

BULLYING AND HARASSMENT: THE ‘NEW BLACK’ IN THE WORKPLACE

John Wilson¹

Introduction

If it is not *the* new black, then bullying and harassment, is at last *a* relatively new *recognised* ‘black’ in the employment law landscape – much the same, I suggest, as ‘unfair dismissal’ was around 20 years ago.

Search the word ‘bullying’ in Australian Industrial Relations Commission and Fair Work Australia decisions on the www.austlii.edu.au search engine and you’ll find the word mentioned in a total of over 180 cases. Do the same for Fair Work Australia cases and you’ll find the word has already been mentioned in more than 60 cases before that Tribunal – and it’s only been in operation since 1 January 2010. Do the same for Commonwealth Administrative Appeals Tribunal and you will see the word comes up in over 145 cases – principally, if not wholly, to do with Comcare claims.

In this paper, I want to achieve three things:

1. First, for readers to understand the difference between workplace ‘bullying’ and ‘harassment’, on the one hand, and ‘reasonable administrative action’, on the other hand – or to put it another way, what is and what is not ‘bullying’ and ‘harassment’.
2. Secondly, for readers to gain an appreciation of how workplace bullying and harassment plays out in the legal world.
3. Thirdly, for readers to be able to apply the principles and lessons learnt from that understanding and appreciation to identify, minimise and remove bullying and harassment in the workplace.

Kelson and the concept of harassment

One of the first cases to grapple with the notions ‘bullying’ and ‘harassment’ was the Federal Court case of *Kelson v Forward* (1995) 60 FCR 39 (*‘Kelson’*).

This case occurred in the early 1990s following a number of allegations made by staff at the Australian War Memorial (‘AWM’) of various types of ‘workplace harassment’. These allegations came to the attention of the responsible Minister, the Minister Assisting the Prime Minister for Public Service Matters, who charged Ms Forward, the Director of the Merit

¹ John Wilson is Legal Director at Williams Love & Nicol Lawyers in Canberra and an Accredited Specialist in Employment and Industrial Law.

Protection and Review Agency (the 'MPRA'), with conducting an inquiry into the allegations.

For the purpose of her enquiry, the Director came up with what she described as a 'working definition' of the term 'workplace harassment' which, she said, she had arrived at by summarising material on the subject of workplace harassment doing the rounds of the Australian Public Service at the time.

That 'working definition' was as follows:

Harassment is any type of behaviour that can be reasonably expected to cause a person to feel threatened, uncomfortable or unable to cope with their work environment.²

The AWM's Director at the time, Mr Kelson, was one of the persons alleged to have 'harassed' AWM staff members. The MPRA sent him a list of allegations and invited him to respond to them against the MPRA's 'working definition' of 'workplace harassment'. Mr Kelson responded by writing to the Public Service Commissioner ('PSC') expressing his concern about the MPRA's 'working definition'. The PSC agreed with Mr Kelson, and wrote to both Mr Kelson and Ms Forward expressing the view that the definition was very broad and went beyond the explanatory and definitional material presented in the PSC Guidelines on the issue.

Notwithstanding that, the MPRA persisted with its working definition, continued with its inquiry and produced a report. Mr Kelson and the Deputy Director of the AWM, Dr McKernan, who was also alleged to have 'harassed' staff at the AWM, sought judicial review before the Federal Court of Australia of what the MPRA had done, including seeking an order that the MPRA's report be quashed.

The application was heard by Justice Finn. The applicants asserted that the MPRA's 'working definition' of harassment was too broad and encompassed matters that should not constitute harassment and therefore the MPRA's use of the definition in inquiring into and making findings against the applicants took matters beyond the MPRA's jurisdiction or authority resulting from the Minister's request.

Justice Finn agreed:

The definition adopted is, in my view, an inherently flawed one. Far from being a common-sense, plain English one it would require significant qualifications to be grafted on to it before it could be rendered serviceable.

The definition is one which focussed upon the feeling of the person said to be harassed. Any behaviour that can reasonably be expected to cause the required feeling is harassment. It is not clear whether that behaviour needs to be specific or whether it should be directed at, or (to use the language of the Guidelines) "targeted at", the person experiencing that feeling. The following

² *Kelson v Forward* (1995) 60 FCR 39, 40.

observation which appears in the Report para 3.6 could be taken as suggesting neither of these is necessary:

Where management is perceived to have failed to prevent or stop workplace harassment or where there is a lack of faith that management will act to prevent or stop it, it is reasonable for staff to feel threatened.

This may give reason for pause. Of far greater concern, though, is the complete lack of differentiation between possible causes of the required feeling. That feeling may be caused by wholly offensive or by wholly inoffensive behaviour. Depending on the reason for, or purpose of, its taking a budgetary decision, a personnel decision, a decision on performance, or a disciplinary decision may properly be described in a given instance as (i) a harassing decision which could reasonably be expected to cause a person to have the required feeling; or (ii) an entirely unexceptionable decision notwithstanding it could reasonably be expected to cause a person to have that feeling.

It is inconceivable that the MPRA actually intended there to be no such differentiation as made here and that perfectly permissible and properly motivated decisions or actions should be characterised as workplace harassment. To adapt the language of Gleeson C J in the Greiner case, above at 134-135, to the present matter:

A conclusion that a person, whilst acting in a way which he believes is in all respects lawful (and which is not found to be unlawful) and in a way that would not be seen ... as contrary to known and recognised standards of honesty and integrity, is nevertheless acting (as an harasser), appears surprising. The explanation may be that there is something surprising about the definition of (workplace harassment).

