

WILLIAMS LOVE & NICOL
LAWYERS

Bullying and Harassment

The New Black

The New Unfair Dismissal

Objectives

By the end of this seminar participants will be able to:

1. Understand the difference between workplace bullying and reasonable administrative action.
2. Appreciate how bullying and harassment plays out in the legal world
3. Know how to minimise the incidence of workplace bullying and harassment

True or False?

‘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.’

Kelson v Forward

(1995) FCR 39

There is a well-known aphorism in United States tort law; ‘It is not a tort for government to govern’. Likewise it is not workplace harassment for managers to manage.

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.

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.

Oxford English Dictionary

harassment, *n.* (hæər 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.

Oxford English Dictionary

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. *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.

Sexual Harassment

Sex Discrimination Act 1984 (C'th)

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.

In Summary

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

Harassment - conduct by a person towards another person that (a) the other person finds 'unwelcome' and (b) *reasonably* causes the other person to feel vexed, persecuted, offended, humiliated or intimidated. Generally, there is the connotation that such conduct is repeated.

Intimidation - 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.

In Summary

Bullying and Harassment

- (1) What did the complainant *subjectively* ‘feel’?: Did he or she really find the conduct to be ‘unwelcome’.
- (2) 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.

Bullying and Harassment

The Legal Consequences

Sexual Harassment

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

Bullying and Harassment

The Legal Consequences

Unfair Dismissal

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

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

Sebasio v Ergon Energy Corporation Limited [2010] FWA 4917

Bullying and Harassment The Legal Consequences

Workers Compensation

Reubinson v Comcare [2010] AATA 676

Bullying and Harassment

The Legal Consequences

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)

Bullying and Harassment

The Legal Consequences

Work Safety

Occupational Health and Safety Act 1991 (Cth)

16 Duties of employers in relation to their employees etc.

- (1) An employer must take all reasonably practicable steps to protect the health and safety at work of the employer's employees.

Bullying and Harassment

The Legal Consequences

Work Safety

- (2) Without limiting the generality of subsection (1), an employer breaches that subsection if the employer fails to take all reasonably practicable steps:
 - (a) to provide and maintain a working environment (including plant and systems of work):
 - (i) that is safe for the employer's employees and without risk to their health; and
 - (ii) that provides adequate facilities for their welfare at work; and
 - (b) in relation to any workplace under the employer's control, to:
 - (i) ensure the workplace is safe for the employees and without risk to their health;

Bullying and Harassment

The Legal Consequences

Work Safety

*Victorian WorkCover Authority v Map Foundation Pty Ltd
trading as Cafe Vamp (9 February 2010)*

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

Bullying and Harassment Minimising Incidences in the Workplace

- 1. Awareness and compliance**
- 2. Preventative approaches to recruitment**
- 3. Enforcement**
- 4. Make behaviour part of performance assessments**

Bullying and Harassment Minimising Incidences in the Workplace

- 5. Hierarchy**
- 6. Managing the micro and the macro**
- 7. A framework for confrontation**
- 8. Self-sustaining policies**

Bullying and Harassment

Final thoughts

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Paid Parental Leave



**Gabrielle
Sullivan**

Overview

- Existing Parental Leave entitlements
- PPL scheme rationale – 1 January 2011
- PPL key features
- Employer and employee responsibilities

Existing Parental Leave Entitlements

Fair Work Act 2009 minimum entitlements under the National Employment Standards since 1 January 2010:

- Unpaid parental leave
- Right to request flexible working arrangements
- Personal/ Carer's Leave

Other sources of Parental Leave or Payments

- Any entitlement to additional unpaid parental leave, or paid parental leave, under employee's *contract of employment*
- Any entitlement to additional unpaid parental leave, or paid parental leave, under an *enterprise agreement*

Australia needed a PPL because...

- PPL benefits:

the Australian economy by:

- ↑ workforce participation
- ↑ productivity
- ↑ child & maternal health and wellbeing

Australian society by

- ↑ gender equity
- ↑ work-life balance
- bringing our employment practices into line with other OECD countries

The Relevant Legislation

Paid Parental Leave Act 2010 (Cth)

An Act to provide for the payment of **parental leave pay (PPL)** & related purposes

S 3A (Object)

to provide **financial support to primary carers** (mainly birth mothers) of newborn and newly adopted children, to:

- allow carers to take **time off work to care for a child** after birth/adoption
- enhance the **health & development** of birth mothers and children
- encourage **women's ongoing participation in the workforce**
- **promote equality** between men and women
- promote **work - family life balance**.

...not that work-life balance is necessarily an easy thing to achieve!



PPL at a glance....

