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M&M at work

When the Office becomes a School Yard:
The rise and rise of bullying in the Workplace

by Sam Kane

Most employees have at some stage in their careers experienced a form of workplace bullying or "harassment", as it is sometimes called. Whilst the concept is not a new one, the prevalence of workplace bullying and the consequential effects on workers is increasing at an alarming rate and drawing increased attention from courts and government. In March 2002, the Queensland Government's Taskforce on Workplace Bullying handed down its report, which aims to assist in creating strategies to address the growing problem of workplace harassment in Queensland.

In this article, we provide an overview of what workplace bullying is, what its effects can be and what remedies are available to an employee who has been subjected to workplace bullying from an employer, supervisor or co-worker. It is a subject which employers can no longer afford to ignore.

What is Workplace Bullying?

Workplace harassment refers to a vast array of behaviours, both open and hidden. The behaviour may range from physical violence to subjecting employees to unjustified criticism and ridicule, hostility, loud or abusive language, humiliation, allocation of menial tasks, withholding of information and threats of dismissal or other disciplinary action. Often, there is an imbalance of power between the bully and the victim. The Taskforce report defines workplace harassment as:

"repeated behaviour, other than behaviour that is sexual harassment, that:

1. is directed at an individual worker or group of workers; and
2. is offensive, intimidating, humiliating or threatening; and
3. is unwelcome and unsolicited; and
4. a reasonable person would consider it to be offensive, intimidating, humiliating or threatening for the individual worker or group of workers."

Workplace harassment should be distinguished from the concept of unlawful discrimination, which is prohibited by anti-discrimination laws at both a State and Federal level. Unlawful discrimination is defined generally as less favourable treatment on the basis of one of the attributes listed under anti-discrimination legislation, such as age, race, gender, disability or pregnancy.

What are the effects of Workplace Bullying?

The effect of workplace bullying on the victim can be devastating and may include the development of severe stress related medical conditions, such as depression and anxiety, or loss of employment, whether by dismissal or resignation.

The costs to employers can likewise be enormous, including the costs of defending legal proceedings (such as downtime of employees involved and legal costs), payment of fines or damages awards or the cost of high staff turnover. The Taskforce estimates the cost to the Australian economy with workplace harassment as between $6 and $13 billion per annum.

What remedies are available to an employee subjected to Workplace Bullying?

To date, there is no law in existence in Queensland which specifically prohibits "workplace bullying" or harassment as such. There are, however, a number of remedies available to employees affected within various jurisdictions, for example:

Discrimination/Sexual Harassment Complaint

If harassment constitutes sexual harassment or if unlawful discrimination has occurred, a complaint may be made to the Anti-Discrimination Commission Queensland under the *Anti-Discrimination Act Qld 1991* or to the Federal Human Rights and Equal Opportunity Commission. Successful complainants may be entitled to compensation for pain, suffering and humiliation, past and future economic loss, out of pocket losses such as medical expenses and legal fees. The employer is usually held to be responsible for the unlawful actions of its employees.

Unfair Dismissal

If an employee is dismissed as a consequence of workplace harassment, an application for reinstatement may be made to the State or Federal Industrial Relations Commission. If the employee felt that he or she had no other option but to resign as a consequence of the harassment, an employee may be able to argue that they were constructively dismissed from their employment, and the dismissal was unfair.

Civil Claims

An employee may seek damages in the State courts against their employer on a range of civil claims, often as a consequence of a personal injury, including negligence in failing to provide them with a safe place of work, breach of contract of employment, or breach of workplace health and safety legislation. Extensive damages have been awarded in some cases for pain and suffering and economic loss suffered by the employee.

Prosecution under Workplace Health and Safety laws

An employee may make a complaint under the *Workplace Health and Safety Act 1995 (Qld)* alleging that the employer has failed to provide a safe place of work, which may result in prosecution of the employer. Whilst the employee may not financially benefit from such a complaint, an employer may face significant fines and legal fees.

WorkCover Claims

If an employee has suffered a psychological injury within the meaning of the *WorkCover Queensland Act 1996* (and the employer is unable to show that the injury occurred

Continued From Page One

as a consequence of "reasonable management action" within the meaning of that Act, an employee may be entitled to WorkCover benefits. An employer's WorkCover premiums may consequently be affected also.

