

Article Information

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Waterfront “Code of Silence” Warrants Anti-Bullying Orders

Can the new Commission anti-bullying jurisdiction be used to wrest back responsibility for workplace conduct from rogue elements intent on influencing workplace behaviour without reference to the employer?

The Fair Work Commission has now given strong support to the view that it can. The Commission has now handed down one of the most anticipated decisions in its anti-bullying jurisdiction this week: Bowker & Ors v DP World & MUA [2015] FWC 7312.

Almost 18 months after the initial application was filed, and after a myriad of interlocutory steps in this first-of-its-kind application, the Commission found that three stevedores at DP World’s West Swanson Terminal have been bullied by their colleagues and members of The Maritime Union of Australia (**MUA**) and that despite steps taken by both DP World and the MUA, there was a significant future risk that the applicants would continue to be bullied.

The Commission has indicated it will make a range of orders including requiring DP World to train its staff in investigative techniques, review and amend its employee handbook and workplace behaviour policies and conduct and implement risk assessments in concert with WorkSafe Victoria. Undertakings offered by the MUA in order to avoid a risk it would be subjected to anti-bullying orders did not go far enough to satisfy the Commission, and unless more extensive undertakings are agreed to, the MUA is likely to be subject to anti-bullying orders as well.

Perhaps the most significant feature of the orders made by the Commission is the indication that it will re-open the issue of whether the orders made are having the desired effect anytime in the next 12 months. A key feature sought by the applicants was that the Commission remain involved and able to be called on in order to ensure that orders could be adjusted to ensure ongoing effectiveness.

Background

The applicants, Annette Coombe, Sharon Bowker and Steven Zwarts are stevedores employed at DP World’s Melbourne site. Ms Coombe, Ms Bowker and (until later) Mr Zwarts were all longstanding MUA members, as are most of the DP World workforce.

In mid-2013, Ms Coombe, lodged a formal complaint with DP World alleging that a colleague was spreading malicious rumours about her in the workplace. Ms Bowker confirmed to DP World when asked that the conduct had occurred, and the individual perpetrator was invited to a disciplinary meeting with management. This step is known on the Australian waterfront as “lagging” on a colleague. Lagging (that is, dobbing) in a way that may get a fellow union member disciplined is traditionally strongly discouraged on the waterfront. This has the unfortunate effect that to avoid being labelled a lagger, the only place an employee can go to have a personnel issue dealt with is the relevant union rather than the employer.

The perpetrator (who was a MUA member) was represented by a site MUA delegate, and on the advice of the delegate denied having made the comment. The delegate’s role in advising Bennier to lie about not having made the comment was later revealed. After the disciplinary meeting, the delegate sought out Ms Bowker and publicly dressed her down in the site cafeteria for having “gone upstairs [to management]” over the issue. The delegate’s actions were investigated and his employment was terminated. This resulted in an unsuccessful claim in the Federal Court in which the Court made clear in a December 2014 decision that it considered the delegate had encouraged the perpetrator to lie, and had publicly castigated Ms Bowker for having lagged.

As part of its decision, the Court found that there was a separate internal system of authority operating in the workplace in

which individuals associated with the MUA exercised authority and control over conduct separately to the authority of DP World as the employer. Neither the delegate nor the MUA appealed the Courts decision. However, each of Ms Bowker and Ms Coombe (and later Mr Zwarts) began to be subject to a range of bullying conduct once it became clear that the MUA delegate's employment was at risk. That conduct continued both in and outside the physical workplace, including through social media, and including other employees being actively discouraged from speaking with any of the three individuals.

Mr Zwarts, the third applicant, later ceased his membership with the MUA, in protest against the MUA's treatment towards the two women, and then himself became subject to bullying.

One significant interlocutory step included a Commission full bench being convened to identify what part of the extensive series of bullying conduct alleged had occurred "at work" (a requirement before the conduct can be considered as "bullying" for the purposes of the Fair Work Act and able to be dealt with). That full bench decision left open the door to conduct which did not occur at the physical workplace amounting to bullying, but did not make final findings, leaving this to Deputy President Gostencnik to deal with in the final decision. In the end, this was not taken any further by DP Gostencnik in the final decision as he was satisfied that whether or not a part of the conduct did not occur at work, there was a sufficient basis to say that "repeated unreasonable conduct" had been directed at each of the three individuals and they had been bullied at work as a result. Further definition of what conduct amounts to conduct "at work" will only be explored in other cases.

Applicants' Position

In order for the FWC to make anti-bullying orders under s 789FF of the Fair Work Act, the applicants had to establish that they had been bullied at work and that there was a real risk that they would be continued to be bullied at work. In support of their position, the applicants gave evidence of no less than 212 complaints and concerns they had raised with DP World and 37 largely uncontested examples of bullying towards them, between 2013 - July 2015.

