NAVIGATING THE MINEFIELDS: Harassment in the Workplace

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A. INTRODUCTION

What legal options does an employee have if they feel that they are being bullied or harassed in the workplace? In years gone by, the answer would probably have been *"not very many"* but this situation is changing. There has been a groundswell of public attention in recent years to the effects and costs of bullying in the workplace, aided in part by some high profile cases. As a result, governments have started to devote greater resources to education about workplace bullying and to enforcement and also studying ways to address the issue.

It may be surprising to hear that the only current legislation directly addressing workplace bullying is workplace health and safety legislation. Otherwise, other existing avenues of legal action must be used which generally depend on the existence of an additional factor to the bullying itself, eg termination of employment or proof of discriminatory intention. It is likely that there will be significant legal change in this area over the coming years as society demands laws to directly address workplace bullying and harassment.

This paper attempts to put the issue into context by giving an overview of the different legal mechanisms available for aggrieved persons to address workplace bullying, examples of some of the cases in the area and some suggested guidance for employers.

B. WHAT IS WORKPLACE HARASSMENT?

One of the biggest difficulties the law has with workplace bullying is in trying to define exactly what it is, given its inherently subjective nature. The commonly accepted definition of workplace harassment (at least in Queensland) is contained in the *Prevention of Workplace Harassment Code of Practice* under the *Work Health and Safety Act 2011 (Qld)*:

> *A person is subjected to "workplace harassment" if the person is subjected to repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person's employer or a co-worker or group of co-workers of the person that:*
>
> *a. is unwelcome and unsolicited;*
> *b. the person considers to be offensive, intimidating, humiliating or threatening;*
> *c. a reasonable person would consider to be offensive, humiliating, intimidating or threatening.*

So, the behaviour must generally occur on more than 1 occasion and is subject to a *"reasonable person"* test. Note also that the terminology of *"harassment"* is used rather than *"bullying"*.

Under the Code of Practice, *'workplace harassment'* does not include reasonable management action taken in a reasonable way by the person's employer in connection with the person's employment. Examples can include:

- giving legitimate instructions and expecting them to be carried out;
- setting realistic standards of performance; and
- requesting improvement to work that is not up to standard.

The Code of Practice also gives examples of workplace harassment including:

- Verbal abuse and constant ridicule;
- Repeated threats of dismissal;
- Persistent and unjustified criticisms or complaints, often about small things;
- Humiliating a person through gestures, sarcasm, criticism and insults;
- Spreading gossip or false, malicious rumours about a person;
- Sabotaging a person's work, for example, by withholding or supplying incorrect information, hiding documents or equipment, not passing on messages and seeking to get a person into trouble.

The Code of Practice also makes the point that workplace harassment can occur between people in any direction within a workplace, eg:

- Laterally (a co-worker harassing another co-worker);
- Upwards (a worker harassing a manager/supervisor; a nurse harassing a doctor);
- Downwards (a supervisor/manager harassing a worker; a doctor harassing a nurse).

Many of the cases deal with what we might think, in retrospect, are obvious cases that would never (hopefully) occur in our workplace. Where the law has greater difficulty is in dealing with what might be called low level harassment, occurring over a lengthy period that can frequently be subtle in nature including claims of overwork or underwork and denial of access to resources. Even greater difficulty is encountered with *"passive"* bullying which can include ignoring or not speaking to a person.

C. INTERNAL AVENUES TO ADDRESS WORKPLACE HARASSMENT

It is generally wise for employers to have a specific policy about workplace bullying and harassment which should set out a process for making an internal complaint or at the least to have a general complaints policy that employees can use if they wish to raise the matter formally with the employer. This at least gives the employer a fighting chance of dealing with a matter before it goes *"legal"* or festers into a major problem. In most cases, employees do not wish to take legal action and this type of process gives the employer a "win-win" opportunity at an early stage. Of course, having a policy raises its own issues, more of which later.

These policies normally require that a concern be raised firstly with the other employee (if practical) or a supervisor. Alternatively, if the matter is serious, a policy may allow a complaint to be made directly to a human resources or other senior manager. Policies often provide for a conference or mediation to take place if possible to try and informally resolve the complaint. If the matter is serious, a policy will usually enable an employer to investigate the complaint and take action as necessary, such as disciplining the other party. It is important for an employer to retain an element of discretion in how to approach complaints that are raised rather than committing to a fixed process in every case. What is important from an employer point of view is not just to have a policy but ensure it is applied and applied consistently.

D. EXTERNAL AVENUES TO ADDRESS WORKPLACE HARASSMENT

The most common forms of legal action to address workplace harassment and bullying are as follows.

1. Complaints to/prosecution by public authorities

a. Complaints to Workplace Health and Safety Queensland

Work Health and Safety Act 2011 (Qld)

In general terms, work health and safety legislation imposes a general duty on employers to protect the health, safety and welfare of their workers. From 1 January 2012, Queensland has new WHS laws as part of a national system (although not all states have signed up at this stage). The new laws do not make wholesale changes to the existing system but there are some important features to be aware of:

- There is a broader primary duty on every person conducting a business or undertaking (*"PCBU"*) to take all reasonably practicable steps to maintain a safe workplace[1] (but it is not a strict duty to ensure a safe workplace);
- This broad duty rests on employers, self employed persons, principal contractors, persons with effective control of a workplace, designers, manufacturers, suppliers, importers and installers;
- In addition to this broad duty, *"officers"* have duties to exercise due diligence to ensure the business complies with its duties and may be personally liable for breaches;
- An *"officer"* is not limited to directors/chief executive officers and includes all persons in a position to influence the conduct of the corporation;
- Workers still have a duty to take reasonable care for their own health and safety;[2]
- In legal proceedings, the onus of proof is on the prosecution to show that a person failed to do what was reasonably practicable to protect health and safety;
- There are larger penalties of up to 5 years prison and/or $3 million fines for PCBUs and up to $600,000 in fines or up to 5 years prison or both for officers;
- There is a greater emphasis on consultation with other business operators and workers including allowing workers to contribute to WHS decision making; and
- There is a greater role for worker elected health and safety representatives (HSRs), including the ability to direct unsafe work to stop.

An officer is essentially defined as an officer within the meaning of s.9 of the *Corporations Act 2001 (Cth)*[3]. In respect of private sector entities, this means relevantly a director or secretary of a corporation or a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation's financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation).

Making or participating in making decisions will mean more than just providing advice. Whilst directors, CEOs and CFOs will more than likely be officers for WHS purposes, how much

[1] S.19 *Work Health and Safety Act 2011 (Qld) ("WHS Act")*
[2] S.28 *WHS Act*
[3] Other than a partner in a partnership (who would presumably be part of the PCBU)

further the responsibility extends will depend on the extent to which the individual is simply an adviser as opposed to actively being involved in the decision making.

