

“The medium and the message: harassment at work.”

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In this paper I would like to address harassment that arises from the use of the Internet and Email. The paper explores actual examples of cases such as: stalking via the Internet, the use of pornography to harass, and Employment Court and Tribunal cases which deal with email misuse. The paper will not shed light on how wide spread this issue is as there has been no prevalence study of Web/email harassment to gauge the extent of the problem. The Internet is just another medium which a perpetrator might use to harass a colleague. However after a few instances of this behaviour I wrote a guide for staff in 1996 saying our Harassment Policy covered the misuse of the Internet (see Appendix).

I believe the misuse of email in the workplace is more significant than the misuse of the Web as a medium for harassment.

For the purpose of this paper harassment¹ is defined as:

- the use of language (whether written or spoken) or,
- the use of visual material; or
- physical behaviour, which, directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether by employer, co-worker, client or customer) and that, either by its nature or through repetition, has a detrimental effect on that employee’s employment, job performance, or job satisfaction.

The paper speculates on why emails might be different (in non trivial ways) from other written communication. But like most people working in this area my focus is on prevention and stopping harassing behaviour. A web/email user policy coupled with a harassment prevention programme is a necessary step in addressing this behaviour.

I’m going to begin with a story about stalking via the Internet and cellphone. The young woman who sought my assistance wished to identify the perpetrator – her cellphone company offered to change her number but she declined (names and other details for the purpose of this case study have been changed).

¹ The definition is based on s108 (1) (b) of Employment Relations Act 2000 (it is similar to s62 (2) of Human Rights Act 1993) an employee¹ may be sexually harassed:

“by-
the use of language (whether written or spoken) of a sexual nature; or
the use of visual material of a sexual nature; or
physical behaviour of a sexual nature,-
directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee’s employment, job performance, or job satisfaction.”

The story began with the visit of a postgraduate student (Nancy) to my office. Nancy had received six text messages over a similar number of days – the messages were of a sexual nature, containing sufficient biographical detail to indicate that the anonymous sender knew her. The messages were on average 25 words long, prurient with references to clothing and body parts. Some messages also included references to Nancy's boyfriend, and towards the end of the series, that she was being observed.

Nancy's Internet provider (a free Internet text messages company) had investigated the messages and traced the perpetrator to two IP addresses in New Zealand. The bulk of the messages came from one address. The sms.com provided the caller's signature and login id – the date and times of the call on the computer print out reflected the time zones the messages were routed through. Nancy established that the majority of calls were sent between 5 and 7 pm. The sms.com told Nancy that in their opinion the six messages she had sent them "do not constitute abuse. If there are more and they become abusive, we will assist you".

The IP address belonged to a company which had students from the university on placement. Twenty students or so, each year spent some time working with the company located in the North Island. The staff and students had access to a bank of computers in the company's head office.

Any individual could log on using a generic password at any one of the six or more computers. The systems controller could tell which computer had accessed the sms site, but could not identify the individual user. After requesting the monitoring of the computers for a few days without luck, we requested the company's IT people to cut access to the site. This request was referred to the Company's Human Resources personnel, who vetoed it, because of concerns about "privacy" issues in the event that one of their staff was the alleged harasser. They also felt that the alleged harasser could continue their behaviour using a different computer.

The company was concerned that its policy was being flouted. Guidelines prohibiting the inappropriate use of email and the Internet were displayed in the computer room. All the students on placement were sent a notice drawing the guidelines to their attention and advising that someone would be talking to staff and students about the guidelines. I visited the company and spoke to some of the students and company staff.

After a hiatus of a week – the text messages continued. One of the messages talked about "following her home" – although this wasn't physically possible because the text message was sent from the company – the police were asked for their assistance. The Police were very helpful and worked with the company's IT people, but to no avail. The student changed her mobile number and the harassing behaviour stopped.

The investigation was hampered by the existence of the generic sign-ons. The lesson in the above case is to ensure that all users have unique sign-ons and the requirement that users do not share their passwords.

