

Workplace bullying

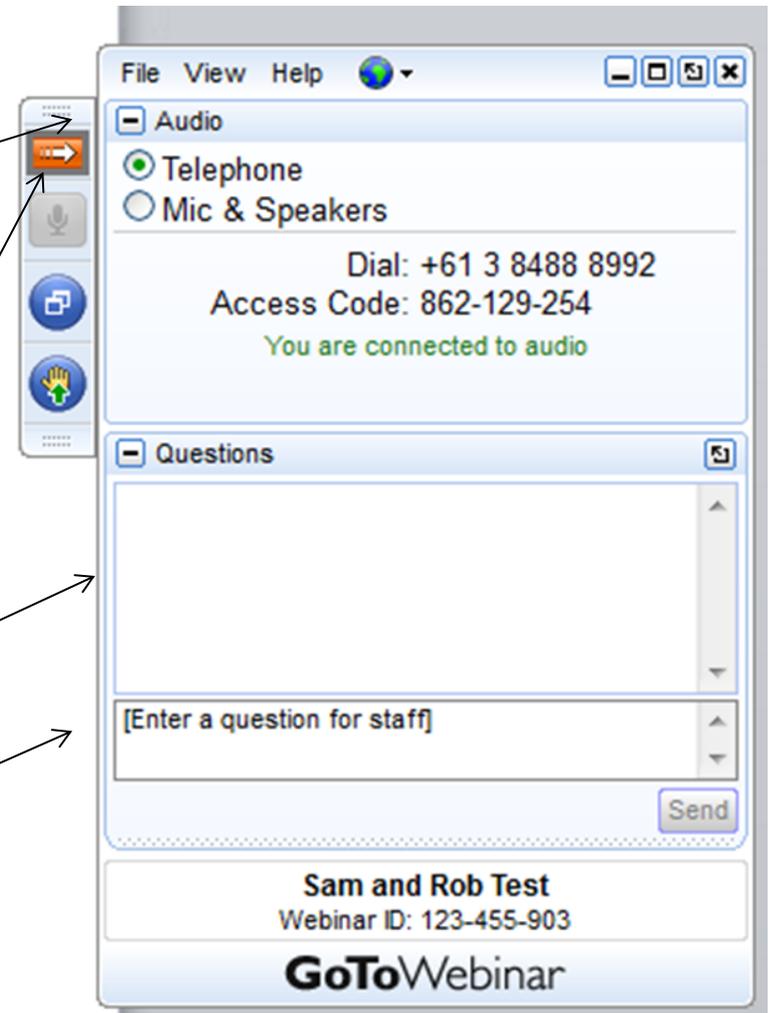
Issues at common law

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How to interact today

- Select audio on the control panel to change between computer audio and telephone.
- Click on the red button to hide and unhide the panel.
- Your comments and questions will appear here throughout the webinar.
- Type your questions here.



What we will be looking at today

- Managing WHS hazards and risks code of practice 2011.
- Prevention of Workplace Harassment Code of Practice 2004.
- Bullying and harassment and the common law.

What is workplace bullying

- Repeated unreasonable behaviour.
- Directed towards a worker or group of workers.
- That creates a risk to health and safety.

What types of behaviours constitute bullying

- Abusive, insulting, offensive language or comments.
- Unjustified criticism or complaints.
- Deliberate exclusion from workplace activities.
- Withholding of information vital for effective work performance.
- Unreasonable and/or constantly changing deadlines.

What types of behaviours constitute bullying

- Tasks unreasonably below or beyond skill level.
- Deny access to information, supervision, consultation, resources to the worker's detriment.
- Spread misinformation or malicious rumours.
- Deliberate change to rosters/leave etc to inconvenience.

How can bullying occur

- Email, text, chat rooms, other social media.
- Directed at worker or workers.
- Carried out by one or more workers.
- Can occur:
 - Sideways between workers
 - Downwards from managers to workers
 - Upwards from workers to supervisors/managers.

What is not workplace bullying

- A single incident of unreasonable behaviour.
- Reasonable management action taken in a reasonable way.
- Workplace conflict.
- Discrimination and sexual harassment.
- Violence – assault or threats of assault.

