benchtv
a benchmark production

Précis Paper

Anti-bullying 'Injunctions'

A discussion of the recent decision of the Fair Work Commission in *Lynette Bayly* [2017] FWC 1886

Discussion Includes

- Anti-bullying jurisdiction
- *Lynette Bayly* case
- Implications for employers and employees

Précis Paper

Anti-bullying 'Injunctions'

In this edition of BenchTV, Simon Obee (Associate at Swaab Attorneys, Sydney) and Michael Byrnes (Partner at Swaab Attorneys, Sydney) discuss the making of interim orders under the Fair Work Commission's anti-bullying jurisdiction, as seen recently in *Lynette Bayly* [2017] FWC 1886.

Anti-bullying jurisdiction

1. In the recent decision of the Fair Work Commission in *Lynette Bayly* [2017] FWC 1886, the Commission made interim orders to stop a disciplinary process that was underway. This case could be a tool in the arsenal of employment lawyers, particularly those acting for employees to prevent or stop an investigation or a disciplinary process.

2. The anti-bullying jurisdiction commenced on 1 January 2014, and enables the Fair Work Commission (FWC) to make orders to stop bullying conduct. Workplace bullying is defined under s 789FD of the *Fair Work Act 2009* (Cth) as repeated unreasonable conduct or behaviour that is directed towards an individual or a group of workers that creates or causes a risk to work health and safety.

3. The Commission has powers to make orders to stop conduct of that kind. To satisfy the repeated element of the definition, there must be more than one instance of the conduct or behaviour.

4. In determining what is considered reasonable, the Commission will undertake an examination of the given situation in determining whether or not to make orders. In order for it to be reasonable, it first needs to be a reasonable management action that then needs to be conducted in a reasonable manner.

5. In order to satisfy the final element of the definition, i.e. creates or causes a risk to work health and safety, it can be a physical or a psychological risk to safety.

6. The anti-bullying jurisdiction of the FWC makes it clear that employers can undertake tasks or processes that might be unpleasant for an employee. This can include performance management, disciplinary processes or investigations.

7. In other cases, such as in *Ms SB* [2014] FWC 2104, the Commission has made it clear that investigations themselves are not (necessarily) a form of bullying conduct. Beyond that, even if you are under investigation and the investigation finds that not all of the allegations are proven, that does not mean that the investigation constituted bullying. It is to be expected in

some investigations that there are going to be allegations that are going to be sustained, and some that are found not to be proven.

8. Increasingly lawyers acting for employees are looking at the disciplinary and investigative processes and scrutinizing them for faults and flaws, both in the procedural fairness aspects and the manner in which it is conducted.

9. Often the orders that the Commission will make might be described as micromanagement. The sorts of orders the FWC makes in respect of employers include having in place a bullying policy, and the orders may involve a review or training regarding that policy, or enforcement of that policy.

10. The orders the Commission might make in respect to employees are things such as they should be physically separated, should only communicate through intermediaries, etc. However, the FWC cannot make monetary orders.

11. Once the employment comes to an end, the Commission generally cannot make any orders in respect of the bullying conduct. If the Commission cannot find that there is a risk to the employee of further bullying conduct, it cannot make orders.

12. This may lead people to think the best way to deal with an anti-bullying application is to terminate the employment of the employee, but this would only lead to an adverse action matter. There is a minor exception to this jurisdictional issue – the Commission still has jurisdiction where an employee has brought unfair dismissal proceedings and is seeking reinstatement.

Lynette Bayly case

13. In *Lynette Bayley* [2017] FWC 1886, the anti-bullying jurisdiction of the Fair Work Commission was used as an effective injunction to stop a disciplinary process.

14. The case involved an employee, Ms. Bayly who brought an anti-bullying application to the FWC, and she was under investigation for misconduct. The employer provided her with draft findings in respect of an investigation report and asked her to attend a disciplinary meeting to provide her response.

15. Ms. Bayly's lawyers wrote to the employer and said that the employee was suffering from a depression and anxiety condition, which was supported by medical evidence. Her lawyers sought particular undertakings. The undertakings were that the employee was not going to be required to attend the disciplinary meeting where she was going to asked, or required, to

provide a response, and that the employer was not going to progress with the disciplinary process for the period of the medical certificate.

16. After the employer refused to agree to these undertakings, Ms. Bayly made an application to the Fair Work Commission under its anti-bullying jurisdiction, and supplementary to this Bayly's lawyers sought injunction-like orders from the Commission on terms similar to what was sought in the correspondence to the employer .

17. An interlocutory injunction is a legal order that can be obtained to maintain a particular situation on an interim basis until the matter can be finally determined. The Commission has the power to make interim orders under s 589(2) of the *Fair Work Act 2009* (Cth).

18. The employer argued that the orders should not be made. The employer put forward various reasons for this, arguing that the employee had been given an opportunity to provide a substantive response and had not done so, and that the draft adverse findings should be taken into account.

19. The employer also argued that the interim orders did not really go to protecting the employee against bullying, they were directed at something else and was beyond what the Commission should order in this case.

