Your *Partners* in Workplace Law

Strateg-Eyes:
Workplace Perspectives

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A message from our Managing Principal

As 2012 draws to a close, it is opportune to reflect on yet another eventful year in Australian workplace relations.

As we go to print there have been minor changes to the Fair Work Act but no real insights as to what the Coalition's proposed framework for legislation might encapsulate. The High Court has handed down an important judgment providing some clarity around the scope of adverse action claims. Work health and safety harmonisation remains very much a work in progress. Bullying and harassment claims continue to have a sensational bent to them.

What we have seen at PCS in the last 12 months leads us to urge all of our valued clients to recognise that the employment landscape is highly volatile and discontent and agitation from employees is being demonstrated at stages far earlier than might have previously been the case.

Of course, terminations of employment are almost invariably going to be challenged but claims of workplace bullying and harassment will increase in the future. Performance management will be considered more unapproachable by managers in this kind of environment. Investigations into alleged misconduct are going to be more closely scrutinised. In short, expect your employees to "muscle up" and be prepared for that with a genuinely preventive approach to workplace relations.

PCS has been identified as one of the ten fastest growing law firms in Australasia. We are pleased at our continued rate of growth and look forward to starting 2013 in our larger offices. 2013 will also see PCS formalise its presence in other capital cities (with some exciting opportunities available to us for global alliances) so that we can consolidate our status as Australia's preferred law firm and service provider to the HR community and for workplace law.

On behalf of all of us I thank you for your continued support of PCS through your business, referrals, participation in our numerous events and goodwill. We wish your businesses much success in 2013 and to each of you personally we wish you a healthy and prosperous year ahead.

Joydeep Hor, Managing Principal

Inside this issue:

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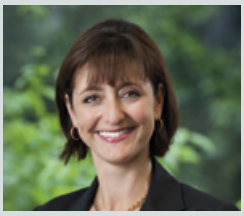
"What goes on tour stays on tour" – or does it?

After-hours conduct and its connection to employment



KATHRYN DENT,
DIRECTOR

It is no wonder that as technology (accessibility of employees through email and mobile phones) blurs the borders and boundaries of the workplace, employers are finding it both difficult to regulate workplace behaviour "after hours" as well as finding it a necessity.

The types of after-hours behaviour by employees which end up being pursued by or against employers in court commonly involve sexual misconduct (which often involves alcohol), injuries sustained at events and of more recent times the (mis)use of social media (the latter being the subject of another article in this edition of Strateg-eyes).

Employers should consider both implementing rules for, and disciplining for breaches of, "after-hours" workplace behaviour if they:

- sponsor or host "social" events attended by employees
- have employees attending social events connected to their workplace (eg social events organised by customers, clients or suppliers)
- have employees going away or attending work conferences together
- provide accommodation for employees which results in employees living in close proximity to each other
- are sensitive about reputational and brand damage that may be sustained by employee misbehaviour
- have employees using social media

You're not the fun police, it's the law...

The incentive to regulate employees' behaviour outside the normal work environment are the legislative obligations which exist for employers as well as individuals (officers and employees alike) under both work health and safety and anti-discrimination legislation.

In particular, the primary duty of care of the person conducting a business or undertaking (**"PCBU"**) under the harmonised work health and safety legislation (in New South Wales this is s.19 of the *Work Health and Safety Act 2011*) will apply if the after-hours event involves workers being "at work in the business or undertaking" . This duty also extends to ensuring that the "health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking". If the after-hours conduct triggers this duty, and that will be debateable given the wording of the duty, then officers and "workers" (employees and a range of others) are also implicated as they have a duty to either, in the case of officers, exercise due diligence to ensure the PCBU complies with its duties or in the case of workers "(w)hile at work", to take reasonable care of their own health and safety and to ensure their acts or omissions do not endanger the health or safety of others (and also to comply with policies and instructions).

The *Sex Discrimination Act 1984* (Cth) makes it unlawful for employees and other "workplace participants" to sexually harass each other as well as for an employer to sexually harass an employee. As regards "workplace participants" the area within which sexual harassment is regulated is at the workplace which the Act defines as "a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant". The incentive for employers to seek to prohibit unacceptable workplace behaviour at after hours events is set out in s.106 which provides employers with a defence to the acts of employees and others, for which they are (otherwise) vicariously liable, provided they have taken all "reasonable steps". In the context of sexual harassment the case of *Lee v Smith & Ors*[1] should serve as a solemn reminder. In this case part of the conduct complained about occurred at a private dinner party attended by work colleagues and where the complainant was allegedly raped by a work colleague against whom she had previously made complaints regarding his sexual harassment of her.

In *South Pacific Resort Hotels v Trainor*[2] the sexual harassment which allegedly occurred after hours involved employees who lived in employer-provided accommodation. This case recognised that "in connection with employment" could have a broad application in terms of an employer's liability for after-hours conduct.

Where does the workplace stop and start?

The work health and safety and anti-discrimination laws provide the legislative basis enabling and indeed justifying the regulation of workplace behaviour and the continuation of the working relationship, such as at a regional conference (see *Leslie v Graham*[3]), in a car park used by employees (see *Dobson v Qantas Airways Limited*[4]) or where workplace events led to an after-hours assault (see *The Australian Workers' Union, Tasmania Branch v Adelaide Mushrooms Nominees Pty Ltd t/a Tasmanian Mushrooms*[5]) will continue the employer's "workplace obligations".

While it was made clear in the context of a workers' compensation claim in the NSW Court of Appeal recently that work social events and recreational

[1] [2007] FMCA 59

[2] [2005] FCAFC 130

activities "can well form part of the course of employment" (*Pioneer Studios Pty Ltd v Hills*[6]), equally, it may be that after-hours conduct does not necessarily fall within the realm of the workplaces that legislation covers, but there is still a reputational risk created by employees' after-hours behaviour. Can an employer still require an employee to behave in a particular way? The answer is, in short, yes but on what basis? Older case law based such intervention and regulation on there being a "relevant connection to employment"[7] and this case law is still good authority.