Workplace bullying control strategy

- Implement workplace bullying prevention policy
 - Set standards for workplace behaviours
- Design and implement a safe system of work
 - PD's, resources, task specific training, monitor workloads etc
- Productive and respectful workplace relationships
 - Promote positive leadership styles
- Implement reporting and response procedures
 - Accessible to staff; objective, fair and transparent
- Provide training and information relevant to the role

Basic common law principles

- Duty of care
- Breach of this duty
 - System of work:
 - > Foreseeability
 - > Preventability
 - > Reasonableness
- Causation

Duty of care

- Generally the existence of a duty of care will not be an issue.
- It is well established the employer has a duty to take reasonable care to avoid exposing employees to unnecessary risk of injuries.
- Also arises as an implied term of the employment contract.
(*Tame v New South Wales*)

Duty of care

- High Court has described the nature of the employer's duty as “a duty, by his servants and agents to take reasonable care for the safety of employees by providing proper and adequate means of carrying out his work without unnecessary risk...”

System of work

- It is well established the employer's duty of care includes an obligation to take all reasonable steps to provide a safe system of work. (*Koehler v Cerebos*)
- This system should include strategies to prevent workplace bullying.
- It is now well established that workplace stress, and specifically bullying, can lead to recognised psychiatric injury.

Foreseeability

- The critical pre-condition to liability for negligently inflicting psychiatric injury is whether “in all the circumstances, the risk of a plaintiff...sustaining a recognisable psychiatric illness was reasonably foreseeable, in the circumstances that the risk was not far fetched or fanciful.” (*Tame v New South Wales*)

Foreseeability

- It is now well established that workplace stress, and specifically bullying, can lead to recognised psychiatric injury.

Prevention

- It is established that one of the obligations of the employer is to “take measures or adopt means reasonably open to him in all the circumstances..” (*Bankstown Foundry v Brastina*)
- For bullying and harassment having a policy in place and following it are reasonable steps.
- The question will generally be whether it was a reasonable response.

Causation

- It has to be reasonably foreseeable that the claimant would have suffered a psychiatric injury as the result of the conduct.
- Plaintiff has to demonstrate a causal nexus between the conduct and the illness.
- It has to be a psychiatric injury, not merely be stressed or anxious.

Reasonable management action

- Bullying is not when the employer performance manages, provides feedback or addresses other performance issues with an employee.
- It is foreseeable that a person could suffer a psychological injury as the result of a process such as an investigation into bullying.
- The employer does not owe a duty of care in the investigation of a complaint, as long as the process is followed.

So far

- We have looked at what bullying is.
- Briefly touched on the common law and what we have to look at in determining whether there is negligence on the part of the employer.

Next

- We will look at some cases to see how the law has been applied and what matters the courts have taken into consideration when determining liability.

Breach of this duty

- Just because a person has established that they were bullied does not automatically mean a breach has occurred.
- Just because a person has not made a formal complaint does not mean no breach has occurred.
- Just because an investigation was carried out it was found that there was not bullying, does not mean no breach has occurred.

Why?

- The reason is that the tests at common law are different.

Midwest Radio

- 1991 case.
- Claimant was subject to behavior which the court clearly considered to be bullying.
- Evidence not only showed the claimant's condition was as the result of this bullying but also other events at work, which were not bullying, also contributed to the claimant's condition.
- The court found in favour of the employer on the basis the claimant's condition was as the result of numerous acts, only some of which were negligent.
The medical evidence could not disentangle them.

State of NSW v Jeffrey

- 2000 case.
- Claimant was bullied by a senior officer.
- Civilian working in the PCYC where his supervisor was a police Sergeant.
- Claimant would not report the behaviour to his superiors.

State of NSW v Jeffrey

- The police service had an established system to report such behavior.
- The PCYC did not.
- The police Sergeant's behaviour was found to be an unauthorised mode of performing an authorised role.
- Employer was vicariously liable for this behaviour.

Dickson & Anor v Creevey

- 2002 case.
- Mr Dickson alleges he was bullied.
- He was a seventh day Adventist.
- Was a workplace in which coarse language, name-calling and mockery were common – not the most genteel of environments.

