

Bullying and Harassment in the Workplace

You may have noticed recent press reports about workplace bullying. It is generally defined as *'any repeated unreasonable behaviour directed towards an employee that creates a risk of health and safety'*. There is no direct legislation such as the Anti Discrimination Legislation that makes workplace bullying a particular offence.

An employer runs multiple risks in failing to address workplace bullying. These include:

1. Prosecution under OH&S legislation
2. An ongoing Worker's Compensation claim.
3. A Common Law or Trade Practices claim for damages for personal injury.
4. A claim for constructive, unlawful or unfair dismissal.
5. A claim for discrimination (depending upon the nature of the bullying such as sexual or racial overtones)

To illustrate this point I refer to the following cases:

[Inspector Gregory Maddaford v MA Coleman Joinery \(NSW\) Pty Ltd \[2004\] NSWIRComm317](#)

A 16 year old factory worker was initiated by being wrapped in plastic by co-workers, rolled around on the trolley and covered in saw dust and glue, saw dust was pushed in his mouth and thrust down his shirt and pants, glue was squirted in his mouth and over his body and he had a fire hose sprayed on him to wash the saw dust and glue out of his mouth, until he coughed and choked. There had been a history of pranks at the workplace. The employer Company, its 2 Directors and 5 employees were successfully prosecuted under the NSW OH&S Act. The company was convicted and fined \$24,000, one Director was convicted and fined \$9,000 and the other \$12,000 as he had prior warning. Four of the five employees were placed on good behaviour bonds and another was fined \$500. All of the employees were also individually audited

[Goldman Sachs JB Were Services Pty Limited v Nikolich \[2007\] FCAFC 120](#)

A claim damages was heard from what started out as an unlawful termination claim in the Australian Industrial Relations Court. Mr Nikolich was awarded damages of \$515,000 for breach by his employer of the terms of his employment contract. The employer was found liable because the aspirational statements in the company's harassment policy, were incorporated as terms into the employee's contract of employment and the employer was found to have breached the relevant provisions of the contract, by failure to live up to what had become actual rather than aspirational commitments. The Court found that as part of the employment contract, the employer had agreed to take every practical step to provide and maintain a safe and healthy work environment.

Nikolich had a dispute with his manager about the reallocation of a former worker clients among other investment advisors leading to allegations that the manager intimidated and harassed him. He made a complaint about the manager's conduct. On trial and on appeal the court found that the employer had failed to abide by its policy because of the employers delay in dealing with the complaint. The result of the delay was that Mr Nikolich suffered a serious psychological injury.

[Naidu v Group 4 Securities Pty Ltd "Group 4" and Nationwide News Ltd "News"\[2005\] NSW SC 618 NSWCA \[2005\] 470, NSWSC \[2006\], NSWCA \[2007\] 377](#)

In June 2005 the Supreme Court of New South Wales awarded \$1.9 million in damages to a former employee suffering a psychiatric illness. Group 4 was contracted to provide security services for News at a number of its sites. Mr Naidu was employed by Group 4 as a security guard and assigned work at News premises under the direct

supervision of News staff in particular a Mr Chaloner, the News Security and Fire manager. Mr Naidu alleged that Mr Chaloner engaged in extensive bullying over a period of four years. This included physical assaults, sexual abuse, indecent exposure, racist and sexual verbal abuse, financial threats and general humiliation. He also claimed that he was forced to work excessive hours and performed personal tasks for Mr Chaloner unrelated to work duties. As a consequence of the bullying and abuse, he was diagnosed with serious depression and post traumatic stress disorder.

The court found that Group 4's discrimination and harassment policy constituted a condition of Mr Naidu's employment contract. The publication of the harassment policy by Group 4 implied that it was a term of the employment contract and that Group 4 would not by its servants or agents intimidate, racially or personally vilify him, subject him to demeaning, harassing, abusive conduct or threats of violence and it would as far as reasonably practical protect him from any such conduct occurring in the course of his employment. The Court also found that permitting such conduct to be inflicted was a breach of an implied term of his employment contract. The Court found that Group 4 employees were aware of the manner in which Mr Naidu was treated and accordingly attributed this knowledge to Group 4. The Court also found that Group 4 was aware that Mr Chaloner could be unreasonable and demanding and that he routinely used the intimidation of staff as a management technique and that Group 4 should therefore have been alerted to enquire as to whether there were any risks to Mr Naidu's health. The Court found that Mr Chaloner was an employee of News Ltd and in every material and practical sense Mr Naidu was subordinate to him. As a result News took over on its own behalf as an agent for Group 4 at least joint responsibility in the matter.

