

Anti-Bullying

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LAWYERS

WHAT IS WORKPLACE BULLYING

Definition of bullying

Workplace bullying occurs when:

- an individual or group of individuals repeatedly behaves unreasonably towards a worker or a group of workers at work,

AND

- the behaviour creates a risk to health and safety.

Reasonable management action conducted in a reasonable manner does not constitute workplace bullying.

MAKING AN APPLICATION

A worker who reasonably believes that he or she has been bullied at work may apply to the Commission for an order to stop bullying.

There is no timeframe for a worker lodging an application for an order to stop bullying.

Making an application to the Commission for an order to stop bullying is a workplace right protected under the general protections provisions of the Fair Work Act.

The Applicant will need to have a subjective belief that he or she has been bullied and that belief must be reasonable (objective test).

EXAMPLES OF BULLYING

Based on cases heard in other jurisdictions, the following behaviours could be considered as bullying:

- aggressive and intimidating conduct
- belittling or humiliating comments
- victimisation
- spreading malicious rumours
- practical jokes or initiation
- exclusion from work-related events, and
- unreasonable work expectations.

Under the anti-bullying laws proof of actual harm to health and safety is not necessary provided that a risk to health and safety created by bullying behaviour is demonstrated.

WHO IS COVERED BY WORKPLACE BULLYING LAWS?

A person will be covered by the anti-bullying laws, and therefore eligible to make an application, if they:

- are a worker (as defined in the Work Health and Safety Act 2011 (Cth))
- are not a member of the Defence Force, and
- work in a constitutionally-covered business.

DEFINITION OF 'WORKER'

The Work Health and Safety Act 2011 (Cth) (WHS Act) states that a worker is a person who carries out work in any capacity for a person conducting a business or undertaking, including any of the following:

- an employee (e.g. teachers, grounds staff)
- a contractor or subcontractor (e.g. electrician/plumber)
- an employee of a contractor or subcontractor (e.g. security personnel)
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking
- an outworker
- an apprentice or trainee
- a student gaining work experience
- a volunteer—except a person volunteering with a wholly 'volunteer association' with no employees (whether incorporated or not). (e.g. volunteer in canteen treated poorly by a member of staff)

Others are also deemed to be workers including Australian Federal Police members (including the Commissioner and Deputy Commissioner) and Commonwealth statutory office holders.

DEFINITION OF 'CONSTITUTIONALLY-COVERED BUSINESS'

A constitutionally-covered business is a person conducting a business or undertaking (PCBU), conducted principally in a Territory or Commonwealth place, or where the person conducting the business or undertaking is:

- a constitutional corporation
- the Commonwealth
- a Commonwealth Authority, or
- a body corporate incorporated in a Territory.

Businesses are usually enterprises operated with the aim of making a profit, and 'have a degree of organisation, system and continuity'.

Undertakings usually have 'elements of organisation, systems and possibly continuity, but are usually not profit-making or commercial in nature'.

WHAT IS A PERSON CONDUCTING A BUSINESS OR UNDERTAKING?

The term *person conducting a business or undertaking* or PCBU refers to the legal entity running the business or undertaking, including incorporated entities, sole traders, partners of a partnership and certain senior 'officers' of an unincorporated association.

However, for the purposes of the anti-bullying provisions, a worker must be working in a constitutionally covered business to be eligible to make an application. This means that not all PCBU's are covered by these provisions.

WHAT IS A CONSTITUTIONAL CORPORATION?

The Fair Work Act defines constitutional corporations as 'a corporation to which paragraph 51(xx) of the Constitution applies'.

The Australian Constitution defines constitutional corporations as 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.

WHEN IS A WORKER BULLIED AT WORK?

A worker is bullied at work if, while the worker is at work in a constitutionally-covered business, another individual, or group of individuals, repeatedly behaves unreasonably towards the worker, and that behaviour creates a risk to health and safety.

REPEATED UNREASONABLE BEHAVIOUR

'Repeated behaviour' refers to the persistent nature of the behaviour and can refer to a range of behaviours over time.

'Unreasonable behaviour' is behaviour that a reasonable person, having regard to the circumstances, may see as unreasonable (in other words it is an objective test). For example, behaviour that is victimising, humiliating, intimidating or threatening.

There is no specific number of incidents required for the behaviour to be considered 'repeated', nor does the same specific kind of behaviour have to be repeated.

RISK TO HEALTH AND SAFETY

A risk to health and safety means the possibility of danger to health and safety, and is not confined to actual danger to health and safety. The ordinary meaning of 'risk' is exposure to the chance of injury or loss.

The bullying behaviour must create the risk to health and safety. Therefore there must be a causal link between the behaviour and the risk. Cases on causation in other contexts suggest that the behaviour does not have to be the only cause of the risk, provided that it was a substantial cause of the risk viewed in a common sense and practical way.

*Reasonable management action carried out in a reasonable manner is **NOT** bullying*

WHAT DOES 'AT WORK' MEAN?

For a worker to be covered by the Commission's anti-workplace bullying laws, the alleged bullying behaviour must occur while the worker is 'at work'. "At work" is not defined.

For the worker to be considered to be 'at work', the alleged bullying may not necessarily have to occur while the worker is actively engaged in work. The phrase has temporal connotations, and applies equally to all kinds of work, and includes entering, moving about and leaving a workplace. It is a broader phrase than "at the employer's place of work".