There is a well-known aphorism in United States tort law; "It is not a tort for government to govern": see Dalehite v United States 346 US15 at 57 (1953). Likewise it is not workplace harassment for managers to manage. The MPRA's definition appears to have lost sight of this.

The definition lacks that vital element which gives the pejorative connotation to behaviour which attracts the description of workplace harassment. This is that element which differentiates the offensive from the inoffensive.

It is not to the point that one can find sentences scattered in the Report which demonstrate that the MPRA acknowledged the need to differentiate harassment from the stress or distress felt on account of management decisions. Those who had allegations made against them and who were being asked to respond by reference to this definition did not possess the luxury of the MPRA's second thoughts on its definition.

In argument before me it was accepted by the respondent's counsel that the definition required a particular, and restrictive, reading. It was, as I understood it, suggested that the word "reasonably" did not refer to the expected effect of the behaviour on the person said to be harassed. Rather it referred to the behaviour itself and to whether it could be said to be harassing behaviour. In other words it served to exclude from the definition conduct which, though it produced the required feeling, nonetheless was appropriate in the circumstances. Even if one were to accept this, despite the violence it does to the definition, it brings one no closer to differentiating the appropriate from the inappropriate. I would add that the contortion I was here asked to engage in is to be contrasted with the Report para 3.2 quoted above which appears

itself to invert the definition so that the "response to the behaviour complained about" can be what "constitutes workplace harassment".³

This is the simple point to be drawn from Justice Finn's analysis: harassment is not only about whether the recipient *feels* 'harassed'; rather, it is about conduct by one person towards another person that a reasonable person would say was offensive in the pejorative sense.

Defining 'harassment', 'intimidation' and 'bullying'

Lexical definitions

The above distinction becomes clear, I think, when one looks at the dictionary definitions of 'harass' and other analogous terms (using the Oxford English Dictionary):

harass, v.

1. *trans.* To wear *out*, tire *out*, or exhaust with fatigue, care, trouble, etc. *Obs.* or *dial.*
2. To harry, lay waste, devastate, plunder. *Obs.*
3. To trouble or vex by repeated attacks.
4. To trouble, worry, distress with annoying labour, care, perplexity, importunity, misfortune, etc.

Trans. To subject (an individual or group) to unwarranted (and now esp. unlawful) physical or psychological intimidation, usually persistently over a period, to persecute. Also more generally: to beleaguer, pester.

harassment, n. (hæ r sm nt) [f. HARASS v. + -MENT.]

The action of harassing, or the fact of being harassed; vexation, worry.

intimidate, v.

To render timid, inspire with fear; to overawe, cow; in modern use *esp.* to force to or deter from some action by threats or violence.

intimidation, n.

The action of intimidating or making afraid; the fact or condition of being intimidated; now, *esp.* the use of threats or violence to force to or restrain from some action, or to interfere with the free exercise of political or social rights.

bully, v.

1. *trans.* To act the bully towards; to treat in an overbearing manner; to intimidate, overawe.
2. To drive or force by bullying; to frighten into a certain course; with *away, into, out of, to.*

³ *Kelson v Forward* (1995) 60 FCR 39, 55-56.

3. *intr.* and *absol.* To bluster, use violent threats; to swagger.

bullying, *vbl. n.*

The action of the verb to BULLY: overbearing insolence; personal intimidation; petty tyranny. Often used with reference to schoolboy life.

Statutory definitions

The terms ‘intimidation’ and ‘bullying’ are not defined in any statute. However, the term ‘sexual harassment’ is defined in the *Sex Discrimination Act 1984* (Cth) as follows:

28A Meaning of sexual harassment

(1) ...a person sexually harasses another person (the person harassed) if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

The *Discrimination Act 1991* (ACT) contains a similar definition.⁴

This definition, in the area of sexual conduct, captures the objectively (‘reasonable person’) inappropriate (‘offensive’) pejorative element that Justice Finn was keen to emphasise in *Kelson*: a reasonable person would anticipate that the ‘victim’ would be offended, humiliated or intimidated.

The term ‘reasonable person’ in the legal vernacular is a familiar one. As to the characteristics of a ‘reasonable person’ (or ‘reasonable bystander’), Lord McMillan described it this way in *Glasgow Corp v Muir*:⁵

Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation. The standard of foresight of the reasonable man is in one sense an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free from both over-apprehension and from over-confidence.

To summarise:

Bullying - behaving in an overbearing, (petty) tyrannical or intimidating manner towards another person.

⁴ S 58(1).

⁵ [1943] AC 448 at 457.

Harassment - conduct by a person towards another person that *reasonably* causes the other person to feel vexed, persecuted, offended, humiliated or intimidated. Generally, there is the connotation that such conduct is persistent or repeated.

Intimidation – *inappropriate* conduct that contains an element of threat or force by a person towards another person in an attempt to have the other person act or deter from acting in a particular way.

Asking the question: has there been harassment?

This, then, is the way that I look at it. If someone alleges that they, or someone else, has been, ‘bullied’, ‘harassed’ or ‘intimidated’; or if, say, you are in a supervisory role and therefore at risk of doing something that your subordinates may find ‘unwelcome’, there are two basic inquiries to be made.

