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Précis Paper

Bullying in the Workplace

A discussion of the law relating to bullying in the workplace

Discussion Includes

- Overview of the current law relating to bullying
- Reasonable management action
- Constructive dismissal
- Advice for employees and employers alike when faced with an issue of bullying in the workplace
- Approach of the Fair Work Commission

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Bullying in the Workplace

1. In this edition of BenchTV, Chris McArdle (Principal Lawyer, McArdle Legal, Sydney) and Deirdre McEvoy (Senior Associate, McArdle Legal, Sydney) discuss the developing legal area of bullying in employment law, and provide advice to both employers and employees alike when faced with an issue of bullying in the workplace.

Overview of the current law relating to bullying

2. There is not a lot of law relating to bullying, because the jurisdiction is only three years old, and most of the decisions handed down in relation to bullying seem to be dismissing applications, rather than upholding them. So there are still very few decisions that give examples of conduct that would be deemed as bullying.

3. There are a lot of procedural decisions to be made even before making an application. For example, there must be an ongoing risk of bullying for the Commission to have jurisdiction. An employee who resigns cannot then continue with their bullying application, because an ongoing risk no longer exists. Similarly if an employee is terminated, they are no longer at risk of bullying.

4. There have been some interesting decisions recently in relation to preventing the termination of an employee in order not to frustrate the bullying jurisdiction. For example, the client in Chris McArdle's current and ongoing case attempted to get a prohibition on a particular action in order to not frustrate the actions of the Commission. In this instance, the Fair Work Commission found that if it continued to process the matter, but not give the client the interim injunction, it would not be losing jurisdiction.

Reasonable management action

5. Applicants almost always genuinely perceive that they have been bullied. But subjective feelings and thoughts are not enough – applicants must show they have experienced unreasonable behaviour at work, which has been directed towards them, and has caused a risk to their health and safety.

6. Employers very often respond by denying the bullying, and calling it instead 'reasonable management action'. It is difficult in this kind of dispute for practitioners to form an objective view as to what really happened. Factors relevant to forming that view will include the context of the alleged bullying, and all the surrounding circumstances. For example,

shouting at a co-worker to "shut the door" would be unreasonable but if the context is that an intruder is trying to gain access, that behavior (the shouting and curt instruction) is suddenly a lot more reasonable.

7. The onus is on the employee to show that something like a performance management regime is unreasonable.

8. One example of employer conduct found to be bullying was in relation to a teacher who had returned from long service leave. She was required to go on training immediately following her return, when everyone else returning from long service leave was not, and the Commission found this to be unreasonable. The teacher was also told her performance was so deficient she needed to be mentored, but the mentor assigned ended up having less teaching experience than she did herself, and again, the Commission found this to be unreasonable.

9. The fact that the Fair Work Commission can only make an order for something to change, and cannot award money, is significant. It is very difficult to fashion remedies that will contribute to a harmonious working relationship.

10. Changes to the *Workers Compensation Act 1987* (NSW) have been made to include s 11A - which states that a person who has suffered psychological injury because of reasonable management action cannot be compensated.

11. Applicants the subject of overbearing micromanagement and unreasonable conduct are advised to take notes of behaviour that is objectionable, including itemising names, dates, details, witnesses. In order for an applicant to succeed, he or she must be able to present this evidence to the Commission, in order for the Commission to be able to make a finding on the facts. Of course, bullying can also be very subtle and insidious.

Constructive dismissal

12. Constructive dismissal is where an employee is forced to resign because of the behaviour of an employer in accordance with s 386 (1)(b) of the *Fair Work Act 2009* (Cth). If the employee leaves without bringing the issue up with the employer, he or she is unlikely to be said to have been 'forced' to have left. The word 'forced' in this context means absence of choice. It will be a rare case where the bullying is so obvious and severe that an employee could be said to have had no choice but to resign. In any event, once an employee has resigned, they effectively preclude themselves from pursuing a stop-bullying application (but they might of course have other remedies open to them)

Advice for employees and employers alike when faced with an issue of bullying in the workplace

13. Employers can be liable for the bullying behaviour of their employees, but they must first be made aware of it. It is prudent to try to solve the problem in the workplace before having to approach the Fair Work Commission. Indeed, one of the first questions the Fair Work Commission will ask of an employee is: *what attempts have you made to try and resolve the issue before coming here?*

14. The employee is best off in the first instance approaching Human Resources to express their concerns. If all the correct steps have been taken by the employee (like complaining to HR first, and being advised by their medical practitioner that they must leave), the applicant may then seek to make out a breach of the implied terms of their employment contract – specifically, the implied terms of fidelity and good faith.