RISK OF CONTINUED BULLYING

For the Commission to be able to make orders to stop bullying, it must be satisfied not only that a worker has been bullied at work by an individual or a group of individuals, but **also** that there is a risk that the worker will continue to be bullied at work by that individual or group of individuals.

Applying the dictionary definition, risk means exposure to the hazard or chance of continued bullying. Relevant considerations will be whether the worker is still working with the individual or group of individuals, and action that may have been taken by the PCBU or a work health and safety regulator to deal with the behaviour.

WHAT DOES 'REASONABLE MANAGEMENT ACTION CARRIED OUT IN A REASONABLE MANNER' MEAN?

Behaviour will not be considered bullying if it is reasonable management action carried out in a reasonable manner (a jurisdictional issue).

This exclusion is comprised of three elements:

- the behaviour must be management action
- it must be reasonable for the management action to be taken, and
- the management action must be carried out in a manner that is reasonable.

WHAT IS MANAGEMENT ACTION?

The following are examples of what may constitute management action:

- Performance appraisals
- Ongoing meetings to address underperformance
- Counselling or disciplining a worker for misconduct
- Modifying a worker's duties including by transferring or re-deploying the worker
- Investigating alleged misconduct
- Denying a worker a benefit in relation to their employment
- Refusing an employee permission to return to work due to a medical condition

An informal, spontaneous conversation between a manager and a worker may not be considered management action, even if issues such as those listed above are raised.

WHEN IS MANAGEMENT ACTION REASONABLE?

Determining whether management action is reasonable requires an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time, including:

- the circumstances that led to and created the need for the management action to be taken
- the circumstances while the management action was being taken, and
- the consequences that flowed from the management action.

The test is whether the management action was reasonable, not whether it could have been undertaken in a manner that was 'more reasonable' or 'more acceptable'. In general:

- management actions do not need to be perfect or ideal to be considered reasonable
- a course of action may still be 'reasonable action' even if particular steps are not
- any 'unreasonableness' must arise from the actual management action in question, rather than the worker's perception of it, and
- consideration may be given as to whether the management action involved a significant departure from established policies or procedures, and if so, whether the departure was reasonable in the circumstances.

At the very least, to be considered reasonable, the action must be lawful and must not be 'irrational, absurd or ridiculous'.

WHAT IS A REASONABLE MANNER?

The management action must be carried out in a 'reasonable manner'.

As above, what is 'reasonable' is a question of fact and the test is an objective one.

Whether the management action was taken in a reasonable manner will depend on the action, the facts and circumstances giving rise to the requirement for action, the way in which the action impacts upon the worker and the circumstances in which the action was implemented and any other relevant matters.

This may include consideration of, for example:

- the particular circumstances of the individual involved
- whether anything should have prompted a simple inquiry to uncover further circumstances
- whether established policies or procedures were followed, and
- whether any investigations were carried out in a timely manner.

WHAT ARE THE OUTCOMES?

Orders to stop bullying

The Commission can make any order it considers appropriate (other than an order requiring a financial payment) to prevent a worker from being bullied at work by an individual or group of individuals.

Before an order can be made, a worker must have made an application for an order to stop bullying and the Commission must be satisfied that:

- the worker has been bullied at work by an individual or group of individuals, and
- there is a risk that the worker will continue to be bullied at work by the individual or group.

What can be ordered

The power of the Commission to grant an order is limited to preventing the worker from being bullied at work, and the focus is on resolving the matter and enabling normal working relationships to resume.

The Commission has a very broad discretion to make any orders it considers appropriate (other than those requiring a financial payment).

The range of orders that the Commission may make (as contemplated by the Explanatory Memorandum) include orders requiring:

- the individuals or group to stop the specified behaviour
- regular monitoring of behaviours by an employer
- compliance with an employer's anti-bullying policy
- the provision of information and additional support and training to workers, and
- a review of the employer's workplace bullying policy.

Orders will not necessarily be limited or apply only to the employer, but could also apply to others, such as co-workers and visitors to the workplace. Orders could be based on behaviour such as threats made outside the workplace, if the threats relate to work.

WHAT ARE THE OUTCOMES? (cont.)

What cannot be ordered

The Commission cannot order reinstatement or the payment of compensation or a pecuniary amount.

If the worker who makes the application is no longer working at the work site where the bullying conduct occurred, and there is no longer a risk that the worker who made the application will be bullied, the Commission will not be able to make an order under the anti-bullying provisions.

CONTRAVENING AN ORDER OF THE COMMISSION

A person to whom an order to stop bullying applies must not contravene a term of the order.

The requirement to abide by an order to stop bullying is a civil remedy provision.

A civil remedy provision is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

An application regarding a breach of a civil remedy provision is made to the Federal Court, the Federal Circuit Court or an eligible State or Territory court. This application may be made by the person affected by the contravention, an industrial association or a Fair Work inspector.

An application regarding a breach of a civil remedy provision must be made within 6 years of the alleged contravention

WHEN ARE COSTS ORDERED?

Section 611 of the Fair Work Act sets out the general provision for when the Commission may order costs. The Commission may order a person to pay the other party's costs if it is satisfied:

- that the person's application or response to an application was made **vexatiously** or **without reasonable cause**, or
- it should have been reasonably apparent that the person's application or response to an application had **no reasonable prospect of success**.

The power to award costs is discretionary.

ACKNOWLEDGMENT

Fair Work Commission Benchbook on Anti-Bullying