1. First, what did the complainant *subjectively* ‘feel’? Did he or she really find the conduct to be ‘unwelcome’?
2. Secondly, and most importantly, if the answer to the first question is ‘yes’, there is the *objective* assessment : Would a hypothetical *reasonable bystander*, having regard to all of the circumstances, fairly conclude that it was *reasonable* for the complainant to feel vexed, persecuted, offended, humiliated or intimidated?

I emphasise the word ‘inappropriate’ in my description of ‘intimidation’ even though the word ‘intimidation’ itself conveys a pejorative tone to ensure that it is understood that we are talking here about conduct that is ‘offensive’. Leaving aside the element of ‘force’, some conduct that contains an element of ‘threat’ towards another person in an attempt to have the other person act or deter from acting in a particular way is, of course, entirely ‘appropriate’ and not (objectively) ‘offensive’. For example, conduct may be legitimate where in the context of ‘under performance management’, the ‘threat’ of possible termination for non-performance, or unsatisfactory performance, of duties.

This gives cause to consider conduct which may be considered ‘unwelcome’ or ‘threatening’ by the person to whom it is directed but is not *objectively* ‘inappropriate’ or ‘offensive’. In other words, ‘unwelcome’ conduct that is not ‘bullying’, ‘harassment’ or ‘intimidation’.

Distinguishing harassment from reasonable administrative action

Such conduct is, I think, best described by the term ‘reasonable administrative action’, which was inserted into the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (‘the SRC Act’) in 2007 so as to exclude entitlement to compensation to Commonwealth and ACT public servants for workplace injuries suffered or aggravated as a result of such action.

In this regard, section 5A of the SRC Act provides:

Definition of injury

(1) *In this Act:*

"injury" means:

- (a) a disease suffered by an employee; or
- (b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or
- (c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment;

but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

(2) For the purposes of subsection (1) and without limiting that subsection, **reasonable administrative action** is taken to include the following:

- (a) a reasonable appraisal of the employee's performance;
- (b) a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;
- (c) a reasonable suspension action in respect of the employee's employment;
- (d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
- (e) anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);
- (f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.

The principles that have emerged from cases before the Commonwealth Administrative Appeals Tribunal as to the meaning and extent of the term 'reasonable administrative action taken in a reasonable manner' are succinctly stated by Senior Member Professor Creyke in *Wilson v Comcare*⁶ as follows:

Reasonable

...Reasonableness is a chameleon-like concept, tailored to the circumstances. As a minimum, to be reasonable the action must be lawful. What is reasonable is also assessed objectively and relates to the specific conduct involved. Dr Campbell explored the concept of reasonableness in Re Georges and Telstra Corporation Ltd where he said:

I observe that the *Concise Oxford Dictionary* defines the word reasonable in terms of soundness of judgment, sensible, moderate, not expecting too much, ready to listen to reason, within the limits of reason, not greatly less nor more than might be expected, tolerable, fair.

In addition, for 'administrative action' to be reasonable, it must be established that there was

⁶ [2010] AATA 396 (28 May 2010) at [51]–[55].

nothing 'untoward' about the actions involved. The actions must also not be 'irrational, absurd or ridiculous'.

Lawful

Whether the administrative actions were lawful depends on adherence to the steps outlined in the relevant policies relating to the employment of Mr Wilson. In relying on relevant policies and agreements, the Tribunal accepts that as Madgwick J said in Kucks v CSR Ltd:

It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon.

Reasonable manner

In Re Georges and Telstra Corporation Ltd Dr Campbell addressed the issue of what it means to take action 'in a reasonable manner'. As he put it:

[T]he fact that the action has to be taken in a reasonable manner in so far as it relates to an employee's employment, clearly implies that objective consideration of circumstances both leading to and creating the reasons for the administrative action to be undertaken and a consideration of circumstances that may flow as the consequence of such administrative action being taken. In such circumstances, where administrative action to be taken involves consideration of circumstances particular to the individual, implementation in a reasonable manner implies that the particular circumstances of the individual known to the employer and impliedly to the maker of the administrative action be considered. Further the circumstances of the individual that could have become known by simple enquiry should be considered. ...[W]hile the assessment of "in a reasonable manner" relates to the administrative action contemplated and does involve the possible consideration of a variety of circumstances, the underlying assessment standard must remain an objective assessment of all the material that has been collated or should have been collated. I would also recognise that particular administrative action as pertaining to an individual employee [is] usually taken in accordance with a corporate policy framework and administrative instructions – frameworks and instruction that have been created as a consequence of consultation with staff and others, and often as such provide the context within and the context of a particular administrative action ... taken.

Summary

So, in distinguishing harassment from 'reasonable administrative action', it is important to remember the following:

- (1) The action must be lawful.
- (2) The action must be objectively reasonable having regard to the circumstances. The action must exhibit soundness of judgment, be sensible, be moderate, not expect too much, show a readiness to listen to reason, be within the limits of reason, be not greatly less nor more than might be expected, be tolerable, and be fair.

- (3) There must be nothing untoward, irrational or absurd about the action.
- (4) The action must have been carried out in an objectively reasonable manner having regard to the circumstances leading to the action and those that will result from it being taken.

Bullying and harassment in the legal world

I now turn to how ‘bullying’ and ‘harassment’ plays out in the legal world.