This issue was recently considered in *John Pinawin t/a RoseVi.Hair.Face.Body v Edwin Domingo*[8] where, in an unfair dismissal context, Fair Work Australia qualified the notion that *"(g)enerally employers have no right to control or regulate an employee's 'out of hours conduct'.* Fair Work Australia affirmed that *"if an employee's conduct outside the workplace has a significant and adverse effect on the workplace, then the consequences become a legitimate concern to the employer. A range of 'out of hours conduct' has been held to constitute grounds for termination because the potential or actual consequences of the conduct are inconsistent with the employee's duty of fidelity and good faith. This concept is closely allied to the implied term of 'trust and confidence' in employment contracts which relates to modes of behaviour which allow work to proceed in a commercially and legally correct manner".* In this case the fact that the employer was a small business with a close personal relationship with the employee was another basis on which summary dismissal based on drug use, was justified.

In *McManus v Scott-Charlton*[9] the court held that an employer may legitimately seek to assert authority over any conduct which threatens order in the workplace or the reputation of the enterprise and this proposition has subsequently been approved in *Farquharson v Qantas Airways Limited*[10] and *Kolodjashnij v Boag*[11]. The "order in the workplace" may represent the chain of command such as the relationship between managers and those under their supervision. Where conduct has a bearing on that relationship then the employer's concern about it (and subsequent action) will be legitimate - *Civil Service Association of WA v Director-General*[12]; *Gera v Commonwealth Bank*[13]; *Kalouche v Legion Cabs*[14].

And, in this age of social media, insulting and threatening comments made about another employee after hours but on a public forum can provide the basis of serious misconduct and summary dismissal[15]. However, comments made on Facebook that are foolish and inaccurate outbursts that do not damage an employer's business may not provide a valid reason for dismissal[16]. Despite the finding in *Fitzgerald's case*, Commissioner Bissett did state "(i)t would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences".

How do you regulate the behaviour?

The regulation of appropriate, or inappropriate, after-hours workplace behaviour may be contained within any workplace behaviour policy or policy on social media, sexual harassment, discrimination or bullying because whether it occurs during or after work hours, the types of acceptable and unacceptable behaviour will be the same and should be treated accordingly. Another policy where conduct may be regulated is in any applicable drug and alcohol policy.

The only difference between during and after-hours behaviour will be that after-hours behaviour may be more difficult to link to the workplace[17] and thus employment in any given factual scenario, however the authorities, as outlined above, will allow an employer to take action where there is a connection between the context in which the after-hours conduct occurs and the employment and so the fact that such a difficulty may arise (in terms of a connection) in the future should not be a deterrent to exercising both in the documentation and practically, an appropriate level of control. The requisite connection between the conduct and the employment may be established by the laws referred to earlier or even where there is a threat to the "order of the workplace" or the employer's reputation or where the employee's conduct amounts to a breach of a contractual duty. As regards breach of contract, such an action may also be available (in addition to an implied breach of contract) if the employer's contract of employment with its employees sets out reasons which may lead to termination (summary or with notice) and these include conduct which "brings or may bring" the employer into disrepute.

As with all policies and contractual terms, the sanctions for any breach should be clear and they should be rigorously implemented and enforced, consistently as well as updated as may be required from time to time.

Conclusion

After-hours conduct can legitimately be the subject of employer regulation and disciplinary action through both the contract of employment and employment policies if it is necessary either in order to either ensure compliance with the employer's legislative work health and safety or anti-discrimination obligations or if it may cause damage to an employer's reputation or order of the workplace. It may be, in any given situation where damage or injury results from an employee's after hours conduct, that an employer can and should divorce the connection from employment and the workplace, however, it is prudent to at all times reserve the right to control actions which may lead to this liability given the encroachment of the workplace into people's private lives and the ever-increasing liability which results. ●

[3] [2002] FCA 32

[4] [2010] FWA 6431

[5] Commissioner PC Shelley – T10691, 5 September 2003

[6] [2012] NSWCA 324

[7] *Rose v Telstra Corporation Limited (1998) unreported, AIRC*

[8] [2012] FWAFB 1359

[9] (1996) 70 FCR 16

[10] [2005] AIRC 982

[11] [2010] FWAFB 3258

[12] [2002] WASCA 241

[13] [2010] FMCA 205

[14] (1998) 81 IR 415

[15] *O'Keefe v Williams Muir's Pty Limited t/a Troy Williams The Good Guys [2011] FWA 5311*

[16] *Fitzgerald v Dianna Smith t/as Escape Hair Design [2010] FWA 7358*

[17] *Streeter v Telstra Corporation Limited* (2007) AIRC 679

When the Workplace and Social Media Collide

NICHOLA CONSTANT,
DIRECTOR

MISA HAN,
GRADUATE ASSOCIATE

With over 10 million Facebook users in Australia, it comes as no surprise that social media is as integral to workplace interaction as "water-cooler talk". While social media channels such as Facebook posts, Twitter accounts and LinkedIn groups offer quick and easy ways to promote business and networking, they could also present headaches for employers.

In particular, employers now face the challenge of balancing bullying, harassment and brand damage risks with the need to respect employees' privacy.

Facebook Comment = Pubtalk?

People have always talked about their work and colleagues after hours with friends and family. However, the digital era and social media mean that it is increasingly hard to distinguish between professional and personal conduct.

In the recent *Linfox* case[25], a truck driver was dismissed after posting derogatory statements about his managers outside of his work hours. The Full Bench of Fair Work Australia upheld a finding that Linfox unfairly dismissed the employee and ordered reinstatement and payment of lost wages.

Even though this case was decided in favour of the employee, the case paves the way for employers to dismiss employees for posting inappropriate comments on social networking sites. The Full Bench noted that posting on Facebook is not equivalent to a conversation in a pub or café, as Facebook conversations leave a permanent written record and have a potentially wider circulation than a pub discussion. The Full Bench said that it was important for employees to exercise considerable care in using social networking sites to make comments about their managers or colleagues.

