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Employment Alert

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THE STRUGGLE FOR POWER

Workplace Bullying and Employer Liability

Bullying is the sort of behaviour that one hopes has an expiry date. That if it happened at all, it would be behaviour that some children participate in only until they become enlightened adults. Unfortunately, if the recent spate of news reports is anything to go by, this does not seem to be the case.

Workplace bullying has begun to be exposed as a real problem - for both employees and employers right here in Victoria.

Only one month ago Cafe Vamp in Hawthorn hit the news as the owner and three employees were convicted and fined for failing to take reasonable care for the health and safety of persons. A coronial inquest into the death of fellow employee, Brodie Panlock, had revealed that significant physical and emotional bullying had driven Ms Panlock to jump off the roof of a multi-storey car park building. The coroner described the employees as "relentless in their efforts to demean her", which included covering her with chocolate and dismissing her as "worthless".

More recently, ex St Kilda player Andrew Lovett flagged his intentions to pursue the football club for breach of the same provisions of the *Occupational Health and Safety Act* 2004. Mr Lovett alleged that the club had deliberately excluded and isolated him and denied him access to the club's facilities and resources during his period of indefinite suspension.

Discrimination or Harassment

Workplace bullying may be considered to be discrimination if done on the basis of a protected attribute (such as sex, race or disability). It may be considered sexual harassment which is also prohibited by the *Equal Opportunity Act* 1995.

The employer may be vicariously liable for this behaviour unless it can be shown that reasonable precautions were taken to prevent it.

Breach of Occupational Health and Safety obligations

As in the real-life situations above, workplace bullying may be captured under the *Occupational Health and Safety Act* 2004. This Act stipulates that employers must “provide and maintain for employees of the employer a working environment that is safe and without risks to health”.

In *Naidu v Group 4 Securitas Pty Ltd and Anor* [2005] NSWSC 618 it was held that the employer owed a duty of care to exercise reasonable care for employee safety, including the provision of a safe place of work and a safe system of work.

The court commented that employers must also protect employees from racial or personal vilification as this is “necessarily implicit in the duty to provide a safe place and a safe system of work”.

WorkSafe claim

An employer may also be liable for damages under the *Accident Compensation Act* 1985 if an employee suffers psychological injury following workplace bullying.

In *Bailey v Peakhurst Bowling & Recreation Club Ltd* [2009] NSWDC 284, a Sydney bar worker was awarded more than $500,000 in damages when she brought a case against her employer under the New South Wales equivalent of the *Accident Compensation Act*.

Carol Anne Bailey succeeded in showing that she had developed a severe psychological condition after being subjected to sustained intimidation, bullying and harassment. The main perpetrator of the bullying was a director of the club and Ms Bailey’s supervisor.

Breach of Contract

Employers who do the right thing and have a policy on bullying in the workplace need to be aware that the policy may be considered to be part of the employment contract. This means that any lack of adherence to the guidelines set out in that policy may amount to a breach of contract.

In *Goldman Sachs JB Were Services Pty Limited v Nikolich* [2007] FCAFC 120 Mr Nikolich complained to his employer about the bullying behaviour of his supervisor which included a series of malicious personal attacks, verbal abuse and insults, and the reallocation of his clients to other colleagues.

Mr Nikolich argued that his employer failed to deal with the complaint according to its own policies and that this constituted a breach of his employment contract. He sought damages for psychological illness caused by bullying.

The question for the court was whether the wording of the policies had contractual effect or whether they were "mere representations of the firm's aspirations".

Mr Nikolich was successful. The court found that even where there was no express reference to the policies and procedures, some sections were deemed to be included in the contract.

This decision caused uncertainty for employers as to which policy documents were contractual and whether any could be excluded from the contract. A recent case has provided clarification, however, in saying that an express disclaimer is enough to exclude the policy from having contractual effect (*Yousif v Commonwealth Bank of Australia* [2010] FCAFC 8).

Conclusion

It is difficult for employers to be across everything that goes on in the workplace. In particular employers straddle the balance of not wanting to seem too intrusive, while at the same time ensuring that nothing untoward is happening.

If an employee complains of bullying in the workplace it is crucial that employers take this seriously and conduct an investigation into reported incidents. This is one way for employers to ensure that they stay on top of situations before they get out of hand.

It is also important for employers to have comprehensive policies on bullying to set the culture in the workplace as one that has a zero-tolerance policy for abusive behaviour. At the same time, employers should ensure that these processes are not contractually binding on them. We can provide assistance in drafting these policies as well as reviewing employment contracts to check whether existing policies form part of those contracts.

For specific advice and guidance on these matters, contact the Workplace Relations Team at Moores Legal.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations, contact the Workplace Relations team at Moores Legal.

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