"Due diligence" includes personally taking reasonable steps to:

- Acquire and keep current information on WHS matters;
- Understand the nature and operations of the work and associated hazards and risks;
- Ensure the PCBU has, and uses, appropriate resources and processes to eliminate or reduce risks to health and safety;
- Ensure the PCBU has appropriate processes to receive and consider information about incidents, hazards and risks, and to respond in a timely manner;
- Ensure the PCBU has, and implements, processes for complying with their duties and obligations (eg reporting notifiable incidents, consulting with workers, complying with notices, providing training).[4]

It is too early to tell how the changes will play out and, as with all new legislation, it may take a year or more to see the practical effects but it appears that:

- The buck will stop with a wider range of persons than was the case previously;
- There are more avenues for lower level enforcement of WHS duties but also greater potential penalties for prosecutions;
- Business operators ignore the increasing WHS trend at their peril;
- Following codes of practice is a good place to start;
- Businesses will need to be careful not to allow themselves to become bogged down in processes without real WHS improvement.

An approved code of practice is admissible in a proceeding for an offence as evidence of whether or not a duty or obligation under the WHS Act has been complied with.[5] The court can rely on the code in determining what is reasonably practicable in the circumstances to which the code relates although evidence of compliance with the WHS Act in a different way to the code but of an equivalent or higher standard can be provided.[6]

In Queensland, the *Prevention of Workplace Harassment Code of Practice 2004* has effect as a preserved code of practice under the new legislation.[7] As described above, the Code gives a description of workplace harassment for OHS purposes and provides that reasonable management action taken in a reasonable way is not workplace harassment for OHS purposes. As with all OHS matters, the Code encourages a proactive approach of:

- Identifying hazards and assessing the risks that result;
- Consulting with workers;
- Deciding on and implementing control measures;
- Monitoring and reviewing the effectiveness of the control measures.

Needless to say, keeping records of all these steps is important. The Code recommends the development and implementation of:

- a workplace harassment prevention policy and sets out the elements of a policy;
- a complaint handling system to manage formal and informal workplace harassment complaints;
- effective human resource systems (eg, reasonable performance management processes and open communication systems);
- training and education;
- regular monitoring and review.

[4] S.27 *WHS Act*
[5] S.275(2) *WHS Act*
[6] S.275(3)&(4) *WHS Act*
[7] A model code of practice is still under consideration at a Commonwealth level and is expected to be released in the second half of 2012.

Enforcement

Workplace Health and Safety Queensland is the state government agency with the power to enforce breaches of the workplace health and safety legislation. There is an equivalent body in each state. Enforcement can take a number of forms including:

a. The issuing of improvement, prohibition or non-disturbance notices;
b. Applying to a court for an injunction;
c. The issuing of infringement notices or on the spot fines;
d. Taking remedial action itself;
e. Accepting an enforceable undertaking;
f. Prosecuting for breach of the legislation.

Penalties of up to $3 million can be imposed for health and safety offences and a court can also make other types of orders including:

a. Adverse publicity orders;
b. Restoration orders;
c. Work health and safety project orders;
d. Injunctions; and
e. Training orders.

Legal proceedings by Workplace Health and Safety Queensland are quasi criminal in nature in that proceedings are taken by a public authority and, whilst no criminal conviction results, convictions for breach of the workplace health and safety legislation can be recorded and penalties imposed.

For a complainant, the advantage of a complaint to Workplace Health and Safety Queensland is that proceedings are taken by a government agency and the person making the complaint is not responsible for the proceedings or their costs. On the other hand, these proceedings do not generally result in awards of compensation for the person aggrieved and the type of legal action taken, if any, is a matter for the discretion of Workplace Health and Safety Queensland.

However, for what might be termed *"serious"* offences, a person may make a written request to the regulator that a prosecution be brought. The regulator must, within 3 months, advise whether the investigation is complete and whether a prosecution will be brought. The person may ask for the matter to be referred to the Director of Public Prosecutions who must consider the matter and advise the regulator, within 1 month, whether it is considered a prosecution should be brought. [8] So, even if the agency makes an initial decision not to pursue a matter, a complainant can escalate their request for a review which may result in a different decision.

I am not aware at this point of any prosecutions by the agency relating to workplace harassment although I understand that several improvement notices may have been issued to employers. I also understand that there are or have been several investigations where the focus is on improving the systems of employers to deal with complaints. However, the possibilities are illustrated by ***Brodie's case*** in Victoria.

CASE ILLUSTRATION
Brodie's case
This was a prosecution in the Magistrates Court of Victoria for breach of state OHS legislation. The facts were that Ms Brodie Panlock was a waitress at a café in Melbourne. She was subjected to persistent physical and emotional bullying by 3 workmates 6 days a week for more than year. This included being held down, having fish oil poured into her bag, being drenched in chocolate sauce, told repeatedly that she was "worthless", having rat poison left in her pay envelope, being spat on and called names. Ms P had an intermittent

[8] S.231 *WHS Act*

relationship with one of the employees and was emotionally vulnerable. She committed suicide in September 2006.

Worksafe Victoria prosecuted the employer in its corporate form, its director and the 3 individual employees. Each of the defendants pleaded guilty. The Magistrate said that the working environment was poisonous and the persistent bullying was in the worst category but nothing was done to stop it. The company was fined $110,000 on each of 2 charges of failing to provide and maintain a safe working environment, the director was fined $15,000 for 2 charges and the employees were fined $45,000, $30,000 and $10,000 for failing to take reasonable care for the health and safety of persons totaling $337,000 in fines.

b. Complaints to the Police

Brodie's case led to the broadening of criminal stalking laws in Victoria to include:

- the making of threats to a person;
- using abusive or offensive words to or in the presence of the victim;
- performing abusive or offensive acts in the presence of the victim;
- directing abusive or offensive acts towards the victim; and
- acting in a way that could reasonably be expected to cause physical or mental harm to the victim, including self harm.

Similar provisions exist in Queensland in s.359B of the *Criminal Code* with penalties of up to 5 years or 7 years in certain aggravating circumstances such as the threat of violence:

359B What is unlawful stalking

Unlawful stalking is conduct-

(a) intentionally directed at a person (the stalked person); and

(b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and

(c) consisting of 1 or more acts of the following, or a similar, type-

i. following, loitering near, watching or approaching a person;

ii. contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;

iii. loitering near, watching, approaching or entering a place where a person lives, works or visits;

iv. leaving offensive material where it will be found by, given to or brought to the attention of, a person;

v. giving offensive material to a person, directly or indirectly;

vi. an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;

vii. an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and

(d) that-

i. would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or

ii. causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.