15. The employer has a duty to provide the employee with a safe place of work. If work has ceased to a safe place because of bullying, then the employer has potentially breached the employee's legal rights. It might be possible that Safe Work would get involved if the breach is serious enough, or the employee could pursue a claim for breach of contract in the Local, District, or even Supreme Courts, depending on the level of damage.

16. In cases of such serious breach, it may be possible for an employee to tell the employer that it considers the employer to have repudiated the contract of employment, and that it is now entitled to walk away and sue for damages, although cases like this rarely succeed.

17. In *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120, the employee successfully argued that a breach of policy had occurred.

18. It is very common for employment contracts to now include a provision stating that workplace policies do not form part of the contract of employment. Such a provision, however, does not remove the fundamental obligation in every employment contract that no one will act unlawfully towards another.

19. s 19 of the *Work Health and Safety Act 2011* (NSW) states that a person in charge of a business must ensure, insofar as it is legally practicable, that there is no harm to health or safety in the workplace – this is a statutory obligation as well as a contractual one.

20. The employee has to prove two things in order to sue an employer for bullying:
    - first, that a person(s) has repeatedly acted unreasonably towards him/her at work
    - second, that that behavior has created a risk to health and safety

Approach of the Fair Work Commission

21. The approach of the Fair Work Commission is very pragmatic. Starting a stop bullying application is not difficult. The employee can name the persons alleged to be bullies as respondents individually.

22. Within 14 days of the application being lodged, the Commission must decide how best to conduct the matter. Each of the respondents will have an opportunity to file a response.

23. Often the Commission will then schedule a conciliation, and these conciliations can sometimes be very effective for parties.

24. Some disputes are intractable, however, in which case they go to a hearing, and the Commission will rule on whether bullying has in fact occurred. Such a hearing would run just as a Court hearing would.

25. Generally speaking, around 95% of legal disputes are resolved prior to a hearing, which is a far from true reflection of the bullying that occurs in reality. Employers and employees alike are advised to adopt a procedure of firstly getting the facts, diarising them, and then sitting down with those involved in an attempt to resolve the issue. If that is not possible, then the Fair Work Commission has a real role to play, and a good record of sorting things out. If that is not possible either, then there may be cause of action for an employee to sue.

26. There are a lot of advantages to parties coming to a resolution between themselves – first and foremost, they will avoid the publicity of a published decision from the Fair Work Commission, and the trend of late has been for justice to be done in public.

27. In sum, bullying must:
    - be ongoing
    - cause, or be likely to cause, damage to a person's health or safety
    - not be reasonable management action.

BIOGRAPHY

Chris McArdle

Principal Lawyer, McArdle Legal, Sydney

Chris commenced legal practice in 1998 after serving as a Commissioner of the Industrial Relations Commission of NSW. Chris is accredited by the Law Society of NSW as a specialist in Employment and Industrial Law and has achieved a number of breakthroughs in the anti-discrimination, unfair contracts and Australian Workplace Agreements Jurisdictions. Chris acts for corporate and individual clients with a philosophy of preventing problems and increasing corporate efficiency.

Deirdre McEvoy

Senior Associate, McArdle Legal, Sydney

Prior to settling in Australia in 2004, Deirdre practiced in Ireland and is one of the few Australian Employment Lawyers who are also admitted and had practical training and experience in the European Union. Deirdre practices exclusively in employment law and has published articles in journals domestically and internationally, including in the Law Society Journal. Deirdre is accredited by the Law Society of NSW as a specialist in Employment and Industrial law and is also a member of Chartered Secretaries Australia.

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