Although the conduct was specifically prohibited by News, that so much of the conduct was intimately connected with the exercise of authority by Mr Chaloner, as so closely associated with his day to day direction and control of Mr Naidu's activities, that News was found vicariously liable for the conduct. There was a finding that it was reasonably foreseeable that an illness might result from Mr Chaloner's misconduct, whether or not Mr Chaloner was aware or cared whether this might be the result. Both Group 4 and News were found liable in negligence for psychological injuries inflicted on Mr Naidu and both found to have a duty of care to provide a safe workplace and safe systems of work, which they had breached.

Of the total damage awarded to Mr Naidu:

- The sum of \$150,000 was awarded as exemplary damages against News, to punish News for Mr Chaloner's reprehensible conduct and deter news from allowing such conduct in the future.
- The sum of \$100,000 was awarded against Group 4 for its breach of various obligations to Mr Naidu under the employment contract for allowing or permitting him to be subjected to over 4 years of malicious treatment by Mr Chaloner.

Otherwise, Group 4 and News were jointly liable for the total damages awarded of almost \$2million.

On Appeal: Although maintaining that an employer had a non delegable duty of care the Court of Appeal (2 to 1) held that Group 4 had not breach its duty as it could not be found to be aware of the conduct and thus upheld Group 4's appeal. News however, was found to be a surrogate employer and vicariously liable for Mr Chaloner's intentional acts and the verdict of nearly \$2 million and indemnity costs stood.

Hunt v Rail Corporation of NSW [2007] NSW ADT 152 (24 July 2007)

In this case a NSW Rail Corp manager was awarded \$20,000 by the ADT because the employer was found to be vicariously liable for sexual harassment. The harassment took the form of offensive and recurring graffiti in the men's toilets and the placement of pornographic material, by persons unknown in the manager's office.

Q-Comp v Foote [2008 QIC 76 (10 September 2008)

Mr Foote was ultimately successful in his claim for Worker's Compensation benefits for psychological injury stemming from alleged systematic bullying occurring over a period of years. The workplace was dysfunctional involving numerous conflicts and a number of grievances lodged against Mr Foote, who also made a complaint of his own, alleging a significant period of bullying and 'mobbing'. The employer did nothing about the complaint until 3 months later and after Mr Foote had followed it up. An enquiry was initiated investigating allegations both by and

against him but did not allow for any investigation of the mobbing allegations. Mr Foote was informed that he was liable for disciplinary action and given an incomplete copy of the investigation report. He was transferred to a different role, potentially limiting his career aspirations. The Insurer defended his claim on the basis of reasonable management action reasonably taken. Mr Foote succeeded because the employer's efforts to deal and manage the complaint were inadequate because:

- The investigation took too long, compared to the rate in which complaints against Mr Foote had been investigated;
- The employer had not kept Mr Foote informed as to the progress of the investigation;
- The terms of reference for the investigation did not correspond with Mr Foote's complaint;
- The investigation was not sufficiently thorough;
- His transfer to another position was significantly detrimental to his chosen career path; and
- The employer largely ignored indications that Mr Foote was suffering from distress.

O'Grady v MAP Foundation & Others (2009) "Café Vamp Case"

A company and its Directors were convicted of failing to provide a safe working environment due to the relentless bullying of a young café worker, who ultimately committed suicide due to the abuse. The employee was subject to a systematic campaign of bullying conduct and insults. The three employees who bullied her were convicted of failing to take care for the health and safety of others and the company was fined a total of \$220,000. The Director of the company was fined \$30,000 and the employees were fined \$45,000, \$30,000 and \$10,000.

It should be noted that the bullying took place 6 days a week for more than a year. The bullying included:

- Being held down workmates
- Having fish oil poured in her bag
- Being drenched in chocolate sauce
- Being told repeatedly that she was worthless
- Being teased about a failed suicide attempt
- Having rat poison left in her pay envelope
- Being spat upon and being called names such as fat and ugly

Bailey v Peakhurst Bowling and Recreation Club (2009)

Mrs Bailey was awarded over \$500,000 as a result of her manager, a Director of the club and supervisor bullying and harassing her. The conduct was carried out for 2 years and involved repeated indications that her job was precarious, the use of extremely vulgar language, requiring her to break liquor licensing laws and requiring her to resign from her union. Mrs Bailey suffered pains, anxiety and depression symptoms and was diagnosed with both anxiety and depression.

Kohler v Cerberos (Australia) Ltd 2005

A sales representative who had been told that she was redundant agreed to accept redeployment to a part time merchandising role. When her employer gave her a list of the stores she had to visit as part of the role, she complained that this was an excessive work load. Her employer declined to investigate the complaint along with numerous other complaints of overwork from other employees. The employee claimed that she had incurred a psychiatric illness from the excessive work load and claimed damages in negligence. She was unsuccessful, the High Court considered that the psychiatric injury incurred by the employee was not reasonably foreseeable because the employee had agreed as a term of her employment to perform those duties and she did not take prolonged sick leave or complain to her employer.

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