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Fair Work Commission hands down first formal bullying ruling

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The early days of the anti-bullying jurisdiction saw little activity and few substantive decisions. However, there have recently been a number of decisions made by the Fair Work Commission providing guidance on the operation of the anti-bullying jurisdiction, and the types of behaviours the Commission will consider as bullying.

Amongst these decisions is the Commission's first formal ruling that bullying had occurred. In this article, ***Tim Lange, Partner,*** *and* ***Katherine Lee, Law Graduate****, discuss a number of these recent cases in order to help employers, human resource managers and employees alike to better understand exactly what constitutes "bullying" in the eyes of the Commission and could therefore potentially give rise to an order to stop bullying.*

The Cases

C.F. [2015] FWC 5272

This decision was the first formal finding of bullying by the Commission on an application for an order to stop bullying under s 789FC of the *Fair Work Act* (**FW Act**). The unnamed applicants in the matter were, at the time of the hearing, employees of an unnamed small real estate business. The applicants alleged that they were bullied by their Property Manager, who had since become employed by a related company. Some of the alleged bullying behaviours included:

- belittling conduct
- swearing, yelling and use of otherwise inappropriate language
- daily interfering and undermining the applicants' work
- physical intimidation and "slamming" of objects on the applicants' desks
- attempts to incite the applicants to victimise other staff members
- threats of violence.

Commissioner Hampton was satisfied that there was sufficient evidence to support the finding that bullying conduct had taken place against the applicants and that such conduct could create a risk to the applicants' health and safety. The requirements of section 789FD(1) of the FW Act were therefore made out and the Commissioner made a finding that the applicants had been bullied within the meaning of s 789FD.

While the employer submitted that the Property Manager had been moved to a different location under the employ of a related company and that this change resulted in the provision of a safe working environment, the Commissioner still found that "in the normal course" there was still potential for interaction between the companies' employees. This finding was supported by the fact that the Property Manager was seconded back to the original workplace on a short-term basis which meant there was a risk that the applicants would continue to be bullied by the Property Manager.

Given the finding that bullying had occurred, the Commissioner had the jurisdiction to make orders to stop the bullying. The orders made were of two broad types: the first type was to prevent contact between the employees and the second type was to combat the workplace culture by implementing a number of anti-bullying policies, procedures and training.

Singh [2015] FWC 5850

The next decision involved an application by Mr Singh, a production-line worker who worked from time to time at a workplace site conducted by Coca-Cola Amatil Australia Pty Ltd (**CCA**). Mr Singh alleged that he had been verbally and

physically abused by an employee of CCA, a Mr Ashcroft, at the site – conduct that was contended to be an "isolated, one-off incident". Mr Singh claimed that the incident was motivated by Mr Ashcroft not liking him.

The respondent parties, being CCA, Mr Singh's employer and Mr Ashcroft, each raised jurisdictional objections to the application on grounds that the single incident did not meet the definition of 'repeated unreasonable behaviour' and therefore did not constitute bullying.

Commissioner Hampton agreed with the respondents' objections that the statutory definition of bullying requires repetition of unreasonable behaviour and found that in this instance, there was only a single occurrence of the alleged conduct. The application was therefore dismissed. This decision makes it clear that for the purpose of the FW Act, bullying is more than a one off incident and the Commission will look for repeated unreasonable behaviour before it will consider the merits of an applicant's claim.

Page [2015] FWC 5955

This decision is another example of the types of behaviour that may or may not fall within the statutory definition of bullying. Ms Page was an employee of a Freemantle Markets stall that sold soap. She brought an anti-bullying application against two people: a caretaker for Freemantle Markets and another stall owner named Ms Latham.

Ms Page alleged that the caretaker had threatened to kill her because he was tired of cleaning up soap scraps from the floor, which he found difficult to remove as a cleaner. However, in the same vein of reasoning as Singh, the incident was a "once-off" and there was no repetition of such behaviour. Furthermore, there was no other contact between Ms Page and the caretaker. For this reason, the incident did not meet the definition of bullying and the Commissioner dismissed the claim.

Ms Page's allegation against Ms Latham arose because she claimed that Ms Latham often stared at her with a "hostile look" and, on one occasion, told her to "get f-ed". She also claimed that Ms Latham "approached other stall holders who subsequently point(ed) and laugh(ed)" at Ms Page.

