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Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
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Over the past few years, we have seen a focus on addressing bullying in workplaces. In 2014 comprehensive Best Practice Guidelines were released by OSH (the predecessor to WorkSafe) and these were recently updated in March 2017 to reflect the introduction of the Health and Safety at Work Act 2015.

The core aspects of the Guidelines 2017 are largely unchanged from the 2014 document. Suffice to say, there have been any number of commentaries on what workplace bullying is, management of it and the impact on workplaces.

The consensus however is clear and perhaps somewhat obvious. Workplace bullying has a number of negative outcomes for individuals and businesses. The impact on individuals is variable, including poor performance, errors and lost time, through to serious health consequences. The flow on effect for businesses can also be far ranging. Individual, and potentially team, productivity is decreased, and overall morale can and likely will be reduced. The wider effect is that a business' reputation can suffer across the board. For example, reputational impact can discourage job applicants and affect client, customer and business relationships.

As noted above, WorkSafe has produced Guidelines on managing bullying in workplaces. Helpfully, the Guidelines provide a clear definition of workplace bullying. The definition as provided by WorkSafe is as follows:

<p>Workplace bullying is: Repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.</p> <ul style="list-style-type: none"> > Repeated behaviour is persistent (occurs more than once) and can involve a range of actions over time. > Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person. > Bullying may also include harassment, discrimination or violence ... <p><i>Note: The bullying definition is adapted from Safe Work Australia's definition.</i></p>	<p>Workplace bullying is not:</p> <ul style="list-style-type: none"> > one-off or occasional instances of forgetfulness, rudeness or tactlessness > setting high performance standards > constructive feedback and legitimate advice or peer review > a manager requiring reasonable verbal or written work instructions to be carried out > warning or disciplining workers in line with the business or undertaking's code of conduct > a single incident of unreasonable behaviour > reasonable management actions delivered in a reasonable way > differences in opinion or personality clashes that do not escalate into bullying, harassment or violence.
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The Guidelines also provide advice on how to manage complaints and investigate claims of bullying. These range from informal resolution options and use of Mediation Services, through to formal investigations and the recommendation that an external independent investigator is appointed in such cases (albeit, this is not a necessary requirement).

Given the awareness of the issue and consequences, legal obligations and practicalities, most employers should have some form of policy to address this and other potentially negative behaviours in the workplace.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Raewyn Gibson, Peter Zwart** or **Dean Kilpatrick**.

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It is difficult to gauge the degree of bullying in workplaces. In was reported by Radio New Zealand in June 2018 that WorkSafe New Zealand received approximately 100 bullying complaints between 2013 and 2017. Of those reported, 42 were referred on to other organisations and nine were investigated. WorkSafe focused their investigations on cases where the person was diagnosed by a specialist as having a serious mental health condition and where there was a clear link between workplace bullying and the illness. It was noted that while no prosecution took place, WorkSafe engaged with the workplaces in question confirming that education had or would occur.

Case law in the employment jurisdiction has been limited. Recent cases have tended to focus on whether the employer's actions have been fair and reasonable when complaints of bullying have been made, as opposed as to determining whether or not bullying has occurred.

A recent example is the determination of the Authority in *Hilford v The Order of St John Northern Region Trust Board* [2018] NZERA Auckland 190. In this case, the applicant had raised concerns about the actions of co-workers on a number of occasions. The Authority had determined that when complaints of bullying were received the employer failed to investigate the complaints in a manner that was consistent with its policy. The Authority went further to state that "An employer who receives complaints from employees about the behaviour of other employees such as harassment or bullying has particular obligations. First, it must undertake a full and fair investigation into the complaint". Then, the Authority stated "a fair and reasonable employer could and should have spoken to [the complainant] before completing its investigation". In this case, the Authority determined the employer had failed to complete a fair investigation consistent with its own policy and also accepted principles. What was absent from the determination was any finding as to whether or not bullying had occurred.

A decision from the Employment Court of 1 June 2018, *FGH v RST* [2018] NZEmpC 60, did however comment on the views expressed by two managers when responding to the complaints of an employee. The facts of this matter are relatively lengthy, but in summary:

- (a) FGH was employed by RST in a role processing and reviewing applications;
- (b) FGH had attention-deficient disorder and also suffered from an anxiety disorder which affected her work performance and her ability to cope with performance management;
- (c) After performance issues were raised and RST sought to address them, FGH raised a personal grievance claiming an unjustified disadvantage on the basis that her employer had failed to provide

a safe work environment while dealing with her performance issues; and

- (d) FGH claimed to have been bullied and that RST failed to sufficiently investigate those allegations.

When examining the question of whether the claims to two managers by FGH that she had been bullied should have prompted RST to undertake an independent investigation in accordance with its Harassment Policy, the Court noted:

"[240] The responses given to [FGH] by Ms Sinclair and Mr Philp as to whether she was being bullied were given intuitively rather than by reference to the Harassment Policy. However, I consider their responses were in fact correct when assessed under that policy, for two reasons. First, Ms Julian had not demonstrated intent; she was not harassing [FGH] so as "to have power or unwarranted control over another". Second, the performance management steps which had been taken fell within the statement in the policy that harassment did not include "legitimate criticisms about your work performance (unless they are expressed in an unprofessional or hostile manner)"; and "free and frank discussion about legitimate issues or concerns in the workplace, without personal insults".

... [242] I find that the response given by Ms Sinclair and Mr Philp to [FGH] were reactions which were open to a fair and reasonable employer in the particular circumstances which pertained at the time."

Once reaching the above conclusions, the Court did not revisit the point in depth, instead focusing on health and safety aspects in the context of FGH's mental health disorders.

While case law deciding that bullying has or has not occurred might be scarce, the decisions we see are clear on what an employer must do when faced with a complaint of bullying (or other negative behaviour). In short, treat all complaints as legitimate until established otherwise.

However, in order to investigate the complaint, facts must be provided. More than feelings are required. While the complainant will likely state that they feel victimised and/or they are being mistreated, this is insufficient. In order to establish whether bullying has occurred, what actually occurred must be determined. For example, a complaint that someone made "mean" comments is not sufficient. The complainant needs to detail what the comments were, when they occurred and in what context.

Addressing complaints of bullying or any negative behaviour in the workplace is not a simple task. We can assist in these cases, so please contact us for further advice.