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Workplace Relations Newsletter
April 2016

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2 years on - A review of the Anti-Bullying Jurisdiction of the Fair Work Commission

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Bullying behaviour in the workplace may be addressed in many different forums. In the first instance, the internal bullying and harassment procedure and dispute resolution process of the relevant employer ought to be an employee's first port of call. Depending on the nature and the consequence of the activities, claims for workers compensation, discrimination, sexual harassment, adverse action or unfair dismissal may be pursued. These types of actions are perhaps more akin to treating the symptoms rather than the cause, and are dependant on some other pre-condition, whether it be the existence of an injury, a prohibited attribute upon which the bullying is based (such as sex, race, religion, etc.) or a termination. In severe enough cases, workplace health and safety or criminal complaints (assault, stalking, etc.) may be available. However, it was only with introduction of Part 6-4B of the *Fair Work Act 2009* (Qld) (**FW Act**) on 1 January 2014 that a dedicated regime was created under the auspices of the Fair Work Commission (**FWC**) to specifically address bullying at work.

As we have now passed 2 years of operation, it is an opportune time to review how the new laws have been applied and the types of orders that have been made.

What is bullying and what can the FWC do?

Bullying at work is defined to arise when an individual or group of individuals *'repeatedly behaves unreasonably'* towards the worker or a group that includes the worker, and *'that behaviour creates a risk to health and safety'*.[1]

Whether behaviour is unreasonable is to be determined objectively, namely what a reasonable person in the relevant circumstances would consider unreasonable. While not intended to be exhaustive, the explanatory memorandum refers to behaviour that is victimising, humiliating, intimidating or threatening.

On an application by a worker, where the FWC is satisfied that the worker has been bullied at

work and that there is a risk that such bullying will continue, the FWC may make any orders it considers appropriate (other than payment of a pecuniary amount) to prevent the worker from being bullied at work.[2] The discretion as to the potential orders is a broad one, extending beyond simply ordering bullying to stop, to include anything that has a *'rational connection to the jurisdiction'*[3] as long as it does not involve monetary compensation. The explanatory memorandum[4] contains examples of possible orders, including training, monitoring and review of policies. This breadth is illustrated by the matter of *Applicant v Respondent*[5] where Senior Deputy President Drake made orders (by consent after conciliation) relating to the required arrival time at work of the bullied worker and the perpetrator, and as to their communication and contact with each other.

We now turn to look a number of recent cases.

Conduct must be more than a single occurrence

In *Singh*[6], a contract worker at Coca Cola had an altercation with an employee of Coca Cola. The contract worker asserted that he had been physically and verbally assaulted. Steps were taken to separate the two workers onto different shifts and to minimise contact, and over the following eight months to the time of hearing there were no further incidents. In the circumstances, Commissioner Hampton of the FWC dismissed the complaint, finding:

> *'… for the behaviour to be 'repeated unreasonable behaviour' it cannot be a single occurrence. The definition implies the existence of persistent unreasonable behaviour but might refer to a range of behaviours over time. … The unreasonable behaviour must however be repeated. … The single incident, whilst on Mr Singh's account would be clearly unreasonable and inappropriate, is not such as to provide the necessary jurisdiction to the Commission to make orders in the context of the anti-bullying regime of the FW Act.'*

Inappropriate conduct by different workers was not in concert and not repeated

In *Hammon v Metricon Homes*[7], a site construction manager alleged a broad range of bullying activities over a number of years. Amongst many others, those allegations included being

issued with warnings about safety breaches on his work sites, a failure to receive pay-rises and promotions, a workload which was unreasonable, inappropriate training, and a personal vendetta by his manager. Commissioner Roe dismissed the vast majority of the allegations, commenting that while the environment was at times robust and competitive, the applicant had not been treated differently to others and that much of the conduct complained of was reasonable management action. The Commissioner noted that the applicant had a *'tendency to reach sweeping and general conclusions from isolated events'.*

However, the Commissioner did accept certain conduct as having been substantiated and inappropriate, including being called a *'lackey,'* the existence of a look alike board on which his head had been placed on a dwarf (as had various other staff members), a supervisor suggesting the applicant's pay be stopped, and being challenged to an arm wrestle at a function with inadequate response by the company. In the context of the many allegations made, these were considered relevantly minor. Most importantly, the Commissioner found that each of these actions involved one-off conduct by different individuals who had not been acting in concert to harm the applicant, and had not been repeated by those individuals. As such, the Commissioner was not satisfied on balance that that the *'repeated unreasonable behaviour while at work'* test had been met, and declined to make any orders. An appeal has been lodged in the matter.

