

## Electronic Harassment - Steps to Protect Employees

By Jonathan Barnes and Sara Mansoori, 5RB

Electronic communications, either email as a direct form of communication or the Internet as a forum for the sharing of information, have very largely replaced the principal modes by which most businesses deal with each other and their customers: letter, telegram, telex, facsimile, paper advertisement, even telephone. But the powerful new media of the electronic age also present challenges for employers when that power is abused. One aspect of this is the need to protect employees, and the business as a whole, when they fall victim to electronic "harassment". There is obviously an infinite number of ways in which this problem can arise. Often, issues stem either from some form of customer dissatisfaction, or because an employee's personal disagreement with someone outside work is brought into the "workplace" by that person, by way of retaliation and in order to cause the employee maximum distress.

Where a business or a particular employee comes under email "attack", it may be possible to take straightforward practical measures to fend off the attacker, by blocking certain senders, changing email addresses and so on. But where the attack is persistent the courts can intervene to grant an injunction. Whilst the courts must not infringe anyone's right to freedom of expression, as protected specifically by the Human Rights Act 1998, they have recognised that not all "expression" is necessarily legitimate. Indeed, a communication may sometimes amount to the civil and criminal wrong of harassment under the Protection from Harassment Act 1997. The last five years have seen court decisions confirming that a series of critical newspaper articles, the sending of unwelcome text messages, and the towing of a defamatory banner behind an aeroplane can all amount to harassment, and lead to injunctions being granted. The reasoning is essentially the same for any email "campaign", whether it is abusive, offensive, defamatory or, as in some cases, threatens to disclose private information. The question in each case is whether a course of conduct amounts to harassment, in other words whether a reasonable person in the same position as the alleged harasser would think that their conduct amounted to harassment of another.

Similar considerations apply if a company or individual is singled out for "flaming" (or similar) on an Internet message board or

discussion forum. Here, a first practical step is often to contact the host of the message board and require it to remove or block postings as part of its "take down" policy. A responsible host ought to respond promptly to such a request, because once a host has been put on notice of offensive content being carried by the site English law will hold the host responsible as the publisher of such content if it is not removed.

A complication which often arises in practice, whether in relation to email or Internet postings, is that the harasser is either not known, or has successfully disguised his or her identity behind a fake electronic personality. Here, the courts have jurisdiction to order internet service providers, hosts, and other intermediaries caught up in the harasser's wrongdoing, to disclose to the victim what information they have that may serve to identify the harasser. That is often a useful step to take, although not always guaranteed to identify the particular harasser in question.

Further, however, the courts may also grant an injunction against "Person or Persons Unknown", by reference to the best description available of the harasser, usually by means of describing what it is he or she has done, or continues to do. This has at least two advantages. First, an injunction against the person unknown gives any internet service provider or host who has (unwittingly) provided their services to him or her an obvious additional impetus to assist the victim, and do everything possible to shut down any further use (and abuse) of their service by the person unknown. Secondly, it means that although there may be a delay whilst further enquiries uncover the identity of the person unknown, once his or her identity is known one of the first tasks arising for the harasser will be to explain why he or she should not be committed to prison for contempt of a court order made to restrain his or her activities, albeit whilst his or her identity was concealed. This requires that the person unknown is put on notice of any injunction obtained, but that may well be straightforward in practice if all that is required is to email the account from which the harassment originated.

It is no doubt true that English legislation and regulation have failed to keep up with the pace at which the electronic media have evolved over the last decade. New means of

communication mean inevitably that employers must consider new ways of protecting themselves and their employees from unwanted communications. In these respects, the English courts are showing themselves to be understanding and flexible when providing injunctive relief in appropriate cases.

© Jonathan Barnes 2007

© Sara Mansoori 2007

This article was first posted by *HRreview*, [www.hrreview.co.uk](http://www.hrreview.co.uk), on 9<sup>th</sup> July 2007.