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Employment Law Update

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Defining the limits of "bullying" in the Fair Work Commission

One year on from the commencement of the FWC's anti-bullying jurisdiction, there have been far fewer cases than anticipated, and very few of those have had anti-bullying orders made by the Commission.

However, an anti-bullying claim is still a potential headache for an employer because dealing with proceedings, while remaining in an ongoing employment relationship, can be very difficult, and because, although the FWC cannot award compensation, an agreed payment along with a Deed of Release and termination of the employment relationship is in fact sometimes the solution to an anti-bullying claim.

Cases before the Commission continue to highlight what can, and cannot, be bullying for purposes of the FWC jurisdiction (note that these points are not necessarily relevant to other contexts in which bullying claims might arise such as workers compensation or work health and safety).

Among the points which have become clear are the following:

- Termination of employment during the course of bullying proceedings will preclude any orders being made, because there will be no ongoing risk of bullying occurring in the workplace *if the employee will no longer be in the workplace.* Note, however, that terminating the employment of an employee while a bullying application is pending carries the risk of being characterised as adverse action, leading to a claim in that jurisdiction, or potentially an unfair dismissal claim.

- For bullying to take place "at work" the essential requirement is for the victim of the alleged bullying to be at work at the time the bullying behaviour occurs. This point was teased out in a case in which employees reported behaviour of a union member to management, and were then abused by other union members on social media for having broken solidarity by having "dobbed in" a union member *(Bowker v DP World & MUA)*. The complainants argued that "while the worker is at work", the words used in the legislation, included bullying conduct with a "substantial connection with work" but the FWC held this is not the case, and that the words require the alleged victim to be performing *work at the time of the bullying behaviour*.

  However, this does not necessarily need to be at the physical workplace, and it could be at any time when an employee would be considered to be "at work", ie they were performing work at any time or location, or engaged on an activity authorised by the employer, such as a meal break or using social media while at work. Part of the alleged bullying consisted of offensive social media comments which were posted when the employees were not "at work" in that sense. However, as the social media postings were viewed by the victims at later times, while they were at work and accessing social media within the limits allowed by the employer, this bullying behaviour was potentially within the scope of the FWC jurisdiction. *Whether they were "at work" did not depend solely on the time at which the offensive comments were first posted:* the alleged bullying conduct continued for as long as the comment remained visible on social media.

  To the extent that union officials who were not employees at the same workplace engaged in offensive conduct, this conduct was still within the scope of the anti-bullying jurisdiction because *it was experienced by the employees while they were at work,* and so the MUA could be sued as an alleged bully. The alleged bully need not be "at work".

Defining the limits of "bullying" in the Fair Work Commission cont.

- Meanwhile in an injury compensation case ***(Hardy v Blackwood)***, the Queensland IRC has held that the existence of workplace cliques (or the fact that people in the workplace dislike each other) does not necessarily constitute bullying and harassment. A council employee alleged psychiatric injury resulting from workplace bullying from 2009-2011. She had kept records of interactions with other staff over a number of years, and alleged 50 "stressors" which she argued had contributed towards her injury, including being directed to perform work outside of her job description (including work of an employee who had resigned, stocktaking, and organising birthday cakes). She said colleagues had yelled at her, spoken in a hostile tone, and sent "terse" emails.

  The IRC held that cliques did exist in the workplace, and that poor behaviour made the workplace difficult and sometimes intense, and that it was apparent that a clique of employees did not like the claimant. However, that in itself was not bullying or harassment. The worker also behaved poorly in the workplace and one of the reasons for other employees avoiding her was to avoid confrontations, which they knew she would record in her diary. The claimant also sometimes substantially overreacted to "usual office activity".

The nuances of what is and what is not bullying can be very difficult to assess in the thick of things, where the situation is never as clear cut as it appears to be after detailed evidence is distilled to a conclusion by a court. The challenge for employers is to deal with issues promptly and fairly in real time, and the basic groundwork for that is *to have in place policies which deal with bullying, harassment and discrimination, and a clear grievance handling policy* to let people know where to go if there is a problem. Having these in place, and having staff aware of them, is the best starting place both for handling issues as they arise, and defending any subsequent claims.

