SQUIRE PATTON BOGGS

WORKPLACE VIEW

February 2015

Help! I've been bullied – but have I been bullied "at work"?

By Emily Tan, Associate

It is no secret that workplace bullying is rife – the cost to Australian business is reported to run into the billions every year.

However, there is now a glimmer of hope that the price tag might stay in check, with the Full Bench of the Fair Work Commission (**FWC**) in *Bowker & Ors v DP World Melbourne Limited & Ors* [2014] FWCFB 9227 clarifying the meaning of "at work" in the context of the anti-bullying provisions of the *Fair Work Act* 2009 (**FW Act**).

What Happened?

In November 2014 three workers from DP Word in Melbourne (**Applicants**) applied to the FWC for anti-bullying orders against their employer and the Maritime Union of Australia (**MUA**) (**Respondents**).

The Applicants sought a finding from the FWC that they had been subjected to workplace bullying after co-workers (who were also members of the MUA) had defecated in their uniforms, made threats, excluded the Applicants from union activities, and wrote offensive and insulting Facebook posts. They also alleged that the MUA had failed to take action to prevent two of the Applicants from being called "lagger" and being ostracised in the workplace.

The Debate

Under the FW Act the FWC has the power to make a "stop-bullying" order if it is satisfied that a worker has been "bullied at work". This was the only aspect of the case in contention between the parties.

The Respondents argued that the claim should be struck out because:

- some conduct had occurred outside the physical workplace;
- when the conduct occurred, the Applicants were not performing work activities/labour (regardless of the time of day and location); and
- the anti-bullying provisions of the FW Act specifically use the language "at work" and "while the worker is at work" as opposed to broader language such as "in the person's employment".

Taking a broader approach, the Applicants argued that a person is bullied "at work" if the alleged conduct has a substantial connection to work (i.e. if it is within the scope of employment or if the employer could initiate disciplinary action in response to the conduct).

What Was Decided?

The Full Bench preferred the Respondents' narrower interpretation of "at work" and commented that those specific words were intended to confine the operation of the substantive anti-bullying provisions. In particular, the Full Bench held that the phrase "at work":

- encompasses circumstances where the bullying conduct (i.e. the repeated unreasonable behaviour) occurs **when the worker is "performing work";**
- is **not confined to the physical workplace, time or day**; and
- would extend to circumstances such as when a worker is on an **authorised meal break at the workplace** and, therefore, not physically working**.**

#Whataboutsocialmedia?

The FWC recognised that social media may create difficulties when interpreting the meaning of "at work". However, it noted that a worker does not have to be "at work" at the time offending social media posts are made. It is enough if the worker accesses the comments while at work as outlined in the examples above.

What Does This Mean for Employers?

The narrower approach taken by the FWC is likely to be a welcome outcome for employers.

However, employers should still be mindful and proactive in managing and preventing workplace bullying by ensuring they have well drafted policies in place and provide effective training to all staff.

Employer Reminder

When is the last time you checked the terms of your employment contract's reference to workplace policies? Or the procedural terms of such policies? Or both? The recent case of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177 is a good reminder to do so because, in some circumstances, workplace policies will be treated as part of an employment contract.

In *Romero*, the Full Federal Court held that the shipping company's Workplace Harassment and Discrimination Policy was incorporated into the employment contract and, by failing to properly investigate a harassment complaint in accordance with the policy, the company breached the contract and was liable to damages.

The court relied on several factors, including that the policy was expressly referred to in the contract and that the employee had been frequently reminded of the policy and its terms during her employment.

Notably, the employee's induction training focused on the policy and required her to demonstrate familiarity with its contents. This was enough to show that there was an expectation to follow the terms of the policy.

The company's breach arose when it incorrectly treated an email from the employee as a formal complaint about her captain, which triggered a formal investigation and bypassed her right to opt for informal options and advice. Under the policy, the formal complaint mechanism was intended to be the final option after all other options had failed and, importantly, one that only the employee could trigger.

The takeaway message from this case is that employers must be cautious not just in how they draft their contracts and other policy documents, but also in how they induct and train their staff. When dealing with complaints, employers should be aware of all their obligations, which might not be found solely in employment contracts, but in external documents such as company policies and guidelines.

Did You Know?

