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EMPLOYMENT UPDATE

WORKPLACE BULLYING – SNAPSHOT OF RECENT DEVELOPMENTS

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Five months into the Fair Work Commission's new bullying jurisdiction, the demand for and scope of the new laws is slowly becoming clearer.

This article briefly summarises a number of recent cases and developments employers should be aware of in this area.

MANAGER FAILS TO OBTAIN STOP BULLYING ORDER

On 12 May 2014, the Commission handed down a decision (available here) rejecting a manager's application for an order to stop bullying.

Specifically, the applicant claimed that she was bullied because:

- two of her subordinates made complaints to HR alleging the applicant had bullied them;
- the employer decided to investigate the subordinates' complaints even though they were without merit;
- she was the target of "malicious rumours"; and
- she was "harassed and badgered" on a daily basis.

While Commissioner Hampton accepted that making vexatious allegations, spreading rumours and conducting investigations in a grossly unfair manner could amount to bullying within the meaning of the *Fair Work Act 2009*, there was insufficient evidence to support such a finding in this case.

Importantly, the Commissioner considered the meaning of "reasonable management action", noting that the term may need to be given a "wide meaning" and that "every day actions to effectively direct and control the way work is carried out" are covered by the exception.

The Commissioner also found that the employer's decision to investigate the subordinates' allegations was "the only reasonable and prudent response" and that the employer's use of an external law firm to conduct the investigations was a reasonable decision.

Overall, this decision is encouraging for employers as it suggests that:

- employees will need a sound evidentiary basis to support their claim for an order to stop bullying; and
- the Commission will take a broad view of what amounts to the defence of "reasonable management action", giving employers some comfort that most management decisions, if reasonable, will fall within the exception.

QUARTERLY REPORT

The Commission has published a quarterly report with respect to its anti-bullying jurisdiction for the period January - March 2014 (available here).

The report reveals that:

- the Commission received 151 applications for an order to stop bullying, only 8 of which were finalised by a decision (with the rest either withdrawn or resolved at earlier stages);
- of the 8 applications finalised by a decision, only 1 involved a substantive order to stop bullying (discussed below); and
- the majority of applicants (around 72%) alleged they were bullied by their manager.

It is clear that the total number of anti-bullying applications received is far lower than expected, which is good news for employers. Despite this, it would be a mistake for employers to let their guard down with respect to bullying risks in the workplace.

In particular, the fact that a large percentage of applicants alleged bullying by their manager suggests it has never been more important to train managers and frontline supervisors about avoiding legal risk during performance management discussions.

NUW MAKES (AND THEN WITHDRAWS) BULLYING APPLICATION

The National Union of Workers (**NUW**) has withdrawn a potentially precedent-setting application for an order to stop bullying that it made on behalf of a group of unidentified labour hire workers.

The bullying provisions in the *Fair Work Act 2009* specify that only a "worker" may apply to the Commission for an order to stop bullying. Whether unions can apply for bullying orders without identifying the employee remains uncertain.

Despite the NUW's withdrawal, there is little doubt this question will come up again. If unions can establish a right to bring bullying claims on behalf of anonymous employees, the new anti-bullying laws may become a much more attractive option for workers. Certainly, it will result in unions pushing workers into using the anti-bullying provisions more frequently.

RETROSPECTIVE TEST CASE "THROWN OUT"

As we reported in our previous update, a recent Full Bench decision confirmed that the anti-bullying provisions can capture bullying which occurred before 1 January 2014.

Following the Full Bench determination, the case was referred back to Commissioner Hampton for a further jurisdictional objection. The respondent, Peninsula Support Services (**PSS**), argued that it was not a "trading corporation" and was therefore not covered by the bullying provisions in the *Fair Work Act 2009*. The Commissioner agreed, finding that PSS did not engage in "significant" trading activities and that there was no jurisdiction for the Commission to deal with the application any further.

As this case demonstrates, the bullying provisions only apply to workers of "constitutionally-covered" businesses, leaving many organisations and their employees without access to the bullying jurisdiction.

FIRST COMPREHENSIVE ORDER

On 21 March 2014, Senior Deputy Drake made the Commission's first comprehensive order to stop bullying (available here). The order requires the employee engaging in the bullying (**respondent**) to:

- complete any exercise at the employer's premises before 8.00am;
- have no contact with the applicant alone;
- make no comments about the applicant's clothes or appearance;
- not send any emails or texts to the applicant except in emergency circumstances; and

- raise no work-related issues without first notifying the employer's COO or his subordinate.

The order also requires the applicant not to arrive at work before 8.15am.

If the order is breached, the employer and respondent face a maximum penalty of $51,000 and $10,200 respectively, though it remains to be seen whether the Federal Court will be willing to penalise technical/minor transgressions.

Although the order was made by consent, it highlights the type of micro-management the Commission may engage in under its anti-bullying powers.

DISMISSAL ENDS BULLYING CLAIM

The Commission handed down a decision on 26 May 2014 (available here) dismissing the employee's claim. The Commission found that the employee's dismissal from employment meant that the claim had no reasonable prospects of success.

In this matter, after the employee filed an application for an order to stop bullying and a timetable was set down for the hearing of the application, his employer dismissed him from employment. The Commission found that as he was no longer employed , there was no risk of continued bullying at work.

The Commission noted that the employee had also filed an adverse action (general protections) claim, and that one potential remedy which could result from that claim was reinstatement. The Commission noted that if the employee was reinstated, then the dismissal of this bullying application would not operate as a bar to any future bullying orders being sought.

IMPLICATIONS FOR EMPLOYEES

It is clear that applications (and subsequent orders) to stop bullying could prove frustrating, costly and time-consuming for employers. In order to mitigate this risk, employers should always:

- be proactive about preventing bullying;
- take allegations of bullying seriously; and
- investigate allegations about bullying as the Commission is required to consider internal investigations when making orders to stop bullying.

Finally, employers should note that bullying may still be actionable as a negligence or breach of contract claim. In a recent Queensland Supreme Court case (discussed in our previous update here), an employee was awarded just under $240,000 in damages after the Court found that the employer's failure to apply its own bullying policy and address a bullying complaint exacerbated the employee's emotional distress and increased the employee's risk of a psychiatric illness, thus breaching the employer's duty of care to the employee.

MORE INFORMATION

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