Ultimately detrimental to Linfox's case was that it did not have a policy on social media and unsuccessfully sought to rely on induction training materials instead.

In light of this case, it will be increasingly difficult for employees to hide behind ignorance to justify inappropriate comments posted online. However, employers must still actively manage the risks of social media use, including bullying, harassment and discrimination claims and ensure they have appropriate policies and training in place.

Maintaining Corporate Reputation

Employers are regularly warned about potential brand damage from employees' misuse of social media. In an interesting example of potential brand damage by an employee Telstra discovered that this misuse can extend beyond criticism of the employer, after an employee pretended to be the Communications Minister. The employee set up a satirical Twitter account and pretended to be Stephen Conroy attacking Telstra. Telstra initially attempted to cover up the impersonator and his public attacks. However, Telstra realised a cover-up was not possible and admitted its employee's behaviour.

Following this, Telstra implemented a new policy on social media. Telstra did not seek to ban social media as it considered that approach to be counterproductive. Instead, Telstra decided to encourage employees to promote the company, disclose that they are Telstra employees and to ensure information shared is accurate.

In the UK case of *Crisp v Apple Retail*[26], Mr Crisp (an Apple Retail employee) posted a series of Facebook comments about Apple products, including his iPhone having no signal and an Apple application not working properly. He also posted disparaging comments about his work using one of iTunes' advertising taglines. Apple Retail dismissed Mr Crisp for bringing the company into disrepute and striking at the core of Apple's values.

The UK employment tribunal found that Mr Crisp's comments about Apple products could amount to misconduct, corporate image was important to Apple's business, and Apple was justified in terminating Mr Crisp's employment. Although access to Mr Crisp's posts was limited to his Facebook friends, the nature of Facebook, and the Internet generally, meant comments by one person could easily be forwarded onto the others.

This UK case recognises employers have the right to dismiss an employee when the employee deliberately damages the organisation's corporate image. We strongly recommend in Australia that employers record this right in employees' contracts of employment and social media policies.

Privacy and Social Media: A Balancing Act

It has become common practice for prospective employers to scan social media profiles of candidates. Some employers have gone so far as to ask job applicants for passwords, to

[25] *Linfox v Stutsel* [2012] FWAFB 7097

[26] *Crisp v Apple Retail* (UK) Ltd ET/1500258/11

'friend' the HR manager, and to log into their profile during an interview, and required prospective employees to sign non-disparagement agreements banning them from posting negative comments about the employer before formally offering the position. But how far is too far?

In 2011, the Financial Sector Union (**"FSU"**) expressed concerns about the Commonwealth Bank's social media policy impinging too far into the private lives of employees. The FSU claimed that the Bank's policy exceeded the employees' contractual obligations and duties of good faith. The Commonwealth Bank revised its social media policy to address some of the employees' concerns.

This suggests that imposing restrictive requirements on social media use is likely not only to trigger individual negativity, but possibly industrial action, as well as potentially breaching privacy and employment laws.

Next Steps

These recent high profile cases suggest that employers may need to rethink their social media management and as in most employment matters, balance is the key.

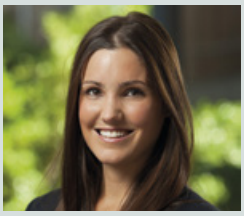
The *'hands-off'* approach may not be sufficient to protect employers from bullying and harassment risks or to protect the corporate image, while taking a *'Big Brother'* approach is likely to trigger negative reactions from the employees. Employers should instead focus on building a positive workplace culture that recognises the realities of employees connecting through the new media and give employees the skills and direction to utilise social media for mutual benefit. ●

DOs and DON'Ts of Social Media Management

DO		DON'T	
✓	Have a detailed social media policy in place	✗	Rely too much on generic appropriate behaviour examples or information contained in employee handbooks or training materials
✓	Investigate incidents or complaints arising from social media use. Failure to do so could expose employers to bullying and harassment claims, workers compensation claims and breaches of work health and safety legislation	✗	Impose a blanket ban on social media use. An increasing number of employees demand social media use in the workplace and, with the widespread use of smart phones, banning social media use could negatively impact on productivity
✓	Build a workplace culture which encourages positive use of social media by providing training and guidelines	✗	Set unrealistic standards of behaviour which impact on employees' freedom of speech and privacy

The High Cost of Inadequate Investigation and Corporate Culture:

Sharma v Bibby Financial Services Australia Pty Ltd [2012] NSWSC 1157



KIRRYN WEST,
ASSOCIATE

People + Culture Strategies recently successfully acted for a client to secure over $1.4m in a case before the Supreme Court of New South Wales.

The case concerned the termination of that senior executive's employment following sexual harassment allegations and highlights a number of important issues for employers, namely, the importance of conducting adequate investigations and the ramifications of an unsatisfactory workplace culture.

The Facts

The executive was employed as the Sales Director of Bibby Financial Services Australia (**"Bibby"**) from 2002 – February 2009. In accordance with the Sales Director's contract, the Sales Director was entitled to a one-off "special bonus" of up to $1.4m. However, shortly before the special bonus was due, Bibby terminated the Sales Director's employment on the basis of serious misconduct relating to allegations of sexual harassment. The allegations included inappropriate touching, inappropriate comments and unwelcome attention.

The allegations of sexual harassment had been made by another employee who was employed by Bibby for three months and claimed that the sexual harassment caused him to leave his employment with Bibby.

In January 2009, Bibby conducted an investigation into the allegations of sexual harassment which involved interviewing a number of employees in the Sales Director's team. None of the employees interviewed supported the claims of sexual harassment. Importantly, at this time, the Sales Director had not been made aware of the allegations, nor was he interviewed as part of the investigation.

Despite this, on 4 February 2009, the Sales Director was called to a meeting where he was told that:

> "Your conduct is unbecoming of a director...If you do not resign we will terminate your contract. This process is not a negotiation. We do not have to tell you anything."