Internal Complaints/Grievance Processes

An employer with a complaints or grievance process for staff to utilise will be required to properly investigate a complaint of workplace harassment strictly in accordance with the terms of its policy. This may result in costs to the employer, including downtime of employees involved in the investigation, costs of obtaining legal or industrial advice, and general disruption or disharmony within the workplace. Employees covered by Awards or industrial agreements are generally protected by dispute or grievance processes provided within the award or agreement, including an entitlement to have the matter conciliated and determined by the Industrial Relations Commission if the matter is not resolved. Government employees are further protected by public sector guidelines and legislation.

The Taskforce has also made recommendations in its report of further legislative reform to protect workers from workplace harassment. These include recommendations to amend the *Industrial Relations Act 1999 (Qld)* to make specific legislative provision in relation to workplace harassment, to give powers to the Industrial Relations Commission to mediate industrial disputes involving such harassment.

Liability for employers

Workplace culture plays a vital role in affecting the prevalence and severity of workplace bullying. No employer can afford to turn a blind eye to the working environment within which staff are required to operate. Staff must be trained properly in relation to appropriate workplace behaviour and supervisors must be taught how to be fair and effective staff managers, and to operate within lawful boundaries. Policies must be developed and implemented in the workplace. The cost to employers and employees of workplace bullying, both financially and emotionally, is great. Employers should take a proactive approach in ensuring that bullies are kept out of their workplace.

Paid Maternity Leave
Will it be delivered?

By Kate Williams.

Reports that Australia's birth rate is falling has put paid maternity leave entitlements back on the agenda. With an increasing number of women opting not to return to work after maternity leave, employers and the government alike are looking at various ways to increase the retention of female staff and decrease turnover costs.

The benefits of paid maternity leave, according to its supporters, include increased productivity and employee loyalty, reduced attrition rates, an earlier return to the workforce and an ability to attract and retain skilled female employees. Westpac Bank reported that its retention rate of female employees increased from 54 % in 1995 to 93% in 2000 as a result of introducing paid maternity leave.

Central to the debate over paid maternity leave are questions of how such an entitlement scheme should be funded and what is a reasonable paid absence from work. There have been numerous models bandied about ranging from government funding to employer funding, with permutations including joint responsibility and a pool financed by an employer's levy.

What concerns small business most about the concept of paid maternity leave is the potential for unintended consequences of such a scheme. What safeguards exist to prevent small business becoming bankrupt due to the astronomical costs of, in effect, employing two people for the same job? What regulations are in place to prevent staff enjoying paid maternity leave, and then deciding not to go back to work?

Employee groups are concerned that forcing a universal paid maternity leave scheme on employers will, in fact, discourage equal opportunity and encourage discrimination.

Both employer and employee groups are cautious that such policies will only hurt the existing schemes in place. They argue that, rather than demand the government legislate paid maternity leave, it should allow employers and employees to negotiate mutually beneficial arrangements.

In Australia, less than one third of working women have access to some form of paid maternity leave. Those who do, tend to be highly skilled, highly paid or in the public service. Those who miss out are likely to be employed in a casual, unskilled or poorly paid position. Australia and America are now the only two industrialised countries who do not universally provide paid maternity leave. More than 120 countries around the world provide for paid maternity leave through the social security system, employer or insurance funded schemes.

It is clear for the first time, the government is seriously considering the benefits of family-friendly policies. So too are companies, who due to the increasingly high standards of conduct the public and shareholders demand from them, are paying more attention to employee issues such as equal opportunity.

The issues are numerous, the debate is fierce and a lot of questions are unanswered. You can be guaranteed this topic will stay hot for a while.

Restraint of Trade Clauses: The Ties that Bind Us

By Joe Carey.

How does an employer protect itself from employees who may leave and set up business in competition with it? What does a prospective employee need to consider when presented with a contract of employment which restricts their ability to work in their trade after termination of their employment? These are important issues that are all too often left unasked by many until it is too late.

Restraint of trade clauses are used in employment contracts to prevent employees from competing against an employer in their industry in the future. These clauses may preclude the worker from working within his or her industry for a certain time period or within a defined geographical limit, or simply from having dealings with the clients of the employer for a limited or unlimited period in future. An employer may also restrain an employee from using confidential information of the business after their employment ceases. We will consider this separate issue in the next issue of M&M at Work.