Whilst there have been no publicized criminal actions in Queensland to date, the provisions are broad enough to be used in an appropriate case. Whether charges should be laid is ultimately a matter for the police and director of public prosecutions. It should be noted that employers are generally not responsible for the criminal conduct of their employees because such conduct does not flow from the course of employment. However, it is possible for individuals to be classed as accessories in an appropriate case under the criminal law.

c. Complaints to the Fair Work Ombudsman

The Fair Work Ombudsman (*"FWO"*) is the federal government's agency responsible for enforcing the federal workplace relations legislation (the *Fair Work Act 2009 (Cth)*). The FWO does not have authority to investigate or prosecute workplace bullying of itself, but can pursue matters where breaches of the *Fair Work Act* are involved. Unlike the situation in workplace health and safety prosecutions, there have been cases where penalties for breaches of the *Fair Work Act* have been ordered to be paid to the victim involved.

CASE ILLUSTRATION
Fair Work Ombudsman v Wongtas Pty Ltd (No 2) *[2012] FCA 30 (Judgment delivered 2 February 2012)*
Ms Ye commenced employment for W in its printing business in February 2006. She informed W of her pregnancy in 2009 and told the directors that she intended to take some leave around the time of birth. She was told that she might not be able to return to her office position. She suffered a miscarriage and took a week's sick leave in August 2009. On her return, she was demoted from office duties to packaging duties and told not to complain. The employer's attitude to her changed markedly. When Ms Ye asked to resume her previous duties, she was refused and told that "many employees resign when they fall pregnant and then stay at home in bed". Ms Ye lodged a complaint with the FWO in September 2009 and inspectors visited W's premises in early November. One of the directors told Ms Ye he was unhappy she had lodged a complaint and she was ultimately dismissed in December 2009.

These actions were found to constitute breaches of the workplace rights protections in s.340(1)(a)(i), (ii), (iii) and (b) and also s.340(2) of the Fair Work Act. The court found that the conduct represented a gross violation of the employer's obligations under the Act and that they had engaged in abusive action against Ms Ye on the ground of gender and pregnancy which adverse action injured Ms Ye in her employment and/or prejudicially altered her position. The directors were each fined $11,880 and agreed to pay Ms Ye $2,207 for economic loss.

2. Unfair dismissal claims

If bullying involves the termination of employment, then it is possible to bring an unfair dismissal claim to Fair Work Australia (or the state industrial relations commission for state and local government employees). However, the focus in these proceedings is on whether the termination was harsh, unjust or unreasonable in all the circumstances and workplace bullying may be only one of the issues involved.

This type of claim is made to Fair Work Australia and there is a 14 day time limit on commencing the claim after termination occurs. Fair Work Australia can order reinstatement and/or compensation of up to 6 months wages. The process involves an initial telephone conciliation conference between the parties and a Fair Work Australia conciliator. If that is not successful in resolving the matter, a hearing will be scheduled before a FWA member and directions will be made for the filing of written evidence by the parties. This is generally an *"own costs"* jurisdiction with FWA having a limited capacity to order costs against a party.

A dismissal will be unfair if the dismissal:

- was harsh, unjust or unreasonable;
- was not consistent with the Small Business Fair Dismissal Code (if the employer has less than 15 employees);
- was not a case of genuine redundancy.

The criteria for deciding whether a dismissal was harsh, unjust or unreasonable include:

a. whether there was a valid reason for the dismissal related to the person's capacity or conduct;
b. whether the person was notified of that reason;
c. whether the person was given an opportunity to respond to the reason;
d. any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal;
e. if the dismissal related to unsatisfactory performance – whether the person had been warned about the unsatisfactory performance before the dismissal.

There is a lot of case law about the meaning of the words *"harsh, unjust or unreasonable"* but essentially a common sense approach is adopted so that employers are required to give employees *"a fair go"*.

Fair Work Australia will consider both whether the dismissal was procedurally fair and substantively fair. From a procedural point of view, it is relevant whether the employee has been given procedural fairness, i.e. whether allegations were put to an employee in sufficient detail, whether the employee was allowed to respond appropriately and whether the response was taken into account before a decision was made about termination. Apart from considering whether a dismissal was procedurally fair, the Commission will consider whether the dismissal was substantively fair, i.e. procedural fairness might have been given to the employee but the decision to terminate was itself unfair or not called for in the circumstances or some lesser penalty than termination would have been more appropriate.

Particular difficulties arise where an employee claims they have been forced to resign from their employment because of the actions of the employer. This situation is known as *"constructive dismissal"*. A resignation by an employee can still constitute an unfair dismissal by the employer if it can be shown that the termination was effectively at the employer's instigation.

CASE ILLUSTRATIONS

Barton v Baker Johnson Lawyers *[2003] QIRComm 349; 173 QGIG 867*

Ms B was a legal secretary who started work on 10 April 2001 for a law firm and performed work for the principal, Mr B and another lawyer, Mr A. BJ's policy manual stated that all staff members should behave in a "dignified and courteous manner at all times". Ms B alleged that she was constantly subjected to verbal abuse by Mr B and Mr A including being referred to as a "f…ing moron" and "piece of shit". Ms B raised concerns at a staff meeting on 11 July 2001 about the way she was being spoken to by Mr A and her employment was terminated the same day. However, Mr B told her that he did not want her to leave and she stayed. Following a subsequent "appalling display of verbal abuse" to the female office staff, Ms B and several other staff members lodged a written complaint with Mr B on 3 March 2002 asking that he desist from his behaviour. Ms B's employment was terminated on 29 April 2002 on the basis that she was a "disruptive influence".

The Commissioner held that the employer's behaviour was "barbaric" and said that it was no defence to tell the employee in advance that Mr B might act inappropriately at times. The maximum compensation of 6 months wages was awarded.