If you need assistance with getting your policy house in order, please contact:

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The boundaries of adverse action

Decisions on adverse action in breach of the general protections provisions of the Fair Work Act have reinforced the importance of the *evidence of the decision maker* as to the matters which were operative in his or her mind at the time of making the decision to terminate employment or take whatever other action is alleged to be "adverse action".

In a case involving a lawyer in the Victorian Office of Public Prosecutions *(Victoria v Grant)* , the lawyer's employment was terminated for disclosing confidential information, poor performance, disobeying directions to attend Court and other conduct issues. At the same time, the lawyer had been grappling with depression. The Federal Circuit Court awarded over $100,000 in damages and penalties, because the judge felt that the conduct and the depression were completely interwoven, and that this should have been apparent to the manager.

However, the manager gave credible evidence, which was not disputed, that he was concerned only with the poor conduct, and that the illness played no part in the decision to terminate employment. On appeal, the award of damages and penalty was overturned, because the evidence of the matters taken into account by the employer was effectively unchallenged and so the depression was not in fact part of the decision making process of the employer, whereas the misconduct was.

The evidence that can be given by the decision maker is therefore critical. It is not final, because other competing evidence which shows that inappropriate matters were indeed taken into account will undermine evidence from decision maker that the inadmissible reasons were not considered. However, clear evidence from the decision-maker should assist greatly in defending an adverse action claim.

Another decision emphasises that the evidence must also exclude illegitimate reasons for the decision. Even if the illegitimate reason for termination is only one of a number of reasons, that is enough for a finding that adverse action occurred.

In a case concerning termination of a university professor's position *(Bessant v RMIT)*, the Vice Chancellor gave evidence that the reason for termination was "primarily financial" – but that left open the possibility that other reasons played a part and was insufficient to preclude Professor Bessant's complaint about her departmental head as one of the reasons for termination of her employment. As she has a "workplace right" to make that complaint, failure to exclude that partial reason resulted in RMIT losing the case.

"Adverse action" or "general protections" claims under the Fair Work Act can be tricky to understand and to contest. In any situation where an employee could argue that some exercise of a workplace right, or some sort of discriminatory behaviour, is behind the decision to terminate employment or otherwise alter work conditions in a way that adversely affects the employee, clarity about the reasons for the action being taking is essential.

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Enquiries, reviews and reports …

The employment law and industrial relations system is undergoing two major reviews at present, so while there have been no major changes in the Fair Work Act and modern award system since late 2013, major change, or dispute about whether there should be major change, again, is impending.

The major reviews are:

- the enquiry by the Productivity Commission, as promised by the Coalition in the 2013 election campaign; and
- the 4 year review of the modern award system mandated by the Fair Work Act.

The Productivity Commission enquiry into the Workplace Relations Framework is intended to inform the Federal Government at a macro level about the desirability of major changes to the Act and the IR system generally. As the Government promised not to introduce major change before the next election, the Commission's report is expected to provide a basis for Government policies, to be taken to the 2016 election so that the Government can obtain a mandate for proposed changes.

This will obviously be a highly sensitive issue in view of the effectiveness of the anti-Workchoices in 2006 and 2007, and the difficulties of the present government in getting public support for difficult changes (let alone getting them through the Senate).

The Productivity Commission's brief is wide, with headline issues such as penalty rates getting most attention. The Commission is due to report by November this year (with a draft report issuing mid-year), and information about its enquiry can be found by *clicking here*.

On the other hand, the 4 yearly review of modern awards, being undertaken by the Fair Work Commission, focuses on the detail of modern awards. Legislated in 2009 as part of the negotiations to get the Fair Work Act passed, commencing in 2014, and continuing at least well into 2015, the review is intended to iron out inconsistencies and other issues which have come into view in the operation of modern awards over the last 4 years. The FWC timetable currently lists hearings into late May, so the exercise has some way to go yet.

Apart from particular content issues (such as the detail of award provisions which conflict with the National Employment Standards eg about annual leave), the review is also considering ways of making awards more user-friendly, such as simpler language, more examples, and readily available supplementary information which spells out what the NES say (so readers don't have to go elsewhere to find this).

As the outcomes of both these processes come into focus, we'll give you commentary on what changes are likely, and what they mean in practical terms.

For further advice on employment law and the industrial relations system please contact:

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