Preventing Bullying & Harassment
beyond banter - banter can go too far

The law has plenty of grey areas. Phrases such as '*reasonable*' and '*appropriate*' can be interpreted in many ways. This means that context and circumstance can be everything in some cases.

The grey area between workplace banter and bullying or harassment is a subject that both, employers and employees, are often concerned about. Whilst it may be rare, a high-spirited exchange between colleagues when taken out of context by another could be seen as harassment and end up as a grievance, disciplinary, or even a tribunal hearing.

Below is a 10 Point Banter Checklist, followed by some landmark cases and learning points which have helped inform the checklist and help you to understand when banter goes beyond banter and becomes harassment

Banter Checklist- 10 Key Points

1. **Tasteless jokes** are often cited in discrimination claims, so be aware of the different types of discrimination. If you're about to comment on someone's sex, race, sexual orientation, religion, disability, or age in a flippant or negative way then alarm bells should be ringing.

   Step away from the comment. No good can come of it.

   Age discrimination is the one that still tends to catch people out. It was the last of the different types of discrimination to be made unlawful – in 2006 – and many people will still make a joke at the expense of the office "old fogey" when they wouldn't dream of commenting on someone's race or sexual orientation. Something to bear in mind when you're asked to sign the next birthday card doing the rounds.

2. Really, when you think about it: "**What I said was a compliment**"
   No, no, no. Even "compliments" can make someone feel awkward, especially in relation to sexual harassment.

3. **Any unpleasant or negative comments to a colleague could constitute harassment**. It's not just discriminatory comments that should be avoided. Sometimes good friends do build up relationships which involve constant mickey-taking of each other.

   Don't let this style of humour become your default for anyone who isn't a close friend. It's often a natural instinct for someone to laugh along and pretend they're not bothered, when really, they are. Unless you know someone really well, you won't be able to tell the difference.

4. **Consider position of the other person: are they more junior than you?** Have they recently joined the team? Are they in a minority in the team, e.g., a woman working in a predominately male environment? All these things may make them feel more sensitive to comments, and less able to complain about it.

5. **Consider your position: if you are senior and have a hand in management decisions**, you need to be beyond reproach. Otherwise, any comments you make won't just be evidence of harassment in themselves, they could also be used as evidence that you may have discriminated in decisions about hiring and firing.

6. **Think about the rest of your team**. Any comment you make doesn't exist in isolation; it also contributes to an environment where that type of humour is accepted. You may only make one joke, but if you are the tenth person to make a similar of joke that day, the recipient's sense of humour will wear thin pretty quickly. If one person always seems to be the butt of office jokes, don't wait for HR to tell you to cut it out.

7. **Be especially cautious of email**. It's all too easy to forward a "hilarious" joke or video to several recipients at once, but if some of them find it offensive then it's not much of an excuse to say that you were just passing it on. Your employer is likely to have special rules about use of IT systems, plus there will be a paper trail showing exactly what you sent. If you wouldn't be happy to copy in the head of HR and the head of IT, then don't click send.

8. **Here's a good rule of thumb** – imagine your comment being read out in a barrister's withering tones in front of a scowling judge. Stripped of its context in the jokey back-and-forth between workmates, anything close to the knuckle is going to sound that much worse.

9. **If your boss takes disciplinary action against you for comments you've made;** it's usually best to apologise, promise to be more sensitive in future and suggest that you'd be happy to participate in equal opportunities training. This puts the ball back in their court and will usually stand you in better stead that insisting that you haven't done anything wrong because it was all just a joke.

10. **Nobody, not even employment lawyers, wants to ban office humour**. But sometimes derogatory humour can become a habit that can land you and your employer in hot water. Think of a different joke that's self-deprecating or that doesn't put anybody down. If you still want to make your original joke, check your mantelpiece for a Perrier Award. If there's nothing there, then your office can probably survive without the benefit of your wit on this occasion

Background The law and landmark cases

The Equality Act 2010 allows employees to bring claims of discrimination and harassment against their employer in circumstances where they have been on the receiving end of, or even have simply overheard, "banter" which they consider has overstepped the mark.

The Worker Protection Act 2023 (Preventative Duty on Sexual Harassment) raises the potential for more cases that centre upon "banter". The issue of overhearing banter is particularly an issue in large open workplaces, such as offices, classrooms, activity centres, or factory floors. If a claim is successful, it can result in a big bill for the employer, as well as reputational damage.

Assessing the banter

The crucial point to be aware of is that the effect of discrimination and harassment is assessed subjectively, i.e., from the claimant's point of view. Just because one person thinks a certain remark is hilarious and clearly only intended as a joke, it doesn't mean that everyone does. Any individual who heard the remark and found it offensive might bring a claim against their employer, and in the eyes of the law it is only their view that matters.

In the case of *Mrozinski v Q Medical Technologies Ltd* ET Case No. 1801217/14, the claimant accused her line manager of six acts of harassment. Evidence was presented to suggest that the claimant had found four of these acts humorous, so the tribunal found that these four acts did not constitute harassment. However, two other acts, including a suggestion by the claimant's line manager that she should dress seductively for a client meeting in order to secure business, made the claimant uncomfortable and embarrassed, and so *was* found to constitute harassment. An award of £2,000 for injury to feelings was made. it did not matter that the claimant had not previously taken issue with her line manager's conduct.