Jennifer Rachel Julia Breene and Jenny Craig Weight Loss Centre Pty Ltd *[2004] AIRC 187*

Ms B was employed by JC for about 2 years and 10 months and held the position of Centre Director prior to her dismissal on 29 September 2003 for bullying and harassing a subordinate who had made a complaint about her. Relevantly, it was found that Ms B phoned a subordinate at home on at least 2 occasions and attempted to visit her at home on another occasion to clarify the source and nature of the allegations that had been made and after having received a direction not to do so. The Commission:

- *noted the Jenny Craig Workplace Bullying and Harassment Policy and that Ms B was aware of the policy and had formal responsibility for its enforcement;*
- *noted that motive was not a condition precedent for harassment and her conduct had been unwelcome and uninvited and a reasonable person should have been aware of and anticipated the implications of Ms B's behaviour;*
- *held the conduct was not exempt from the employer's policy just because it occurred outside working hours and there was a direct connection with the workplace;*
- *found that, whilst at the lower end of the spectrum, Ms B did harass the subordinate and breached policy;*
- *held that, when combined with the failure to obey a reasonable and lawful direction, there was a valid reason for termination;*
- *found that whilst there were some deficiencies of procedural fairness, the termination was not harsh, unjust or unreasonable.*

Kylie Wood v Rainbow Coast Neighbourhood Centre Inc *[2012] WAIRC 00340 (Judgment delivered 6 June 2012)*

". . sound and sensitive management of the situation is likely not only to minimise the respondent's exposure but also deal with the employee' concerns promptly . ."[9]

Ms W was employed as a Creche Supervisor from May 2003 until 18 September 2010, initially on a part time and then casual basis. She was suspended on pay on 21 May 2010 and the employer commenced an investigation into claims of bullying against her. Only 3 of 7 people who worked with Ms W were asked to give statements. On 1 June 2010, Ms W lodged complaints with the employer and WorkSafe WA claiming bullying by the centre manager. On 15 June 2010, after considering an "independent" investigation report, the employer wrote to Ms W asking her to show cause why her employment should not be terminated but this was later withdrawn and Ms W was advised that her own allegations would be investigated. A finding was made that her allegations were unsubstantiated.

On 24 August 2010, WorkSafe issued an improvement notice directing the employer to fully investigate the allegations by and against Ms Wood and consider the timing of the complaints against Ms W. Ms W's employment was terminated on 18 September 2010 for reasons which included that the complaining employees claimed to be fearful of Ms W returning to the workplace and that she had made a complaint against her manager and therefore failed to assist with the investigation against her.

The Commissioner held that the employer's investigations were defective with its initial investigation being too narrow and some complaints being solicited by the employer. The Commission also criticised Ms W's suspension and said that by the time of WorkSafe's direction, the employer was already moving to terminate Ms W's employment.

The Commission held that the employer's behaviour over a period of time could be viewed as bullying behaviour in accordance with the WorkSafe Code of Practice and that Ms W did not receive natural justice in the allegations against her as required by the Code of Practice. The dismissal was held to be procedurally and substantively unjust.

[9] Para [200] referring to *Hill v Minister for Local Government Territories and Roads* PR946017 26 April 2004 Lacy SDP.

3. Unlawful dismissal/adverse action/breach of workplace rights claims

It is a breach of federal and state industrial legislation for an employee to be terminated for reasons of prohibited discriminatory grounds (such as age, race, sex, family responsibilities or temporary absence from work). Under federal legislation (which applies to all private sector employees), it is also a breach, in very simple terms, for an employee to take any detrimental step against an employee because they:

a. have what is called a *"workplace right"* or have exercised, or the employer thought they were going to exercise, a workplace right. A workplace right is essentially a right or benefit given to employee under workplace legislation, such as discrimination legislation or workplace health and safety legislation (eg the right to take personal leave, the right to be a WHS delegate or union officer); or
b. have the ability to make a complaint to the employer about their employment.

This avenue opens up a range of potential grounds for an employee in a situation of workplace bullying to rely on but it is important to remember the legal context of the claim. It is necessary for a claimant to frame the factual incidents that have occurred within the available legal parameters. Ie, in an adverse action claim, it is not the fact of the workplace bullying that is of primary relevance but the fact that the employee had a workplace right or did or did not exercise that right or made a query about their employment. This type of claim often involves an action taken by an employer in retaliation for something the employee has done. It should also be noted that the workplace rights provisions are not limited to employment situations but can also apply in principal-contractor relationships.

This type of claim must be commenced in Fair Work Australia within 60 days of termination of employment, if that is the adverse action alleged. If termination of employment is not relied on as the adverse action, then it appears that a 6 year time limit exists for commencing the claim (although it would normally be desirable for any claim to be commenced as soon as possible). An initial conference in Fair Work Australia is compulsory in a termination based adverse action claim but not otherwise. After a conference is held by Fair Work Australia (if applicable) and there is no agreed resolution, then proceedings must be commenced in the Federal Court or Federal Magistrates Court within a strict time limit (currently 14 days). There is no limit on the type of remedy that can be given by the court in this type of claim. Monetary penalties, compensation and injunctions are potential remedies. As with the unfair dismissal jurisdiction, the general rule is that each party bears their own costs which can make this an attractive avenue for complainants despite the technical difficulties that can be encountered.

HR officers should also keep in mind the accessorial liability provisions of the *Fair Work Act 2009 (Cth)* for being knowingly involved in contraventions of the act and the possibility of personal liability for penalties.[10]

CASE ILLUSTRATION

Jones v Queensland Tertiary Admissions Centre Ltd (No 2) *[2010] FCA 399 (Judgment delivered 29 April 2010)*

Ms J was the employer's CEO and appointed bargaining representative in EBA negotiations (or alternatively, so the court held, if she was not formally appointed, she had the right to participate in the bargaining process). Complaints were made against Ms J by the ASU and individual employees. The complaints coincided with the bargaining process. Ms J claimed that the relevant union had orchestrated a campaign against her because of her bargaining negotiations and that QTAC was bowing to pressure from the union in taking action against her. The court held:

- *commencing a disciplinary investigation can in certain circumstances be adverse action;*
- *a show cause notice as to why an employee should not be subject to disciplinary action, including termination, could be an adverse action.*

[10] See *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors [2010] FMCA 863*

The court accepted the existence of a workplace right and that these matters could be an adverse action either as injury or alteration of position. However, despite having earlier granted an interlocutory injunction, at trial, the court found that there was no evidence of a link between the workplace right and the adverse action in this case. Her Honour found that the only reasons motivating the key directors of QTAC were a concern that Ms J had been mistreating staff, a belief that action should be undertaken to investigate those allegations and that the investigation should be undertaken in accordance with established procedures.

***Ramos v Good Samaritan Industries (No. 2)** [2011] FMCA 341 (Judgment delivered 24 August 2011)*
Mr R was employed by GSI as a store manager from 22 June 2009 until his resignation on 22 July 2010. At a manager's meeting in March 2010, he referred to a female colleague as "darl" in a meeting. Mr R's manager later raised concerns about this and below budget sales results. Mr R told the manager he should accept some responsibility as well and when he told the manager he would not work unpaid overtime, he was told he should rethink his position as the store manager.

