



AUSTRALIAN BUSINESS
Lawyers & Advisors

WORKPLACE BULLYING AND PERFORMANCE MANAGEMENT

Presented by Louise Hogg



Employment Law Specialist Firm of the Year

Bullying

What is bullying?



An **individual** or a group of individuals



A **worker** or a group of workers **at work**

Repeatedly behaves **unreasonably** towards



That behaviour creates a **risk** to health and safety

What does “at work” mean?

- To be bullied “at work”, a worker does not necessarily need to be at their ordinary place of work or actively engaged in work
- There should be a temporal connection between the person’s work and the alleged bullying conduct
- In *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* the Full Bench of the Fair Work Commission held:

“The use of social media to engage in bullying behaviour creates particular challenges. Conceptually there is little doubt that using social media to repeatedly behave unreasonably towards a worker constitutes bullying behaviour. But how does the definition of ‘bullied at work’ apply to such behaviour?... The relevant behaviour is not limited to the point in time when the comments are first posted on Facebook. The behaviour continues for as long as the comments remain on Facebook. It follows that the worker need not be ‘at work’ at the time the comments are posted, it would suffice if they accessed the comments later while ‘at work’”.

What does “repeatedly” mean?

- Unreasonable behaviour or conduct which is persistent in nature
- More than one occurrence
- A particular type of behaviour does not need to be repeated. Instead, there could be a range of behaviours over a period of time which, when viewed collectively, constitute repeated unreasonable behaviour

Who is a worker?

The definition of “worker” is drawn from the Work Health and Safety Act 2011 (Cth). A worker is a person who carries out work in any capacity for a person conducting a business or undertaking (PCBU), including any of the following:

1. An employee
2. A contractor or subcontractor
3. An employee of a contractor or subcontractor
4. An employee of a labour hire company that has been assigned to work for a PCBU
5. An apprentice or trainee

Bullying – some examples

Psychological bullying is:

- Verbal abuse: name calling, teasing, taunts
- Practical jokes
- Exclusion/isolation
- Intimidation
- Allocation of tasks above/below ability
- Unreasonable criticism
- Impossible deadlines
- Deliberately changing work rosters to cause difficulty
- Withholding information required to perform a task

Physical bullying is:

- Physical contact-pushing, shoving, grabbing etc
- Initiation rites

Bullying isn't

- Reasonable management of performance
- Counselling and discipline
- Reasonable supervision
- Poor management
- A single incident

Recent decisions of the Fair Work Commission

- Performance improvement plan for “star” employee was reasonable management action - Mr Miroslav Blagojevic v AGL Macquarie Pty Ltd; Mitchell Seears [2018] FWCFB 4174
- Bullied at work and “stop bullying” order issued by the Fair Work Commission – Ms Watt [2018] FWC 1455

Fair Work Commission Statistics

Timeframe	No. of FWC Applications	No. made by apprentice/ trainee	Allegations against manager(s)	Made in Qld
Jan-March 2018	186	1	144	51
Oct-Dec 2017	149	0	116	35
Jul-Sept 2017	172	0	138	43
Apr-Jun 2017	168	0	146	34

WorkCover Queensland Statistics

From 1 July 2016 to 30 June 2017 there were:

- 98,581 new claims
- 4,344 of the new claims were psychological / psychiatric claims
- 40.5% of psychological / psychiatric claims were lodged by males and 59.5% were lodged by females
- 15.7% of psychological / psychiatric claims were lodged by workers under the age of 30
- Average cost of a psychological / psychiatric claim is \$50,556.00

A blurred background image of a business meeting. Several people are seated around a table, looking at documents. One person in the foreground is holding a pen over a document. The scene is dimly lit, suggesting an indoor office environment.

Performance Management

Why do people underperform

- Unclear direction
- A lack of training
- Lack of information provided to the employee
- What the employee sees as a lack of 'fairness' in the way the management deals with them
- A 'personality clash'
- Boredom
- Overwork and tension
- Lack of motivation
- Workplace culture

Risks of underperformance

- Poor performance becomes the 'standard'
- Management & supervision can be undermined
- Can lead to stress, sickness, absenteeism (LTIs)
- Can lead to staff turnover
- Reputational damage to organisation

Benefits of early intervention

- Any underlying issues contributing to the worker's poor performance can be identified and addressed, both individually and across the organisation (if applicable)
- Create culture of accountability
- Positive impact on employee and their commitment to the organisation
- Staff retention
- Consistency in how workers are treated and managed
- Minimises the risk of claims relating to termination of employment



Types of performance management and monitoring

- Ad-hoc feedback
- Reactive performance management for general underperformance
- Reactive performance management arising from a specific serious incident

Performance management cycle



Effective performance management

- Proper training of managers
- Clearly identify why the employee is underperforming
- Identify how the employee can improve their performance
- Regularly monitor performance and set realistic timeframes for improvement
- Provide feedback and ensure that performance goals are being met

Dealing with difficult situations

Difficult situations may include:

- **Disagreements:** Listen, resist the temptation to carry out a battle of words – there will be no winners as a result – and try to pinpoint the reason for the disagreement and find a solution but stay on the high ground
- **Hostility:** is usually a form of defence, so be positive, use evidence of behavior rather than feelings and be prepared to take a break if necessary
- **Emotional reactions:** these can sometimes clear the air, so be positive, turn the conversation around but be prepared to offer a break if necessary
- **Silence:** try not to make assumptions, resist the temptation to fill the silence, gently probe and ask more questions rather than giving opinions, ask the employee if they have more to say or if their silence means agreement; summarise the discussion and ask if the summary is fair
- **Unrealistic expectations:** explain why the expectations are unrealistic, offer suggestions for different outcomes, try not to discourage, demotivate or make promises that can't be fulfilled, instead make sure the individual knows what has to be done for performance to improve

Risks associated with poor performance management

Legal risks

- Workers' compensation claims
- Bullying claims
- Unfair dismissal claims

Organisational risks

- Low morale
- Staff retention issues



A photograph of a crowd of people at a presentation or conference. In the center, a hand is raised high, palm facing forward. The background is blurred, showing other people and a large screen displaying text. A semi-transparent dark grey box is overlaid on the image, containing the word "Questions?".

Questions?

Contact Us



Louise Hogg

Associate Director – Brisbane
louise.hogg@ablawyers.com.au
1300 565 846

■ **SYDNEY**
10/140 Arthur St,
North Sydney NSW 2060

■ **NEWCASTLE**
Suite 402, Level 4
Watt St Commercial Centre
Newcastle NSW 2300

■ **BRISBANE**
10 Felix St
Brisbane QLD 4000