The Sales Director was then sent a Deed of Release containing an offer of notice and a pro rata amount of the special bonus, which he rejected. Bibby then took steps to terminate the Sales Director's employment for serious misconduct and did not pay the Sales Director's notice or the special bonus.

After proceedings were initiated by the Sales Director, Bibby also sought to rely on conduct of the Sales Director that had been discovered post-termination. This conduct related to the taking of ecstasy tablets and failing to disclose a potential conflict of interest.

The Findings

There were two key issues for the Court to decide. Firstly, had the Sales Director's employment been validly terminated on 4 February 2009 and, secondly, if the Sales Director's employment had been validly terminated, had the Sales Director engaged in conduct discovered post-termination which amounted to serious misconduct?

The Court held that Bibby decided to terminate the employment of the Sales Director on 4 February 2009 and the allegations of sexual harassment or other serious misconduct were not upheld. Therefore, the Sales Director

was entitled to the special bonus and six months of notice. The Court noted that:

> "the Defendant had decided to terminate the plaintiff in full knowledge of the allegations of serious misconduct. It decided not to rely upon those matters or proceed towards termination... The Defendant decided to terminate the plaintiff without cause by termination..."

In coming to this view the Court took into consideration:

- that the Sales Director was told the termination of his employment was "not a negotiation";
- comments that were made to the Sales Director about Bibby's loss of trust and confidence;
- that the Sales Director was directed not to return to the office, contact staff or contact clients; and
- that the Sales Director's salary was stopped (although later reinstated).

The Court also considered whether any of the conduct discovered post-termination could be used to justify a termination on the basis of serious misconduct.

In relation to emails evidencing drug taking, the Court found that the conduct of the Sales Director could only be viewed in the context of Bibby's policies, procedures and corporate culture. Bibby's Drug and Alcohol Policy provided that in the event of an incident involving drugs or alcohol, Bibby would intervene and offer assistance. In such circumstances, the Court found that the Sales Director's employment would not have been terminated summarily on the basis of sending emails referencing drug use.

Further, the Court found that at that time the emails were sent, Bibby had a corporate culture which tolerated heavy drinking and condoned and paid for the use of dating and escort services and strip clubs as part of the business. Bibby's workplace culture meant that the Sales Director's conduct was no more damaging to the company's reputation than Bibby's Managing Director attending lap dancing venues and/or strip clubs with clients and/or suppliers. The Court stated that:

> "It appears that the environment in the defendant's office was such that in those years it is questionable as to whether the plaintiff's conduct on the two occasions in 2003 and/or 2004 would bring the defendant's reputation into any further disrepute than would the Managing Director's conduct in attending lap dancing venues and/or strip clubs with clients and/or suppliers."

The Court also considered whether the Sales Director had failed to disclose a necessary conflict of interest.

The Court held that while there may have been a lapse in judgment, it did not justify dismissal for serious misconduct.

Key Learnings for Employers

The case sends a strong message to employers to ensure that:

- Investigations should be conducted by persons who are experienced and competent, in many circumstances, an external independent investigator should be engaged.
- Obtaining evidence corroborating the allegations is important, in the absence of such evidence, employers should be cautious of making adverse findings.
- Procedural fairness must be followed – any employee being investigated should have all of the allegations put to them and be provided with a reasonable opportunity to respond.
- Policies and procedures can be onerous and, as such, should be carefully drafted and reviewed to ensure the policies and procedures are not unnecessarily onerous.
- The corporate culture of an organisation should be regularly audited; appropriate behaviour and culture training should be provided to all employees and managers regardless of their seniority. ●

Bullying and Harassment in the Workplace

CARA SEYMOUR,
SENIOR ASSOCIATE

KATHRYN LEWIS,
GRADUATE ASSOCIATE

We frequently hear that cases of bullying and harassment at work are on the increase. Most studies suggest a figure of 1 in 5 or 1 in 6 people experiencing some form of bullying or harassment in the workplace.

In all likelihood, it is not so much that human behaviour has changed for the worse but that increased awareness of what is and what is not acceptable conduct at work is generating a higher rate of reporting of incidents that may constitute bullying or harassment.

As the body of case law in this area grows, it is instructive to look at these decisions to understand what the terms "bullying" and "harassment" mean so you can identify and to the extent possible, eliminate, the kinds of behaviours that cause harm to people and create legal risk in your workplaces. Last year the Productivity Commission estimated the effects of workplace bullying to be costing between $6 billion and $36 billion annually.

Minimising the risk of bullying and harassment requires good grievance procedures that aim at fair, confidential and timely resolution of complaints. However individual complaint-based mechanisms or policy documents are never enough to engender cultural change throughout workplaces. Broader strategies such as training and awareness raising programs, mentoring and positive leadership also need to be considered.

Bullying – what is it?

There is no legislative definition of "bullying" however, case law and those government organisations responsible for administering work, health and safety (**WHS**) laws have provided us with the following key elements:

- A repeated pattern of behaviour that is;
- Inappropriate, unreasonable and possibly aggressive; and,
- Poses a risk of physical and/or psychological harm.

Other features of bullying are that it is unwelcome and targeted at a particular person/s even if the subjective intention of the person was not to bully. While the power relationship between the person who is bullied and the person bullying may not necessarily be obvious, at the heart of bullying behaviour is an abuse of power.

Bullying encompasses inappropriate behaviours that range from extremely overt and aggressive to the more subtle passive aggressive forms such as:

- Physical assault
- Verbal abuse/yelling
- "Initiation Rites"
- Malicious teasing and making someone the brunt of pranks or practical jokes
- Excluding or isolating employees
- Giving employees impossible assignments, consistent heavy workloads and unrealistic timeframes
- Assigning meaningless tasks unrelated to the job
- Deliberately withholding information that is vital for effective work performance
- Consistent non-constructive criticism of work product
- Psychological harassment such as the "silent treatment", gossip and rumours
- Favouritism and unfair allocation of tasks.