Spreading gossip may amount to bullying

In *Page*[8], an employee of a stall holder at the Fremantle Markets, Ms Nadia Page (**Ms P**), alleged that the wife of another stall holder (**Ms L**) stared at her *'with a hostile look'*, refused to say hello to her, swore at her, and told other stall holders false stories about Ms P which caused

others to point and laugh at her.

Ultimately Commissioner Cloghan of the FWC declined to make any orders, finding there to be inadequate evidence to support the allegations. However. the Commissioner made the following comments, essentially warning the parties involved:

> *'Bullying can manifest itself in many ways. I consider it uncontroversial to say that spreading misinformation or ill-will against others as bullying.'*

While Ms L was entitled to terminate '*any cordial or neighbourly relationship'* and should not be criticised for a desire to be left alone, if she had sworn at Ms P:

> *'It departs from normal social interaction in the workplace and fall*[s] *within the definition of bullying if repetitive. This also goes for criticism/ gossip with other stall holders at Fremantle Markets. Scurrilous denigration of a worker in the workplace would certainly fall within the boundary of bullying.'*

Termination prior to or during the course of a bullying application

As noted at the outset, for a stop bullying order to be made, the FWC must be satisfied that the worker is at risk of continued bullying at work in the future. It follows then that if the worker is no longer working in the workplace then as a matter of law the FWC has no power or basis upon which to proceed.

The FWC has consistently recognised this limitation and been prepared to dismiss applications without a hearing on the basis that they have no reasonable prospects of success.[9] As concluded by Deputy President Gostencnik's in *Shaw v ANZ Bank*:[10]

> *'... it seems to me clear that there cannot be a risk that Mr Shaw will continue to be bullied at work by an individual or group of individuals identified in his application because Mr Shaw is no longer employed by ANZ and therefore is no longer at work. … It necessarily follows that I do not have power to make an order to stop bullying and, as a consequence, I am satisfied that Mr Shaw's application has no reasonable prospect of success. I see no reason in the circumstances why I should not exercise my discretion to dismiss Mr Shaw's application given my finding and I do so.'*

The Full Bench of the FWC recently endorsed this approach in *Obatoki v Mallee Track Health & Community Services*:[11]

> *'... the power to make such orders will only be enlivened once the two limbs of s 789FF(1) have been satisfied, that is, that the worker making the application has been bullied at work by an individual or group of individuals: and that there is a risk that the same worker will be continued to be bullied at work by the individual or group. Given that the second limb was not satisfied in this matter, the Deputy President did not have the power to make any of the types of orders contemplated by s 789FF.'*

This is not to suggest of course that terminating the employment of a worker is an appropriate response to a bullying complaint. Such action would likely see an employer face an adverse action complaint on the basis that it has treated the worker adversely because of the exercise of a workplace right.[12] Nevertheless, where the circumstances are such that the worker's employment otherwise ends in the course of the process, or the bullying complaint is made in response to a termination, a complete defence may be available.

Reasonable management action is not bullying

In *SB*[13], a manager (**Ms SB**) was the subject of a number of internal complaints by a subordinate. The company engaged an external law firm to undertake an investigation and ultimately determined that the complaint was unsubstantiated. A further complaint was made by another subordinate (**Ms CC**), which was again investigated and was found by the employer to have been substantiated in part, and the employer flagged the possibility of disciplinary action against Ms SB. Ms SB made her own complaint of bullying against Ms CC and against the company for failing to dismiss the allegations against her.

Her complaint was rejected by the employer. Ms SB then pursued her allegations in the FWC.