The second case followed from a request to run a sexual harassment awareness workshop for a department in a Tertiary Institute. The need for the workshop arose

from the response, or more the lack of response, by staff to student misuse of computers. A student created a pornographic screen saver and took delight in testing it when female students were in the vicinity. The female students gave the offending male short shrift, but when a male employee began to collude with the perpetrator saying 'it was a harmless' the female students complained to the Head of department.

The viewing of pornographic material by bystanders is the most common way Internet pornography enters the arena of sexual harassment. It is no different than the display of calendars or pin-ups; there is the potential to create a hostile environment for employees.

In a similar case from the United States, a group of Minneapolis librarians exposed to a sexually hostile work environment have filed with the Equal Employment Opportunity Commission. Patrons can freely download pornography on library computers. This case has given rise to a debate on Internet filtering; opponents say filtering is "dumb" because:

"They block words the supporters of filters do not want blocked, and they do not filter words these supporters do want blocked," "People do not understand how ineffective filtering is. It sounds good in theory, but it blocks a lot of stuff that should not be blocked."²

The other side of the pornographic coin, i.e. the storage of pornographic material, highlights the pitfalls of technological fixes. The new Employment Authority heard the next case, an unjustified dismissal.

In May last year the ANZ bank told its employees that it had commenced screening for objectionable/pornographic material on its network. The staff were told an employee in Auckland had been dismissed and that other centres were being scanned. Subsequently some employees in Wellington were found with pornography stored on their computers and were dismissed. One of the Wellington employees took a personal grievance case against the Bank.

B "explained that he received emails from others within and outside the bank and that, as he could not read or open them, he normally deleted them."³ He alleged his picture viewer was not operating. When asked during the investigation if others had access to his computer, he replied they may have but it was unlikely they would put the material there. The Bank had policies on the misuse of computers and the use of passwords.

The Authority decided that the dismissal was unjustified on the grounds that a fair and reasonable employer would have tested the viewer and checked if other employees had access to B's computer. The Authority also found that B was subjected to disparate treatment, because other employees were given the opportunity to delete objectionable/pornographic material without recrimination. B had deleted

² <http://www.newsbytes.com/cgi-bin/udt/im.display.printable?client.id=newsbytes&story.id=166171>

³ p5 *Bingham v ANZ Banking Group* (WA, Wellington, WA 86/01, 27 November 2001).

pornographic material “found on his computer on the 17 May, but deleted by 18 May.”⁴

It would appear that the Bank was seduced by the ability to automatically scan its network and did not stand back and proceed cautiously with their normal disciplinary process. Scanning the network was the easy part.

A number of cases of the misuse of emails have been brought to the Employment Tribunal and Court in recent years. The NZ Employment Service case *Clarke v Attorney-General* involved employees, one of whom in the space of six weeks sent “612 email messages of an objectionable nature”⁵ The Courts said the “plaintiffs had exchanged messages which referred to their manager in derogatory terms. Evidence was produced that one of the plaintiffs had used a female employee’s personal computer for sending a pornographic message to another of the plaintiffs.”⁶

In *Rhodes v The Chief Executive of Dept of Work & Income*⁷ the plaintiff told two female employees that he had a dream about them. He followed this up with emails to the women. The employer investigated and although the behaviour was ‘rated at the lower end of the scale under the Workplace Harassment Policy’⁸ the employee was dismissed.

The existence of net etiquette guides and courses is evidence that brusque or terse emails are common. We have become inured to the email which doesn’t have a greeting or salutation. When I received a friendly email, Hi (in the subject address), from a senior staff member recently I knew something was amiss. I deleted the email along with the attached screen saver, saving myself from the Goner virus. I suppose there is something to be said for not greeting people on email.

Some emails are written material of a sexual or racial nature, but much of it is another form of harassing behaviour –workplace bullying. The next case is more typical of the abuse of email – where internal email is used to create a hostile environment or climate where workplace bullying can flourish.

