Ashurst Australia
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Employment Alert

Fair Work Act bullying amendments – heads up from Victorian Court of Appeal

WHAT YOU NEED TO KNOW

- The Federal Government intends for the parts of the *Fair Work Amendment Bill 2013* (Cth) dealing with bullying to commence on 1 July 2013.
- There is some guidance on the concept of 'bullying' in the Explanatory Memorandum, but the position is not clearly set out in the Bill.
- A recent Victorian Court of Appeal case provides some guidance as to how employers can expect the bullying amendments to be interpreted and applied by courts.

  Key lessons include:

  - There will not be a duty of care until the employer can foresee the risk of injury or harm to health. A risk of injury or harm to health will be foreseeable when the employer has knowledge of allegations of bullying or knowledge of bullying conduct, and knowledge of the risk of impact or actual impact on the complainant's health. There may be situations where an employer has this knowledge because of the relevant circumstances. Employers will need to consider the nature and extent of the work being done and the signs given by the worker concerned.
  - Once the risk is foreseeable, the employer must take all reasonably practicable steps to minimise the health and safety risks of the alleged bullying.
  - Whether there is repeated unreasonable behaviour towards a complainant is an objective test and cannot be assessed by adopting the complainant's perceptions of the events which may not be properly based on fact.
  - If the alleged bully provides evidence of sensible, practical reasons for engaging in the 'bullying conduct' then the conduct is unlikely to be viewed objectively as 'unreasonable behaviour'. Employers should ensure they are able to explain the reasons for their decisions and actions when challenged.
  - The complainant's reaction (or lack of reaction) to the conduct provides evidence of the character of the conduct. If the complainant did not react to the conduct, this may support the inference that objectively, the conduct is not intimidating. However, employers should be mindful that in some circumstances there may be a legitimate explanation for a complainant's apparent 'failure' to react to the bullying conduct.
  - The fact that the complainant consistently labels the conduct as 'bullying' (including at the time the conduct occurs) does not mean that there has been 'unreasonable behaviour' by the alleged bully.
  - A series of inappropriate behaviours (which cannot be viewed individually as unreasonable) may collectively be viewed as sufficient to amount to bullying.
  - The context in which the communications and behaviour takes place, including the nature of the relationship between the complainant and alleged offender, and their individual circumstances, both personal and professional, will be relevant to the objective assessment of whether bullying has occurred.

WHAT YOU NEED TO DO

- Prepare for the commencement of applications to the Fair Work Commission by workers alleging bullying. This includes familiarising yourself with the proposed legislation and what 'bullying' and 'reasonable management action' mean.
- Review your workplace policies and procedures on bullying so that they represent best practice.
- Consider 'refresher' training for workers (including contractors) about those policies (including appropriate workplace behaviours).
- Consider whether staff are adequately trained to conduct workplace investigations.
- Act immediately and reasonably when you become aware of circumstances that may constitute bullying.
- Conduct management processes reasonably. This will usually require transparency, fairness, objectivity and in many circumstances, a constructive approach.

In our *Employment Alert* dated 26 March 2013 on "Further amendments to the Fair Work Act 2009 and the Sex Discrimination Act 1984" we reported on the second tranche of change to the *Fair Work Act 2009* (Cth) (**Act**). This followed last year's review of the Act by the Fair Work Act Review Panel, including the proposed introduction of provisions to govern workplace bullying.

The House of Representatives Committee will hold hearings on the proposed amendments set out in the *Fair Work Amendment Bill 2013* (Cth) (**Bill**) in the coming weeks. The Federal Government intends to implement the workplace bullying provisions in the Bill on 1 July 2013.

To recap:

- the Bill allows the Fair Work Commission (**FWC**) to deal with workplace bullying complaints;
- a worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order addressing the bullying;
- 'Bullying' is defined as repeated unreasonable behaviour by an individual or group that creates a risk to health and safety. The test of what is 'unreasonable' is intended to be objective; and
- the Bill provides that 'reasonable management action carried out in a reasonable manner' does not constitute bullying in the workplace.

A recent Victorian Court of Appeal decision *Brown v Maurice Blackburn Cashman* [2013] VSCA 122 (22 May 2013) which we review below provides employers with some guidance on how the workplace bullying amendments are likely to be interpreted by the FWC and courts. In the decision, the Court of Appeal adopted the definition of bullying set out in a WorkSafe Victoria guidance note, which is the same as the definition adopted by the Bill.

