

Statutory, Criminal and Employment Remedies for Bullying

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WORKPLACE BULLYING PROGRAMME

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STATUTORY, CRIMINAL AND EMPLOYMENT REMEDIES FOR BULLYING

Remedies for Bullying

1. Enlightened and prudent employers have or ought to establish procedures so as to recognise, handle and eliminate bullying in the workplace. This not only leads to a safe and happy workplace, but also complies with many laws now which pertain to the workplace. The blight of bullying has long been recognised in the schoolyard but only more recently recognised in adult workplaces. Some years ago, I delivered a paper to the heads of New South Wales government departments on workplace bullying. I chose my own workplace in that regard and looked at bullying which occurs in court rooms. I attach a copy of that paper on "*Judicial Bullying*". Leaving aside my personal experiences and those of other Barristers being bullied by Judges and other lawyers, the topic of bullying in the workplace is a serious matter and is recognised as such by the courts.
2. The particular areas with which I wish to deal with firstly relate to workers compensation; secondly, general employment law and thirdly, occupational health and safety law and how that touches upon criminal law.
3. I note that Mr Des Kennedy SC will be speaking this afternoon about damages at common law for negligence arising out of bullying and I shall leave those common law aspects to him.
4. In relation to workers compensation, psychological or physical injuries caused by bullying are compensable should the employment be causative, or a substantial contributing factor to injury received. Skylarking which can be a form of bullying, if it causes physical injury, is compensable. This has the effect that compensation is payable to the

worker which in turn adds to the premium costs paid over a period of time by the employer. Psychological injuries are perhaps more difficult to detect than physical injuries, however, they are clearly recognised by not only the Workers Compensation Court, but also Common Law Courts. In *State Transit Authority of New South Wales ats Chemler [2007] NSWCA 2* Chief Justice Spigelman observed at [40]:

“In this area of law, as in negligence, the talem qualem principle is applicable that is employers take their employees as they find them. With respect to psychological injury there is an “egg shell psyche” principle, which, like the equivalent “egg shell skull” principle, is a rule of compensation not of liability. The element of foreseeability required by the law of negligence is not the basis of the “egg shell skull” principle and can be applied by way of analogy to claims for compensation under the 1987 Act.”

Justice Basten at [69] said:

“If conduct which actually occurred in the workplace was perceived as creating an offensive or hostile working environment, and a cognizable injury followed, it was open to the Commission to conclude that causation was established.”

The principles in *Chemler* provide that if the injury is suffered relates to a perception of real events, which are not external events that can satisfy the test of injury arising out of or in the course of employment per Spigelman CJ at [54]. Further, if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Workers Compensation Commission to conclude that causation is established per Basten JA at [69]. It is further the case that so long as events within the workplace are real rather than imaginary, it does not matter that they affected the worker’s psyche because of a flawed perception of events, because of a disordered mind. This principle is found in a Queensland case entitled *“Leigh Sheridan ats Q-Comp [2009] QIC 12.*

5. Under the *New South Wales Workers Compensation Act* under s 11A(3), psychological injury is defined as an injury that is a psychological or psychiatric disorder. The term extends to include the

physiological effects of such a disorder on the nervous system. That is a very broad definition of psychological injury and includes any of the matters that could be found in the Diagnostic and Statistical Manual of Mental Disorders 4th Edition known as the DSM IV which I understand has recently been updated. Such a psychological injury can be an anxiety disorder, an adjustment disorder, even in a serious case Post Traumatic Stress Disorder(PTSD). The principle in relation to workers compensation is that if an injury occurs you take the victim as you find them irrespective of the pre-existing vulnerability of the victim. Many cases before the Workers Compensation Court relate to psychological injuries caused by bullying well beyond matters of mere skylarking and humiliation, but even to the extent of bullying in relation to unrealistic work demands. See *Attorney General's Department ats K [2010] NSWCCPD 76* per Acting President Bill Roche. In that case, the worker was a solicitor and she was awarded weekly compensation as a result of a psychological injury which was diagnosed as an adjustment disorder with depressed and anxious mood with major depressive episodes allegedly received by her due to an excessive work load, together with chronic pain from a work related foot injury and harassment at work [1]. The scope of psychological injury compensation has been restricted by the terms of s 11A of the Act which says:

“11A(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.