In this instance, Commissioner Cloghan did not find it necessary to issue an anti-bullying order because the evidence was not determinative of the alleged swearing and gossiping actually occurring. While the Commissioner did note that it was evident the relationship between Ms Page and Ms Latham was no longer cordial, he also stated that the nature of the relationship itself is not relevant to a finding of bullying. The Commission found that the issue is whether the "boundary" of the relationship, having been set, is broached by repetitive unreasonable behaviour, such as telling a person to 'get f-ed' on numerous occasions or repeatedly spreading criticism or gossip amongst other co-workers, as such "scurrilous denigration of a worker in the workplace would certainly fall within the boundary of bullying".

Gilbert v Downer EDI Engineering Power Pty Ltd [2015] FWC 5774

While this case does not directly deal with an application under the anti-bullying jurisdiction, it is an interesting example of the factual circumstances the Commission will consider in deciding whether workplace bullying occurred. In an application for relief from unfair dismissal due to physical incidents in the workplace, the Mr Gilbert claimed that he had been a victim of workplace bullying, and that this was relevant to the Commission's determination of whether there was a valid reason for his dismissal.

The evidence before the Commission was that Mr Gilbert had been involved in a physical incident with another employee (**the Incident**). Mr Gilbert claimed that he had experienced two other prior physical incidents with the same employee but gave no evidence in support of that claim. The Incident was precipitated by Mr Gilbert calling the employee "a f-ing dog". The employee then punched Mr Gilbert and Mr Gilbert replied with, "haha well done, you've just lost your job".

In the above context, Commissioner Cloghan found that the allegation of workplace bullying was not supported and surmised that there could be no way that Mr Gilbert was an "innocent party to the incident" given that his comments had caused the ensuing altercation. On the evidence that Mr Gilbert had himself "created a hostile, intimidating and offensive environment," the Commissioner determined that the employer had a valid reason to terminate Mr Gilbert's employment and dismissed the application for unfair dismissal.

This particular case demonstrates that the role between victim and perpetrator in a bullying scenario is often dynamic. It also identifies the interrelation between unfair dismissal and anti-bullying applications. However it is important to note that anti-bullying applications can only be made while an employee is still employed at the relevant workplace, which by its nature means that such applications cannot be brought simultaneously with an unfair dismissal claim, which requires the employee to have been dismissed (except in the rare case where a demotion may give rise to an ability to commence an unfair dismissal claim).

Roberts [2015] FWC 6556

This last decision is an example of what the Commission may consider in deciding whether there is a continuing risk of bullying behaviour on an applicant's return to work.

Mrs Roberts alleged that the Sales Administrator at her real estate workplace had bullied her. Her employer argued that no orders were necessary, as there was no risk that Mrs Roberts would continue to be bullied at work due to new anti-bullying policies being put in place.

The Commission was satisfied that there had been eight occasions of unreasonable behaviour exhibited towards Mrs Roberts by her manager. Despite the employer establishing an anti-bullying policy and manual, the Commission found that there would be a continuing risk of bullying. The main factor contributing towards this finding was the perpetrator's and the employer's reluctance to accept that any of the behaviour exhibited to Mrs Roberts amounted to bullying. Such a *"lack of understanding as to the nature of the behaviour displayed at work has the proclivity to see the behaviour repeated in the future".*

Lessons for Employers

Even taking these most recent decisions into account, the practical approach for employers in managing the issues in a way that reduces exposure, has not altered. Policies should first be in place that confirm expected standards or conduct, and identify what will happen in the event the standard is not met. Policies should allow for the employer to have flexibility in how different issues might be investigated or dealt with on a case-by-case basis. An employer who receives a report of an inappropriate workplace incident between two employees should investigate the complaint in accordance with its policies and procedures. If the allegation of bullying is substantiated, the employer should then consider what measures it might take to objectively resolve the issues or otherwise consider whether it is necessary to limit or prevent continuing interaction between those two employees. Employers should also be reminded to establish or strengthen their anti-bullying policies, procedures and training as a means of reducing the potential for any anti-bullying orders to be made.