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Termination found to be adverse action because of employer's inconsistent responses to bullying

In a recent case involving the CFMEU and BHP Coal, the Federal Court had to consider an application by the CFMEU for two employees to be reinstated because the termination of their employment was said to be adverse action, taken for reasons connected with their exercise of workplace rights, and in particular their union membership.

The employees, Adams and Winter, were members of the CFMEU. Another employee, Cramond, had resigned from the union. Mr Cramond alleged that Adams and Winter, "stood over" him, on separate occasions but both aggressively, and pressed him to re-join the union and threatened that he would be "sent to Coventry" if he did not. The work site was a "union pit" with almost all the employees belonging to the union.

Cramond complained to BHP Coal. He complained about bullying but also many other issues involving the union, most of which HR found had no substance. Adams then sued Cramond for defamation. Adams lost his defamation case, and in the process, the judge made comments critical of Mr Adams and accepted Cramond's version of events. BHP Coal considered the judge's comments and then asked Adams and Winter to show cause why their employment should not be terminated. It was not satisfied by what they had to say, and terminated the employment of both of them. Adams and Winter, via the CFMEU, then commenced adverse action claims in the Federal Court, arguing that the terminations were really motivated by their union roles and the strained industrial relations between the union and BHP Coal.

BHP Coal therefore had to prove that the sole reason for the termination of employment of the two men was the alleged bullying, and that their union involvement had nothing to do with the termination. BHP Coal failed to prove this, and lost the case. Overall, the evidence suggested that BHP had supported Cramond's defence of the defamation proceedings, and that senior management had taken a close interest in the case, which strongly suggested that the industrial relations context and the union activity Adams and Winter were factors in the decision to terminate their employment.

The reliance on bullying conduct to justify the termination lost force because in another bullying case of greater seriousness, BHP Coal had given a final warning and a 14 day suspension without pay, to an employee who twice threatened another employee by:

- verbal abuse, swearing, yelling and using an aggressive and angry tone
- physical threats such as "I'll see you out in the car park" (which was accepted to be code for "I'll beat you up") and threatening to punch him.

This conduct was far more serious than the robust and assertive expression of the union's position by Adams and Winter which, was not alleged to involve swearing or threats of violence. The only apparent explanation for the difference and treatment of the two cases was that in the case of Adams and Winter their status in the union and the involvement of Cramond in arguments with the union, and BHP Coal's generally poor industrial relations with the union were factors in the termination decision.

What is the significance of this for employers?

This decision highlights two particular lessons:

Whether there is an illegitimate reason behind action against an employee, so that it may constitute "adverse action" is a broad question, which will be assessed having regard to

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circumstances overall. The relevant manager saying that illegitimate reasons were not taken into account will be tested against the background facts.

When considering taking disciplinary action, it is important to consider how the decision to do so will look to an independent outside observer, and to question whether the circumstances might suggest that illegitimate reasons have affected the decision. If a manager, being honest and objective, thinks that there is a risk of adverse action being upheld, then that is a risk that has to be factored into decision making. Ideally, this should result in the process being refined or action taken in such a way as to minimise this risk, perhaps at a different time or in a different context.

Secondly, it is no good relying on a "real reason" which will look dodgy because there will be other situations which can be used to show that a similar issue was not treated so seriously in other situations. As an employer, you need to take a broad view to how things will look to an outside observer: will the reason you rely on look dodgy?

For further advice on dealing with bullying claims in your workplace please contact our experienced Employment Lawyer:

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First decision in a contested bullying case

On 12 May, Commissioner Hampton of the Fair Work Commission delivered judgment in the first contested bullying case to reach a final decision in the FWC.

The decision does not name the parties, but the situation described is one that many involved in human resources issues can relate to. It also gives some indications of how bullying matters are likely to run in the future, and in particular how the FWC is likely to weigh up evidence in such a matter.

In this case, a restructure had merged 2 teams at different locations, and had appointed the complainant, SB, as team leader of the merged team. She encountered resistance from team members who were not happy to embrace the changes introduced by the business. SB did not receive support from management to the extent that she felt was appropriate.

In the context of tension between SB and her team, in August 2013 an employee made an internal bullying complaint about SB's behaviour. This was investigated by the employer, and dismissed. Subsequently, another employee made a complaint about bullying by SB, which was partly upheld and partly dismissed, after an external investigation. It was after this that SB made a bullying complaint to the Fair Work Commission, alleging bullying by her subordinates, and bullying by management by way of lack of support, including receiving the bullying complaints, the investigations and not sufficiently publicising her exoneration from the first complaint, and the dismissal of another complaint against her about conduct at the Christmas party.