One can make the obvious point that workplace bullying is costly for an organisation regardless of whether things ‘get legal’. There is the damage to victims and witnesses: distraction from tasks, loss of motivation and energy, reduced ‘psychological safety’ bringing or leading to less employee suggestion or initiative or forthright discussion (and so on), absenteeism, employee turnover (plus time spent at work by employees looking for new work). There are consequences for management: time spent appeasing, calming, counselling or disciplining bullies and victims, time spent reorganising work areas so that bullies do less damage, time spent interviewing, recruiting and training replacements for departed bullies and victims, and so on.

When the matter finally becomes ‘legal’ its manifestation can be in any one or more of the following areas.

(1) Sexual harassment under s 28B of the *Sex Discrimination Act 1984* (Cth) or s 59 of the *Discrimination Act 1991* (ACT) (for the ACT public sector)

These Acts allow employees to seek compensation for suffering resulting from harassment or discrimination on the basis of sex, marital status, pregnancy or family responsibilities.

Employment Services Australia Pty Ltd v Poniatowska [2010] FCAFC 92

This case appealed an earlier ruling which held that in terminating Ms Poniatowska’s employment, ESA discriminated against her on the basis of her sex in contravention of section 14(2) of the *Sex Discrimination Act 1984* (Cth).

Poniatowska was employed by ESA as a building consultant for just over one year, including a six month probationary period. During this time, Poniatowska was the victim of sexual harassment by two male employees of ESA in the form of sexually explicit emails, texts and picture messages and, in select instances, phone calls. These advances were held to constitute sexual harassment for the purposes of s 28B of the *Sex Discrimination Act 1984* (Cth) and resulted in Poniatowska’s humiliation, embarrassment and discomfort. In each instance, the matter was made known to ESA management.

ESA had no formal workplace sexual harassment or discrimination policies and management adopted an approach consistent with the 'robust' environment in which they operated. Despite some informal meetings and oral reprimands to the male employees involved, no formal warnings were given, no written records of the complaints were kept and there was limited investigation into the conduct of the male employees involved. Nor was any confidentiality accorded to Poniatowska regarding her complaints.

By contrast, after reporting the second bout of harassment, there was found to be a concerted and premeditated effort to identify and record problems in Poniatowska's work. Three warning letters and a letter of suspension were given to Poniatowska and her employment was terminated ostensibly on the grounds of poor performance. These grounds were found to be inadequate, without sufficient factual basis or evidentiary support and rather masked a desire to terminate Poniatowska because she had demonstrated a 'sensitivity' to conduct of the nature alleged which did not 'fit' with the 'robust' and often coarse culture of the firm.

This premeditated effort, together with ESA's dismissive response to Poniatowska's concerns and overall failure to adequately investigate her allegations was sufficient evidence to show she was discriminated against on the grounds of her gender and treated less favourably than a male in her position would likely have been treated.

The Federal Court dismissed the appeal 2:1 and upheld the earlier decision awarding her \$433,000 in compensation for pain and suffering, lost past and future earning capacity and medical expenses.

(2) Unfair dismissal under the *Fair Work Act 2009* (Cth)

The *Fair Work Act 2009* (Cth) allows employees who have been unfairly dismissed to seek an order from *Fair Work Australia* requiring their employment to be reinstated or compensation of up to 6 months pay awarded to them.

***Adam James Harley v Aristocrat Technologies Australia Pty Ltd* [2010] FWA 62**

This case concerned the forced resignation of an employee as a result of a sustained course of harassment.

Mr Harley had been a Business Development Executive with Aristocrat Technologies since 2004. He resigned on 1 July 2009 having received a letter of suspension the day before on the grounds of poor performance and customer dissatisfaction. Mr Harley subsequently brought an action for unfair dismissal, arguing that he was effectively forced to resign, thus constituting a dismissal under s 386(1)(b) of the FWA and that this dismissal was unfair, resulting from a sustained course of personal harassment by a superior and a failure by his employer to adequately investigate his alleged incompetency *or* his harassment concerns.

The tribunal accepted evidence that Mr Harley was a competent employee and that events leading to his suspension constituted harassment. In three meetings prior to his suspension, management raised concerns with Mr Harley over generally insignificant matters, often concerning incidents that had occurred months in the past and had already been resolved. These matters included the use of his company mobile for personal calls, late completion of online training, failure to meet sales objectives and customer dissatisfaction. Evidenced was adduced to demonstrate that Mr Harley had previously resolved these concerns and that other employees had engaged in similar conduct without equivalent reprimand. The claims of customer dissatisfaction appear to have been largely false and were never properly investigated despite Mr Harley requests. The only evidence of customer dissatisfaction was the unsubstantiated allegations of Mr Harley's supervisor and principal harasser, Mr Brown, who also instigated the performance review meetings and whose negative conduct toward Mr Harley had been noted by others in the office.

Following the third meeting, Mr Harley raised his harassment concerns in a meeting with superiors and by email. There was no subsequent investigation into these concerns and the next occasion of contact was the letter of suspension. Given the absence of just cause for termination and the failure of management to investigate the harassment claims or the alleged instances of customer dissatisfaction upon which suspension hinged, Mr Harley's dismissal was held unfair.

Mr Harley sought reinstatement but this was considered inappropriate in the circumstances and Mr Harley was instead awarded a sum equivalent to six months remuneration as agreed by the parties or to be determined by *Fair Work Australia* and reduced by any income earned from other employment in the preceding period.