- the PPL scheme started on 1 January 2011
- it provides *eligible working parents* with a maximum of **18 weeks** of *Parental Leave Pay* at the National Minimum Wage (\$570 p. wk gross)
- PLP payments paid by federal government, and will be generally **administered** by the employer as from 1 July 2011

Parental Leave Pay (PLP)

PLP

- only paid *after* the birth/adoption
- only paid *within 12 months* of the birth/adoption
- does not apply to births/adoptions pre-1-1-11
- will not be paid for any period after returning to work unless
 - the PLP is transferred (e.g. to father)
 - the work relates to “keeping in touch” provisions

Parental Leave Pay (PLP)

- is in **lieu of** baby bonus (except for the 2nd child of twins) and Family Tax Benefit B
- is really an **alternative** government allowance for families (new parents ineligible for PLP may still get other forms of government family assistance such as the baby bonus)

Eligibility for PLP

A new parent who is a **primary carer** who:

- has been in paid work for at least 10 of the 13 months before expected birth/adoption, and
- has worked at least 330 hours of paid work in that 10 month period (average of one day a week)
- earned \$150 K or less (carer's adjusted taxable income) in previous financial year
- elects to participate in the PPL scheme

Employee Responsibilities

- Advise employer of planned parental leave
- Apply for PPL through the Family Assistance Office
- Notify employer when they wish to receive PPL

Employer PPL Responsibilities

- Forward PPL payments from FAO to employees through their usual payroll system, less deductions only for withholding tax and child support (for workers with 12 months continuous service before the date of birth/adoption, incl. Casuals – s 34)
- Keep records of this payment
- Liaise with the Family Assistance Office (to provide employer identity, bank and pay cycle details, and to receive funds)

Issues for Employers

- Superannuation payments not to be made for PPL (at present)
- Neither a period of unpaid parental leave under the NES, nor a payment under PPL, will count for continuity of service purposes
- Payroll tax liabilities and workers compensation premiums should not rise as a result of PPL

- PPL is in addition to existing entitlements to paid or unpaid parental leave; s 99A: employers who already provide PPL through an industrial instrument cannot withdraw that entitlement for the life of the instrument;
- during new bargaining cycles, employers and employees will be able to modify employer funded PPL provisions in light of the Government PPL scheme

Employers to consider...

- Employers should consider:
- whether revisions to their payroll systems and processes will be necessary;
- whether their employment contracts, enterprise agreements, or existing parental leave policies require amendment in light of the new PPL entitlement;

Further Information

- www.familyassist.gov.au
- www.fahcsia.gov.au
- www.fwo.gov.au

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ADVERSE ACTION

Sebastian McIntosh

A New Concept?

Yes

- The phrase ‘Adverse Action’ is brand new

However

- It can be viewed as an extension of:
‘Unlawful Termination’

OVERVIEW

What are the 'Adverse Action' provisions?

Overview

- Elements of ‘Adverse Action’
- Practical approach
- Remedy

DETERMINING LIABILITY

Three Questions

1. Has an 'Adverse Action' been taken?
2. What is the 'real reason' for the taking of the adverse action?
3. Is that 'real reason' prohibited by the act?

THE REASON

A person must not take an adverse action because...

Reason 1

- A person must not take an ‘Adverse Action’ because... the person has exercised or proposes to exercise a workplace right

Workplace Right

- Often associated with some form of workplace law
- Includes making a compliant or inquiry

Reason 2

- A person must not take an 'Adverse Action' because... of a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibility, pregnancy, religion, political opinion, national extraction or social origin;

Reason 3

- A person must note take an ‘Adverse Action’ because... the person is associated with an industrial association or engages in industrial activity

**WHAT IS AN ADVERSE
ACTION?**

‘Adverse Actions’ include:

- Dismissal;
- Injuring the Employee in his or her Employment;
- Altering the position of the Employee to the employee’s prejudice; and
- Discriminating between an employee and other employees of the employer

‘Adverse Action’ also includes:

- Where an employer refuses to employ a *prospective* employee; or
- Discriminates against a *prospective* employee

AND

- Where an employer *threatens* to do any of the previously mentioned actions.

TAKING AN 'ADVERSE ACTION' *BECAUSE*

A search for the 'real reason'

... ‘because of’ ...

- The prohibited reason must take no part or be dissociated of the ‘real reason’ for the performing of an ‘Adverse Action’
- The Court will assess the *objective* reason that an action was taken:
 - Subjective intention relevant but not determinative; and
 - The ‘real reason’ can be unconscious

CONSEQUENCE FOR EMPLOYERS

Consequence

- Can still take actions for valid reasons
- Beware of the ‘Reversed Onus of Proof’
 - This involves producing evidence

REMEDY

CONCLUSION

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