MACKINNON & ASSOCIATES

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Bullying

"Johnson, what is this rubbish? Five pages of waffle that tells me absolutely nothing. I've told you a thousand times, I need hard sales information, not something my pre-schooler could have written. I haven't worked out yet if you're thick or just plain lazy. Either way, I'm running out of patience lad."

"Ah, yes Mr Smythe" replies Johnson as he scurries for the door.

So what sort of manager is Mr Smythe? He'll probably have a reputation as being blunt, to the point, someone who calls *"a spade a spade"*. He may also be viewed quite positively as someone who cuts to the chase and gets results.

In the eyes of the law however, Mr Smythe may well be a **bully**. And more and more often it seems, managers like Mr Smythe are facing accusations of *"bullying"* from disgruntled staff.

Indeed, *"bullying"* seems to have become the new catch cry in employment circles. Far too often it seems, as soon as a manager puts in place some formal performance measures, a bullying accusation is thrown back as part of the employee's defence. To add to the employer's sense of frustration, this sometimes comes with a medical certificate and associated stress leave. In some cases, the employee may resign and bring a constructive dismissal claim.

Last year, the Employment Relations Authority dealt with several cases alleging bullying, and we are aware of a number of other cases currently before the courts.

What is Bullying?

So what's the difference between a firm authorative manager and a bully? Various academics have written at length on this question and the Employment Relations Authority has formulated this test:

> *"Bullying may be seen as something that someone repeatedly does or says to gain power and dominance over another, including any action or implied action such as threats intended to cause fear and distress. The behaviour has to be repeated on more than one occasion and there must be evidence that those intended or felt fear."* (Used in Evans v.

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Gen-i-Ltd AEA 1250/04 and endorsed in at least one Authority determination since then.)

Another respected definition is *"a bully is someone who knowingly abuses the rights of others, to gain control of the situation and the individuals involved. Bullies deliberately and personally use intimidation and manipulation to get their way"*. (Sam Horne 2002)

Why Is Bullying Unlawful?

Employers have an implied duty to keep their employees safe. If an employee is bullied to the extent that there is a breach of this duty, then a personal grievance could arise. In addition, the Health & Safety in Employment Act 1992 expressly imposes on employers a duty to prevent mental harm, which inevitably includes bullying. Bullied employees therefore have the option of bringing a personal grievance or lodging a complaint with the Department of Labour's OSH Inspectors based on a breach of health and safety legislation.

Indeed in instances where an employee is alleging they've suffered serious harm as a result of bullying, the employer will have to inform OSH itself.

What Should an Employer Do?

Some employers make the mistake of quickly dismissing a bullying charge, based on their own knowledge of the personalities involved. In doing so, they fail to realise that managers who bully may achieve good results and may be well liked by many of their staff, including their own boss.

Any employer faced with an allegation of bullying has a legal obligation to investigate the allegation and to do so promptly and sensitively. A failure to investigate fully and fairly breaches obligations to both parties.

As part of this investigation an employer should seek answer to a series of key questions, including:-

- Was the behaviour complained of abusive or unwarranted?
- Was it repeated?
- Was it designed to gain control, power or dominance over another?
- Was it intended to cause fear or distress?
- Did it have a negative effect on the recipient?

The employer may ultimately conclude, that the manager has acted reasonably and that the employee is using the bullying allegation to hide their poor performance. Alternatively, the employee may have something of a *"chronic victim"* mentality. However, if there is evidence of bullying, then disciplinary action has to be taken. Formal warnings, transfers, intense levels of training, and possibly even dismissal are sanctions that need to be considered. From a health and safety perspective, the employee's work environment must also be made safe.

What About Mr Smythe?

So is Mr Smythe a bully? If this was a one off situation, probably not. However, if it is typical of the way he speaks to Johnson and if he repeatedly calls into question Johnson's intelligence or attitude, then Mr Smythe may well be a workplace bully.

Message for Managers

None of this should make managers feel nervous. Yes, there are *"shades of grey"* particularly when dealing with employees who are particularly sensitive to criticism. However, so long as managers carry out performance management in a professional and firm manner, they should have few problems.

The real message is abuse, swearing, the playing of favourites and the making of threats have no part in modern performance management. So long as these areas are avoided, and there is a focus on honest constructive feedback, the risk of being successfully labelled a *"bully"* remains small.

