"ITS LIFE JIM BUT NOT AS WE KNOW IT"

Finding causes of action outside the WorkCover jurisdiction for those hurt by bullying and harassment

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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? Traditionally, most legal claims of bullying have been addressed through a claim to WorkCover for a workplace injury. Other options have been historically limited and have generally depended on the existence of an additional factor to the bullying itself, eg termination of employment or proof of prohibited discrimination. Indeed, until 1 January 2014, the most direct form of legislation addressing workplace bullying was workplace health and safety legislation. The situation is changing although workplace bullying remains a difficult area for the law.

This paper seeks to give an overview of the different legal mechanisms currently available for aggrieved persons to address workplace bullying, apart from workcover claims. This will hopefully be of assistance to practitioners used to the personal injuries jurisdiction when considering the range of legal options open to clients.

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).

A similar definition also now exists under amendments to the *Fair Work Act 2009 (Cth)* which operate from 1 January 2014. There, a worker will be *"bullied at work"* if:

i. While the worker is at work;
ii. An individual or group of individuals;
iii. Repeatedly;
iv. Behaves unreasonably;
v. Towards the worker or a group of workers of which the worker is a member; and
vi. The behaviour creates a risk to health and safety.

Many of the cases deal with what we might think, in retrospect, are obvious cases that would never (hopefully) occur in a 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

The first consideration should be whether there are any internal avenues open to employees to raise harassment allegations. It is 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 employee and 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. However, most policies fall short of agreeing to any independent external intervention.

D. EXTERNAL AVENUES TO ADDRESS WORKPLACE HARASSMENT

The most common forms of legal action to address workplace harassment and bullying , other than through a WorkCover claim, have been 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

[1] S.19 *Work Health and Safety Act 2011 (Qld) ("WHS Act")*
[2] S.28 *WHS Act*

- There is a greater role for worker elected health and safety representatives (HSRs), including the ability to direct unsafe work to stop.

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.[3] 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.[4]

In Queensland, the *Prevention of Workplace Harassment Code of Practice 2004* has effect as a preserved code of practice under the new legislation.[5] 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.

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.

[3] S.275(2) *WHS Act*
[4] S.275(3)&(4) *WHS Act*
[5] A model code of practice is still under consideration at a Commonwealth level.

However, for what might be termed *"serious"* offences, a person may make a written request to the regulator that proceedings be taken. 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. [6] 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 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.

[6] S.231 *WHS Act*

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 publicised 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. 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 the Fair Work Commission (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 the Fair Work Commission and there is a 21 day time limit on commencing the claim after termination occurs. The Fair Work Commission 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 Commission conciliator. If that is not successful in resolving the matter, a hearing will be scheduled before a FWC member and directions will generally be made for the filing of written evidence by the parties. This is generally an *"own costs"* jurisdiction with the FWC 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"*.

The Fair Work Commission 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. Sometimes also, rash actions by an employer in response to a bullying complaint can result in the alleged bullier being successful in an unfair dismissal claim.

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)*

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. Compensation of $3,026.60 was ordered.

3. Unlawful dismissal/breach of workplace rights claims ("adverse action 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 (or that the bullying had a connection with industrial action by the victim). 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 the Fair Work Commission within 21 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 1 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 the Fair Work Commission is compulsory in a termination based adverse action claim but not otherwise. After a conference is held by the Fair Work Commission (if applicable) and if there is no agreed resolution, then proceedings must be commenced in the Federal Court or Federal Circuit Court within a strict time limit (currently 14 days). Where both parties agree however, the matter may proceed in the Fair Work Commission. 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.

CASE ILLUSTRATION

Wilkie v National Storage Operations Pty Ltd *[2013] FCCA 1056 (Judgment delivered 9 August 2013)*

Ms W worked as a centre manager at the employer's Cockburn Centre in Perth from 20 December 2010 until 20 January 2012. In June 2011, she commenced taking one day sick leave each month on medical advice to reduce her stress levels. On 7 December 2011,Ms W notified her team leader that she would need to leave at 2.30 pm the following day in order to collect her son from school as arrangements to have someone else collect him had fallen through. The team leader informed Ms W by email that no one was available to cover for her, that the office could not be closed and she would need to make alternative arrangements for her son. Nonetheless W left the office at 2.30 pm. As a result she was issued with a first and final warning.