Bullying and performance management

Confusion about what constitutes bullying most often arises in the context of performance supervision and management, disciplinary action and allocations of work. Reasonable work allocation in compliance with systems and the requirements of a worker's role, performance supervision and management are not bullying, nor are the decisions to counsel or warn a worker when performance issues arise.

There is a rising incidence of employees raising bullying and harassment complaints in response to performance management, so it is important to distinguish the differences between bullying behaviours and what is termed as "reasonable administrative action" or even reasonable disciplinary and management action.

Case example

Recently, an employee with an existing stress-related depressive disorder had her case upheld on appeal to the Federal Court. The issue before the Administrative Appeals Tribunal had been whether the employer was liable for the employee's psychological condition pursuant to section 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**Act**). Her illness was diagnosed after she received a series of promotions. She took leave and on returning from leave found that her job had been restructured and that her workload had, in her estimation, tripled. Following a group meeting, her manager called her aside for a one-on-one impromptu meeting during which the manager accused her of having a "negative attitude" and said:

> *"I don't see you having a role in corporate clients and possibly anywhere in the organisation".*

The appeal first considered the correct interpretation of 'reasonable administrative action taken in a reasonable manner in respect of the employee's employment' as that phrase appears in section 5A(1) of the Act. The Federal Court confirmed the Tribunal's finding that the employer's action was unreasonable due to the "tension-charged" nature of the one-on-one meeting and coupled with the failure to give the employee any notice of the serious issues being raised. It held that the impromptu meeting was causative of an aggravation of the Respondent's pre-existing condition.[23]

Cyber Bullying

New technology has created a more public platform for bullying and harassment which has been termed "cyber bullying". The characteristics of cyber bullying are the same as bullying but the medium is through the internet, mobile phone and most often social networking sites. The intent must be to cause emotional distress and there must be no legitimate purpose to the communication.

Easy access to digital devices has the effect of allowing bullying to extend beyond the workplace and into home life, sometimes with devastating effect. Victoria has responded to workplace bullying introducing legislation amending the *Crimes Act 1958* (Vic) with what is colloquially known as "Brodie's Law". This followed the death of 19 year old Brodie Panlock who was severely bullied at work. A coronial inquest found that this treatment directly resulted in her death. The enactment widens the definition of the existing crime of stalking to workplace and cyber bullying. The maximum penalty is 10 years imprisonment.

Examples of cyber bullying behaviour include: posting demeaning and humiliating photos, sexual remarks or threats and posting comments that defame or ridicule.

Harassment

Unlawful workplace harassment is any form of behaviour that is unwelcome and targets a person because of a ground prohibited by discrimination legislation such as sex, race, disability and age. Behaviour amounts to harassment if a reasonable person in

the position of the perpetrator would have anticipated that the person at whom the behaviour is directed, would be offended, humiliated or intimidated by that behaviour. Under discrimination legislation, sexual harassment is specifically defined to encompass an "anticipation of the *possibility*" that the sexual conduct would cause offence to the person.

Workplace harassment and sexual harassment can be a one off incident or a pattern of behaviour. The intention of the person is not a relevant consideration and the person claiming to have been harassed does not have to say "no" to the conduct to prove that it was unwelcome. The scope of behaviour considered as harassment includes offensive jokes, suggestive or sexual remarks, repeated unwelcome sexual invitations, racist or ageist remarks, imitating someone's accent & repeated questions about someone's personal life. It may include non-verbal behaviour: suggestive or aggressive looks or stares, offensive hand and body gestures, invading someone's personal space, distributing sexually explicit or racist or sexist emails and displaying offensive or sexually explicit posters.

Lessons from the case law

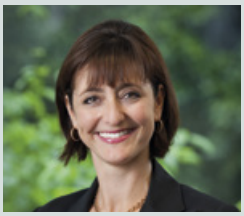
One of the big mistakes employers make, is mixing personal comments or opinions with performance review or attacking the person instead of their performance. Focus your feedback on the requirements of the role and support underperformance with objective data related to duties consistent with the role. That is not to say that particular personality styles and maintaining personable relationships is never core to success in certain positions. In client service industries, the ability of an employee to maintain relationships is crucial to success. In another recent case an employee's failure to build and sustain relationships with internal and external service providers and two internal managers was found to be a valid reason for dismissal of an employee. The employee made a bullying claim after the problems with relationships with two managers but this was not upheld and the reason for termination that he was not a good company fit was accepted by the court.[24]

Best practice is to remain focused on the requirements of the position and to direct all comments to that end. Pay attention to your oral and written communications and consider the impact of the email and mobile messages that you send. For example, avoid adopting an impolite or sarcastic tone or sending a barrage of emails or texts raising performance issues. If you usually address workers a certain way, maintain the same level of communication when discussing performance issues. Don't let your frustration with an employee's failure to perform to expectations translate into unfair treatment of that person. ●

[23] *National Australia Bank Limited v KRDV* [2012] FCA 543 (28 May 2012)

[24] Stevenson v Air Services Australia [2012] FMCA 55 (1 February 2012)

Workplace Investigations – who what where when how and why?



KATHRYN DENT, DIRECTOR

ERIN LYNCH, ASSOCIATE

As the end of year looms and staff become relaxed in anticipation of the holiday season, some inappropriate workplace behaviours may either emerge or be displayed at various events.

Such behaviour will require an employer to "investigate". The level of investigation, and the resources devoted to it, will depend on how the behaviour comes to the employer's attention and the nature of the (mis) behaviour. Regardless of these factors, that is whether the investigation is formal or informal, and the complaint similarly, it is crucial that employers get this investigation right as it will form the basis for any disciplinary decisions made and will come under scrutiny if the employee later challenges your decision.

This article is designed to be a practical guide to investigations having regard to practices recently considered by Fair Work Australia.