Alternative Holidays - More Obligations for Employers

Most employers will be aware that if a public holiday falls on a day that an employee would normally work and the employee works on that day, they qualify for a paid alternative holiday.

It is also well established that alternative holidays are to be taken at agreed times, if possible. If the timing cannot be agreed, then if the employee is taking an alternative holiday within 12 months of the date the entitlement arose, then the employee can take that day on the giving of 14 days notice. However if the alternative holiday is based on a day worked more than 12 months earlier, the final decision rests with the employer. This can create problems when employees receive higher pay on some days than others. Often they'll want to take the alternative days on the day their pay is greatest.

However, what is not specified in the Holidays Act is what happens when an employee has a *"bank"* of accrued alternative holidays, some more than 12 months old and some less. A full bench of the Employment Court has now provided important guidance on this issue *(NZEPMU v. ACI Operations (ARC 9/06))*.

In this case, the employer had received advice from the Department of Labour that if employees had a mix of alternative holidays, some being more than 12 months old and some less, the employer could deal with these on a chronological basis, from oldest to newest. This meant that if agreement couldn't be reached over the timing of an alternative holiday, the employer could decline an application if it had genuine reasons to do so, on the basis that the employee had to use up their old days (the timing of which the employer ultimately controlled) before their more recent alternative holidays.

This right was important to the employer because it claimed a pattern had emerged in which staff were consistently taking alternative holidays on the days when, based on their overtime, their rates of pay were at their highest.

However, in spite of the Department of Labour's advice, the Employment Court rejected the chronological approach.

It held that if an employee has an entitlement to an alternative holiday which is less than 12 months old, they can exercise that right entirely unaffected by the fact that the employee may have entitlements to other alternative holidays which are more than 12 months old.

The Court didn't accept the argument that such an approach would be a nightmare to administer. It said an employer must keep a list of all alternative holidays which an employee has qualified for. Whenever an alternative holiday is taken, the employer must note on its records which particular entitlement that alternative holiday is being exercised against. This would need to be discussed with the employee.

The case has major practical ramifications for many employers. Every employer should already know that if their staff work on public holidays and qualify for alternative holidays, they must keep records of this. **However, many will be startled to learn that each time an employee takes an alternative holiday, the employer needs to ask their employee against which particular public holiday, that alternative holiday is being taken.**

If the employee says that the day they are using arose less than 12 months ago then they can determine when that day of leave will be taken.

Given that the chronological approach has been rejected, this is the only way the correct "age" of each alternative holiday can be recorded.

Payroll managers take note!

[Note: Mackinnon & Associates acted for the employer in this case.]

Without Prejudice Discussions

In our last newsletter, we wrote about the value of having an honest counselling discussion with a non-performing employee about whether the role was right for them (Issue 3, "Walking the Line"). We emphasised the importance of being fair in these discussions and not presenting termination as inevitable.

However, some employers seem to think they can say what they like in a counselling discussion just as long as they use the phrase *"without prejudice"*. Typically they then hold a conversation like this:

> *"Johnny, we need to have a "without prejudice" discussion. That means this is "off the record". This is the third time you've been late this week. I've had enough. It's over. Now we can do this the hard way or if you like, you can resign and I'll give you two weeks pay. You need to make up your mind now."*

If this conversation was truly *"without prejudice"* it would mean the conversation was privileged. That means it could not be admitted as evidence in any subsequent proceedings. Legally, it is as if the conversation operated in a vacuum and in some respects, is as if it never occurred.

However, some employers fail to realise that to obtain the protection of privilege, it is not as straight forward as simply dictating that the conversation is *"without prejudice"*.

The protection will only apply if the discussions are made as part of a genuine attempt to settle a dispute. It therefore won't apply in the example above because there is no dispute at the time and the parties aren't attempting a settlement. In fact, the label "without prejudice" is simply being used to 'hide' a discussion that should not be occurring.

Because of this, it's likely that if Johnny brought a personal grievance, these discussions would be admissible and could be relied on by him to support his claim.

The second point about the protection is that there must be an agreement between the parties that the discussions will operate on a without prejudice basis. The employer cannot simply dictate that the discussions will be without prejudice.

The real time and place for *"without prejudice"* negotiations is where the parties have a genuine dispute and one side wants to open negotiations to resolve it. In those circumstances, it is legal (and sensible) to ask if the discussion can be *"without prejudice"*.

The best advice is to tread carefully. Don't fall into the trap of thinking anything goes just because the words *"without prejudice"* have been used!!

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