Throughout their evidence the applicants also identified five key issues they alleged indicated a continuing risk of future bullying, these included:

- a 'code of silence' which existed at the workplace and within the MUA which had the effect of dissuading employees from making or verifying complaints for fear of being labelled a 'lagger' and being ostracised
- DP World's inadequate workplace investigations into the bullying
- the incompleteness of DP World's investigations
- inadequate return to work arrangements that lacked "hard measures" to combat workplace risks
- DP World's delay in advising the applicants of outcomes to complaints and concerns.

Respondents' Position

DP World gave a limited acknowledgement that the applicants had been bullied. However, it sought to argue that it had established policies and was taking steps to address bullying and other undesirable workplace behaviour, which were part of a wider cultural change in the workplace. DP World also submitted that it had adopted a "conventional and appropriate system to manage workplace risks" in its formulation of return to work plans for the applicants and had prepared sufficient risk assessments.

On the other hand, the MUA formally denied the applicants' allegations of bullying but did accept, on the basis of the applicants' evidence, that the Commission could find that the applicants had been bullied. However, it sought to convince the Commission that no anti-bullying orders were necessary, asserting that:

- The bullying incidents relied on by the applicants were relatively old and therefore were not reliable in determining whether the applicants would be at risk of experiencing similar conduct in the future.
- Since 2013, there had been a number of changes in "state of affairs at the workplace".
- The applicants failed to identify exactly which persons would be responsible for future bullying.
- The MUA and two MUA members provided undertakings to take steps to reduce the risk of future bullying to the applicants.

Findings

DP Gostencnik found that each of the applicants had been bullied at work, and that there was a risk that the bullying would continue once the three applicants returned to the workplace (having been absent on a combination of leave since September 2014).

One of the key points accepted by the Commission was the continued pervasive effect of the 'code of silence' at DP World and amongst the MUA. The Commission found that the degree to which this 'code of silence' was entrenched in the

workplace culture meant that employees would not make or verify workplace complaints to DP World, without first approaching the MUA, for fear of being ostracised, bullied and labelled a 'lagger'.

In making anti-bullying orders, the Commission was satisfied there was a future risk of bullying towards the applicants at work by the individual or group of individuals who had previously engaged in bullying towards the applicants. The Commission found that:

- The bullying behaviour was "enabled" by the workplace 'code of silence'.
- DP World had not succeeded in dealing adequately with the 'code of silence', which would take more time and effort to shift, change and ultimately eradicate.
- The system of authority and control which exists in the workplace, continues to create a live risk that the applicants will be bullied by the same individuals that subscribe to the Code when they return to work. It is not required that the exact identities of those individuals or that group are defined but it is sufficient that they can be identified "by some description".
- It is unnecessary to identify the form of the future bullying to be satisfied that there is a risk of it occurring.

Based on these findings, the Commission has identified it will make eight orders against DP World, to prevent the applicants from being bullied, subject to allowing DP World an opportunity to address them. These included requiring DP World to train its management staff in forensic investigative techniques, review and amend its employee handbook and workplace behaviour policies, and involve the workplace health and safety regulator in the conduct of risk assessments.

Very late in the proceeding, the MUA, and individual MUA members implicated in some of the bullying conduct, offered undertakings to avoid the potential that anti-bullying orders would be made against them. The Commission did not accept the undertakings went far enough, and has identified more extensive undertakings it would accept in lieu of making orders. These include the making of a decision by the MUA's National Council by February 2016 in terms directed to correct continued and misguided adherence to the 'code of silence', and the distribution for the next 12 months of a newsletter to MUA members by the union. It remains to be seen whether the MUA and those individual members will adopt these more extensive undertakings in lieu of orders.

Lessons for Employers

As one of the most significant cases in the Commission's bullying jurisdiction to date, employers and HR professionals should take note of the key messages this decision communicates about what the Commission considers to be bullying, how to manage complaints of bullying, as well as the power the Commission has to tailor make orders to deal with specific workplaces, unions and behaviours. These include:

- Anti-bullying powers can be exercised against unreasonable third-party behaviour in the workplace where necessary to ensure that employees are responsive to employer direction rather than unreasonable direction or influence of a third-party.
- Unions which exercise significant influence amongst a workforce also have significant opportunities to influence members to comply with reasonable workplace conduct under the direction and control of the employer - if necessary anti-bullying orders can be directed at ensuring union influence is used to enhance an employer's responsible control over workplace conduct.
- A robust and effective investigation process which minimises delay in resolution of personnel complaints is a key step in an employer avoiding criticism over inadequate process, and in avoiding anti-bullying orders altogether.
- Anti-bullying orders can take many different forms, and an imaginative approach to what is necessary and appropriate can result in a benefit to the workplace by reducing potential for bullying without significant interference in the employer's operations.