Mr R then made a complaint to the CEO about his manager's conduct which was investigated and dismissed by the CEO. Several employees subsequently made complaints about Mr R's use of profanities in the workplace. Mr was suspended on pay while these allegations were investigated and he was given a final warning. Mr R resigned and commenced proceedings alleging he had been subject to adverse action and forced to resign because of his complaint, by GSI:

- *threatening him with disciplinary action in relation to his conduct;*
- *discriminating between him and his managers by "siding" with them in the investigation;*
- *requiring him to sign a performance management framework;*
- *denying him access to the TOIL policy; and*
- *suspending him for performance related reasons.*

Mr R claimed $1,501,382 in compensation as well as additional penalties. GSI contended that its concerns about Mr R's performance pre dated his complaint and the action it had taken was reasonable and appropriate. The FM found in GSI's favour holding that:

- *a warning of disciplinary action, including possible dismissal, as part of a legitimate disciplinary process, does not constitute adverse action and here, the warning did not occur because of his complaint;*
- *there was no threat of dismissal and Mr R was simply informed that disciplinary action would be taken if he breached GSI policies in future, which was reasonable;*
- *a request to sign a document acknowledging the role of manager was not in itself adverse action;*
- *although suspension can constitute adverse action, the action here was not taken because of Mr R's complaint and was legitimate.*

4. Discrimination claims

Workplace harassment may also be able to be addressed through a discrimination complaint if it can be shown the conduct either constituted sexual harassment or direct or indirect discrimination on the grounds prohibited under state or federal discrimination legislation, ie, that the bullying occurred because of a person's age, race, sex, family responsibilities etc.

Most complaints of discrimination occur in a work context. The basic rule is that employers may not unlawfully discriminate in the arrangements made for offering employment, the selection of employees, or the terms and conditions of employment offered. Once an employment relationship exists, it is unlawful for an employer to discriminate on the basis of any of the prescribed grounds or attributes in the terms or conditions of employment, by denying access to promotion or other benefits (such as training), by subjecting an employee

to any other detriment, or by subjecting an employee to less favourable working conditions resulting in harassment.

There may be an exemption from these requirements in limited circumstances, particularly where the nature of the role has some particular requirement. It is also necessary for employers to make clear to employees and contractors that they are also bound by this legislation as the employer can be held liable for the actions of their workers.

Complaints about discrimination can be made either to the state Anti-Discrimination Commissions or to the federal Human Rights Commission. The following comments primarily reflect the provisions of the Queensland anti discrimination legislation but the federal legislation and other state legislation is similar in effect. The *Anti-Discrimination Act 1991 (Qld)* provides that it is against the law to treat a person unfairly for reasons including:

- sex;
- marital status;
- relationship or parental status;
- race;
- religious belief or activity;
- political belief or activity;
- impairment/disability;
- trade union activity;
- lawful sexual activity;
- pregnancy;
- breastfeeding needs;
- family responsibilities;
- gender identity;
- sexuality;
- age.

Direct discrimination occurs if a person treats someone else less favourably than they would another person in comparable circumstances because of, for instance, age or race.

Indirect discrimination involves imposing a requirement, condition or practice that appears fair and neutral but can only be complied with by a higher proportion of people without the attribute or personal characteristic. The question is whether the issue is likely to have a proportionately different or worse impact on a particular class of persons. In a practical sense, most bullying discrimination cases are likely to involve a claim of direct discrimination given the complexities of establishing indirect discrimination.

Sexual harassment stands apart from concepts of direct and indirect discrimination and is any unwelcome sexual attention that is offensive in some way. It is against the law whenever and wherever it happens. Under the Queensland legislation, sexual harassment occurs if a person:

(i) subjects another person to an unsolicited act of physical intimacy;
(ii) makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person;
(iii) makes a remark with sexual connotations relating to the other person; or
(iv) engages in any other unwelcome conduct of a sexual nature in relation to the other person;

AND the person engaging in the conduct does so either:

(i) with the intention of offending, humiliating or intimidating the other person; or
(ii) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

Sexual harassment and workplace bullying often overlap and this can be an attractive avenue of complaint given the broad nature of potential sexual harassment.

CASE ILLUSTRATION

Lang v. Nutt *Anti-Discrimination Tribunal Queensland, Member Roney, 23 November 2004 [2004] QADT 37*

The complainant, who had been a marketing assistant with the Palm Beach Surf Lifesaving Club Supporters' Club Inc, alleged that she had been subjected to sexual harassment by the General Manager during her employment for some 2.5 years. She claimed she had been subjected to unsolicited demands for sexual favours, comments with sexual connotations relating to her, other unwelcome conduct of a sexual nature and an unsolicited act of physical intimacy, namely kissing on the lips and on the head.

The Tribunal found that although there had been a level of sexual banter and innuendo engaged in by both parties, none of that amounted to solicitation or encouragement for the conduct which occurred. The Tribunal was of the view that it would have been obvious to Mr N that his advances were unwelcome and that he was attempting to use a position of influence over Ms L to persuade her to engage in consensual sexual activity with him. The Tribunal also considered that whilst Ms L's reaction to the events resulted from her special susceptibility to anxiety or panic attacks, this did not excuse the respondent or diminish his responsibility for the consequences of his actions. The Tribunal applied the "eggshell skull" rule that just because Ms Lang might have a special susceptibility did not mean that the compensation she should receive should be reduced.

The Tribunal considered an award of $15 000 for general compensation was appropriate together with interest. The Tribunal found that Ms L was probably capable of performing paid work from the time she left the Club's employment but the respondent had not sought to show that there was any employment available to her that she should have undertaken. In any event, the Tribunal considered that Ms L would have had difficulty obtaining employment given her depressed state. The Tribunal awarded $24 700 for past economic loss being the equivalent of 1 year's nett income, making a total award of $40 505.

Procedurally, complaints of discrimination and sexual harassment are dealt with in a similar manner to unfair dismissal and workplace rights claims. Generally, discrimination claims must be commenced within 1 year of the discriminatory conduct occurring. There are rules about the interaction between unfair dismissal, adverse action and discrimination claims which exist and it is not generally possible to have more than one of these types of claims on foot at the one time.

The first step is a conciliation conference, whether it is in the state anti-discrimination commission or the federal Human Rights Commission. If the matter cannot be amicably resolved, then the complaint can be escalated to the Queensland Civil and Administrative Tribunal (for matters commenced in the ADCQ) or the Federal Court or Federal Magistrates Court (for matters commenced in the HRC). The matter is then subject to the formal processes of those bodies leading ultimately to a hearing. The general rule in these jurisdictions is again that each party bears their own costs and there is theoretically no limit on the remedy that can be granted.

The approach taken to assessment of damages flowing from any breach is similar to that of the civil courts, ie, there is consideration of general damages for pain and suffering as well as past and future economic loss.

5. Workers compensation claims for breach of the tortious duty of care

"WorkCover" claims are a popular legal avenue for aggrieved workers because they are perceived to be a relatively quick and cheap way of obtaining compensation for the wrongs allegedly perpetrated against them. Where a case has good prospects, it is also possible that a common law negligence claim will be handled by lawyers on a speculative basis thus removing the issue of legal costs as an immediate negative factor in pursuing such claims.

