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EMPLOYMENT LAW

Staying on the right side of anti-bullying laws

By Diana Clement

Bullying can be a costly workplace secret. On the one hand, bullying allegations are a great source of business for employment lawyers. At the same time, they come with reputational damage and heartache for legal workplaces, which often need to look in their own back yard.

According to the International Bar Association's recent report *Us Too? Bullying and sexual harassment in the legal profession*, bullying is rife in legal workplaces around the world, with one in two female respondents and one in three men reporting they had been bullied at work (*LawNews* 24 May 2019).

Here in New Zealand, Colmar Brunton was last year commissioned to do a national survey of lawyers to assess safety in the workplace. Some 57% said they had been bullied and 18% were sexually harassed at some point in their careers.

It's not all bad news, however. The surveys and the magnifying glass placed over Russell McVeagh partners in 2018 have led to soul-searching and reflection by law firms, new human resources policies and, in many cases, greater empathy.

Employment lawyer Jennifer Mills, head of practice at Jennifer Mills & Associates, says there is more sophistication than ever among corporates and law firms around anti-bullying policies. Issues are more likely to arise in boutique practices, she says.

Defining bullying

One of the big issues with alleged bullying, says Mills, is the lack of a precise definition in New Zealand legislation.

But WorkSafe's guidelines in March 2017 are becoming widely accepted in both human resources (HR) practice and the New Zealand courts.



Where do workplaces draw the line between bullying and robust management?

Barrister Catherine Stewart, who convenes the ADLS Employment Law Committee, says while the WorkSafe guidelines aren't a legislative definition, the courts are beginning to adopt and refer to them.

The WorkSafe guidelines define bullying as:

- ◆ Repeated and unreasonable behaviour that:
 - ◆ Must be persistent
 - ◆ Can involve a range of actions over time
 - ◆ A reasonable person in the same circumstances would see as unreasonable
 - ◆ Can be physical, verbal or relational/social
- ◆ Directed towards a worker or a group of workers
- ◆ Can lead to physical or psychological harm
- ◆ Not limited to managers targeting staff or staff targeting managers. Can also happen

between co-workers, other people at workplaces

- ◆ Can be carried out by one or more people and can be directed at a single person or a group
- ◆ May occur outside normal work hours
- ◆ Can be carried out in a variety of ways including email, text messaging or other social media channels
- ◆ Can be direct and personal attacks or indirect and task-related

The types of behaviours that constitute bullying can be direct or indirect, says Mills.

But the definition is still open to interpretation, says Ros Webby, partner at Dundas Street Employment Lawyers.

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"A lot of it is going to be gut. If it is a robust environment anyway, what is acceptable and what is not acceptable is different," she says. "Something that may impact greatly on me may not impact on you. Then the definition runs that behaviour past the mythical 'reasonable person' to test whether the behaviour itself can be described as unreasonable."

She points out, however, that the definition of bullying that must be considered in each individual case is the definition set out in the organisation's own policy, although issues could arise if that definition conflicted with WorkSafe's guidelines.

Webby says when managing staff, it's important to remember there will be stars, those who are competent and others who need performance management. Expecting all staff to meet the performance of the stars comes with the prospect that the manager's actions could be viewed as bullying.

What's not bullying

When it comes to accusations of bullying, a big issue is where robust management ends and bullying begins, says Dr Bill Hodge from the University of Auckland's Law School.

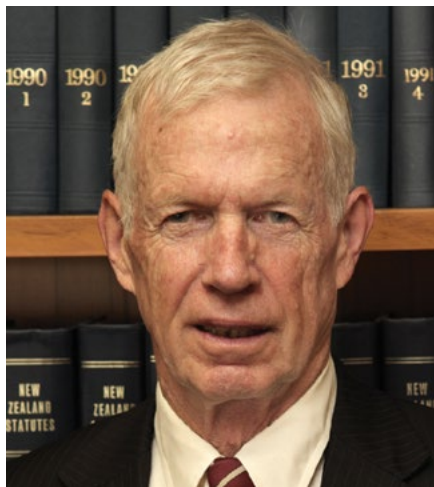
"There is sometimes a belief among employees that all bad behaviour in the workplace is bullying. This lack of clarity can cause an issue.