The question which commonly arises is whether or not these clauses are actually valid and enforceable. Because of their ability to prevent an individual from earning a living in their trade, these clauses are subject to much scrutiny from the courts. There is a legal presumption that these clauses are unenforceable unless the employer is able to show that the restraint is reasonable and is no wider than is necessary to protect the employer's business interests.

It is necessary to examine the particular circumstances of each case to determine whether the clause is reasonable and does, in fact, go no further than is necessary to protect the business interests of the employer. In examining these clauses, the courts will have regard to the nature of the business, the employee's position in the business, the employee's connection with the clients of the business and the time and geographical limits which the employee is prohibited from trading within. If the court believes these limits are longer or wider than is absolutely necessary, the clause will be void, and the employee will not be subject to the restraint of trade.

A recent example of an unacceptable restraint of trade can be observed in the decision of *Double T Radio P/L v Marr (2001)*. In that case, Ms Marr was engaged by a Melbourne radio station in a production position. Her employment contract prevented her from being "*directly or indirectly engaged, concerned or interested in any radio licence area in Melbourne or an overlap radio licence area which encompasses a significant portion of Melbourne, for the period of three months after termination (of employment)*". Ms Marr left her position with her employer and obtained employment with another radio station. While the employer argued Ms Marr would be able to unfairly aid their competitors, the Judge concluded the clause was drafted far too widely to be valid. Although the term was only for three months, there were limited opportunities for her in her position. Consequently, the court ruled the clause was unenforceable.

In drafting restraint of trade clauses, it is important to examine the particular circumstances of the employer-employee relationship, the nature of the business and the client base and to consider what restraint is necessary to protect an employer's interests. While courts will aid employers to protect their reasonable business interests, they will also recognise the worker's right to practise their trade. So the restraint of trade clause is not deemed too wide by the court, employers must take care to ensure that the clause has been properly drafted, that it offers no more than adequate protection and the employee's ability to continue working is not impeded. An employer who erroneously believes that a wide restraint clause will provide better protection for their business may find the clause is invalid and no trade restraint at all is imposed on their employees.

Child Protection in Queensland: Screening of Volunteers

by Sam Kane

M&M at Work has previously reported that the requirement to screen paid employees in "child related employment" in Queensland commenced on 1 May 2001, with the introduction of the *Commission for Children and Young People Act 2000 (Qld)*. The requirement to screen certain volunteers has also now commenced, with effect from 1 May 2002. Employers operating in child related employment, such as schools and sporting clubs, must now ensure that volunteers also are screened in accordance with the Act in order to protect both themselves and the children under their care.

Whilst some exemptions exist in relation to volunteers who are parents of children involved in a school or sporting activity, or for volunteers engaged on a "one off" or sporadic basis, it is better to err on the side of caution and check with the Commission for Children and Young People whether screening is, in fact, required.

Employers should now consider whether, in relation to any existing volunteer (as at May 2002), there is a reasonable suspicion of a criminal history making them unsuitable for child related employment. If so, screening must be conducted immediately. All new volunteers should be asked whether they possess a suitability notice issued by the Commission (stating that they are a suitable person to work with children) and, if not, take immediate steps to apply for such a notice before the volunteer commences. There is no fee payable for screening of volunteers.

Given that serious consequences may follow from failure to screen volunteers, including fines, litigation or harm to a child, it is essential that employers appoint a designated officer who is responsible for ensuring that all relevant employees and volunteers have been screened.

"Don't Come Monday"

When is it ok to summarily dismiss?

By Jason Walsh

In this era of enterprise bargaining, employment contracts and workplace reform, many employers remain confused and unclear about their rights when dismissing an employee. The general perception of many employers is that there exists much bureaucratic "red tape" to cut through when seeking to terminate the employment of one of their workers. Whilst the law certainly takes into consideration the rights and remedies available to those who have been unfairly dismissed, there does exist avenues for an employer to sack their employees "on the spot". This article examines the circumstances in which it is appropriate to dismiss an employee without notice and the ramifications for an employer seeking to exercise such authority.