Best Practices in Investigations

Any investigation process is likely to incur a certain level of cost, time and risk. If an employer is conducting a workplace investigation, then five key actions are to:

1. ensure all of the allegations are set out to the employee the subject of the complaint;
2. conduct all processes in a manner that complies with any applicable organisational policies and ensures all parties involved are respected (which includes agreements as to confidentiality and not victimising others) and have an opportunity to state their version of events;
3. provide a comprehensive report of the steps you have taken, the findings you have made, and the recommended course of action;
4. clearly identify whether the allegation is made out or not and provide evidence in support of a conclusion; and
5. provide suggestions, if any, for improving investigatory procedures.

Internal vs External investigations

Whether reference to an external investigator (such as a lawyer) is warranted will generally depend on the nature of the behaviour being investigated. External investigations where you seek to attract legal professional privilege over the investigation by engaging lawyers are more suitable for sensitive matters or if the matters are serious and may result in litigation or generally if an independent view is required where there is more likely to be freedom from bias or conflict of interest.

If an internal investigation is undertaken then it is preferable to separate the role of decision-maker from investigator and it is imperative that the investigator has the appropriate skill-set, knows and appropriately applies, your organisation's policies and procedures. The investigator should avoid simply following a checklist which will limit the information and evidence being considered. The investigator should always provide procedural fairness to those involved and seek advice where required to ensure the organisation's actions are appropriate.

Repercussions of inadequate investigations

There are four mains repercussions resulting from inadequate investigations that make adequate investigations a necessity, they are:

1. the risk that the dismissal will be challenged as unfair due to the employee being investigated not being afforded procedural fairness (and if found to be unfair, remedies in result of that – reinstatement, re-employment or compensation);
2. the time and costs of litigation to the business, including adverse publicity;
3. any lack of uniformity in disciplinary proceedings resulting in employees being treated differently in relation to similar allegations; and
4. low morale in the workplace and the lack of confidence in management.

Cases

The recent cases below demonstrate the importance of employers carrying out thorough and independent investigations.

In *Narwal v Aldi Food Stores Pty Limited*[18] Mr Narwal's employment was summarily terminated after he took goods from the store he managed without paying. Aldi Food Stores Pty Limited (**"Aldi"**) claimed that Mr Narwal had acted dishonestly and viewed his actions as misconduct.

When Mr Narwal returned to work two days later he was alerted by Aldi management that he had not paid for the goods. Mr Narwal paid for the goods immediately. Nonetheless, the Area Manager summarily terminated Mr Narwal's employment.

[18] [2012] FWA 2056

Fair Work Australia (**"FWA"**) found that there was no basis for summarily dismissing Mr Narwal. FWA was critical of the Area Manager's actions and stated that he had *"completely failed to properly investigate and consider the important implications of the suspended docket"*. Further, FWA formed the view that Aldi had failed to *"satisfy even a basic level of proof upon which to find that the [store manager] acted dishonestly or committed theft"*.

In this case the investigation was inadequate. The seriousness of the conduct was mitigated by the employer allowing him to work after having knowledge of his activities. An employer will be deemed to condone the conduct if they do not act swiftly in response. The investigation failed to address all relevant evidence.

In *Jones v Commission for Public Employment*[19] Jones was a parole officer who failed to disclose during her recruitment that her husband was a parolee. Jones lodged an unfair dismissal claim after being terminated on the grounds of serious misconduct. The termination letter stated that "an investigation into your alleged conduct was not warranted".

It was held that although there was a valid reason for dismissal, Jones was unfairly dismissed. The dismissal was unfair as the employer did not afford the necessary procedural fairness. The investigation was held to be inadequate as:

- the opportunity to respond by letter was not sufficient;
- Jones was given a time limit to respond in writing;
- the employer failed to investigate the alleged conduct; and
- the allegation was based on information obtained from elsewhere, not the investigation.

By contrast, an adequate investigation was confirmed to have taken place in *Jalea v Sunstate Airlines*[20]. In this case Jalea lodged an unfair dismissal claim after being terminated for misconduct. Jalea's manager lodged a complaint after Jalea responded in an inappropriate manner to suggestions that she undergo

mediation due to conflict with a colleague. The complaints were investigated through several witness interviews and written correspondence whereby allegations were put to Jalea allowing her an opportunity to respond. At the conclusion of the investigation Jalea was forced to either transfer to a Sydney base with a first and final warning or have her employment terminated. Jalea's employment was terminated for failing to respond to the offer of transfer or attend meetings, for use of inappropriate language, failing to follow a reasonable direction and using force to enter her manager's office.

The dismissal was upheld as valid based on the serious nature of Jalea's conduct which on several occasions clearly breached the organisation's policy. The investigation was deemed sufficient as it provided procedural fairness and complied with company policies. The investigation was adequate as:

- notice was provided ahead of the meeting;
- the HR manager was not experienced in investigations;
- the investigation engaged an extensive process of appeals consistent with the policy;
- it was not relevant that witness statements were not signed, nor that all witnesses were not spoken to; and
- it was not flawed merely because it could have been performed better and that Jalea was unhappy with the outcome.

In *Tokoda v Westpac*[21] the employee submitted a medical certificate which did not contain the doctor's provider number. When Westpac telephoned the doctor, the doctor stated that he had not provided the certificate and that Ms Tokoda has not visited his surgery.

An investigation was carried out which resulted in Ms Tokoda being terminated. During the investigation Ms Tokoda alleged that she had been bullied. Westpac investigated the bullying complaint and it was deemed to be unsubstantiated.

It was held that the dismissal was not unfair as there was a valid reason for termination. Fair Work Australia formed the view that Ms Tokoda's evidence was unconvincing and not credible. The investigation findings by the Area Manager of the Retail Branch Network were upheld. Ms Tokoda appealed to the Full Bench. The Full Bench upheld the decision reaffirming that her behaviour constituted serious misconduct.

The investigation was adequate as:

- all relevant parties were interviewed;
- Tokoda was informed about the outcome of the investigation and the reasons;
- the investigator admitted that one of the complaints related to another employee's error;
- the termination was made after the investigation; and
- there was a valid reason for the termination not related to the complaints made.