Bruce Hill v Minister for Local Government, Territories and Roads [2004] AIRC 394

This case concerned the termination of employment for apparent poor performance. The employee, Mr Hill, disputed this and argued he was in fact terminated for confronting his General Manager over his bullying and harassment which, if true, would constitute unfair dismissal.

Mr Hill was employed in September 2003 and received written notice of termination in March 2004. He was terminated for poor performance of his work obligations. The termination followed a meeting with his General Manager on 28 January to discuss his performance. This appraisal was in the context of a contractual salary review and not triggered by specific performance concerns. In the meeting, his General Manager requested he develop a new HR strategy. At a next day meeting to discuss this strategy, Mr Hill raised with his General Manager his concerns over her bullying and harassment of both himself and other staff. She promptly demanded his resignation. He refused to resign and went home and took stress related sick leave. Whilst on sick leave, a notice of termination was delivered to his home on 8 March.

Termination was the result of a collective management decision based upon the evidence of the General Manager as to Mr Hill's poor performance. She assured management that she had given him notice of his performance concerns and ample opportunity to respond. This had not occurred – Mr Hill was not accorded due process. He was not told during the appraisal that termination was possible or that his performance was inadequate. Nor did a review of the appraisal did not reveal grounds sufficient for termination. Only one member of the management team who made the decision to terminate was aware of the harassment allegations.

The employer argued the alleged harassment was irrelevant to the consideration of whether the termination was unfair because these concerns had not been disclosed to all members of management who made the decision to terminate. This was disregarded with the harassment held to be a highly relevant part of the factual matrix leading to dismissal, especially given management relied entirely on the evidence supplied by the manager at the centre of the harassment allegations.

The General Manager's behaviour was shown to include yelling and berating staff and Mr Hill without due cause, refusing to hear reasonable explanations or consider contrary evidence and other behaviour generally considered to be irrational and causing staff and Mr Hill to feel upset, threatened and humiliated. The employer failed to deal with this behaviour despite multiple complaints by various staff members or to take into account the behaviour and complaints in assessing the General Manager's report on Mr Hill. There was a sharp contrast of approach in dealing with the complaints against the Manager as compared to those against Mr Hill. This disparity, together with the absence of valid grounds, notice or warnings and the failure to provide opportunity to respond all further reflected the inadequacy of the employer's response and the unfair treatment of Mr Hill.

Mr Hill was held to have been unfairly dismissed and his employment was reinstated with compensation to be paid for any income lost prior to and in the course of proceedings.

Sebasio v Ergon Energy Corporation Limited [2010] FWA 4917

This matter concerned the dismissal of Mr Sebasio for poor performance. Mr Sebasio had been employed at a remote power station for over 20 years as an electrical mechanic. He was a local resident in a predominately Torres Strait Island and Aboriginal community. He was responsible for all operations of the power station which provided electricity to five separate communities. His prominent role within his community meant he was often contacted directly in relation to electrical issues rather than via the company. In October 2009 he received a letter from his manager Mr Farmer requiring him to show just cause as to why his employment should not be terminated following earlier meetings to discuss his performance issues. The letter noted his failure to undertake work assigned, to communicate effectively with management and to meet specific business requirements within timeframes. He reportedly failed to complete the necessary administrative tasks associated with his

employment and was difficult to contact. Despite Mr Sebasio's written response his employment was nevertheless terminated.

Mr Sebasio argued this was unfair as he had limited resources and training available to him in completing the required tasks, had been performing the work of multiple employees and had been subject to bullying by his Supervisor in the form of under-resourcing and micromanagement. He noted that these concerns had been raised repeatedly with management but without adequate response. These factors led him to experience a stress disorder and to further isolate himself from management.

It was held the dismissal was unfair. Mr Sebasio's ad hoc approach to the completion of his administrative duties had been effectively endorsed by his employer for many years. The sudden escalation of the matter together with a failure to provide additional resources or adequately acknowledge Mr Sebasio's concerns were considered mitigating factors in explaining his poor performance, especially in the context of a promotion which increased his responsibilities but not his remuneration. The micromanagement by Mr Farmer, including daily calls demanding to know whether Mr Sebasio was at work, had been at work, at what time and whether he had completed minor tasks that he had in fact been performing competently for years, was taken to have contributed to Mr Sebasio's isolation from management and his increased failure to communicate. Given the size of Ergon, the breakdown in communication should have attracted more attention from the human resources specialists within company and further inquiry should have been initiated prior to termination. Ergon's failure to consider reassigning Mr Sebasio to another role given his obvious dedication and experience also contributed to a finding of unfairness.

As a remedy, reinstatement to his previous role was considered inappropriate given the ongoing administrative requirements of the position and his inability to meet them. However, reinstatement with the company in another position within the community was ordered in recognition of the employer's failure to manage as well as Mr Sebasio's length of service and diligence.

(3) Worker's Compensation under the SRC Act (public sector employees) or the applicable private sector workers compensation legislation (e.g. *Workers Compensation Act 1951 (ACT)*)

Public and private sector workers compensation legislation allows employees to pursue compensation for workplace 'injuries', as defined in the legislation.

Reubinson v Comcare [20010] AATA 676

Mr Reubinson was employed as a cooking teacher at a technical institute. In April 2008 he submitted a claim for 'workplace stress'. The claim was denied by Comcare and this decision was affirmed on review. Mr Reubinson sought a review by the Administrative Appeals

Tribunal. Comcare acknowledged that Mr Reubinson's condition was attributable in part to his employment but denied liability under the *Safety, Rehabilitation and Compensation Act 1988* on the grounds that the injury stemmed from reasonable administrative action taken in a reasonable manner.

