2014 . Vol 20 No 2

Contents

Editorial Note

In Vol 20 No 1, in the article titled "Developments in Anti-Discrimination Law 2013", the sentence reading "In GLS v PLP (Human Rights), which involved the Equal Opportunity Act 2010 (Vic)," should have read "In GLS v PLP (Human Rights), which involved the Equal Opportunity Act 1995 (Vic),". However, the principle set out in the case applies equally to the 2010 Act. The author apologises for any inconvenience.

Information contained in this newsletter is current as at March 2014

LexisNexis® Butterworths

Legislative overreach: employers and employees bullied into a corner?

Anna Forsyth *VICTORIAN BAR*

The new anti-bullying provisions in Pt 6-4B of the Fair Work Act 2009 (Cth) (FW Act) provide employees with a statutory right of recourse to seek redress for workplace bullying. They also extend the same right to non-employee "workers". This article focuses on the reach of the new provisions and the potential challenges that will be posed for both employers and employees by the breadth of their application.

The case for change

The report produced in October 2012 following the House of Representatives Inquiry into Workplace Bullying recommended the implementation of an individual right of recourse for victims of workplace bullying to seek remedies through an adjudicative process.[1]

The Commonwealth government accepted this recommendation and commenced a process of legislative reform, culminating in the introduction of Pt 6-4B of the FW Act, entitled "Workers bullied at work", which commenced operation on 1 January 2014.

From the outset, these new provisions were aimed at implementing a protective regime that extended beyond the conventional employer-employee relationship and the FW Act's definitions of "national system employer" and "national system employee".[2]

Concepts of the "worker" and the "person carrying on an undertaking or business" in the new provisions have been borrowed from traditional occupational health and safety frameworks and, more recently, the national model Work Health and Safety laws.[3]

Implicit in the new anti-bullying provisions is a recognition that risks to health and safety do not discriminate between employees and non-employees. The essential element to determining who should be a "worker" is the undertaking of work. Protection from workplace bullying should not be based on legal relationship or payment for the work performed.[4]

The statutory scheme

The primary function of Pt 6-4A of the FW Act is to allow any "worker" who reasonably believes that he or she has been bullied at work to apply to the Fair Work Commission (the Commission) for an order to stop the bullying.[5]

Paraphrasing s 789FD(1), workplace bullying is "repeated, unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety".[6]

Bullying does not include "reasonable management action carried out in a reasonable manner",[7] and the Commission will only make an order to prevent bullying where it is satisfied that there is a risk that the worker will continue to be bullied at work.[8]

In considering the terms of an order, the Commission must take into account any final or interim outcomes arising out of an investigation into the matter, any procedure available to the worker to resolve grievances or disputes, and any final or interim outcomes arising out of such a procedure.[9]

The concept of the "worker"

Section 789FC(2) of Pt 6-4B defines "worker" for the purposes of the new anti-bullying provisions by reference to the equivalent term in the Work Health and Safety Act 2011 (Cth) (WHS Act). In summary, this will include a person who carries out work in any capacity for a person conducting a business or undertaking, including work as:[10]

- an employee;
- a contractor or subcontractor, or an employee of a contractor or subcontractor;
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking;
- an outworker;
- an apprentice or trainee;
- a student gaining work experience; or
- a volunteer.

Importantly, a person is only a worker within the meaning of this definition if and while that person "carries out work in any capacity for a person conducting a business or undertaking" (PCBU). The concept of a PCBU is central to the operation of the WHS Act and is therefore central to the operation of the FW Act anti-bullying provisions.

The meaning of a "PCBU"

Part 6-4A of the FW Act relies on the meaning of a PCBU in the WHS Act.[11] In short, a person conducts a business or undertaking whether alone or with others and whether or not for profit or gain.[12] A PCBU includes a business or undertaking conducted by:

- incorporated entities;
- sole traders; and
- partners of a partnership or an unincorporated association,[13]

but does not include a volunteer association[14] or an elected member of a local authority acting in that capacity.[15]

Pursuant to s 789FC, a worker must be carrying out work for a PCBU in order to apply to the Commission for an order to prevent bullying. In addition, the bullying must have occurred while the worker was "at work in a constitutionally-covered business".[16]

In short, this means that the PCBU for which the worker is carrying out work must be a "constitutionally-covered business" as defined in s 789FD(3) of Pt 6-4A.[17] In practice, this will include most of the corporate private sector, as well as Commonwealth government and territory workplaces.

Thus, the situations in which a person may be found to be carrying out work for a PCBU for the purposes of meeting the definition of a "worker" under the anti-bullying provisions of the FW Act extend significantly beyond the regular employer-employee setting.

Some practical examples

In extending protections to those other than employees and imposing duties on those other than employers, the new anti-bullying provisions of the FW Act have the potential to raise complex, and arguably problematic, issues for both employers and employees.