Statutory "no fault" claims

If an employee has suffered an injury because of workplace bullying, such as a psychological injury, they can also apply to their relevant workcover authority (eg WorkCover Queensland) for compensation for the injury that has been suffered as long as the statutory requirements are met. Claims can be made for statutory benefits under the WorkCover no fault scheme and claims can also be made separately for generally greater compensation if it can be shown that the injury was caused or contributed to by the negligence of the employer. In both statutory and common law claims, the employer has a limited direct role to play (other than in the provision of evidence) because matters are practically handled by the relevant workcover authority (or self insurer).

In statutory *"no fault"* WorkCover claims, the basic requirements are that a *"worker"* has suffered an *"injury"* which is:

> *"a personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury."*[11]

However, an *"injury"* does not include a psychiatric or psychological disorder arising out of, or in the course of:

> a. *"reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;*
> b. *the worker's expectation or perception of reasonable management action being taken against the worker;*
> c. *. . .*[12]"

Examples given in the legislation of reasonable management actions taken in a reasonable way include:

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker;
- a decision not to award or provide promotion, reclassification or transfer, or leave of absence or benefit in connection with, the worker's employment.

This is often a battleground in bullying claims where the reasonableness of management action is in issue. Employees have 6 months from the date of their injury in which to lodge a statutory claim. If either the employee or employer is unhappy with the decision of WorkCover, a review can firstly be sought from Q-COMP, the independent statutory authority for overseeing the workers compensation scheme. Q-COMP can accept fresh material and generally makes its decisions on the papers, ie, without hearing from the parties or witnesses in person. A further appeal avenue exists to the Queensland Industrial Commission and finally to the Queensland Industrial Court. If successful, the claimant is entitled to certain monetary benefits, medical treatment and rehabilitation arrangements in accordance with the statutory scheme. For practical reasons, it is rare for claimants in alleged bullying situations to return to their original workplace once they have taken significant leave.

[11] *S.32(1) Workers Compensation and Rehabilitation Act 2003 (Qld)*
[12] S.32(5) *WCRAct (Qld)*

CASE ILLUSTRATION
Q-COMP and Robin Jeffrey Foote *(2008) 189 QGIG 802*
Mr F was a counselor at a needle exchange program run by the Queensland Community Health Service. He received very little advice about who had authority over him and the chain of command above him was in a constant state of flux. This gave rise to a number of conflicts and several grievances were laid against Mr F by other workers. In June 2002 Mr F lodged a written complaint of his own alleging he had been subject to systemic bullying. A limited investigation was commenced 3 months later after follow up from Mr F. Following the investigation, Mr F was advised that he would be liable to disciplinary action and was transferred to an administrative position. He was provided with part only of the investigation report which left him with the impression that no one had supported his version of events. Mr F submitted an application for compensation claiming a psychological injury over time.

WorkCover rejected the claim on the basis Mr F's condition was the result of reasonable management action being the disciplinary action. Q-COMP affirmed WorkCover's decision but an Industrial Magistrate found in favour of Mr F. On further appeal, the Industrial Court could not find affirmatively that Mr F had been subject to "mobbing" or "systemic bullying" but nor did it find that there had been reasonable management action reasonably taken by the employer and in particular the Court considered:

- *that the investigation had been protracted;*
- *that Mr F had not been kept up to date with the investigation's progress;*
- *that the terms of reference focused on issues that did not reflect the true nature of the complaint;*
- *that the complaint was dismissed largely on the basis of an absence of detail but without any attempt to meet with Mr F to determine the details;*
- *that the transfer "wholly separated" Mr F from his career path;*
- *that early indications that Mr F was suffering from psychological distress were met with scant concern.*

In the circumstances, the employment was held to be a significant contributing factor to the injury.

Common law claims

Most statutory claims are a prelude to a common law negligence claim which is also the subject of the workcover insurance scheme. These claims are based on the common law of negligence which is, at least in Queensland, still subject to the common law assessment of damages (although subject to significant statutory restrictions). It is well established that employers owe their employees a duty to provide a safe system and place of work and to take reasonable care to avoid exposing employees to unnecessary risk of injury. In any claim of negligence, there are several elements to be established:

1. the existence of the relevant duty of care;
2. breach of the standard;
3. damage which was reasonably foreseeable and caused by the employer's conduct.

Employers will generally be vicariously liable in common law for the acts of their employees carried out in the course of their employment but will not be liable for acts which fall outside the scope of employment.

CASE ILLUSTRATION
Bailey v Peakhurst Bowling & Recreation Club Ltd *[2009] NSWDC 284*
Ms B was employed as a casual bar steward from 1998 to 2006. She was subjected to a pattern of workplace bullying over 2 years by her supervisor which included constant threats that Ms B would lose her job, changing her work classification so that she lost pay and seniority, pressure to bend or break licensing rules, use of extremely vulgar language, pressure to resign her union membership and falsely alleging a shortfall in the bar finances.

The court accepted that Ms B had a serious chronic generalized anxiety disorder and post traumatic stress disorder and depression and that she was unlikely to return to paid employment.

The employer conceded that it owed Ms B a duty of care that required it to provide her with a safe place and system of work and that it had breached that duty of care with the consequence that Ms B had suffered psychological injury resulting in a psychiatric disorder. Damages (for economic loss only given legislative restrictions) were assessed at $507,550.

Naidu v Group 4 Securitas Pty Ltd & Anor *[2005] NSWSC 618 / [2007] NSWCA 377*
Mr N was employed as a security guard from 1992 to 1997. Group 4 provided security services to Nationwide News Ltd and Mr N's direct supervisor, C, was a News employee. Mr N was subjected to harassment, duress, racial and sexual abuse, humiliation, unreasonable workloads and pressure and threats of violence and financial harm over several years by C. He suffered serious psychiatric injury. On News learning of the conduct, C's employment was terminated.

The court held that both Group 4 and News were negligent and also held that Group 4 was liable for breach of contract. In a judgment largely affirmed on appeal, the court found that:

- *Group 4, as Mr N's employer, owed him a duty of care to exercise reasonable care for his safety, including the provision of a safe place of work and a safe system of work;*
- *the duty could not be delegated notwithstanding C was a News employee;*
- *there was an implied term in the contract of employment to protect all employees from vilification because of the duty to provide a safe place and system of work and also because of Group 4's particular policies;*
- *Group 4 should have been aware of the issues that existed between Mr N and C;*
- *in placing Mr N under C's direction, Group 4 accepted vicarious liability for his conduct;*
- *News was also vicariously liable for C's conduct;*
- *Liability should be apportioned 65% to News and 35% to Group 4;*
- *damages of almost $2 million should be awarded against News including $150,000 exemplary damages and $1.6 million against Group 4.*

However, contrast this approach with that of the Queensland District Court in another case from around the same time.