An employer's decision to dismiss an employee who has a medical condition is likely to be subjected to greater scrutiny. It is therefore critical that the reasons motivating the employer's decision are unrelated to the medical condition.

In *Victoria v Grant* [2014] FCAFC 184, a solicitor employed by the Office of Public Prosecutions (**OPP**) was terminated due to misconduct that warranted disciplinary action including being late for work, failing to brief counsel before an upcoming trial, and disobeying instructions by attending a proceeding.

He brought a claim under s 351(1) of the *Fair Work Act* 2009 (Cth) on the basis that the OPP had taken adverse action against him because of his mental disability. The OPP argued that the dismissal was unrelated to his depression and was in fact based on his failure to follow lawful directions.

The employee's claim was upheld at first instance, but overturned on appeal to the Federal Court, which found that there was no connection between his mental illness and the four acts of misconduct that were the reason for his dismissal.

Client Corner

Jacob R. Hays
Managing Director
SoftwareONE, Australia

What occupation would you have taken up if you had not done your current role?

Lawyer. I moved into sales after graduating from law school in the US.

What has been your best professional moment?

I couldn't think of anything that didn't sound like I was a megalomaniac.

As business becomes even more global, what employee issues are becoming increasingly relevant in your industry?

As an organization that now has 2,000 employees in 82 countries, we face numerous issues every day—maternity leave, 457 visas, relocation requests, holiday leave, etc. Because of the different regulations per country, it's extremely difficult to keep everything in order.

What do you do for fun on the weekends?

I have two little girls (five and two) and they keep me busy with trips to the beach and pool—and tea parties with the princesses. My neighbour is an avid surf skier and he's been taking me out once per week. I'm trying to learn to surf too, but I'm not very good.

What are two rules you try to live by?

Integrity and be humble.

Legislation Update

Legislative Instrument	Status	Proposed Changes
Work Health and Safety Bill 2014 (WA) (**WHS Bill**)	Draft WHS Bill closed for public comment on 30 January. Currently, WA and Victoria are the only two states that have not adopted this bill. Victoria has stated that it has no intention of introducing the bill in the near future.	Contains the key provisions of the national WHS model developed by SafeWork Australia which aims to harmonise state laws. Key changes include: • Requiring officers to exercise due diligence and take active steps to ensure compliance • Increasing OHS penalties • Expanding the concept of a 'primary duty holder' from an Employer to 'Person Conducting a Business or Undertaking'.
Fair Work Amendment (Bargaining Processes) Bill 2014 (Cth)	House of Representatives – second reading speech delivered on 27 November 2014.	Introduces a requirement that productivity improvements at the workplace must be discussed before an enterprise agreement can be approved by the FWC. Requires the FWC to have regard to a number of prescribed factors in deciding whether an action ballot is warranted in an industrial action, principally the impact it would have on workplace productivity. If this threshold is not met, there is no entitlement to a ballot.

Events Update

Telesis Events – Employment Law 2015

5 March 2015, Rydges Hotel Perth

Squire Patton Boggs Speaker

Felicity Clarke (of counsel) will present on 'Addressing mental health and injury in the workplace: rights and responsibilities: Your legal rights and obligations made clear.'

Please email claire.tinker@telesisevents.com.au to register for this event.

IES Conferences – New IR Laws for HR Managers Conference

12-13 March 2015, Novotel Langley, 221 Adelaide Terrace, Perth

Felicity Clarke (of counsel) will speak on 'Your responsibilities to ill and injured workers – Best practice case study' (9:05 a.m., day 2)

Dominique Hartfield (Senior Associate) will speak on 'Restrictive Covenants and Restraints of Trade – Case Law and Emerging Issues' (2 p.m., day 2)

To register for this event, please contact Debra Mundy, Conference Manager, IES Conferences Australia on (02) 9425 7600

Contacts

Kylie Groves
Partner
T +61 8 9429 7475
E kylie.groves@squirepb.com

Bruno Di Girolami
Partner
T +61 8 9429 7644
E bruno.digirolami@squirepb.com

Felicity Clarke (Editor)
Of Counsel
T +61 8 9429 7684
E felicity.clarke@squirepb.com

Dominique Hartfield (Editor)
Senior Associate
T +61 8 9429 7500
E dominique.hartfield@squirepb.com

Anna M. Elliott
Of Counsel
T +61 2 8248 7804
E anna.elliott@squirepb.com