The FWC accepted that the making of vexatious allegations, spreading rude or inaccurate rumours, and conducting an investigation in a grossly unfair manner could constitute bullying if done repeatedly. A manager could be bullied by subordinates. However in this instance, Commissioner Hampton rejected the application, finding that the actions of the employer which were the subject of the application, including undertaking investigations of complaints, were reasonable management action and in fact were *'the only reasonable and prudent response'*. Using an external law firm to undertake investigations was not unreasonable. The Commissioner commented that management action need not be perfect, it was not relevant that it could have been done better, and the only question was whether the actions were in fact reasonable and done in a reasonable manner.

As to the action of individuals, the Commissioner concluded that the limited actions found to have been substantiated did not create a risk to health and safety:

> *'I am not satisfied that the alleged behaviour occurred and/or was unreasonable in the context that it occurred. Some of the behaviour as I have found was bordering upon unreasonable but not such as to fall within the scope of bullying behaviour as defined by the Act. In particular, I cannot be satisfied, based upon the evidence before the Commission, that the limited degree of unreasonable behaviour by the individuals concerned was such that it created a risk to heath and safety.'*

Initial unreasonable action remedied by subsequent improvement

Contrast can be drawn with *Willis v Gibson, Capitol Radiology*[14] in which a newly employed radiologist brought an application for bullying against his employer and two managers after being the subject of an investigation and receiving a disciplinary notice. The employer initially sought to have the claim dismissed on the basis that its actions were reasonable management action in a reasonable manner. However, following a preliminary hearing Commissioner Lewin was critical of the way the investigation had been undertaken, the lack of forewarning

to the employee and conduct which was *'unreasonably abrupt and threatening'*, and the confusion between performance management and discipline. As such, the employer had not satisfied the Commissioner that the case could not proceed.

A substantive hearing followed some months later. The Commissioner reiterated that the initial actions of the employer were not reasonable management action done in a reasonable way, and ultimately concluded that the conduct in the circumstances satisfied the test for bullying. However, since the initial finding, the employer had taken a very different approach. The initial disciplinary notice had been withdrawn. The two managers involved had no further involvement, and the matter had received direct attention by senior management. A reasonable performance management plan had been implemented and considerable restraint had been shown in the face of inflammatory conduct by the employee. The subsequent management action could not be faulted. In those circumstances, the Commissioner concluded that there was no risk of further bullying and therefore no basis for any order.

Bullying orders made where ongoing fear for safety notwithstanding change to employment

In *CF and NW v Company A and ED*[15] the FWC issued a stop bullying order for the first time following a contested hearing. In this matter, two female employees of a real estate company alleged that their supervisor, a property manager, engaged in bullying behaviour by belittling them, swearing and using other inappropriate language, engaging in physical intimidation and slamming of objects on desks, and by threats of

violence. Neither of the two employees felt they could safely return to the workplace, and both had sought medical treatment. In response to the complaint, the property manager resigned and took up employment with a related company at a different location, but there was ongoing interaction between the two businesses and the property manager was seconded back to the original business for a short period.

Commissioner Hampton found that bullying had taken place and that, notwithstanding the change in employment status of the perpetrator, given the ongoing interaction between the businesses there was a material risk of further bullying in the workplace by the relevant individual. On the evidence, the Commissioner was satisfied that *'without measures being implemented to set and enforce appropriate standards of behaviour in the workplace there was a risk of further relevant unreasonable conduct'.*

Two types of orders were made. The first related to the specific behaviour and minimising the contact between the perpetrator and the two employees involved going forward. The second type related to the broader culture of the business, requiring the implementation of anti-bullying policies, procedures and training, and ongoing reporting arrangements. The orders were issued with an expiry date of 24 months.

Is 'de-friending' on Facebook bullying?

In *Roberts v VIEW Launceston Pty Ltd*[16] the FWC concluded that a real estate agent had been subjected to bullying over an extended period by the agency's office administrator. The unreasonable behaviour found to have been substantiated included:

- Being belittled and responded to in an aggressive and rude manner;
- Having administrative work on her listings delayed to make her look unprofessional;
- Referring one of her clients to a collection agency when the employee had made arrangements for delayed payments;
- Being spoken to abruptly and in a condescending manner, being ignored, and being treated differently from others in terms of day to day office activities;
- When raising a concern with the principal of the agency, being told that her actions were like *'… a school girl going to the teacher to tell on the other child'*; and
- Being *'de-friended'* on Facebook.