6. The next question I look at is the question of what can be done about bullying and how that affects the contract of employment. Employers need to be aware of the existence of bullying in the workplace and need to put themselves in that position to detect whether it is occurring. That

can be a very difficult thing to do. However, where it is found, then depending upon its degree, such bullying may amount to serious misconduct which presents the employer with the opportunity to instantly dismiss an employee guilty of it. In a less serious case one ought put such a person on warnings and should the relevant behaviour persist, to dismiss him or her. An example of bullying in the workplace which came before the Industrial Court which led to a dismissal and then an application for reinstatement was *Bankstown City Council ats Paris [1999] NSWIRComm 368* a decision of a Full Bench of the Industrial Relations Commission of New South Wales. In that case, now some eleven years ago, a subject employee referred to as Mr X became the target of what appeared to be a serious form of harassment culminating in acts which the Full Bench described as “*despicable*”. The two perpetrators were dismissed and did not seek to be reinstated. Another person, although not an active participant in it was dismissed for failing to, amongst other things, inform the employer that this was taking place. The complained about behaviour included inappropriately touching Mr X’s genitals, lighting pieces of paper in the truck and throwing them into Mr X’s lap, pushing burning paper under a toilet door while Mr X was in there, using rope to tie him up and also pulling Mr X’s tracksuit pants down whilst he was in a lunch break in a park under the control of the Council. In relation to all this behaviour, the Full Bench said this:

“Nothing we have said in this judgment should be taken as indicating any tolerance of misbehaviour in the workplace. Skylarking and mucking around, while thought by some to be legitimate form of amusement, have no place at all at work. These proceedings have not been about whether misbehaviour in the workplace is acceptable but rather whether the treatment of an employee, in a milieu where such behaviour seems to be rather the norm than the exception was harsh, unreasonable or unjust. Having regard to Council’s apparent lack of awareness for such behaviour and the absence of any stricture against it, and with differing degrees of involvement of the facts, the case is permitted an order in the employee’s favour. Each case will need to be determined in the light of its own facts.”

One can see, even though in that case the employee on the periphery of the behaviour was given a reinstatement order, the Full Bench stated clearly that in an appropriate case where an employee is guilty of such humiliating behaviour towards another employee, ought be dismissed and will find no remedy in relation to reinstatement or damages for loss of his or her employment.

7. The *Occupational Health and Safety Act 2000 (NSW)* places absolute and strict requirements upon employers to provide a safe workplace and to remove risks which could expose employees or others visiting the workplace to injury. Despite recent pronouncements by the High Court in relation to how that legislation has been interpreted by the Industrial Court of New South Wales (see *Kirk v IRC* [2010] HCA 1), the safety requirements under the relevant statute are severe and breach of which can expose a corporate employer to significant fines of up to \$550,000.00 for a first offence and for individuals fines up to 1/10th of that amount. Such individuals who may be fined that amount may be managers or directors of corporations where such behaviour has taken place. An example of this would have been in the *Bankstown City Council* case which dealt with unfair dismissal. Had the Council been aware of the behaviour, or had the Council been in a position where it ought to have been aware of the behaviour, or had the Council not conducted proper risk assessment in relation to such behaviours taking place, it could well have been subject to prosecution and significant fines. There have been some cases before the Chief Industrial Magistrate and the Industrial Court in relation to occupational health and safety prosecutions concerning bullying. One such case is *Inspector Gregory Maddaford ats M A Coleman Joinery (NSW) Pty Limited* [2004] NSWCIMC 42 (5 May 2004) and the appeal from that decision of *WorkCover Authority ats Coleman* [2004] NSWIRComm 317; (2004) 138 IR 21. At first instance the Chief Industrial Magistrate, Mr George Miller had before him prosecutions against the employer corporation and two of its directors, being Brian Coleman and Graham Coleman. At first instance, the corporation was fined \$24,000.00 and

the directors were each fined \$1,000.00. The facts in that case were that the first defendant was a timber and joinery shop. The facts were that a sixteen year old apprentice went upstairs in the factory, was grabbed by a group of fellow workers who then proceeded to wrap him from his feet to his neck in cling wrap using the manual clinging wrapping machine located on the premises. The apprentice was then picked up and placed facing up on a wheel work trolley and secured to the trolley using more cling wrap. His shoes and bum bag were removed and filled with saw dust. The evidence also was that the trolley was pushed from side to side and spun around. Saw dust was thrown over Mr Doyle, down his pants and in his shirt. Wood glue was put in his shoes and over his body and in his mouth. Similar humiliating behaviour was used such as the use of a fire hose on him together with more glue placed upon his body and in his mouth. The entire incident was said to have lasted approximately half an hour. This was referred to as, by the evidence of some of the workers as an initiation ceremony and one of the director's was made partially aware of it going to take place. The evidence was that a culture of initiation had existed within the factory and this incident had lasted for half an hour during working hours without management intervening. One of the director's was aware of past pranks occurring in the factory. Evidence was to the effect that the apprentice suffered no form of psychiatric disorder or illness as a result of the incident. The Magistrate said this:

“This dispute between the doctors (in relation to injury) does not diminish the seriousness of the breach. There was present a potential risk of serious injury to (the apprentice) from the events of this day such as suffocation. What occurred was a sustained assault for approximately half an hour from his fellow employees. What started out as a simple episode of bullying got out of control leading to a serious physical threat to Doyle's health and safety. As conceded by the defendants' viewed objectively this is a serious matter.”

The Magistrate described initiation as a polite term for bullying. Such a culture he said needs to be stamped out and bullying has no place in the workplace. The employer had occupational health and safety

policies concentrating on physical injuries. Only after the incident were there any policies developed in relation to anti-violence/bullying/harassment and a sexual harassment policy. The allegations of breach of the Act went to inadequate supervision, inadequate training for employees to ensure safety at the workplace (for psychological events and for bullying) and no policies to prevent pre-mediated acts of violence upon employees in initiation ceremonies. The seriousness against the individual defendants was that Mr Brian Coleman was told about the initiation ceremony taking place but did nothing about it, and the other director was in charge of supervision where the incident took place, but this supervision did not deter employees from engaging in the initiation ceremony on that day. The WorkCover Authority appealed citing that the fines imposed by the Magistrate were insufficient and manifestly lenient. In assessing what was an appropriate penalty, the Full Bench said this about offences under the Act relating to bullying:

“We have little doubt that bullying is, unfortunately, prevalent in many workplaces. The nature of bullying is such that it is usually covert and not disclosed by either the offender or the victim. It is not surprising, therefore, that breaches of the Act relating to bullying and violence in the workplace would fall within the category of breaches that are difficult to detect and are rarely reported. --- we find issues of deterrence must loom large in our consideration as to penalty [83].”

They went on to say this:

“The evidence demonstrates that the company has introduced procedures in relation to anti-violence/bullying/harassment and sexual harassment policy, and has employed an occupational health and safety specialist. However, the Company took no steps to investigate the incident until after it was contacted by the WorkCover Authority of New South Wales. No employee was dismissed or disciplined as a result of the incident, other than to receive a general reprimand at a group meeting [85].”

Employers must adopt an approach to safety that is proactive, not reactive [86].”

In lieu of the fines of \$1,000.00 imposed against the directors, the Full Bench upheld the WorkCover appeal and imposed a fine of \$9,000.00

against Brian Coleman and a fine of \$12,000.00 against Graham Coleman.

8. In a more serious case of workplace bullying, proceedings were brought in Victoria as a result of repeated bullying against a nineteen year old café worker called Brodie Panlock, in February 2010. In September of 2006, Brodie Panlock committed suicide and it was found it was as a result of being bullied at work. The employer and four co-workers at the restaurant, Café Vamp in Melbourne were fined a total of \$335,000.00 for repeated bullying, or permitting such bullying to occur. There was even a clamouring by the tabloid press in Victoria that charges for murder, or indeed manslaughter, be pursued against those responsible for the bullying. No doubt, in the appropriate case that will occur.

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JUDICIAL BULLYING

by

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The court room has long been the place where perpetrators and victims of bullying have had their disputes determined. Severe and persistent bullying is unlawful. Such conduct can amount to not only a breach of contract, a tort and a crime, but also involve workers compensation and anti-discrimination laws. In a recent decision, the New South Wales Chief Industrial Magistrate fined an employer for failing to prevent bullying in the workplace, thereby breaching the *Occupational Health and Safety Act (NSW) 2000*.¹

Enlightened and prudent employers have, or ought to, establish procedures so as to recognise, handle and eliminate bullying in the workplace. Once one accepts that court rooms are places of work, then the rules that apply to bullying in workplaces ought equally apply in court.

An examination of any case conducted in court reveals a number of relationships where bullying can occur. Lawyer against lawyer, lawyer against client, lawyer against witness and judge against any of the foregoing. When one considers the Oxford English Dictionary definition of the noun "bully" being "*a person who uses strength or power to coerce or intimidate weaker persons*". The most superior position in court is that of the judge. It is the judge against whom relief for such behaviour is most problematic.