The plaintiff emailed staff “what on its face appears to be abusive and obscene language”. The plaintiff “alleged harsh and abusive language was not unusual in email communications in the workplace, and that they never received any protocols or policy from the defendant stating what was inappropriate or unprofessional language. They also referred to an email from a team leader which had included harsh language.”⁹

I would like to return to *Clarke v A-G*, a case where the employee was given training in the appropriate use of the email facility. Goddard CJ in distinguishing the email conversations indulged in by the employees from their ordinary conversations said:

⁴ ibid 12

⁵ p601, *Clarke v Attorney General* [1997] ERNZ 600

⁶ ibid

⁷ *Rhodes v The Chief Executive of Dept of Work & Income*. (CA, Christchurch, CA 37/01, 5 September 2001).

⁸ ibid 4

⁹ p 887, *Howe v The Internet Group (IHUG)* 1 ERNZ 879

“they were reduced to permanent form on a computer suggesting a degree of premeditation, and they were sent in a workplace context where they could have done considerable psychological and social harm”¹⁰

Goddard stresses that an element of premeditation must be present when messages are created but e-mailers can be in denial about premeditation. The send button is clicked as soon as the message is composed – emailing being more akin to a speech act than letter writing. In addition to denial is the cocooning effect of the individual lost in their computer.

To explore this unreflective imperative to click and send our automatic writing let’s start with the analogy of the car. The car driver believes that the bubble of steel and glass is their unique space which must transport them unimpeded by others. The phenomenon of road rage is the extreme response to this worldview. The employee sitting at their computer terminal enters a similar cocoon. Pornography is viewed and stored – its very accessibility seems reason enough to indulge in its consumption.

Some emailers enter the cocoon and indulge in terse and vituperate correspondence which can create a hostile environment, in most cases a generalised form of harassment – called workplace bullying.

The Employment Tribunal commented on the behaviour of an employee saying: “It seemed to be beyond his understanding that if he wrote continuously to his manager and to fellow employees in such contemptuous tones he would eventually damage the working relationship irretrievably.”¹¹

Employers should tackle the misuse of their computer networks by having written policy which names the behaviour. An email and Internet use policy should reference the employers Harassment policy. The policy should provide a description of the behaviour and a clear message to employees that the behaviour will not be tolerated. Experts agree that this is the single most effective thing an employer can do to counteract these behaviours.

In conclusion all workplaces with Internet/email facilities should have a written policy disseminated to staff as appropriate for the size of the company. The misuse of the Web in the workplace is opportunistic and existing legal sanctions are adequate to deal with the harassment that might arise.

I think that the use of emails to harass or bully colleagues requires zero tolerance from employers and this could derive support from a legal sanction against workplace bullying.

Appendix

Is using an on-line sex site sexual harassment?

In some instances, yes. When staff or students either individually or in groups view sexual images via computer in the presence of others, some staff or students may find it humiliating, demeaning, and offensive. Openly viewing sexual explicit materials

¹⁰ p 621 Clarke v A-G

¹¹ p8 Fitzsimons, M (in press) “Bully for you: The phenomenon of workplace bullying”, Brookers Human Rights Law and Practice

from the Web, posting lewd jokes on institutional bulletin boards, and using sexually oriented screen savers can constitute sexual harassment by creating a hostile environment.

The issue is an emerging one as more sexual materials become available and when people view them in places where others might also see the materials or observe the responses someone has to the materials. Not at issue is an individual's viewing such materials in the privacy of an office, or cubicle, since there would not be a hostile environment affecting someone else if that is all that happened.

Some recent complaints have included unwelcome exposure to internet sex, as when someone walks by another person's computer and observes offensive materials. Sometimes viewing of such materials in a public space, is accompanied by sexual comments and an invitation to "share" the materials with others, assuming that everyone will "enjoy" them. They may talk about the materials in a hostile or ridiculing manner or they may forward these materials to others. Joking remarks about the materials, sexuality, and women are also a common behaviour associated with the viewing of sexual materials, especially in the presence of women.

Some students may not say anything even though the materials make them uncomfortable, because they do not want to offend the person or "make a big deal of it", or because they fear retaliation.

Also at issue is the use of institutional resources for non-institutional activities; for employees the issue is related to workplace productivity (employees who are watching are not working).

The University wishes to make clear to staff and students that the viewing of sexual materials in public spaces may be a violation of the University harassment policy.