The claim followed allegations from a student of inappropriate comments, bullying and harassment by Mr Reubinson. Management sought out Mr Reubinson in the week following an initial informal complaint and scheduled an informal meeting to discuss the complaint at which Mr Reubinson denied it. A formal complaint was then made and a supporting complaint received from another student. A formal written letter was delivered to Mr Reubinson three weeks later notifying him that an investigation had been commenced following the receipt of further information appearing to confirm the complaint,. The letter requested he attend a formal meeting to respond to the complaint. This meeting was postponed at Mr Reubinson's request, pending further information. Mr Reubinson subsequently informed management the matter was affecting his health and that he would not be attending work. His doctor's advice confirmed this. An investigation was then carried out and Mr Reubinson's conduct was found not to constitute misconduct. At the time of the hearing Mr Reubinson had not returned to work.

It was generally accepted that he suffered a condition outside the normal boundaries of mental function and behaviour and this is sufficient to attract the operation of the Act. Liability therefore hinged on an assessment of the disciplinary actions taken by the institute and whether they were reasonable in the circumstances and undertaken in a reasonable manner.

It was held that the actions in relation to the informal meeting were reasonable but that the subsequent letter did not constitute reasonable administrative action. Contrary to the contents of the letter, the institute did not conduct a further investigation of the comments. It failed to interview the complainants or the student who was the alleged subject of the comments before writing to Mr Reubinson to schedule a formal meeting. The letter was misleading and it was reasonable for Mr Reubinson to infer from its contents that some finding of guilt had already been made against him, and without having been given the opportunity to respond. The lack of information provided in the three weeks between the informal meeting and receipt of the letter also contributed to his condition. The actions taken by the Institute were not reasonable, and failed to accord Mr Reubinson procedural fairness.

The Institute was ordered to pay compensation for the injury as from the date he was diagnosed and advised not to return to work.

While this case involved an injury resulting from administrative action that was considered *not* to be reasonable, there are a number of cases where the injury occurred as a result of reasonable administrative action taken in a reasonable manner. Some recent case examples include:

Lynch v Comcare [2010] AATA 38 (20 January 2010)

Stieglitz v Comcare [2010] AATA 263 (15 April 2010)

Karalenko v Comcare [2010] AATA 49 (25 January 2010)

Quick v Comcare [2010] AATA 209 (20 May 2010)

McGee v Comcare [2010] AATA 386 (24 May 2010)

Wilson v Comcare [2010] AATA 396 (28 May 2010)

Henderson v Comcare [2010] AATA 700 (15 September 2010)

Radulovic v Comcare [2010] AATA 777 (12 October 2010)

Devasahayam v Comcare [2010] AATA 785 (14 October 2010)

(4) Investigation and prosecution under work safety legislation (e.g. *Work Safety Act 2008* (ACT))

Work safety legislation allows the court to impose pecuniary penalty orders on employers and employees who fail to discharge their work safety obligations.

As to what the ‘work safety obligations’ of employers and employees are, the *Work Safety Act 2008* (ACT), for example, provides the following:

21 Duty—safe conduct of business or undertaking

(1) *This section applies to a person conducting a business or undertaking.*

Examples—person conducting business or undertaking

1 employer

...

(2) *The person has a duty to ensure work safety by managing risk.*

Note Managing risk—see s 14.

(3) *Without limiting subsection (2), the person’s duty includes—*

(a) *providing and maintaining a safe workplace and safe systems of work; ...*

27 Duties—worker

(1) *A worker has a duty not to expose the worker, and other people who may be affected by the worker’s work, to work safety risks because of the worker’s work.*

(2) *Without limiting subsection (1), the worker’s duty includes—*

(a) *cooperating with a person conducting the business or undertaking for which the worker works, or a person in control of the worker’s workplace, to allow the person to comply with the person’s duties under this Act; and*

- (b) *complying with instructions given by a person conducting the business or undertaking for which the worker works, or a person in control of the worker's workplace, in relation to work safety; and*
- ...; and
- (d) *reporting any risk, illness and injury, connected with work, that the worker is aware of.*

7 Meaning of work safety

In this Act:

work safety, *of people, means the health, safety and wellbeing of people in relation to work.*

8 Meaning of risk

In this Act:

risk *means exposure to the chance of injury or loss.*

14 Meaning of manages risk

(1) *For this Act, a person **manages risk** in relation to a duty by—*

(a) *taking reasonably practicable steps—*

(i) *to identify any risk that might be associated with the duty; and*

(ii) *to eliminate any risk that might result if the duty is not exercised; and*

(iii) *if it is not reasonably practicable to eliminate each risk that might result if the duty is not exercised—to minimise each risk; and*

(b) *informing anyone else who has the duty about the possible risks.*

(2) *For this section, if someone is required to minimise a risk, the person must do each of the following that is available, in the following order, until the risk is reduced as far as is reasonably practicable:*

(a) *substitute the thing giving rise to the risk with something that gives rise to a lesser risk;*

(b) *isolate the thing giving rise to the risk from anyone otherwise put at risk;*

(c) *minimise the risk by engineering means;*

(d) *minimise the risk by administrative means;*

(e) *ensure personal protective and safety equipment is used.*

Examples—par (d)

1 *put in place safe working practices*

2 *provide training, instruction or information*

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

Victorian WorkCover Authority v Map Foundation Pty Ltd trading as Cafe Vamp & Ors (9 Feb 2010)

Map Foundation Pty Ltd owned and operated a cafe called 'Cafe Vamp' in Victoria. Mr Da Cruz was the sole director and was present for approximately 5 out of 7 days per week. Mr Smallwood was head waiter and managed the cafe in Mr Da Cruz's absence. Also employed by the cafe was as waiter and head chef respectively was Mr MacAlpine and Mr Toomey. There was no workplace OH&S system in place and no information available to employees regarding OH&S, bullying or harassment.

