

A INTRODUCTION

Three years ago, the terms "*workplace bullying*" and "*workplace stress*" were virtually unheard of. There is no doubt that many workplaces had bullies within them and many workplaces employed staff who felt stress as a result of the workplace environment and bullying which may have occurred. So why is it that these terms have become more frequent in recent years? Are more people being bullied at work? Are more people stressed at work? It is my own view that the amendments to the Health & Safety in Employment Act 1992 ("HASE Act") introduced into law on 5 May 2003 together with the publication of the book by Andrea Needham *Workplace Bullying: The Costly Business Secret* (Penguin, New Zealand, 2003) brought to the fore workplace stress and workplace bullying. Many employees identified themselves as suffering from workplace stress following the amendments to the HASE Act or from workplace bullying after reading Needham's book.

B STRESS UNDER THE HEALTH & SAFETY IN EMPLOYMENT ACT AND ITS AMENDMENTS

The HASE Act was amended in 2002 and the amendments came into force on 5 May 2003. The amendments to the HASE Act extended the definition of "harm" to include physical or mental harm caused by work related stress. Since the introduction of these amendments to the HASE Act, certainly in practice, there was initially an influx in the number of claims being brought by employees which included a claim of workplace stress. The purpose of this paper is not to deal with the area of workplace stress except to say that where an employee alleges workplace bullying there is often a claim that the resulting stress is workplace stress and therefore actionable under the HASE Act as amended.

C WORKPLACE BULLYING

Noticeably since the publication in 2003 of Needham's book referred to above on workplace bullying, many personal grievance claims brought by disgruntled employees have alleged bullying behaviours in the workplace. Certainly I have noticed and talked with many employees since 2003 that have read Needham's book, and identified that the behaviour they were receiving at work was bullying behaviour. Many of these employees chose to bring personal grievance claims alleging constructive unjustifiable dismissal or unjustifiable disadvantage, based on workplace bullying.

D WHAT IS WORKPLACE BULLYING?

As stated above there is no definition of "*workplace bullying*" in our legislation. Chapter 2 of Andrea Needham's book is devoted to the question of what workplace bullying is. On page 22 of her book she refers to the definition of workplace bullying developed by the Workplace Bullying & Trauma Institute ("WBTI") which is an organisation based in the United States and Canada. The WBTI definition of workplace bullying is:

- The repeated health/endangering mistreatment of a person (the target) by a cruel perpetrator (the bully);
- Acts of commission (hostile verbal, non verbal communication and interfering actions) and omission (the withholding of resources/time, information, training, support, equipment/guarantee failure) – which are all driven by the bully's need to control the target;
- Is illegitimate behaviour, unrelated to accomplishing productive work, so outrageous as to be the antithesis of what a good employer values and encourages;..."

Needham's book is comprehensive and useful in that it refers to a number of international organisations concerned with bullying. Employers wishing to delve more into the issue of workplace bullying will find her book a very useful resource. The area

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is a difficult one for employers because of the lack of recognition of "workplace bullying" in the legislation so it is important for employers to consider what workplace bullying is, how to recognise it and then what to do about it.

There have been one or two cases in New Zealand which demonstrate the type of behaviour that could be classified as bullying behaviour. The cases were brought in the context of personal grievance claims. *Job v AG in respect of the DG of the Department of Conservation* (unreported, AA 18/03, 20 January 2003, A Dumbleton) was a personal grievance claim alleging unjustifiable dismissal. In this instance, the grievant brought a personal grievance claim alleging unjustifiable dismissal following his dismissal because of bullying in the workplace. His behaviours included bad language and threats. The employer was of the view that the employee's conduct in harassing and bullying staff constituted serious misconduct. The Employment Relations Authority ("The Authority") found that the dismissal in this instance was justified because the applicant's behaviour in bullying and harassing staff had caused the employer to lose trust and confidence in him.

Another Authority decision which refers to the type of behaviour that could be classified as bullying is *O'Brien v Renton Chainsaws & Mowers Ltd* (AA 21/03 27 February 2003, H Doyle). The employee in this case resigned and brought a personal grievance claiming constructive unjustifiable dismissal. The employee complained to his employer on numerous occasions about his relationship with a particular manager whom he claimed was constantly swearing at him and pushing him. The Authority found in favour of the employee observing that the employee had an entitlement to a safe and secure workplace and the failure of the employer to provide him with this was a breach of its duty to him and which had resulted in his resignation.

E IS WORKPLACE BULLYING ACTIONABLE?

New Zealand, as with many overseas jurisdictions, does not have legislation to deal with "workplace bullying", nor do we have a proper legal definition of what workplace

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bullying is. An employee who has an employment relationship problem must bring a claim under the Employment Relations Act 2000 ("the ER Act"). The Act contains no definition of workplace bullying nor does it include workplace bullying as a behaviour for which an employee can claim a personal grievance. Section 103 of the ER Act clearly defines what constitutes a personal grievance and includes:

- unjustifiable dismissal,
- unjustifiable disadvantage, namely that an employee's employment has been affected to his or her disadvantage by the unjustifiable action of the employer,
- discrimination,
- sexual harassment,
- racial harassment, or
- duress in relation to the employee's membership or non membership of a union or employee organisation.

Nowhere in the definition of personal grievance does it refer to workplace bullying. This means that an employee must bring his or her claim under the more general headings of "*unjustifiable dismissal*" or "*unjustifiable disadvantage*" and frame the claim around the already recognised duties implicit in the employment relationship, such as the duty to provide a safe workplace, and the duty of trust and confidence.

Similarly, the Human Rights Act 1993 does not prohibit "*workplace bullying*". The Human Rights Act prohibits racial and sexual harassment in New Zealand workplaces but does not prohibit bullying or other harassment (other than racial or sexual harassment).