Also see our related article on *Sharma v Bibby Financial Services Australia Pty Ltd*[22] in this publication.

These cases are a stark reminder that proper processes must be followed in the investigation of complaints in order to defend legal proceedings which may arise from the decisions implemented as a result of an investigation's findings. ●

[19] [2012] FWA 7069
[20] [2012] FWA 1360
[21] [2012] FWA 5379
[22] [2012] NSWSC 1157

The principles of leading and communicating change successfully

ROBYN SEFIANI,
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There is no doubt change is in the air, on the global and local political, economic, media and business fronts.

The last 12 months alone has seen significant shifts in Australia's legal, retail and professional services landscapes. In this new paradigm, organisations are reviewing their strategic direction and many are opting for change to strengthen their competitive position.

The challenges presented by significant change are accompanied by risk, which is nothing new – as noted by Machiavelli over four centuries ago.

> *"There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things."*
>
> Niccolo Machiavelli,
> The Prince (1532)

Change is often confronting, and managing change successfully requires a carefully planned approach to ensure internal and external stakeholders clearly understand what change is happening and why it is necessary. But well-managed and communicated change can also present great opportunities for CEOs and leadership teams to get on the front foot.

A recent *Financial Review Business Intelligence* survey indicated that responding to change – in relation to business environments, globalisation and organisational structure to deal with an increasingly remote workforce – is critical to success.

Furthermore, communication was ranked the most important issue for current leaders (87% of respondents), ahead of leadership, strategic thinking, resilience and decision making.

Communicating change effectively

These days, communication strategy sits alongside legal counsel, business strategy and human resources advice as a critical part of planning to support change. Sefiani's specialist *Change Communication Practice* works with leadership teams to provide expert help to navigate the challenges presented by communicating change, not least addressing issues around rumour, speculation and fear of upheaval often experienced by stakeholders.

Overall, the six key principles for the successful leadership of change are:

1. Establish rationale, purpose and urgency of change

Major change projects need momentum to succeed. The more clearly leaders can communicate the problem they are trying to solve by instigating change, the better. A sense of urgency is critical to garnering the support of stakeholders throughout an organisation. Without motivation and clear rationale, stakeholders within the business will question the need for change.

While it may feel difficult to articulate, the reality of what would happen if action is not taken is a powerful way to communicate the absolute necessity of the change itself. Authenticity is also imperative, as 'crying wolf' will not be tolerated by employees who may already be fearful and speculative of change coming their way.

2. Identify stakeholders

Think broadly and deeply about everyone the change will affect. Establish their influence and importance in relation to the success of the program, and bear in mind that more often than not, these influencers sit outside of your business. They could be the spouses or friends of employees considering a relocation or redundancy package, and understanding the impact of these influencers and finding a way to communicate with these groups is essential.

Also consider 'agents of change' - these may be esteemed managers within the business, or well-respected external experts who can support your rationale for action.

3. Lead from the top and establish a change leadership team

Major change needs to be led actively and authentically by the head of the organisation. It also requires a powerful guiding coalition able to take the message of change, and return with feedback, to all areas of the business. This includes not only the leader of the business, but legal counsel, communication strategy specialists, human resources representatives, change agents and influencers. Defining appropriate roles and responsibilities for these leaders of change is critical to ensure not only a co-ordinated approach, but the assurance that feedback received will be owned and actioned.

4. Plan with military precision

Successful change programs, whether operational or cultural, also need careful and detailed planning and long term thinking. Planning for the announcement of change is only half the battle, and in the majority of poorly executed change programs, it's where the momentum – and the battle - is lost. Without a long term plan, with carefully structured updates, milestones and wins, a change program loses drive, employee engagement and, critically, faith among key constituents.

5. Develop clear vision

Successful change needs to be supported with a vision that is clear and easy to communicate. It needs to appeal to your key stakeholders – to customers, shareholders and employees. The picture must be viewed from their perspectives.

For example, numbers and five-year-plans meant nothing to Apple employees in 1997, when Steve Jobs returned to the business he founded to discover it was on the verge of bankruptcy. Steve Jobs cultivated a vision and a culture of innovation that spoke to all of his stakeholders – it was clear, concise and easy to grasp, and has resulted in arguably the greatest turnaround in US corporate history.

Equally critical is removing obstacles to that vision, and ensuring the actions, statements and behaviour represented within the business are in line with the vision. This may mean making some tough decisions if you are dealing with leaders or managers obstructing change, but there is little point striving for a vision that is consistently undermined by actions – or worse – endorsed by the inaction of the leadership team.

6. Communicate, communicate, communicate

Do not underestimate the importance of not only regular updates and announcements, but listening and responding to feedback to fine tune your strategy as change rolls through an organisation.

- Communicate authentically, frequently and responsively.
- Remember, communication does not exist in a vacuum – messages, no matter how well-practised and fine-tuned, will always be influenced by the circumstances in which they are received.
- Consider events and circumstances both outside and inside the organisation may impact the delivery of critical messages, and think carefully about the communication channels you have to deliver them.
- As a general rule, use active channels – face-to-face and direct personal engagement – when dealing with major announcements. Passive channels – email, pre-recorded videos and newsletters – are best used to reiterate and support messages, rather than drive them.

Planning and communicating change is complex and challenging. There is little doubt that leadership teams who take action to manage the risks inherent in both are far more likely to succeed in positively positioning not only the change itself, but their personal and professional reputations.

About Sefiani Communications Group

Established in 1999, Sefiani Communications Group is the largest privately-owned corporate and financial public relations firm in Sydney, and one of the leading issues management firms in Australia.

Led by an experienced team of Directors, Sefiani offers strategic counsel backed by industry expertise, commercial insight and strong networks, and the ability to execute communication programs successfully.

Sefiani's senior change specialists work closely with clients through change communications strategy workshops, timeline planning, stakeholder identification, message development, crafting communications materials, issues anticipation and response, media relations, social media engagement strategy and risk identification. Sefiani also provides CEO media skills coaching for announcement day, manages media engagement on the day and monitor the effectiveness of change communication to all stakeholders.