Hodges v State of Qld *[2006] QDC 382*
Ms H was a cleaner at the Maryborough Base Hospital. She claimed that from November 2000 to February 2001, she was required to carry out her work in an environment of sexual harassment and intimidation. In particular, she said that a co worker, E, had touched her on the hand and back, grabbed her breast, asked for sexual relations and told dirty jokes. Ms H made a verbal complaint to the employer about certain matters and was asked to put the complaint in writing but Ms H was reluctant to do so and she was told to think about her options. The matter was in any event reported to the Hospital HR Department. Ms H was interviewed and E's employment terminated. The court:

- *was satisfied that sexual harassment had occurred;*
- *held that the hospital had acted reasonably in advising employees of sexual harassment procedures and proper workplace conduct prior to the conduct occurring and acted reasonably in response to the complaint;*
- *did not consider that there had been any breach of the employer's common law duty of care;*
- *whilst dismissing the claim, assessed general damages at $15,000.*

6. Civil claims for breach of contract

Contracts may contain express obligations on the part of the employer towards an employee or alternatively policies which assure employees of certain conduct by an employer may be incorporated into the contract of employment in certain circumstances.

In addition to these express obligations, it is accepted that there is an implied duty in all employment contracts to take reasonable care not to expose employees to health and safety risks at work. This duty operates in conjunction with the tortious duty considered above.

Australian courts have also tentatively recognized the existence of an implied term of mutual trust and confidence which requires the parties not to act in a manner likely to damage or destroy the relationship of trust and confidence between the parties. But whilst it has been referred to, it has not been relied on and cases suggest that it cannot be used in cases of termination of employment.

Whether the avenue of a contractual claim exists practically depends on the wording of the contract of employment and the policies the employer has in existence. If an employer has a policy setting out commitments about how it will address workplace harassment and bullying and if that policy can be said to be more than just a guideline but a binding obligation under the contract of employment, then legal proceedings may be able to be taken in the civil courts seeking a remedy for breach of contract. There is generally a 6 year time limit on taking this type of proceeding. This type of proceeding is often unattractive to claimants because they generally take longer than the other types of private action outlined above and the general civil costs rules apply - ie, the loser pays the other party's costs.

CASE ILLUSTRATION

Nicolich v Goldman Sachs JB Were *[2006] FCA 784 / [2007] FCAFC*

Mr N was an Investment Adviser with GS. He complained to the HR Department about the fact and circumstances of re-allocation of shared clients to financial advisers, which meant that he would not be in a position to share in profits. He also complained that his immediate supervisor had intimidated and harassed him. It took HR 3 months to complete a report and as a result of the delay Mr N took significant leave due to depression and his employment was ultimately terminated as a result. Mr N had received certain policies when he started and his contract of employment provided that it was expected he would comply with these policies. The policies contained procedures for dealing with harassment complaints and also provided that the employer would take every practicable step to maintain a safe and healthy work environment.

The claim included bases of unlawful termination under the Workplace Relations Act for "temporary absence" and disability, misleading or deceptive conduct under the Trade Practices Act and, most relevantly, claims of breach of contract. In a decision which was largely affirmed on appeal, the court:

- *found that the employer's handling of the complaints was "extremely inept";*
- *the contractual terms necessarily included a promise that the employer would comply with its policies and its conduct breached its own promises and procedures concerning OHS, harassment and the grievance procedures;*
- *accepted that Mr N had a psychiatric illness caused by the employer's breach and damages for pain and suffering were part of the consequential loss or alternatively the employer should have reasonably foreseen the likelihood that Mr N would suffer injury due to their breach;*
- *awarded Mr N $515, 869 being $80,000 for general damages and $305,869 for past economic loss and $130,00 for future economic loss.*

7. Kitchen sink claims

There has been a trend in recent years towards some claimants and their law firms taking a high profile and multi pronged approach to litigation over alleged bullying. It is a high risk approach for all concerned.

ILLUSTRATIONS

Kristy Anne Fraser-Kirk v David Jones Ltd & Ors

This case was settled on confidential terms but according to the original application, Ms F-K claims were made on the following bases:

a. *misleading or deceptive conduct under s.52 and misleading representations prior to employment under s.53Bof the Trade Practices Act 1974 (Cth) (as it then was) and equivalent state legislation;*
b. *breach of various policies which were expressly or impliedly incorporated into the contract of employment;*
c. *a claim in tort of breach of duty of care to provide a safe system of work;*
d. *a claim in tort of trespass; and*
e. *a claim in equity of detriment by failure of the respondents to fulfil representations.*

Dye v Commonwealth Securities *[2012] FCA 242 (Judgment delivered 16 March 2012)*

Ms D made a number of claims that she had been sexually harassed by 2 senior bank officers. After a lengthy hearing, Ms D's claims were dismissed in their entirety and Ms D was subsequently ordered to pay the respondent's indemnity costs. Ms Dye's claim had a number of bases:

(a) *breach of the implied contractual term of trust and confidence;*
(b) *breach of policies and procedures which were said to have been incorporated into the contract as term of employment;*
(c) *sexual harassment under the Sex Discrimination Act 1984 (Cth);*
(d) *sex discrimination under the Sex Discrimination Act 1984 (Cth);*
(e) *victimization under the Sex Discrimination Act 1984 (Cth);*
(f) *discrimination on the basis of a disability under the Disability Discrimination Act 1992 (Cth);*
(g) *misleading or deceptive conduct under the Trade Practices Act 1974 (Cth) (as it then was);*
(h) *the tort of injurious falsehood; and*
(i) *defamation.*

James Hunter Ashby v Commonwealth of Australia & Anor

This case is still in process and the basic facts are well known. In the original statement of claim in the Federal Court, the listed causes of action were:

1. *adverse action under the Fair Work Act 2009 (Cth);*
2. *sexual harassment under the Sex Discrimination Act 1984 (Cth), Anti-Discrimination Act 1991 (Qld) and the Anti-Discrimination Act 1977 (NSW);*
3. *victimization; and*
4. *breach of the implied contractual term of trust and confidence and good faith and cooperation and safe work.*

It is of interest that unions have not shown a willingness to become involved in the *"kitchen sink"* approach. Whilst these cases have a high profile, they are more the exception than the rule.