Hypothetical scenarios

Some hypothetical scenarios are posited below:

- The Commission receives applications from a number of employees in a workgroup who all identify a particular manager as the perpetrator of bullying. As an interim measure, the employer decides that the manager will be stood down so that it can assess and mitigate risk. In response, the manager makes his own anti-bullying application, identifying "upward bullying" and collusion by the employer with the upward bullies.[18]
- A manager receives phone calls from a union representative during bargaining for a new enterprise agreement. The manager claims that these phone calls are constant and abusive, and that they have failed to produce any substantive outcome. The manager alleges that he is being bullied by the bargaining representative and lodges an application in the Commission for an order to prevent bullying by the union and its representative.
- A large supermarket chain engages a contractor to provide its cleaning services. The contractor in turn engages a subcontractor to undertake the cleaning of all the supermarket's refrigeration devices. One of the subcontractor's cleaners complains of being bullied by a co-worker. The alleged bully is an employee of the contractor company. The supermarket receives the cleaner's anti-bullying application. Both the contractor and the subcontractor deny ever being trained by the supermarket in the company's occupation health and safety policies or in their legal obligations to prevent bullying and other workplace hazards.

Questions raised by the examples

Each of the examples above raises questions about how far the Commission may be prepared to go in making anti-bullying orders and on what terms it may seek to do so:

- How are the interests of employees to be balanced in managing employer risk?
- Will some employees bear the brunt of anti-bullying measures more than others?
- Will anti-bullying orders extend to union officials?[19]
- To what extent will an employer or principal be held responsible for conducting a business or undertaking and for training contractors and subcontractors in workplace health and safety?

Nothing new

Cases involving bullying at work are not new to the Commission. Recently, a Full Bench majority urged an employer to address an "anti-dobbing" culture that had contributed to its failure to control a supervisor's bullying behavior.[20] Often, unfair dismissal claims follow the termination of an employee who has been found to bully colleagues.[21]

It is true that those on insecure working arrangements, such as contractors, apprentices and labour hire workers, are particularly vulnerable to workplace bullying. Arguably, the damage caused by the psychological impact of bullying has not been effectively addressed by existing laws dependent on criminal, rather than civil, standards of proof and designed for the regulator rather than the individual.

The question is whether the new anti-bullying provisions will be any more effective in this regard. It is unfortunate for both employers and employees that workers are not required to exhaust internal grievance procedures before lodging anti-bullying applications in the new jurisdiction. Given the potential for a wide range of disputes to arise under the "worker/PCBU" rubric, there is a real risk that applications to stop bullying in the Commission will simply escalate workplace tensions rather than solve them. Neither employers nor employees stand to gain.

Anna Forsyth
Barrister
Victorian Bar
anna.forsyth@vicbar.com.au

Footnotes

1. House of Representatives Standing Committee on Education and Employment *Workplace Bullying: We Just Want It to Stop* Commonwealth Parliament, October 2012, Recommendation 23, p 190.
2. See ss 13 and 14 of the FW Act.
3. All governments, with the exception of those in Victoria and Western Australia, have implemented laws giving effect to the nationally agreed template. See Work Health and Safety Act 2011 (Cth) and corresponding state and territory legislation.
4. National Review into Model Occupational Health and Safety Laws *Second Report to the Workplace Relations Ministerial Council* January 2009 at [23.259].
5. Above, n 2, s 789FC.
6. Above, n 1, Recommendation 1, p 18. The Committee noted the lack of a nationally consistent definition of workplace bullying and recommended that this definition be adopted nationwide.
7. Above, n 2, s 789FD(2).
8. Above, n 2, s 789FF, which provides that the Commission may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent bullying if satisfied that the worker has been bullied at work by an individual or group of individuals and there is a risk that the worker will continue to be bullied by the individual or group.
9. Above, n 2, s 789FF(2).
10. See, s 7 of the WHS Act and the Note to s 789FC(2) of the FW Act. Under s 7 of the WHS Act, others are also deemed to be workers, including Australian Federal Police members and Commonwealth statutory officer holders. The definition of "worker" for the purposes of Pt 6-4A of the FW Act explicitly excludes a member of the Defence Force.
11. Above, n 2, s 789FD(3) and refer generally to s 5 of the WHS Act and reg 7 of the Workplace Health and Safety Regulations 2011 (Cth).
12. Above, n 2, s 5(1) of the WHS Act.
13. Above, n 12, s 5(2).
14. Above, n 12, s 5(7).
15. Above, n 12, s 5(5).
16. Above, n 2, s 789FD(1).
17. A "constitutionally-covered business" is different from a "national system employer" for the purpose of s 14 of the FW Act and vice versa. The distinction is one of fact and will need to be assessed on a case-by-case basis.
18. Commissioner Cribb has described "reverse bullying" applications as having come before the Commission, whereby managers claim that they are being bullied by subordinates: "Bullying claims largely against supervisors: FWC" *Workplace Express* 28 February 2014.
19. Explanatory Memorandum to the Fair Work Amendment Bill 2013 (Cth) at [118]: "Orders will not necessarily be limited or apply only to the employer of the worker who is bullied, but could also apply to others, such as co-workers and visitors to the workplace." Despite such commentary, it is to be noted that the Labor government refused to expand the anti-bullying provisions to expressly include the conduct of union officials towards workers and employers, as advanced in the Coalition Industrial Relations Policy, May 2013.
20. *DP World Sydney Ltd v Lambley* [2013] FWCFB 9230.
21. *Meadley v Gippsland Waste Service Pty Ltd* [2013] FWC 1034; *Bucknor v Aero-Care Flight Support Pty Ltd* [2013] FWC 6559; *Meacle v BHP Coal Pty Ltd* [2013] FWC 2331.