Dickson & Anor v Creevey

- Mr Dickson did not report the behaviour.
- There was a complaints process he could have used.
- Defendant was successful.

NSW v Mannall - 2005

- Ms Mannall was team leader.
- Appointed to a job over her previous team leader.
- There was some loyalty to the previous team leader.
- She was charged with making changes and improving the level of service provided.
- Her supervisor took a passive role in responding and managing the issues.

NSW v Mannall - 2005

- NSW Court of Appeal upheld the finding that the defendant was vicariously liable for the negligence of the plaintiff's manager who subject the plaintiff to a prolonged campaign of 'victimisation, harassment, humiliation and abuse'. This included behaviour such as being belittled in a demeaning and belittling way in front of others, insinuations she had been favoured for a promotion, being shunned by staff, being left out of meetings, having changes made in the team without consultation and generally experiencing a lack of support from her manager.

Wolters - 2013

- Mr B (supervisor) verbally abused Ms C in Dec 2007.
- Mr B had thought Ms C had done something wrong but she had not.
- Ms C suffered a debilitating psychological injury as a result of this abuse.
- Ms C lodged a formal complaint which was never investigated.
- Mr B's supervisor spoke with him, took a "low key" response to Ms C's complaint.

Wolters - 2013

- In March 2008 Mr B yelled at Ms W.
- Ms W reported Mr B's behavior and the employer declined to investigate her grievance.
- Mr B wrote to the Vice-Chancellor and accused her of poor performance.
- Mr B did not check the facts before doing this.

Wolters - 2013

- At first instance the court found in favour of the employer.
- The claimant had alleges the employer was vicariously liable for Mr B's actions – this was dismissed.
- The claimant alleged the employer had exposed her to a risk of injury which could have been avoided – dismissed.

Wolters - 2013

- Claimant appealed this decision.
- Counselling was a reasonable action the employer should have undertaken.
- Decision was overturned.

Keegan v Sussan - 2014

- Claimant returned to work after maternity leave.
- New manager had recently been appointed.
- Within 11 days the claimant ceased work and did not return.

Keegan v Sussan - 2014

- Employer had a policy in place but management's action were inconsistent with this policy.
- The conduct of the claimant clearly put the employer on notice she was likely to suffer a psychological condition.

What have we learnt

- The definition of bullying does not have to be proved for an action at common law to be successful.
- Have an appropriate policy in place.
- At the first hint of alleged bullying, act immediately.
- Carry out an investigation.

What have we learnt

- A complaint does not have to be in writing or a formal complaint as per the policy.
- Don't let managers try to cope, employer has to provide assistance eg HR Division.
- Support all staff, including managers.

What have we learnt

- Follow the policy.
- If the policy is not followed the employer has to show that another approach was reasonable in the circumstances.
- If bullying is established, it does not mean the employer is negligent, negligence is more likely to follow from how management handles the issues.

Other related issues

- If a claimant has been off work in relation to a psychological condition, no matter what it arises from, you need to carefully consider any return to work options, particularly if it arises from workplace bullying.
- The employer is now on notice and the duty of care is even higher.
- Need medical support for the return to work (preferably from treating psychologist/psychiatrist).
- As part of the return to work plan have regular follow ups.
- Don't let the claimant make the decision where they should return to work to.

Cases

- *Tame v New South Wales* [2002] HCA 35
- *Koehler v Cerebos (Aust)* (2005) 222 CLR 44, 53
- *Bankstown Foundry Pty Ltd v Brastina* (1986) 160 CLR 301
- *Midwest Radio v Arnold* [1999] QCA 020
- *State of New South Wales v Garry Jeffrey & Ors* [2000] NSWCA 171
- *Dickson & Anor v Creevey* [2002] QCA 195
- *New South Wales v Mannall* [2005] NSWCA 367
- *Wolters v The University of the Sunshine Coast* [2013] QCA 228
- *Keegan v Sussan Corporation (Aust.) Pty Ltd* [2014] QSC 64

QUESTIONS?