Another employee of the cafe was the victim of consistent and repeated bullying and harassment by Mr Smallwood, Mr MacAlpine and Mr Toomey. Between them, they subjected the employee to verbal insults, personal criticisms, taunts, name-calling, offensive and degrading sexual comments about the employee's appearance and earlier suicide attempts, threw food, kicked and spat at the employee, interfered with the employee's clothing and personal possessions, left Ratsak in the employees tip jar after a suicide attempt, gossiped about and excluded the employee. Other employees were not subject to such treatment.

Mr Da Cruz was aware of this treatment, being present on some occasions when it occurred and even occasionally condoning it. In failing to stop the conduct or implement processes to manage the issue of workplace bullying, he failed to take what were reasonably practicable measures to ensure a safe workplace.

The subject conduct exposed employees to increased risk of psychological harm, post traumatic stress and anxiety disorders. It also increased the risk of self harm and suicide and other psychosomatic conditions such as depressions and the likelihood of high risk behaviours such as drinking and drug abuse.

The employee subsequently committed suicide.

The employer was found guilty under the *Occupational Health & Safety Act 2004* (Vic) of failing to provide a safe working environment insofar as is practicable and failing to provide the information necessary to enable employees to perform their work in a safe manner.

The employer was fined \$220,000 (\$110,000 per charge), had a conviction recorded and was ordered to pay \$3,000 in costs to the Victorian WorkCover Authority. Several individual employees were also fined amounts varying between \$10,000 and \$45,000.

Inspector Gregory Maddaford v Graham Gerard Coleman [2004] NSWIRComm 317

This case concerned a failure to ensure the health and safety of employees at a timber factory in NSW.

16 year old Dwayne Doyle was a relatively new employee who on the day of the company Christmas party was subjected to a workplace 'initiation' ritual by a group of other employees. He was summoned under false pretences to the top level of the factory where he was seized by five male employees who then used a manual plastic wrapping machine to wrap him from head to toe in heavy duty plastic wrap before securing him to a work trolley. Mr Doyle's request to be released was ignored. Mr Doyle was then spun around on the trolley and had his clothing filled with sawdust. Wood glue and sawdust were then forced into his mouth. Mr Doyle was an asthmatic and this caused him to choke and he was unable to breath. A fire hose was used to flush out his mouth before the process was repeated. This lasted half an hour.

Mr Doyle remained with the company for approximately 2 more months before ceasing his employment. WorkCover inspected the factory one month later at which time the company commenced an internal investigation which was unable to determine who bore primary responsibility for the 'initiation'. All employees were reprimanded and told such behaviour was unacceptable but no further action was taken. WorkCover subsequently brought charges against both directors for failing to ensure the health and safety of their employees through inadequate supervision and training and failing to prevent premeditated violence or to implement policies against workplace violence. Charges were also brought against six individual employees all of whom were found guilty and order to pay fines or serve good behaviour bonds.

The Managing Director, Brian Coleman, was on the premises at the time of the incident but did not know of or witness the incident. He was informed about the incident later the same but did not immediately investigate, considering the Christmas party an inappropriate time. The other director and Factory Forman, Graham Coleman, had been told at an earlier time by another employee that a new employee may be subject to such 'initiations'. The culpability, and therefore liability, of both directors was increased by virtue of this knowledge, especially Graham Coleman. As Factory Forman he had a high level of responsibility for the day-to-day management of the company and in failing to take action to prevent the incident, despite having prior notice, he failed in his duty to ensure the health and safety of his employees.

WorkCover appealed the initial decision in this case arguing the \$1,000 fine imposed on each direct was inadequate. On appeal and in assessing the penalties to be imposed, the Commission considered not only the nature and gravity of the offence but also the need for specific and general deterrence, the foreseeability of the risk and the failure to implement simple and feasible measures that could have reduced the risk. Subjective considerations such as the company's excellent track record and subsequent implementation of comprehensive workplace safety policies were relevant but secondary to considering the objective seriousness of the offence.

In imposing penalties, the Commission had regard to the individual financial circumstances of the directors but concluded there was nothing to suggest a substantial fine appropriate to the offence would impose an undue burden. Of a possible \$55,000, a fine of \$12,000 was

imposed on Graham Coleman and \$9,000 on Brian Coleman, reflecting his lesser culpability. The first instance fine of \$24,000 against the company was also upheld.

Minimising the incidence of workplace bullying and harassment

Finally, some tips on minimising the incidence of workplace bullying and harassment.

The authorities and agencies charged with oversight of the workplace safety legislation have produced a plethora of material on risk management and means of dealing with workplace bullying and harassment in the last few years, particularly in the light of the Café Vamp case.

