

Enforcing Zero-Tolerance Policies in the Workplace? Not so fast!



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Eager to implement measures to prevent sexual harassment and other abusive behaviour toward employees and to project a positive, progressive image to the public, many employers have implemented “Zero-Tolerance” policies on bullying and harassment in the workplace.

But not so fast! Even when a behaviour seems to fall squarely within your policy, it is important to take the time to thoroughly investigate, or you might find yourself faced with legal challenges to your disciplinary decisions.

What’s the problem with zero-tolerance policies?

Zero-tolerance policies are not of themselves discriminatory or unacceptable. However, there is a risk that they will be applied inappropriately if the employer is not fully informed on the law around discipline in the workplace.

Courts and tribunals have often found the enforcement of these policies legally at odds with the *principle of proportionality*. To properly observe the principle of proportionality when making a disciplinary decision, you must balance the severity of the conduct in issue with the severity of the penalty, after considering the unique context of the case. The decision to dismiss an employee must not be “unjust.” Legally, zero-tolerance *cannot* mean automatic dismissal.

Decisions that affect a person’s career are also held to a certain standard of *procedural fairness*. The amount of procedural protections an individual is owed depends on the type of decision being made. The courts have specifically acknowledged the importance of work to a person’s life and identity. Having a fair and fulsome *process* in place to investigate complaints is essential in the employment context, especially when the conduct complained of is severe.

Guidelines for Effective Zero-Tolerance Policies

- 1) **Your policy should clearly define what “zero-tolerance” means for employees.** Make it clear that your company has taken a firm stance against a particular behaviour and that every reported incident of that behaviour will be carefully investigated and addressed by management. A well-known zero-tolerance policy can be a great tool to both encourage reporting, and to demonstrate an offending employee was aware their behaviour was unacceptable.
- 2) **Treat each incident as unique.** In deciding whether disciplinary action is warranted, consider mitigating and aggravating circumstances, both internal and external to the workplace. Mitigating circumstances could be the employee’s health related struggles, past work record, relationship with the complainant and the overall workplace culture. Aggravating circumstances could include the degree of the misconduct, the employee’s actual knowledge of the broken rule, the effect on the complainant and damage to the company’s reputation. Keep a record of your findings.

- 3) **Make sure your process is procedurally fair.** When investigating a complaint, treat your employees as individuals. Be respectful. Employees should be informed of the alleged misconduct and have the opportunity to give their side of the story. Thoroughly examine all circumstances around the misconduct. Keep private details as confidential as possible.
- 4) **Get outside help.** A well done, procedurally fair workplace investigation indicates to a court or tribunal that the company did their due diligence. There are plenty of situations where the best option is to hire an external investigator. Sexual and other forms of harassment, bullying and discrimination are very sensitive topics. Check out our blog post "[When do I need a Workplace Investigator](#)" for more information, or give us a call to discuss if an external investigation is advisable.
- 5) **Be mindful of your company culture.** Actively cultivate a culture of respect and promote positive relationships amongst employees and management. Make sure employees are aware of prohibited conduct and of venues of support if they are struggling. Always take complaints and comments about harassment seriously. Zero-Tolerance policies should be readily accessible and uniformly applied. As with so many things, when it comes to dealing with allegations of harassment, "an ounce of prevention is worth a pound of cure."

In summary, ***be bold when setting expectations, but judicious when meting out discipline.*** When someone crosses the line, take some time to consider all the facts before showing them the door.

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