

So now we have it: After four months, 48 pages and 66 interviews, the Dominic Raab bullying investigation report has been published.

In his resignation letter to the PM, Raab made a number of points about the bullying allegations against him, accusing the report of setting the bar too low, such that it would bring within that phrase behaviours it should not properly cover. Many describe that fighting withdrawal as characteristically graceless on Raab's part, but is it possible that, at some level, on that point at least, he was actually right? In particular, should the Raab investigation lead employers of senior staff to look at bullying allegations in a different way?

"The same standards and norms should govern Parliament and Whitehall as govern any other workplace," says the foreword to the 2018 Ministerial Code. This is expanded in the code itself: "Ministers are expected to maintain high standards of behaviour and behave in a way that holds the highest standards of propriety" (i.e. quite definitely not the same standards and norms as often apply in other workplaces, but never mind for now). The Code then explains that this means ministers being required to be "professional in all their dealings and treat all those with whom they come into contact with consideration and respect. Working relationships ... should be proper and appropriate. Harassment, bullying or other inappropriate or discriminating behaviour ... is not consistent with the Ministerial Code."

Of course, no one is really interested in any of that. What they want to see are the gory details of exactly what Raab said to whom that constituted the bullying found by the investigation. To them, the report is sadly going to be something of a disappointment, in that most of the relevant information has been omitted in the interests of preserving the confidentiality of the witnesses. We have some descriptions of generic behaviours, but little more. Knowing that the report would be the subject of considerable public interest, the decision was taken that being seen to protect those who asked for confidentiality outweighed the prurient public curiosity.

From that extract from the Code, the investigator rapidly dismissed the issues of harassment and discrimination and so focused primarily on the main allegation of bullying. He took its meaning for that purpose from a recent High Court action relating to the conduct of another senior politician, the then-home secretary, Priti Patel. That Court had accepted that there was a broad consensus that conduct could fall within the description of bullying if it was "(i) offensive, intimidating, malicious or insulting behaviour; or (ii) an abuse or misuse of power in ways that undermine, humiliate, denigrate or injure the recipient." That is not new or specific to Whitehall or civil servants, as it is effectively the definition used by ACAS. What was new was an express statement by the High Court



that conduct could fall within (i) and so be bullying within the Ministerial Code, even if the perpetrator is not aware or has no intention that his/her conduct has that effect.

This opens the door to allegations of unconscious bullying, a novel and, frankly, terrifying concept in employment relations terms. However, that was followed very shortly by the directly contrary proposition that a particular course of action (in that case, removing certain duties from an employee) could be either a legitimate management choice or with the express intention to denigrate or humiliate, and that only the latter (i.e. conduct with bad intent) would count as bullying. In other words, it seems the requirement for intention or malice is put straight back in, at least in relation to "normal" managerial conduct. That means that a step the manager could legitimately take would only be bullying if it were taken maliciously, but acts or omissions they could not properly commit did not require that same level of intent, presumably on the basis that if the manager should not have behaved that way, they either must or ought to have known that to be the case.

Confining the definition of bullying to that used in the High Court claim, the investigator noted, potentially excluded many of the external factors that would properly go into consideration of similar allegations in most private sector bullying or disciplinary policies – the understanding of the alleged perpetrator, mitigation, apology, contrition, likelihood of effective working relationships going forward, etc. Again, therefore, while the Ministerial Code does many things, it does not (interpreted in that narrow way) give effect to its own foreword, i.e. that it should be governed by the same standards and norms as any other workplace.

That said, the investigator then considered those same factors anyway, so it may be that the distinction is more semantic than practical. However, in setting out his brief, he appears to have made a slight modification to part (i) of the bullying definition above: whether the conduct was offensive, intimidating, malicious or insulting or was experienced as such, again moving the question away from the intent behind the behaviour (and, indeed, from the objective facts of the behaviour itself) and toward the more subjective question of how it was received.

The investigation noted a distinction made in an earlier internal Civil Service report between conduct that was "abusive" (i.e. intentional and targeted) and that which was "abrasive" (a personal style that feels like bullying to the victim, but is not intended to be so and where the perpetrator may be unaware of how their conduct is landing). He took the possibly bold view that both could count as bullying under the Code definition, but, at the same time, accepted that legitimate, reasonable and constructive criticism of an employee's performance would not do so, by implication even if it led the employee to feel uncomfortable, frightened, put down or disrespected. The precise significance of intention and malice to a finding of bullying under the Code therefore remains undetermined.

Raab's main defence (obviously irrelevant if bullying genuinely does not require knowledge or intention) was that he neither knew nor ought reasonably to have known that his conduct was having the impact alleged by the various complainants. He contended that bullying had to entail some element of targeting of an individual or group, did not include "generalised styles of working" applied equally to all, and should not extend merely to conduct that is "direct, demanding, challenging, rigorous or questioning ... particularly where the recipient [of the behaviour] is a senior person in a high-stakes environment".

Sixty-five paragraphs in, the investigator slightly jarringly concludes that it is not his remit, after all, to determine as a matter of law what bullying means for the purposes of the Ministerial Code, and turns to his factual findings. These are not set out in great detail for the confidentiality reasons already mentioned, and, for employers generally, are actually the least important part of the whole exercise. The key, in the sense of lessons and guidance that employers can take from the report for their own purposes, lies in the approach taken to Raab's defences above (being, in our experience, those used by many alleged bullies across the private sector, too), plus the visible rehearsal of other potentially relevant considerations in the assessment of the evidence heard.