An employee who claims that he or she was forced to resign as a result of workplace bullying, either as a result of the employer's inactivity in respect of workplace bullying by a colleague or because of bullying by the employer him or herself, may bring a personal grievance that he or she was unjustifiably dismissed. The unjustifiable dismissal relates to being forced to resign because of a breach of duty on the part of

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the employer. Resignation in these circumstances is referred to as a "*constructive dismissal*".

Alternatively, the employee can bring a personal grievance of unjustifiable disadvantage as a result of bullying by the employer. The claim is that the employee's employment has been affected to his/her disadvantage as a result of the employer's failure to take steps to prevent the bullying.

Unjustifiable constructive dismissal and unjustifiable disadvantage are the most frequent means of bringing claims based on workplace bullying. From my experience, the number of employees bringing these types of claims is on the increase. However, if you review the case law, it seems that it can be difficult for employees to prove that the bullying that they have suffered crosses the threshold of seriousness to support a personal grievance claim. It appears from the case law to date, that bullying in the form of physical or verbal abuse such as constant and offensive swearing will give rise to a successful personal grievance, but some of the more insidious forms of bullying, such as intimidation demonstrated by a brusque management style are unlikely to pass the threshold.

See for example: *Harbord v Waste Management Limited* (WA30/05), where the bully made threats to another employee that he would kill him. The bully's physical size and gang connections were extremely intimidating to his co-worker who was the subject of the threats. The employer failed to investigate the employee's concerns when it became aware of the threats. Contrast this to: *Briggs v NZ Gem Trading Co Ltd* (AA194/04) where the Authority accepted that the Manager, alleged to be a bully, had a brusque management style but did not accept that this led to the employee's resignation or gave rise to an actionable claim. In this case the employee had been counselled by her Manager for her own interpersonal shortcomings. See also: *McGowan v Nutype Accessories Ltd* [2003] 1 ERNZ 120 in which the bullying took place "*under the noses of management*". This Employment Court decision makes it clear that employers must take effective steps to put an end to constant verbal abuse.

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In this case a subordinate taunted and swore at his Manager at every opportunity. Senior management of the company failed to take action to enforce its warning that the bully would be dismissed if the abuse continued.

What can be taken out of the case law? Firstly, employers have an obligation to provide a safe, secure work environment. This duty is explicit in the HASE Act and has been affirmed in significant case law such as *Attorney-General in respect of the Chief Executive of the Department of Corrections v Gilbert*, 14 March 2002 (CA 141/00) in which the Court of Appeal emphasised the implied duty on employers to take reasonable steps to maintain a safe workplace for their employees (in the context of a work related stress claim). Employers also have a well recognised duty to maintain the relationship of trust and confidence with their employees and this can be undermined by serious and sustained acts of bullying.

Employers have the responsibility to take complaints of workplace bullying seriously and to take steps to investigate and put an end to any such bullying. The worst case scenario could include a situation where an employer is aware of bullying of an employee, takes no steps and the employee is subject to physical or mental violence which causes harm. OSH will investigate incidents of "serious harm" in the nature of a recognisable mental or physical illness and may prosecute under the HASE Act. Employers would be liable for fines under the HASE Act as well as potentially claims under the ER Act.

Whatever you might take from the case law it is clear that bullying in the workplace is divisive and can have a serious impact on work harmony and cohesiveness. For this reason, many claims are settled without the claim progressing further in order to deal with the negative and more intangible aspects of a bullying situation. Sometimes, unfortunately, the only solution is for either the bully or the person being bullied to exit the workplace. These exits may be negotiated in genuine bullying situations as the only practical solution to a breakdown in the employment relationship, but may

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also be negotiated in situations where the claim of bullying is used as a tactic by the employee to avoid the consequences of disciplinary action.

F WHEN IS BULLYING USED AS A TACTIC TO AVOID APPRAISAL?

In my experience, in the last few years there has been an increase in claims brought alleging workplace bullying against managers who are managing the performance of the employee concerned. It is at the point when the employee's employment is in jeopardy that the employee will instruct an advocate/lawyer who will raise bullying as an issue. The claim will be raised that the employee's employment has been affected to his or her disadvantage as a result of this unjustifiable action (i.e. disciplining) by the manager. It is often seen used as a tactic to enable the employee to resign with an exit package rather than being dismissed. The genuineness of these bullying claims must be questionable. At the end of the day, if the employee concerned has not raised issues of bullying before, if the company has performance standards which the manager is ensuring are maintained, then such an allegation should be seen for what it is, a tactic in order to enhance an exit. The employer concerned could make a call as to whether there is any benefit in having the employee resign with an exit package or whether this leads to the setting of an unhealthy precedent in the organisation. We advise caution in cases where the claims of bullying do not appear to be genuine. As with all claims of harassment, spurious or unsupported allegations that are raised against a Manager who is simply trying to manage a difficult employee, can have implications for the Manager's reputation and confidence if handled incorrectly or insensitively.

G LEGAL STRATEGIES FOR MANAGING BULLYING AND HARASSMENT IN THE WORKPLACE.

Employment agreements/employment policies and procedures should ensure that workplace bullying/harassment of an employee is behaviour which is not tolerated by the organisation and will be regarded as serious misconduct if found to be occurring.

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Workplace bullying/harassment should be treated in a similar way to other types of harassment including sexual or racial harassment. It would be useful for employers to devise their own definitions which do not have to be exhaustive of bullying behaviours which will not be tolerated in their organisation and to make it clear what the process would be if employees are being targeted.

Check performance management systems to ensure they are fair and objective.

If an allegation of workplace bullying is made, treat it seriously, and as with other complaints investigate and take steps to address the situation.

For more information, contact LawWorks at the below address.