Commissioner Hampton observed that much of the evidence consisted of generalities rather than detail, and involved "potentially inflated notions" of the significance of various instances of conduct. One of the witnesses for the team leader had provided a statement, but was unwilling to provide details, which the Commissioner noted was perhaps understandable because of ongoing working and reporting relationships, but meant that there was a substantial gap in the evidence.

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First decision in a contested bullying case cont.

The Commissioner ultimately found that no bullying behaviour was proven. There was a lack of evidence of *repeated* conduct or of a *risk to health or safety* or of the *likelihood of continuation* of the conduct complained of. The conduct alleged also fell short of being *unreasonable* conduct.

For example, while SB was not happy about the investigations, the Commissioner noted that the employer had an obligation to investigate complaints of bullying, and that it was reasonable to do so by way of an external investigation. It was also reasonable of the employer not to make a particularly prominent publication of the outcome of the first bullying complaint the Christmas party complaint, as that might well have given extra prominence to the original allegations, against SB's interests. Dealing with unfounded complaints might be unreasonable behaviour by the employer, but none of the instances in this case was sufficiently clear cut to say at the outset "This is unfounded".

Inflated ideas about what conduct might count as "bullying", whether for the purpose of an FWC complaint, or generally, are very common, and the FWC bullying jurisdiction will fulfil a useful function if it helps clarify thinking about what may or may not amount to bullying. This decision indicates that cogent evidence will be required before the Commission it is satisfied about behaviour being unreasonable, likely to continue and posing a risk to health and safety, all matters which are necessary before a finding of bullying can be made.

Evidence being incomplete because potential witnesses do not wish to become involved has always seemed likely to be a problem in the bullying jurisdiction, which is predicated on employment being ongoing.

In this case, the Commissioner concluded by suggesting the employer pay attention to some matters in relation to future handling of the issues, in attempt to assist in dealing with issues which showed every sign of becoming chronic, and which had already resulted in staff turnover and stress-related workers compensation claims.

This case clarifies what is likely to make headway in the FWC anti-bullying jurisdiction.

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Penalty rates reduction

A recent decision of a Full Bench of the Fair Work Commission has, for the first time in a long series of cases, accepted a claim for a reduction in penalty rates, in this case affecting the Restaurant Industry Award.

Employers in the hospitality, retail and restaurant and café industries have, for some time, been arguing that weekend penalty rates inhibit businesses operating, and limit opportunities for additional employment on Sundays especially.

Weekend penalty rates have been a feature of Australian industrial regulation, and the award system, for many years. Sunday rates in particular were intended to compensate employees for the disadvantage of having to work on Sunday, which was seen as a day of religious and sporting commitments. Penalty rates were developed in an age when standard employment involved a single male breadwinner working 5 days a week, so that working Sunday as well would involve significant disadvantage.

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In this case, the employers contrasted this with a 21st century situation in which:

- religious observance and active participation in sport (as opposed to viewing sport by "audio visual means") was much reduced,
- typical employees engaged in weekend work in restaurants and cafes were not career employees in the industry,
- these employees often preferred to work on weekends as they were involved in caring responsibilities or education during the week
- the penalties applied to many employees who had not already had 5 days employment so that they potentially had opportunities for family and social time at other times in the week
- Sunday was now not much different to Saturday, so there was no justification for higher Sunday penalties.

On the other hand, the union argued that many of the employees affected were amongst the lowest paid, and relied on penalty rates as a significant component of their income.

The Full Bench split 3-2, with the majority deciding that while Sunday was still a day for much family and social activity, a case had been made out for some reduction in some penalties to achieve the modern award objective of encouraging participation in employment, but that the impact should be restricted to the two lowest levels of classification (therefore excluding career employees), and should take effect by reducing a 50% Sunday loading to 25%, so that it would not exceed a total 50% loading in combination with casual loading of 25%. (The minority decision favoured a slightly smaller reduction, implemented in 2 stages so as not to immediately prejudice current employees, but applying to all classification levels.)

As employers have had a difficult process to obtain this limited reduction, this case does not foreshadow broad-based reduction to penalty rates. This was expected to be an area of interest to the Abbott Government, but whether that is politically possible (in light of the memory of Workchoices, the reaction to the budget, and the situation in the Senate) remains to be seen.

However, with the ACCI and other business groups gearing up for a campaign on the issue, and raising the issue in, for example, the pharmacy and retail award reviews, and with the ACTU in the opposing corner, it seems that this is an issue which will get a higher profile in the next few months.

For more information on changes to penalty rates please contact our experienced employment lawyer:

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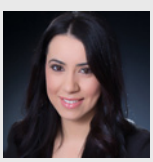

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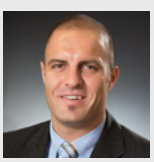

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