The investigator was careful to note that he had placed less weight on hearsay allegations; had noted the time lag between events and complaints for two reasons – its impact on recollections on both sides and what it said, if anything, about how seriously the conduct in question was genuinely viewed at the time; had considered the particular nature of the work of a Minister of the Crown ("there can be a degree of real urgency in relation to a Minister's priorities, and it may be a source of frustration if those priorities cannot be successfully pursued"), something that many senior executives might say of their own positions, but, obviously, without the same level of public scrutiny); the working styles of the alleged bully (that Raab described himself as inquisitorial, direct, impatient and fastidious, demanding, driven and focused on detail probably tells you all you need to know on that); and the seniority and, hence, implicit resilience of those making the complaints, etc.

Having rehearsed those considerations, the investigator rejected a substantial number of the complaints against Raab, but did accept that in a couple of instances, he either knew or should have known of the undermining and humiliating impact of certain of his conduct. In one case, he had "introduced a punitive element" and separately made the suggestion that certain civil servants were in breach of their contracts of employment, raising the spectre of disciplinary action, although without any actual threat of it. He convened a meeting with a particular official for the sole purpose of criticising them for their team's failure to deliver a submission on time, even though there was no underlying urgency. Many of his criticisms on that occasion and others were euphemistically described as "unconstructive", (except obviously to the extent that the disputed terms "woeful" and "utterly useless" could be regarded as helpful encouragement, perhaps some form of mentoring). Overall, said the report, "he ought to have realised earlier that some individuals would find it difficult to cope with his style and should have adjusted his behaviour accordingly".

So where does this leave employers?

1. First of all, in no sense bound by the conclusion that a lack of intention or malice does not prevent conduct being deemed bullying, not only is this report specific to the Ministerial Code, but it concludes expressly that conduct that is for good reason, even if it has that adverse impact, can be legitimate.
2. Still obliged to keep very much in mind that conduct that is not strictly bullying is not, thereby, automatically acceptable. It may still feel very much like bullying on the receiving end, but the difference lies in how the employer can and should respond to it. Bullying is misconduct, and usually (because of the intent/malice condition) pretty serious at that. An abrasive management style is good reason for a sharp word or the offer of coaching, but, absent intention, it would not normally form a basis, without more, for a dismissal. Remember that Raab was not "dismissed", but quit because he had said, maybe foolishly in hindsight, that he would do so if findings were made against him. It does seem likely that he would have been pushed, if he had not jumped, but that would be by way of political expediency for the PM and is not an indication that the same would or should be true in the private sector.



3. Facing a strengthened obligation to draw unattractive management behaviours to the executive's attention at an early stage – you can possibly be unaware of the impacts of your behaviour until then, but if you are told about it (which the report concluded that Raab was not, at least not in any clear terms) and continue it nonetheless, that makes it far more arguable as intentional. Much was made here of the protection of individuals by the withholding of certain specifics, but, for these purposes (not yet disciplinary), there is little need for those specifics. The executive can be told on a "word to the wise" basis that what they claim to be just their management style is not working for X, Y or Z generic reasons. Either that grants them self-awareness they may have lacked or lost (e.g. in the context of some high-pressure transaction) or they fail to recognise the message at all. Either way, repetition thereafter is much more likely to constitute some form of bullying.
4. Fourth, seeking to create a channel whereby complaints can be raised promptly with the minimum fear of retaliation. The less that concern, the less credible will be a complaint raised long after the event. The more quickly the offside flag is raised, the more quickly the executive can be put on notice of the impact they are having.
5. Next, seeking to avoid placing on its management the sort of pressure that obliges them to work Raab-like days (7 a.m. to 11 p.m. it is recorded), since that will magnify the impact on the executive of the ordinary inefficiencies or errors which, it is absolutely inevitable, will occur from time to time. Couple huge pressure with lack of sleep and your average executive simply becomes a hair-triggered accident waiting to happen.
6. Sixth, keeping a very close eye on the interplay between what you say will count as bullying in your internal policy and what you say you will do about it if it happens. Trumpeting your zero-tolerance approach is all very well, but if, in an excess of eagerness to be seen to do the right thing, you define bullying too widely, you may find that you are painted into a corner by your own policies and obliged to dismiss when the facts, do not really justify it. Every case depends on its own facts, and a knee-jerk response to allegations of bullying without a detailed review of those facts may do the employer more harm than good.
7. Still having to take into account any contributory conduct or performance of the complainant. The report said that Raab should have adjusted his own behaviours, but it equally recognised some obligation on the part of colleagues to recognise and avoid pushing his buttons so far as practicable. If you know that your boss does not like wordy answers, is very fussy about deadlines, big on detail and likely to test your thinking, you will be at least partly to blame if you keep going into meetings unprepared. Similarly, there was criticism of Raab's tendency to interrupt, but if your employee fails to "read the room" and just blathers on, regardless (which was not the case here), what do they expect? It will be very few bullying cases that are completely one-sided, and both perspectives need to be seen to be considered.
8. Not getting tied up in the minutiae of hand gestures and the arts of constructive criticism and acceptable interruption rehearsed in the report. For the most part, these are too transient and too subjective to be actionable. Personal styles (and reactions to those styles) vary too widely to lay down objective rules of engagement applicable every time. Maybe we can nonetheless distill from the report three no-nos for executives: the traffic policeman's stop signal to the face; rudeness or abuse in place of constructive criticism; and banging the table except as an absolute last resort.
9. Last, looking for signs that the future will be different. If Raab had behaved before the complaints the same way as after them, said the report, there would have been no complaints. However, even though Raab apologised for any upset caused, it appears that he was never able to accept that, in all of this, he had actually done anything wrong. In the end, what comfort could the Prime Minister (or any other employer) take from that approach that the issue would not recur?

Key Contact

David Whincup

Partner, London

T +44 20 7655 1132

M +44 7802 860759

E david.whincup@squirepb.com