For instance, a number of resources can be found on the ACT Work Safety Commissioner's website at www.worksafety.act.gov.au/bullying, and Comcare's website at www.comcare.gov.au/safety_and_prevention/your_working_environment/bullying.

As for practical tips or steps that occur to me from the decided cases and other material that I have read, I offer the following:

(1) Awareness and compliance

Make sure that the 'no bullying or harassment' rule is (a) said, (b) written down, (c) generally 'put in front of people's faces' and (d) acted upon. There is nothing worse – and it happens time and again, particularly in work safety cases – than having beautiful policies and other material lovingly prepared by someone in HR that just sit on shelves gathering dust that nobody knows about. Or worse still, that are said, written down, and even generally 'put in front of people's faces' (in the form, say, of posters dotted around the workplace), but are not acted upon.

(2) Preventative approaches to recruitment

Start addressing bullying and harassment at the recruitment stage. Find out about candidates behaviour from referees. Try to narrow the selection of candidates according to competence as much as possible before the interview so that the interview focus is particularly on the candidate's personal qualities. Have candidates speak to a good number of people in the organisation to determine the level of 'fit'. Have the candidate interviewed by people who will be hierarchically above, below and alongside them and with people from unrelated work disciplines, not just one or two specific managers (who may be bullies or harassers themselves). Sociological research into 'homosocial reproduction' in the workplace indicates that those responsible for selecting candidates select candidates that most closely reflect themselves.⁷ If that is so, then bullies and harassers are more likely to select bullies and harassers.

⁷ Elliott, James R. and Ryan A. Smith. Race, Gender, and Workplace Power. American Sociological Review, Vol. 69, No. 3. (June, 2004) 365-386.

(3) Enforcement

Get rid of bullies and harassers fast. There are two strategies that can be employed.

Firstly, utilise probationary employment periods and invest time and resources in the assessment of behaviour. Section 22(6) of the PS Act enables agency heads to engage ongoing and non-ongoing APS employees on condition of probation.

Section 29 of the PS Act provides that an agency head may terminate the employment of an APS employee by written notice. For an ongoing APS employee, the notice of termination must specify the ground or grounds relied on for the termination. The available grounds for termination set out in subsection 29(3) of the PS Act include *failure to meet a condition imposed under subsection 22(6)*.

Note that sometimes applicable enterprise agreements set out the rights and entitlements of a probationary employee. If you have any influence over the contents of such agreements, make sure that, whilst being fair, it remains relatively easy to terminate probationary employees for behavioural reasons.

Unless the applicable enterprise agreement provides otherwise, the length of the probation period is a matter for the agency to determine. While there is no set statutory minimum or maximum period it has been common APS practice in recent years to set an initial three month probationary period with the possibility of extension for a further three months (i.e. up to a total period of six months).

Secondly, be aware of the fact that an employee can only make an application under the 'unfair dismissal' provisions of the *Fair Work Act 2009* once he or she has served a *minimum employment period* of six months ending at the earlier of the time when the person is given notice of dismissal or immediately before dismissal.

(4) Make behavior part of performance assessments

Following on from the third point, treat bullies and harassers as incompetent employees. That is, make behaviour a performance issue and part of the performance assessment process. The point is this: those persons who persistently bully, harass or intimidate others are, and ought to be treated as incompetent, regardless of any otherwise excellent work performance.

(5) Hierarchy

Whilst recognising that there will always be a supervisor/supervised more senior/less senior 'pecking' order, focus upon doing what can be done to downplay and reduce unnecessary status differences in the workplace.

(6) Managing the micro and the macro

Effective risk management requires you to focus on and develop the little things as well as the big, to manage moments as well as more general practices, policies and systems. Develop

strategies to encourage employees to reflect on how they behave, how fellow employees respond to them and others, and how best to interact with those persons immediately in front of them. In 2002, a program was implemented in the US Department of Veterans Affairs to reduce bullying and harassment in that agency. Each sector had an ‘action team’ of managers and union members who developed their own particular method of intervention. Each team focused upon making small but good changes at each workplace. At one site, they worked on eliminating seemingly small personal slights, like glaring, interruptions and treating people as if they were ‘invisible’. At another, they held a ‘flake off’ every Friday afternoon, where the group drilled down into the little details of big problems – such as having employees talk about ‘what it is like to be me’ and ‘how you could help me more’.

(7) Developing frameworks for confrontation

Model and teach constructive confrontation. Teach employees how best to approach people and problems properly and positively, using evidence and logic, rather than personal attacks, disrespect or intimidation. Develop a culture where employees know when it is appropriate to argue, listen, gather more evidence or simply accept and implement a decision (even if they still disagree with it).

(8) Self sustaining policies

Link big policies to small decencies. There must be a self-reinforcing cycle between the ‘big’ things that are done and the ‘little’ things that happen when people talk with one another and work together. The message is this: having all the right policies and management practices to address bullying and harassment is meaningless unless one treats the person right in front of you, right now, in the right way.

Conclusion

There is no doubt that workplace bullying and harassment is an area of focus in employment law at present. Regardless of what form it takes, the law makes such behaviour is unacceptable and employers have a legal duty to guard against it. Understanding the distinction between acceptable and unacceptable conduct and, for those responsible for taking it, the difference between what is ‘reasonable administrative action’ taken in a reasonable manner, and what is not, is crucial in implementing effective workplace policies and adopting an overall approach that aims to prevent as well as manage incidences of workplace harassment is the best way for employers to discharge this duty and protect their employees.