2001. The report's conclusions pointed to the huge rise in psychological harassment over recent years, stressing its gender dimension and the connection with the spread of short-term contracts and growing job insecurity, and that women are more frequent victims than men of psychological harassment.

In its resolution of September 2001, the European Parliament asked the Commission to publish no later than March 2002 a Green Paper providing a detailed analysis of the situation regarding the issue of bullying at work in the various Member States and then, on the basis of that analysis, to present no later than October 2002, an action programme of measures at Community level against bullying at work. It also asked for the action programme to include a timetable.

In its Communication of March 2002 on The Community strategy on health and safety at work (2002-2006)¹¹, the Commission admits that psychological harassment and violence at work pose a special problem requiring legislative action. But it fails to say what form it will take, nor what timetable it has in mind.

¹⁰ Jessica Harris, *An evaluation of the use and effectiveness of the Protection from Harassment Act 1997*, Home Office Research Study 203, London, 2000.

¹¹ See "Long on ideas, short on means", *TUTB Newsletter* No 18, March 2002, pp. 3-6.