You should also be aware that, even if you can show that another individual in the same situation would have found the remarks funny rather than offensive, this will not help your case.

This is shown from *Keenan v Benugo Ltd* ET Case No. 2203590/12 where the civil partner of a gay employee was asked whether he had come to see his "*husband or wife or whatever he is*". Another gay manager at the organisation gave evidence to say that he would not have found this question offensive, but this was held to be irrelevant; the remark had offended the claimant and therefore an award of £1,500 was made in the claimant's favour.

Strength of character
It may be thought that a certain individual is considered to have a strong character, and so can "*take*" banter in a way that a more vulnerable person cannot. However, this is a dangerous assumption to make.

In *Bahra v Chief Constable of Bedfordshire Police* ET Case No: 1201460/12, a police officer endured race discrimination over an extended period of time and, due to his "strong character", had not raised complaints until much later than other less robust employees' person probably would have done.

The tribunal held that his strength of character would not result in lower compensation, rather it simply meant that he had endured the injury for longer. He was awarded £30,000. Conversely, in most workplaces there may be some particularly vulnerable employees who will suffer more extreme injury as a result of banter than the average person would. If successful in their claim, the employer will nonetheless be liable for the full extent of that person's injury, no matter whether it is beyond the expected or not.

Managing the banter
Clearly the existence of banter in the workplace can be dangerous for employers. It is therefore advisable to have clear anti-harassment and equal opportunities policies in place, and to ensure that these policies are communicated clearly to employees.

Employers should train their employees about their obligations under the policies, and as part of this training should consider giving examples of banter which would be considered unacceptable.

As a final point, employers should ensure that they are extremely direct with employees about the potential consequences of engaging in banter that oversteps the mark.

Here are seven more tribunal cases which crossed the line between banter and unlawful discrimination.

1. Gay lawyer who discovered homophobic comment in case file was discriminated against
In Bivonas LLP and another v Bennett, B found a handwritten note in which he and a colleague were discussed. Among other remarks, the note referred to B's "*batty boy mate*." This amounted to direct sexual orientation discrimination because a reasonable worker could take the view that this was a detriment. The tribunal noted that the claimant's colleague who had investigated his grievance prior to the tribunal claim "*had received no awareness training whatever in matters of equality, diversity or the possibility of unconscious as well as conscious prejudice."*

2. Heterosexual employee called "gay" won harassment claim
In Austin v Samuel Grant (Northeast) Ltd, a heterosexual male employee, A, won a sexual orientation and religion or belief harassment claim after repeated inappropriate remarks made verbally and by email. During once incident, colleagues asked A whether or not he liked football. When A told them that he was not interested, his colleagues said, "you're gay then." A filed a grievance, which the HR director rejected, on the basis that the remarks were office banter. The company's evidence was that this expression is "quite normal in Northeast England football circles" and is treated as a joke.

3. One-off comment about age held to be discriminatory

In Clements v Lloyds Banking plc and others, the claimant, C, was an employee in his 50s. His manager, who had concerns about his performance, said to him during a conversation "*you are not 25 anymore*" and suggested moving him to a different role.

C resigned and claimed constructive dismissal following further conduct by the bank. The tribunal decided that C was constructively dismissed but the dismissal was not tainted by age discrimination. However, the comment about C's age was discriminatory, showing that a one-off comment can amount to discrimination.

4. Employee compared to women on "My Big Fat Gypsy wedding" was harassed

In Harper v Housing 21, the claimant, H, complained about the attitude of her line manager, J, towards her Irish nationality. J's offensive behaviour included repeatedly likening H to women on the TV programme "My Big Fat Gypsy Wedding," although J said that her comments were office banter and that she did not intend any malice.

The employment tribunal upheld claims of direct race discrimination, racial harassment, and constructive dismissal.

5. Boss told female colleague he would like to eat you as a marshmallow

In *Furlong v BMC Software Ltd,* the claimant, F, complained about a number of incidents, including that a senior vice president of the company groped her bottom and told her "he would like to eat her like a marshmallow". She was also told by a manager that colleagues suspected her of having a relationship with a married male colleague. The tribunal upheld the claimant's various claims including direct sex discrimination and sexual harassment. It made recommendations to the employer including that it reviews the equal opportunities training given to managers.

6. Employee told Manager's remarks were only like banter in "Carry On" films

In *Minto v Wernick Event Hire Ltd*, a female employee, M, was subjected to daily remarks that were of the same sexual nature as the theme of the "Carry On" films. Her manager gave evidence that banter, including strong language, was an everyday fact of life. The tribunal found that this amounted to sex discrimination and harassment.

Employment Judge said "'*Banter' is a loose expression, covering what otherwise might be abusive behaviour on the basis that those participating do so willingly and on an equal level. It can easily transform into bullying when a subordinate employee effectively has no alternative but to accept/participate in this conduct to keep his or her job."*

7. "Monkey" comment amounted to harassment

In *Basi v Snows Business Forms Ltd*, the employment tribunal awarded an employee who worked in sales over £2,000 for office banter that spilt over into racial harassment. It commented that the office environment was conducive to "healthy banter" but found that the claimant, B, a Sikh of Indian origin, was harassed when he was called a *"monkey"* or "*cheeky monkey*" during a golf match at which business matters were discussed.

The employer did have a "rudimentary policy," but there was "no satisfactory guidance, no training, no monitoring and no policing of this policy."