Summary dismissal is a right vested in an employer to terminate the employment of a worker without giving notice. It is a contractual right, where the employer can treat certain breaches of contract to bring about an end to the employment agreement entered into with their employee.

The right to dismiss an employee summarily will depend upon the facts of each case and the type of conduct engaged in by the employee. A summary dismissal will only be justified if there is a sufficiently serious breach of contract or in situations where an employee indicates they no longer intend to be bound by the employment agreement.

The most common ground upon which an employer can end their employment agreement with an employee without notice is gross misconduct. Gross misconduct embodies a broad spectrum of actions. There is no fixed law as to the degree of misconduct necessary to justify immediate dismissal. However, it is clear that a single act of misconduct will only justify dismissal if it is of a very serious nature, such as assaulting a co-worker, working whilst intoxicated, failure to follow a lawful direction of the employer, or fraud or serious dishonesty.

Except in cases of gross misconduct, dismissal without notice generally cannot be justified unless the misconduct or disobedience was habitual or the kind to cause material loss to the employer. The burden of establishing whether a summary dismissal is proper is on the employer, who must show that the misconduct was of such gravity that their termination of employment was justified in the circumstances.

Even if an employer may establish misconduct warranting immediate termination, unfair dismissal laws require adherence with the principles of natural justice. An employer seeking to dismiss an employee summarily must therefore give the employee a reasonable opportunity to respond to the allegations of misconduct made against them and to defend their actions before dismissing. When the nature of the misconduct is severe (such as theft), the requirement for the employer to prove the misconduct in fact occurred and to afford the employee procedural fairness becomes even greater.

In establishing that a summary dismissal is fair and reasonable, the employer is not limited to relying on the breaches of contract that actually motivated the dismissal, but any evidence that subsequently comes available to the employer following the termination. An employer who has sacked an employee for certain acts or behaviour and later gains information involving previous conduct which is also in breach of the employment agreement, may rely on the subsequent evidence to establish the summary dismissal was justified.

The law currently enables an employer to use their authority in situations to dismiss an employee on the spot. The employer must be able to substantiate their claim that the misconduct complained of justified the employer to terminate the employment. An employer must exercise caution when considering whether or not to exercise their power to dismiss an employee, as an employee may bring an action against the employer for unfair or wrongful dismissal. The employer must be satisfied that they will be able to prove their actions in response to an employee's misconduct was reasonable in the circumstances and show that the employee was given a reasonable opportunity to respond the allegations made.

In summary, before dismissing an employee summarily, an employer must:

1. Consider whether the conduct is misconduct justifying summary dismissal;
2. Ensure there is sufficient evidence that the conduct in fact occurred (eg. employee /witness statements, documentary evidence, video footage, admissions by the employee); and
3. Ensure that the employee has been informed of the allegations and given the opportunity to respond to them.

Editorial

By Patrick Mullins

In this issue, Samantha Kane considers the increasingly prevalent topic of bullying in the workplace and the recent report of the Queensland Government's Taskforce on Workplace Bullying. Given the potential impact upon employees and also the profitability of businesses, it is an important topic to take note of.

We also consider the circumstances in which employers can instantly dismiss an employee. We encourage employers to follow the guidelines set out in the article and to seek professional advice in appropriate circumstances to minimise the risk of wrongful and unfair dismissal claims. It is also advisable for employers and employees to consider carefully before entering into an employment agreement whether it is appropriate for the agreement to contain a restraint of trade clause and whether the desired restraint is reasonable in the circumstances.

There is also a reminder that on 1 May 2002 the employee screening requirements of the Commission for Children and Young People Act 2000 (Qld) came into effect in relation to volunteers. This topic is important for all workplaces involving work with those under the age of 18, in particular sporting and educational bodies.

Finally, we update you on the raging debate which continues in relation to the introduction of paid maternity leave in Australia. We are pleased to say that Mullins & Mullins has recently introduced paid parental leave to its staff, which we are certain will benefit both individual staff members and the firm itself.

Mullins & Mullins
LAWYERS AND NOTARY

Level 22 Central Plaza One
GPO Box 2026, Brisbane Q 4001
345 Queen Street, Brisbane Q 4000
Phone: (07) 3229 2955
Fax: (07) 3229 8075
Email: skane@mullins-mullins.com.au