In another recent case *Comcare v Martinez (No 2)* [2013] FCA 439 (17 May 2013), the Administrative Appeals Tribunal held that feedback provided appropriately with the intention of assisting the employee to improve work performance, behaviour, or directing and monitoring workflow, does not constitute bullying if it is conducted in line with approved processes. The Tribunal noted that some degree of humiliation may often be a consequence of a manager exercising his or her legitimate authority at work.

Brown v Maurice Blackburn Cashman [2013] VSCA 122

Facts

Ms Brown was a salaried partner and the head of the family law department at law firm, Maurice Blackburn Cashman (**MBC**).

Ms Brown made 23 allegations that between January 2003 and November 2003, she was bullied, harassed and undermined by her colleague (and later, partner), Ms Formica. The allegations stemmed from Ms Brown's period of maternity leave, during which Ms Formica temporarily took on the role of head of family law and a number of Ms Brown's files on top of her own.

The behaviour alleged by Ms Brown to constitute bullying included that Ms Formica:

- sent Ms Brown a rude and critical email while she was on maternity leave about her failure to complete file notes;

- created 'a crisis' by requiring Ms Brown to attend a hearing on her second day back from maternity leave and refusing to go over the file details with her; and
- 'declared war' by verbally threatening that MBC's partners were playing the two partners off against each other so that one of them would leave.

Ms Brown alleged that Ms Formica's conduct continued despite the complaints and requests for intervention she made to MBC's managing partner. Ms Brown alleged that MBC was vicariously liable in tort for the acts of Ms Formica and directly liable for its unsafe system of work.

Having already received workers compensation and disability insurance payments for her psychiatric injury, Ms Brown claimed damages for pain and suffering ($300,000). She also submitted that her total economic loss as a result of being unable to work as a solicitor in the future was $2,502,500 (after deducting workers compensation payments). The statutory maximum for pecuniary loss damages was $1,211,860.

The Court of Appeal's decision

The Victorian County Court found that Ms Brown had not been bullied, it was not reasonably foreseeable that Ms Brown might suffer psychiatric injury, and that MBC did not breach its duty of care.

Ms Brown appealed to the Victorian Court of Appeal which upheld the County Court's findings in all respects. The Court of Appeal found that Ms Brown had not established that Ms Formica had bullied her or that MBC had been negligent towards her in its management of the issues between Ms Brown and Ms Formica.

In examining whether MBC owed a duty of care to Ms Brown, the Court of Appeal considered whether, in all the circumstances, the risk of Ms Brown sustaining a recognisable psychiatric illness was reasonably foreseeable in the sense that it was *not far-fetched or fanciful*. While the Court of Appeal acknowledged that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress, it found that the relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. This requires consideration of the nature and extent of the work being done, and the signs given, by the employee concerned.

The Court of Appeal found the following to be relevant to the nature and extent of Ms Brown's work:

- Ms Brown was a salaried partner in a position of supervision and control over the person who was alleged to have harassed her;
- Ms Brown remained the head partner of the family law department of MBC at all material times;
- it was inevitable that those within the department, including Ms Formica, would raise issues with Ms Brown concerning their workload and that there may be some stress and conflict in this regard; and
- the power balance between Ms Brown and Ms Formica was not one which carried an obvious or inherent risk of vulnerability on Ms Brown's part.

The Court of Appeal held that Ms Brown's complaints involved, at best, instances of perceived but illusory harassment and instances of Ms Formica's robust expression concerning her workload to a departmental head. Ms Formica's behaviour was not materially inappropriate, systematic or repeated.

The County Court had correctly undertaken the assessment of the nature of the conduct complained of having regard to all the circumstances of the case including, in particular, the context and objective meaning of the acts complained of.

On this basis, the Court of Appeal found that a duty of care did not arise until Ms Brown specifically raised her allegations of bullying and the impact the stress was having on her health to the managing partner of MBC in late October 2003. The Court of Appeal also found that the managing partner's response after then in chairing a meeting and a mediation between Ms Brown and Ms Formica to discuss the issues and attempt to repair their relationship was reasonable in the circumstances.

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