Sefiani has a considerable track record of working with boards and leadership teams to develop strategic change communication programs. Rapidly growing client need has reinforced Sefiani's decision to establish a change practice, led by Managing Director Robyn Sefiani and Associate Director Francesca Boase. ●

STOP PRESS:
Proposed Consolidation of Commonwealth anti-discrimination laws

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Moves towards harmonisation of Commonwealth anti-discrimination laws began close to three years ago, with the 2009 launch of National Anti-Discrimination Law Information Gateway by the Standing Committee of Attorney-Generals. In 2010, Robert McClelland (the then Attorney-General) announced that a review would begin to assess the viability of consolidating current anti-discrimination laws into one single piece of legislation.

Steps towards harmonisation began in earnest in September 2011, when Attorney-General Nichola Roxon and Finance Minister Penny Wong released a Discussion Paper by the Commonwealth Attorney-General's Department, inviting submissions over the following 6 months from interested parties.

On 20 November 2012, the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth) ("**the Bill**") was finally released – representing another step towards the potential harmonisation of Anti-Discrimination at a Federal level.

Key changes under the Bill

One major change is, of course, the harmonisation and amalgamation of the five statutes which currently regulate this sphere, into one piece of legislation. For employers, this change will have the benefit of simplifying the myriad of statutes that they are currently expected to comply with, namely:

- *the Age Discrimination Act 2004* (Cth);
- *the Disability Discrimination Act 1992* (Cth);
- *the Racial Discrimination Act 1975* (Cth);
- *the Sex Discrimination Act 1984* (Cth); and
- *the Australian Human Rights Commission Act 1986* (Cth) ("**AHRC Act**").

As part of the harmonisation process, grounds previously only available under the AHRC Act concerning discrimination in employment (for example: religion, political opinion, industrial activity and social origin), will also be incorporated into the unlawful discrimination regime. However, despite Australia's International Labour Organisation obligations, discrimination on the ground of criminal record will not be included in the unlawful discrimination regime. Instead, consideration will be given to whether there are more appropriate models to deal with this ground, with amendments to privacy and/or spent conviction schemes flagged as possible alternatives.

In addition to this, the Bill seeks to align protection against discrimination to the highest current standard found in the *Racial Discrimination Act 1975* (Cth) – namely that discrimination will be unlawful in connection with any area of public life. This has the advantage of ensuring that there is consistency regardless of the type of discrimination being alleged.

Another change aimed at simplifying the current anti-discrimination regime, is the streamlining of exceptions and exemptions, and the introduction of a general exemption for "justifiable" conduct (that is, conduct done in good faith for a legitimate aim, in a manner proportionate to that aim). The effects of this additional exemption on employers remain to be seen; however, it will no doubt be interesting to watch the case law developing around this new exemption if the bill is successfully passed in its current form.

One further change has been to the default position of the parties as regards to the costs of litigating anti-discrimination matters. Under the Bill, each party will bear their own costs rather than the current practice of costs following the event. Although this may have the effect of encouraging individuals who have genuinely been discriminated against to come forward and take action, it may result in employers being left out of pocket in terms of time and money if they are required to defend a discrimination claim in court.

It should be noted the Bill does not propose any changes to the interaction between the *Fair Work Act 2009* (Cth) ("**FW Act**") and anti-discrimination legislation, so individuals will still be able to commence actions under either regime. There are also no proposed changes to time limits for making complaints to the Commission (12 months of alleged conduct) or making applications to the Court (within 60 days of receipt of closure of their complaint by the Commission).

Changes to the complaint process

What is likely to be the most contentious change proposed by the Bill is the move to streamline the complaint process by:

- shifting the burden of proof from the complainant to the respondent – similar to the onus borne by employers in general protections claims under the FW Act; and
- changing the default costs position, requiring each party to a court dispute to bear its own costs (although the court will still retain the discretion to award costs).

Under current anti-discrimination law, the burden of proof for direct discrimination complaints before a Court lies with the complainant. Under clause 124 of the Bill, the onus of proof will shift once the complainant has established a *prima facie* case. It will be the respondent who is required to establish a non-discriminatory reason for the action, to show that the conduct is justifiable or that another exception applies to them.

What is also notable is that the complainant will not be required to disprove the application of any defences or exceptions. The rationale for this proposed change is that the respondent will generally be the party best placed to know, and have access to evidence to prove, the reason for the alleged discriminatory conduct. The result is that in the absence of an adequate explanation by the respondent, if a complainant has provided facts from which the Court could conclude that discrimination has occurred, then that complaint must be upheld.

Implications for employers

In light of these proposed shifts in the legislative regime, the Federal Government has acknowledged that employers are likely to incur additional costs associated with reviewing and updating their current workplace policies to ensure legal compliance, as well as costs incurred in training employees on the changes.

Concerns have also been expressed that the reverse onus of proof combined with the change in the default costs position for litigants may see an increase in the number of out of court settlements and payment of "go away" money by employers, so as to avoid the costs of litigation since it is likely that they may no longer be able to recoup their costs even if they "win" the case.

Going forward

With the Bill having now been referred to the Senate Committee on 21 November 2012, it is likely that consultation on the Bill will occur during between now and early 2013. A report from the Senate Committee can likely be expected in mid-February 2013.

PCS recognises that these proposed changes will be of considerable importance to our clients and given our expertise in this area welcomes you to contact us if you require assistance in compiling a submission in response to the exposure draft. If you are interested in participating in this process please contact Margaret Chan on (02) 8094 3116 or margaret.chan@peopleculture.com.au.

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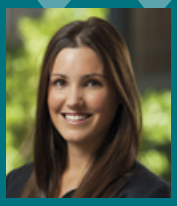

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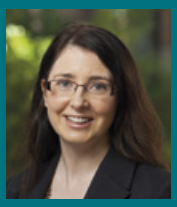

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