The court held that Ms W had a workplace right to take personal/carer's leave or unpaid carer's leave due to an unexpected emergency, namely the need to collect a primary school child from school. The employer was well aware of why Ms W sought to leave work early. The court was satisfied that the warning amounted to adverse action in that it made Ms W more vulnerable to dismissal.

Three days after receiving the warning Ms W was informed that she was being transferred to another centre as an assistant manager "given your current personal circumstances". Ms W did not wish to transfer. The employer admitted that the decision to transfer Ms W was motivated, at least in part, by her personal circumstances, including her use of personal leave for medical reasons and/or family responsibilities, which was not permissible. The court also found that while Ms W's salary was to be maintained, the transfer involved a change of role from centre manager to assistant manager, which was effectively a change of contract terms. The change altered Ms W's position to her prejudice as it reduced her status and level of responsibility. The court found that Ms W's demotion was a repudiation of her contract entitling her to treat the employment as having come to an end, and on that basis, a termination at the initiative of the employer. The court awarded W $32,130.78 for lost remuneration.

NTEU V Royal Melbourne Institute of Technology *[2013] FCA 451 (Judgment delivered 16 May 2013)*
Professor B's employment was terminated due to redundancy. She had made written complaints of bullying and intimidation by her head of school and met with the Vice Chancellor about the complaints. The head of school wrote to the VC advising that he did not consider Professor B's position in the faculty to be tenable and proposing several options, including redundancy.

The judge was not satisfied that RMIT had discharged its onus. This was based on the failure of the VC to give explicit evidence about her reasons and the absence of any clear connection between the financial deficit in the Youth Work discipline and the choice of Professor B as the one who should be made redundant. This included the absence of any criteria by reference to which the making of that choice occurred. The judge also took into account the VC's apparent determination to ignore her knowledge of the head of school's animosity towards Professor B. Reinstatement was ordered and RMIT was penalised a total of $37,000.

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 are 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;
- relationship or parental status;

- race;
- religious belief or activity;
- political belief or activity;
- impairment;
- trade union activity;
- lawful sexual activity;
- pregnancy;
- breastfeeding;
- family responsibilities;
- gender identity;
- sexuality;
- age;
- association with, or relation to, a person identified on the basis of any of the above attributes.

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.

Nunan v Aaction Traffic Services Pty Ltd *Qld Civil and Administrative Tribunal, Member Gordon, 14 October 2013 [2013] QCAT 565*
Ms N had been employed as a traffic controller and complained of sexual harassment by another controller, Mr H, at the Hamilton Harbour site between October 2010 and 9 March 2011. It was alleged that the behaviour was in the form of personal comments and questions with a sexual theme, noises and gestures including for example, Mr H saying on the very first day they worked together that he wanted to stick his tongue in her anus. This innuendo continued over 5 months until 9 March 2011 when, having found a photograph of Ms N's bare breasts on her phone, he made various explicit sounds, comments and sexual actions with his stop/slow stick for the rest of the working day. Ms N suffered an emotional breakdown and subsequently a major depressive disorder. Member Gordon awarded damages totalling $102,217.00 including $40,000 for personal injury and humiliation, $51,895 for past financial loss and $6,430.00 for future loss.

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 Australian 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 AHRC). 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. 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 tortious duties.

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 this has not yet been relied on in the context of a bullying case.

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.*

6. 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

MS F-K made claims of physical harassment by the Chief Executive Officer. 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.

D. NEW REMEDY - APPLICATION TO FAIR WORK COMMISSION TO STOP BULLYING

From 1 January 2014, the Fair Work Commission has the power to make orders to "stop" bullying under recent amendments to the *Fair Work Act 2009 (Cth* . The purpose of the new avenue is to promote the right to safe and healthy working conditions by providing a mechanism to help an individual worker resolve a bullying matter quickly and inexpensively. This does not prevent the worker from also pursuing any of the legal avenues previously considered (although the existence of such proceedings would be taken into account by the Commission in considering whether to make an order).

The laws do not apply to sole traders, partnerships or trusts with an individual trustee. The laws only apply to "constitutional corporations", ie the federal government, Commonwealth authorities and "trading, financial or overseas" corporations. Not for profit corporations will be subject to some uncertainty about the coverage of the laws.

