

# Workplace Bullying Update: In and Out of the Fair Work Commission



## BOARD DISCUSSION

Not only having solid bullying and harassment policies and procedures in place, but ensuring there is adequate training, monitoring and enforcement of those policies, will stand an employer in good stead to address problematic behaviour and change workplace culture.

A review of the bullying cases that have come before the Fair Work Commission (FWC) since its inception.

Given it has now been 23 months since the FWC established a jurisdiction to deal with formal workplace bullying complaints, the Sydney and Melbourne Marsh Workforce Strategies Forums were an ideal opportunity to explore the workings of the FWC since its operation.

Amber Chandler, a Partner at national law firm Kaden Boriss, addressed the audience on recent key decisions on workplace bullying complaints from the FWC.

As Chandler explained, there were 874 applications for a Stop Bullying Order in the first 15 months of the jurisdiction. Of those, 200 were resolved during proceedings, 72 were finalised by a decision and only four resulted in a Stop Bullying Order.

It's worth exploring the first formal FWC finding of bullying, *CF, NW v Company A and ED [2015] FWC 5272 (5 August 2015)*, to appreciate the workings of the FWC.



In this case, two real estate employees alleged bullying and harassment by one of the business's property managers. The alleged bullying included belittling and humiliating conduct, swearing and abusive language, physical intimidation and victimisation by slamming objects on their desks and making threats of violence.

The employer did carry out an informal investigation and attempted mediation, eventually relocating the property manager to another business at a different venue. The employees made workers compensation claims and were unable to return to work.

Commissioner Hampton found bullying was established, an unprofessional workplace culture existed and interactions between the property manager and the two employees had created a risk to their health and safety.

As a result the Commissioner made orders to remain in place for 24 months covering both specific and broader workplace conduct. In terms of specific conduct, the victims and the property manager were ordered not to approach each other or attend each other's business premises. Regarding broader workplace conduct, the business was ordered to establish and implement appropriate anti-bullying policies, procedures and training, with reporting requirements.

## WHAT HAPPENS WHEN A BULLY CLAIMS TO BE THE VICTIM?

During her presentation, Chandler also outlined the case *Gilbert v Downer EDI Engineering Power Pty Ltd [2015] FWC 5774 (26 August 2015)* to demonstrate the FWC's approach in a situation where the bully claims to be the victim.

In this case the employment of a trades assistant in Western Australia was terminated for serious misconduct six months after he started work with the company.

The serious misconduct involved a physical altercation in which he displayed aggressive behaviour towards a workmate. The employer conducted a brief investigation and found both parties had breached the conduct policy by failing to treat each other with dignity and respect and engaging in violent and abusive behaviour. Both parties were dismissed for serious misconduct.

The trades assistant filed an anti-bullying application with the FWC alleging he had been the victim of workplace bullying because he was punched in the face by a workmate and received injuries to his lip and jaw.

Commissioner Cloghan was not persuaded that the trades assistant was an innocent party or that he was a victim of workplace bullying. As such, both his anti-bullying and unfair dismissal applications were dismissed.

Overall, Chandler noted the statistics from the first 15 months of the FWC jurisdiction revealed with just 874 applications, the FWC anti-bullying jurisdiction is not the choice of legal recourse for every case of workplace bullying. (Initially, it was expected up to 3,500 applications would be received each year.)

The concerns many employers had in the lead-up to the establishment of the anti-bullying jurisdiction have been largely laid to rest, including concerns by employers that their "dirty laundry" would be aired in the FWC exposing them to bad publicity or that the powers given to the FWC to make prescriptive orders would result in extensive meddling in their business affairs. In fact, the FWC through its anti-bullying jurisdiction has facilitated positive cultural change in some workplaces.

Chandler observed the type of litigation employers are more likely to face from alleged workplace bullying is in the context of workers compensation claims, noting claims for psychological injury as a result of bullying and harassment have significantly increased in the past decade.



"Not only having solid bullying and harassment policies and procedures in place, but ensuring there is adequate training, monitoring and enforcement of those policies, will stand an employer in good stead to address problematic behaviour and change workplace culture," said Chandler.

Chandler recommends employers apprehend workplace bullying behaviours before they become damaging and, if bullying occurs, deal with it appropriately with fair internal investigations and clear outcomes.

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