The final point is interesting and has received significant media attention. However, in context, the FWC was not suggesting that *'de-friending*' a person on Facebook, or refusing to be friends in the first place, would amount to bullying. Rather, it was one factor in a pattern of behaviours which as a whole were found to be unreasonable. To amount to bullying, conduct must be repeated in nature, and as noted in *Page*[17] co-workers are not required to be friends. Nevertheless it does raise legitimate concerns for employers that the FWC was prepared to consider as relevant a worker's personal decision to cease being friends with someone on social media as part of its considerations of broader workplace behaviour.

The employer further contended that because an anti-bullying procedure and manual had been established since the incident, there was no risk of bullying behaviour occurring at work in the future. This submission was rejected and was noted as inconsistent with its position that the behaviour complained of was not bullying in the first place. As stated:

> *'A lack of understanding as to the nature of the behaviour displayed at work has the proclivity to see the behaviour repeated in the future … I conclude that there is a risk of Ms Roberts continuing to be bullied at work.'*

The matter was reserved for discussion of appropriate orders.

Commentary

Notwithstanding the many bullying applications that have been commenced, few at this stage have resulted in formal orders being issued by the FWC. It may be of course that many issues have been able to be resolved during the conciliation process without the need for orders. For those matters that have progressed to a hearing, applicants have often struggled to substantiate their allegations, or have failed to demonstrate that the requirements of the FW Act have been met. It is not a forum for airing general workplace grievances. Nevertheless, the process consumes considerable time and

energy for any employer, and is often used in conjunction with a worker's compensation claim.

For an employer, the key takeaways remain:

1. Employers retain a fundamental legal obligation to ensure the safety of their workers in the performance of work.
2. Employers must ensure they have a workplace bullying policy, and a process for handling complaints. Training should be provided regularly (every 12 months) so employees are aware of the employer's expectations and the potential consequences.
3. Complaints should be taken seriously and investigated. Where substantiated, appropriate disciplinary action ought to be taken. Subject to the severity of the conduct, that may range from counselling, warnings, re-training / education, suspension, demotion or termination.
4. If bullying is established, care should be taken to ensure the bullied employee is not punished or disadvantaged. All too commonly the bullied worker is the one who is moved or required to accommodate the other party.
5. Communication with all affected parties remains key in any process. Regardless of the outcome, all employees want to feel that they have been heard and respected.

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[1] S 789FD of the FWA.
[2] S 789FF of the FWA.
[3] *Obatoki v Mallee Track Health & Community Services and Others* [2015] FWCFB 1661.
[4] Explanatory Memorandum to the *Fair Work Amendment Act 2013* (Cth) [120].
[5] PR548852.
[6] [2015] FWC 5850.
[7] [2015] FWC 5565.
[8] [2015] FWC 5955.
[9] *Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank and Another* [2014] FWC 3408; *Ravi v Baker IDI Heart and Diabetes Institute Holdings Limited and Others* [2014] FWC 7507; *G.C.* [2014] FWC 6988; *Hayward v Department of the Environment and Others* [2014] FWC 9444; *P.K.* [2015] FWC 562; *Jackson* [2015] FWC 402.
[10] [2014] FWC 3408.
[11] [2015] FWCFB 1661.
[12] See ss 340 and 341 of the FWA.
[13] [2014] FWC 2104.
[14] [2015] FWC 1131 and [2015] FWC 3538.
[15] [2015] FWC 5272.
[16] [2015] FWC 6556.
[17] [2015] FWC 5955.

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Workplace Relations Gazette 2nd edition

The Workplace Relations Gazette 2nd edition provides employers with a synopsis of practical and noteworthy cases with a focus on unfair dismissal, bullying, adverse action, breach of contract, general protections, penalties and sentencing, and work health and safety.

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