8. Other possibilities and concluding thoughts on the topic of external avenues

An avenue that is the topic of current discussion and may gain some traction would be a claim of contravention of an Enterprise Agreement (and in the right circumstances, an industrial award). If an enterprise agreement contains a clause dealing with bullying and harassment or workplace health and safety generally, it may be possible for a party to claim there has been a contravention of the agreement under s.50 of the *Fair Work Act 2009 (Cth).* This is a civil remedy provision under the Act and courts can make any order considered appropriate which may include injunctions, orders for compensation because of the contravention and reinstatement. It may well only be a matter of time before this avenue is explored.

The federal parliament is currently undertaking an inquiry into workplace bullying including an examination of legal protections. The results of that inquiry are yet to be seen but several submissions have suggested the introduction of a stand alone legislative prohibition on workplace bullying enforced by civil penalties and uncapped statutory damages.

The threat of litigation arising out of workplace bullying complaints should be put into appropriate context. Significant challenges confront claimants in taking external legal action and no direct action for workplace bullying simpliciter exists at this point in time. The threat of involvement by the workplace health and safety authorities and the Fair Work Ombudsman is very real but prosecution is rare.

Most private claims will take the form of an unfair dismissal claim (if termination of employment is involved) which should be capable of resolution at an early stage or a workers compensation claim because these are generally the most practical form of litigation. The incidence of workplace rights claims is rising and discrimination claims are also a danger in the appropriate case. However, in most cases, the position is at least arguable and this encourages both parties to settle their differences without going to a hearing. The nightmare scenario of the *"kitchen sink"* claim is fortunately unlikely unless the employer has a high profile and the case is one which is likely to attract publicity. None of this is to say that bullying complaints should not be treated seriously but to demonstrate that not every complaint of workplace bullying involves a cast iron winner of a legal case. In many respects, it is the practical consequences of workplace bullying claims in the workplace that have the potential to damage an employer's operations than the claim itself, ie the effect on morale and diversion of resources to deal with the matter.

D. THINGS TO KEEP IN MIND

a. Establish business priorities and culture

Whether to establish and the extent of measures to proactively address workplace bullying is ultimately a commercial decision for each business or organization and reflects the amount of risk an organization is prepared to accept and the willingness to resource effective anti bullying measures. The imperatives facing a small business in this regard are different to those facing larger businesses. Much also depends on the culture of the organization and the example set by its leaders.

The reality is that the incidence of external claims of workplace bullying through one or more of the means set out above is relatively small. That may be more a reflection of the practical realities associated with external avenues than of the existence of bullying in the workplace depending on the particular case. However, the risk in not taking pro active measures is that, sooner or later, an incident will arise which causes practical disruption in a business or organization and carries the risk of one or more forms of the civil action outlined above and the threat of prosecution by the authorities and the associated public stigma.

It also appears that workplace bullying is an issue which is not going to go away and it can be imagined that the current trend of increasing litigation will only continue to escalate over coming years, particularly if the political will for legislative change is present. There are good practical and legal reasons why some form of pro active measure should be taken in advance of any complaints arising.

b. The importance of policies and contracts

From an employer's perspective, it is important to be clear and upfront with employees that workplace harassment will not be tolerated and to have a system for dealing with complaints. This should start with a clear policy, preferably in writing, which is communicated to employees on their commencement of employment and acknowledged by them. This can be as simple or as detailed as befits the size and resources of the particular business or organization. Having a policy is a good starting point for making the attitude of the business clear and commencing to comply with OHS requirements.

However, it is also important, so far as it is possible to do so, to also be clear with employees that these policies do not form part of the contract of employment and are not mutually enforceable. This type of contractual provision appears to have been accepted by the courts as a valid means of excluding contractual liability (although it will not affect tortious or other forms of liability).[13]

c. The importance of follow through

It is of course not enough to simply have a policy and leave it in the bottom drawer nor is it enough to have the policy as part of an induction package and no more. It is wise to periodically conduct refresher training with employees, which should also be formally acknowledged. Any policy should be dynamic in nature and subject to change through use and experience so the policy and process should itself be subject to periodic review and update.

At a more involved level, it is desirable to provide managers with training in appropriate workplace behaviours and cultures including the signs of workplace bullying so that steps can be taken at an early stage. This can include training in the fundamentals of what is termed *"neuroleadership"* or how to get the best of out of employees.

At a practical level, line and HR managers should interact with employees to get an ongoing sense of the workplace and can monitor what is happening at the coalface by such steps as:

- Conducting exit interviews to understand why staff are leaving and to identify latent issues;
- Looking into the cases of employees taking excessive sick leave;
- Annually reviewing staff grievances.

d. Comply with your own policy

This may sound like an obvious thing to say but many of the reported decisions involve what seem like obvious failures by employers to follow their own policies about what particular process will be applied in the event of a complaint. Sometimes this is a result of using an *"off the shelf"* policy without thinking through the potential consequences. Some policies promise a full investigation of every complaint without consideration for different levels of complaint. Employees expecting a certain level of response according to policy may be disappointed by a different level of response.

[13] *Yousif v Commonwealth Bank of Australia [2010] FCAFC 8*

e. Don't ignore complaints and apply proper processes

This may also sound trite but as the old saying goes *"a stitch in time saves nine"*. Line managers should be encouraged not to sweep complaints under the carpet. Any complaints that are made should be promptly considered and a decision made, subject to policy considerations, about the best way to proceed. Some matters may fall into the category of *"whinging"* , others may involve discussion with the parties involved and perhaps counseling or even informal or formal mediation.

Other matters may deserve more formal investigation either internally or using the services of independent consultants. However, once matters become more formal, the basics of procedural fairness need to be kept in mind. None of this is to say that a robust approach cannot be taken to issues and complaints but it is important to recognize what is serious and what is less so and this can only be done by application of a suite of elements.

As a sidenote, the syndrome of *"workplace mobbing"* should also be kept in mind in appropriate cases. This is generally a situation where one or more employees complain about their line manager, particularly where that manager has been given the responsibility for managing longer serving and under performing employees who have not previously been the subject of proper performance management.

f. In the event of external legal action, seek advice early

This does not mean that businesses should necessarily start spending thousands of dollars on expensive lawyers. However, the reality is that many, particularly smaller, businesses don't treat legal claims seriously until the court stage is reached or a hearing is imminent.

It is wise to seek advice from experienced professionals to at least put the particular matter into context and obtain guidance about the best way forward.

Employers should particularly beware the dedicated self represented litigant for they are the most dangerous form of opponent in any litigation. They usually have the time on their hands to investigate and pursue their legal options and a level of sense of wrong having been done so that they do not act in a reasonable commercial way. The prospect of an ultimate costs order in the employer's favour is of little comfort given the practical inconvenience and cost that can be incurred in these matters.

ATTACHMENTS:

1. Code of Practice
2. Diagram of options
3. Practical scenarios

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