20. The Commissioner considered these arguments and weighed them up, having regard to the principles that are used in interlocutory injunction cases, considering whether there was a serious issue to be tried, and what is the balance of convenience?

21. It appeared on the face of the case that there was some strength to the substantive bullying application that had been made by the employee, The Commission thought that there was an element of retrospectivity to some of the allegations that had been made against the employee. They believed that some of the allegations against the employee may have been raised after she raised allegations of bullying against the employer.

22. Once the employment comes to an end, the Commission has no jurisdiction in its anti-bullying jurisdiction, so that militated towards the making of the orders.

23. The orders themselves broadly reflected the undertakings. The orders made were:
    - The employee not be required to attend the disciplinary meetings
    - The employee not to be required to participate in the disciplinary process, and
    - No disciplinary sanction be imposed against the employee until further order.

24. If there was a change of circumstance, for instance if the employee had made a recovery from her condition, then that would have been a basis to approach the Commission to have the orders lifted.

Implications for employers and employees

25. The Commissioner in making the orders in this instance turned on the circumstances of this particular case. The Commissioner did state in his determination that these sorts of orders will not be made regularly, and it will not become an avenue for stopping all investigations.

26. If an investigation is not being conducted in a reasonable manner, then that provides a basis for an employee who is subject to such an investigation to approach the Commissioner and seek an injunction like order.

27. The employer in *Bayly* made the argument that there was a third party investigation, and that was said to be a reason not to make the orders. This is certainly something that is prudent to do, but it is no guarantee that orders cannot be made in respect of the investigation just because the investigation is being conducted by a third party. However, this does raise the specter of the Commission actually investigating or scrutinizing the investigator's own conduct.

28. It is certainly now expected that investigation is part of a good, robust process. An employee or their representative may consider this avenue of seeking interim orders in circumstances where there is an apprehension that procedural fairness is not being afforded to the employee, or where the conduct of the investigation itself is such that the employee can argue that there has been unreasonable conduct.

29. The mentality which is adopted by employers sometimes is a 'proceed at all costs'. This may be a good starting point in that the employer sets the agenda and will determine when these steps occur, having regard to the principles of procedural fairness. However, this should not be an immutable principle – you need to be flexible.

30. For example, if an employee has submitted a medical certificate to say that they are not in a fit state to participate in that process, you must reflect upon that and consider that if you decide to proceed, are you leaving yourself open to attack or criticism? You must consider whether the process is then impugned by the fact the employee was not able to fully participate, potentially leaving yourself exposed in relation to any subsequent action.

31. How sustainable the outcomes of a disciplinary process are is linked to how solid the investigation is. If an employer is facing a situation such as was faced by the employer in *Bayly*, they may need to consider how defensible their position is.

32. If you are an employer and you have these orders made against you, then they almost invariably are going to be made with a broad liberty to apply. It is also important to keep in mind that they are interim orders, meaning they are still subject to final hearing. If these orders have been made against you, one thing to consider is seeking that the matter be considered on an expedited basis in order to mitigate the impact of the orders.

33. If you are acting for employees on the other hand, you should always consider whether or not you can make this type of application.

34. The Commission does not have the power to make monetary orders in anti-bullying matters. However, there are a fair number of cases where an employee will bring an application of this kind in order to try and negotiate or bring about an agreed separation, or separation on terms with their employer.

35. The Commissioner then mediates or conciliates the matter, and that conciliation becomes the basis for the employer and the employee to say that the relationship is not working, and work towards bringing the relationship to an end. Sometimes that resolution will involve the payment of money from the employer to the employee. If you are able to bring an application of this kind and threaten to bring such an order , this may give you leverage.

36. This case and the avenues followed in this matter are definitely something that all employee representatives should be considering in similar matters.

BIOGRAPHY

Simon Obee

Associate at Swaab Attorneys, Sydney

Simon was admitted to practise as a solicitor in the Supreme Court of NSW in February 2015, having previously qualified as a Solicitor in England and Wales. Simon has provided assistance to employers and individuals on a diverse range of matters including drafting contracts and enterprise agreements, interpreting award provisions, advising on obligations under the *Fair Work Act,* managing employees with ill health and poor performance, and advising on unfair dismissal, adverse action and discrimination claims.

Michael Byrnes

Partner at Swaab Attorneys, Sydney

Michael Byrnes is a workplace relations lawyer with over 20 years' experience in assisting clients navigate employment and work health and safety issues. Michael is an experienced advocate who has appeared in various courts, tribunals and commissions in both interlocutory and final hearings on matters including breach of employment contract, statutory underpayment claims, industrial disputes, unfair dismissal hearings, work health and safety plea hearings and coronial inquests. Michael runs specially tailored training programs and seminars for clients (including at board level). He also drafts and reviews workplace policies and undertakes complex and sensitive workplace investigations.

BIBLIOGRAPHY

Focus Case

Lynette Bayly [2017] FWC 1886

Judgment Link

Lynette Bayly [2017] FWC 1886

Cases

Ms SB [2014] FWC 2104

Legislation

Fair Work Act 2009 (Cth)