Only a "worker" can make an application to the Fair Work Commission but that term is defined broadly. A "worker" is an individual who performs work in any capacity, ie an employee, individual contractor or subcontractor, outworker, apprentice, trainee, work experience student or volunteer. The term includes an employee of a corporate contractor or subcontractor and labour hire workers.

A worker will be *"bullied at work"* if:

i. While the worker is at work;
ii. An individual or group of individuals;
iii. Repeatedly;
iv. Behaves unreasonably;
v. Towards the worker or a group of workers of which the worker is a member; and
vi. The behaviour creates a risk to health and safety.

Examples of things that can constitute bullying include:

- Verbal abuse and ridicule;
- Threats of dismissal;
- Unjustified criticisms or complaints;
- Humiliating a person through gestures, sarcasm, criticism and insults;
- Spreading gossip or false, malicious rumours about a person;
- Sabotaging a person's work, hiding documents or equipment, not passing on messages.

In all cases, the behaviour is subject to the requirements that it be repeated and *"unreasonable"* so an objective test is applied.

Reasonable management action carried out in a reasonable manner is not bullying. Reasonable management action may include any of the following actions which are carried out for legitimate reasons and in a *"reasonable"* way:

i. Performance management processes;
ii. Action taken to transfer or retrench a worker;
iii. Other steps in the course of workplace change or restructuring;
iv. A decision not to provide a promotion to a worker;
v. Disciplinary actions;
vi. Allocating work in compliance with systems and policies;
vii. Injury and illness processes.

This avenue is still a private remedy in that the worker must make an application to the Fair Work Commission for an order to stop bullying. The Fair Work Commission is required to start dealing with the application within 14 days. Once an application is filed, the Commission's anti-bullying team will seek to contact all relevant parties to obtain sufficient information to enable the Commission panel head to determine how to deal with the application. This could involve referring the matter to a staff mediator to conduct a mediation or investigate the matter more fully, dealing with jurisdictional issues or assigning the matter to a Commissioner, for instance to convene a conference of the parties or conducting a hearing. Conciliation conferences will not generally be mandatory.

Before making orders, the Commission must be satisfied that bullying (as defined) has occurred and that there is a risk that the worker will continue to be bullied. The Commission must take into account:

i. The outcome of any investigation;
ii. Any procedure available to the worker to resolve grievances; and
iii. Any outcome from a grievance procedure.

So, the making of an internal complaint and pursuing any internal avenues will be a factor considered by the Commission in deciding whether to make an order. The Commission can make any order it considers appropriate to prevent the worker from being bullied, apart from ordering a money payment. This could involve making an order or a recommendation or expressing an opinion. Examples of orders that could be made include:

i. Requiring an individual or group to stop the bullying;
ii. Regular monitoring of workplace behaviours by an employer;
iii. Compliance with an employer's workplace bullying policy;
iv. Provision of information and support and training to workers;
v. Review of the employer's workplace bullying policy.

Breach of an order leaves a person open to potential penalties under the Fair Work Act. It is unlikely that orders will be made where a worker is no longer employed or engaged at the relevant workplace. There have been no published decisions as yet in this new jurisdiction.

E. CONCLUDING THOUGHTS

It is likely that the making of a WorkCover claim will remain the primary avenue for employees who have been bullied at work to obtain redress. However, other remedies may complement traditional workers compensation claims.

There is little downside in making a complaints to a public authority such as Workplace Health and Safety Queensland but there is no guarantee of action, or the extent of action by the public authority in relation to the complaint. Unfair dismissal claims rely on the termination of the employment relationship as a base requirement. Breach of workplace rights claims, whilst not limited to termination situations, do rely on there being some evidence of breach of a particular workplace right. Likewise, discrimination claims rely on proving the connection with a discriminatory attribute. Civil claims tend to exist in the rarefied atmosphere of the test case. Unlike the other private claims, which are largely about reinstatement to employment or compensation after the event, the new anti bullying provisions in the *Fair Work Act* offer an avenue to practically stop bullying from occurring in real time proceedings. Which of these avenues is appropriate will of course depend on the individual case.