The judge can control a lawyer's cross-examination of a witness by rejecting questions which are irrelevant, annoying, intimidating, or otherwise improper.² Intimidating conduct between lawyers, and between lawyer and client, can be controlled by the judge, the Bar Association, the Law Society or by the intervention of the Legal Services Commission. However, the protection against judicial bullying is

¹ See *Inspector Gregory Maddaford v M A Coleman Joinery (NSW) Pty Limited, Brian & Graham Coleman* NSWCIMC 5/5/04

² See section 41 of the *Evidence Act* and the general powers of a judge to control proceedings whilst in court.

more illusory than real. Misbehaviour by a judge in court may lead to a successful appeal on the basis that the judicial officer may have been perceived to be biased. Judicial misbehaviour also might be the subject of a complaint, in New South Wales to the Judicial Commission although these remedies may not always be adequate.

A difficulty with bullying in the courtroom, as in other workplaces, is grappling with the definition of it. In some workplaces a manager may perceive what is being done as appropriate, but forceful performance management. In a courtroom a judge might perceive his or her actions to be appropriate, if forceful, case management. Judges in many of the courts are commonly confronted with practitioners who are lazy, lacking in diligence and appropriate skill for the particular cases they are running. Judges commonly are confronted with witnesses whose testimony challenges credulity and parties whose behaviour is rapacious and lacking in honesty.

One can many times see how the patience of judges can be tested. However, sometimes the judge's behaviour itself, in the face of such events, steps beyond the bounds of what is appropriate and may ultimately itself become unlawful behaviour.

Justice Michael Kirby, the then President of the Court of Appeal in *Escobar v Spindaleri* (1986) 7 NSWLR 51 at 52, noted:

"It does not become counsel to lose his or her temper in court. Still less does it become a judicial officer to depart from proper procedures, no matter how provocative may be the ill-judged conduct of those before the court."

Every practicing litigation lawyer will always have stories of judicial intemperance, if not bullying. Such stories are regularly the topic of lawyers' discussions at the end of a difficult day. Some of the criticism of judges is fair, some not.

The most celebrated literary and screen barrister of recent times has been Horace Rumpole. One can remember his encounters with Judge Gerald Bullingham, referred to by Horace as "the Mad Bull". Rumpole was able to deal with Judge Bullingham's incivility by taking issue with the judge, muttering under his breath and chuckling over the judge's bad behaviour with friends over a glass of claret. However, the fact

was Rumpole lost his last 10 cases before Judge Bullingham. If that was the result of standing up to the judge in the way that Rumpole did, it was not very helpful to the client.

In order to understand why there are judges who are bullies is perhaps also to understand why there are bullies in society. Bullies may behave that way in order to mask their own inadequacies or merely reveal a learned behaviour as a method to get one's own way. One thing bullies do not like is being challenged or exposed by a potential victim. Something bullies love is an audience so that they can show their strength and worth to many at the same time as inflicting pain upon the victim.

A common place for judicial bullying to occur is in court directions lists which are crowded with many practitioners. The bullying judge, by playing to the gallery can be found humiliating and shouting at hapless and usually junior practitioners. The effect of this is not only on the victim, but also *pour encourager les autres*. It may have the desired consequence of enforcing, in the judge's eyes, appropriate case management. On the other hand, it may have deep psychological effects upon the victim. Practitioners will tell of people coming back from court distraught after a particular judge has bullied them in court. Many practitioners, as a consequence, will shy away from litigation and some in fact may even leave the profession.

It is in these circumstances why merely appeal or complaints to the Judicial Commission are clearly inadequate. One would imagine that complaints regarding bullying made to the Judicial Commission would be considered to be minor matters and kept private between the complainant and the judge. The complainant may also suffer from every victim's problem with a bully: the bully may be free to get them on another occasion. The remedy may perhaps be for practitioners to bring complaints of bullying first to their respective representative association, that is the Law Society and the Bar Association. More serious complaints might also be made to the WorkCover Authority, the body charged with enforcing safety in the workplace.

Judges need, perhaps, to be reminded that their actions may have consequences far beyond merely ensuring that cases run efficiently. A lawyer, like anybody else in society, may be not be able to cope with public humiliation which may in turn cause

stress or harm to their psychological wellbeing. The Bar Association of New South Wales has instituted a program for the assistance of barristers suffering stress and other anxiety conditions. The nature of the job is stressful and actions of judges may, in cases with respect to some practitioners, be entirely inappropriate and harmful. One would hope that like the dinosaurs, judicial officers like Judge Bullingham will vanish.

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