It Is a Cultural Thing

Can Employers Be Held Liable for a Poor Workplace Culture?

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Most businesses would claim to have a positive workplace culture (or be aspiring to have one), although this may not be borne out in reality. If a poor workplace culture exists, is this solely the employer's responsibility? More to the point, can an employer or Person Conducting a Business or Undertaking (PCBU) in a work health and safety context be held liable if a poor workplace culture impacts on workers' health? Based on recent action taken by safety regulators, the answer is yes.

In 2013, Jessica Wilby started what she told friends was her "dream job" at the Coroners Court of Victoria. In February 2018, Jessica took on the role of acting senior legal counsel, as well as continuing in her substantive role. A month later, during which Jessica experienced an excessive workload (essentially performing three roles), long hours and what was described as a "toxic" workplace culture, Jessica suffered a mental breakdown at work. She returned to work the next day and performed the role for another five weeks, until her condition deteriorated and she was forced to take sick leave. In September 2018, seven months after she had taken on the acting senior legal counsel role, Jessica took her own life.

Five years later, in October 2023, Jessica's employer, Court Services Victoria (CSV), pleaded guilty to breaching the Victorian Occupational Health and Safety Act 2004 (OHS Act) by failing to provide and maintain a safe workplace for Jessica within the Coroners Court of Victoria, which contributed to her suicide. CSV was fined AU$379,157, plus AU$13,863 in costs.

The court heard that several complaints had been made by workers at the Coroners Court over the period between December 2015 and September 2018 in relation to matters including bullying, favouritism, verbal abuse, derogatory comments, intimidation, invasions of privacy and perceived threats to career progression. The toxic nature of the workplace was also reflected in the number of staff who had taken leave due to work-related stress.

Notably, a cultural and engagement survey conducted by external consultants in 2015 identified the Coroners Court as having a poor workplace culture, low morale and unaddressed inappropriate behaviour. Despite this, very little had been done by CSV to improve the culture by 2018, with some of Jessica's managers attributing the stress she was going through and the obvious impact it was having on her health to "problems at home".

In another case in September this year, WorkSafe Victoria charged the Victorian Building Authority (VBA) with breaching its duty under the OHS Act to provide and maintain a safe workplace, in addition to its duty not to recklessly endanger persons at the workplace, following the suicide of a VBA inspector. WorkSafe alleged that VBA refused to transfer the inspector to another supervisor and continued to pursue redundancy and performance processes against him when it knew this may place the inspector at risk of psychological injury.

Under the OHS Act, reckless endangerment is one of the most serious offences (second to workplace manslaughter) and carries a maximum fine of just over AU$3.6 million as applicable at the time of the alleged offence.

Similar to the Victorian Coroners Court, this has come at a time when VBA is reported to have an "appalling" workplace culture and unsafe practices, to the point where VBA's board has commissioned an independent inquiry into allegations of bullying and workplace culture issues within the organisation. The WorkSafe proceedings are ongoing.

So, to what extent can businesses and organisations be found liable for issues arising from a toxic workplace culture? There is little doubt that workplace culture and health and safety in the workplace are intrinsically linked, with the increasing emphasis on the need to address "psychosocial hazards" that can pose a risk to workers' mental health now incorporated in work health and safety regulations and codes of practice in a number of jurisdictions. Additionally, it is worth noting that several of the psychosocial hazards that are identified in the codes of practice – such as bullying and harassment, lack of organisational justice, high job demands, lack of support, inadequate reward and recognition and workplace conflict – are factors that are commonly seen in, or can contribute to, a poor workplace culture.

This means that PCBUs are responsible, under applicable work health and safety legislation, for identifying factors in the workplace that may contribute to a toxic workplace culture (which are also psychosocial hazards in their own right) and implementing control measures to eliminate or minimise those hazards so far as is reasonably practicable. As set out in most jurisdictions' work health and safety regulations, this requires the application of a risk assessment approach in the same way that would be applied in relation to physical hazards at work. Further, if a PCBU allows the culture of its workplace to deteriorate to the point where it becomes toxic, and does not take steps to address this, it can potentially be held liable for any psychological injury a worker suffers as a result, as reflected in the cases mentioned above.

So, what does this mean for PCBUs going forward? A poor workplace culture cannot be turned around overnight, but there is general consensus that a positive workplace culture starts at the top. Management can set an example by demonstrating that a positive, inclusive and safe workplace is prioritised and valued. Getting feedback and input from the workforce on concerns they may have at work (even if that must be done anonymously) is also a good start so that a plan can be developed on ways in which issues (and potential risks) arising from a poor workplace culture can be addressed.

Importantly, PCBUs should be sensitive to workers exhibiting high levels of stress at work. If any workers are showing signs of being affected by factors at work to the point where there may be a potential risk to their mental health, PCBUs may need to step in to offer additional support. For example, if a worker's stress is related to their workload or excessive hours, this may involve redistributing work or taking on additional staff to assist.

One thing is clear – having a positive workplace culture is not just an aspirational goal. Businesses and organisations need to be aware of and monitor the work environment to ensure that the prevailing culture is not potentially creating a serious risk to workers' mental and physical wellbeing. This is not only necessary as part of their duty of care under workplace health and safety law – in some cases, it could even save a life.

Our Labour & Employment team can assist and advise on managing psychosocial hazards in the workplace and potential risks related to workplace culture.

Authors

Kim Hodge
Partner, Perth
T +61 8 9429 7406
E kim.hodge@squirepb.com

Steve Bowler
Director, Perth
T +61 8 9429 7566
E steve.bowler@squirepb.com