"If, for example, your employer hits you and it's a one-off event, this in itself isn't bullying, although it would almost certainly qualify as assault. Harassment and discrimination, which can be part of bullying, have their own legal remedies as other unreasonable behaviour."

There can be issues for new lawyers adjusting to the culture of a legal practice. "If they have been in university they may be accustomed to courteous comments. In a law firm it might be on the spot and harsh. There is a deadline tomorrow and the firm's reputation is on the line. [The boss] is relying on your piece of work," Hodge says.

"If you come from a different background or if you have been at university and go straight into a place of employment, you might perceive management direction as being bullying."

WorkSafe has outlined what is not bullying as:



Bill Hodge



Catherine Stewart

- ◇ Constructive feedback and legitimate advice
- ◇ A single incident of unreasonable behaviour
- ◇ Differences in opinions or personality clashes
- ◇ One-off occasional instances of rudeness or tactlessness
- ◇ A manager requiring reasonable work instructions to be carried out
- ◇ Setting high performance standards because of safety

A good case to consider in this context, says Mills, is *Evans v Gen-i Ltd* ERA Auckland AA333/05, 29 August 2005. This distinguishes between bullying, criticism and feedback by an employer.

The outcome was that all behaviour needs to be viewed in the social context in which it occurs and the motivation for the behaviour is also relevant. "A vulnerable person may perceive criticism of his or her work as bullying, regardless of how the criticism is couched."

Mills says she has observed a trend of employees being more willing to complain about what they perceive as bullying. These complaints aren't always justified and sometimes an accusation of bullying is used to deflect a disciplinary process.

"They say it is bullying when it's micro-management or there is a cultural clash and the employee will try to deflect the complaint against them," says Mills.

She sees cases where, as soon as a performance management review has begun, the employee turns around and complains that he or she has been spoken to harshly and that this is bullying.

An employer must halt the disciplinary inquiry until it has investigated and made a decision about the employee's bullying complaint.

Policies and processes

Probably without exception, all large law firms have robust anti-bullying policies and processes in place although this may not be the case with some smaller boutique firms, says Mills.

Increasingly those anti-bullying policies are framed around the WorkSafe guidelines. Most policies Hodge sees in his investigations are fit for purpose.

Mills says a good policy does the following:

- ◇ Clarifies what bullying is/what behaviours are unacceptable
- ◇ Emphasises the organisation's commitment to preventing bullying

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LawNews

LawNews is an official publication of Auckland District Law Society Inc. (ADLS).

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LawNews is published weekly (with the exception of a small period over the Christmas holiday break) and is available free of charge to members of ADLS, and available by subscription to non-members for \$140 (plus GST) per year. To subscribe, please email reception@adls.org.nz.

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- ◇ Sets out how to lay a bullying complaint
- ◇ Sets out the process which should be easy and clear
- ◇ Should be straightforward for complainants
- ◇ Should be reinforced, monitored and regularly reviewed

There are mixed feelings among the legal fraternity about whether the processes attached to anti-bullying policies are sufficiently substantial.

Hodge doesn't come across many instances where the policy is not combined with adequate processes. The issue, he says, is implementing those processes.

Typically, HR will push complainants into an informal approach, with or without the help of HR mediating. HR doesn't want the work of a formal complaint; nor does it want the conflict, Hodge says.

Catherine Stewart says she has seen cases where the employee doesn't want the issue to go to a formal complaint, but HR considers it important to investigate the issue.

Robust management or bullying?

Generally speaking, says Stewart, there is a fine line between robust management and bullying.

"I don't think that is an easy line to draw," she says. "For example, you might have someone who is driving an organisation to achieve better results, pushing employees to be successful and who has a 'no tolerance' attitude towards misdemeanours. That kind of driven attitude is often seen in organisations.

"It doesn't necessarily constitute bullying but might be simply a robust management style, so long as it is not exhibiting bullying-type behaviours to achieve those goals."

The point where a complaint of bad behaviour tips over into bullying under the Employment Relations Act is situational and subjective, adds Hodge.

"You look for more than one complainant and people [who are] supporting, saying there is an issue. If several people are saying it is over that line, however unclear that line is, then we can say to the partners [the alleged bully] needs some form of training."

Or they may need a warning about their style, says Hodge. "They can still achieve the outcomes necessary for the partnership but with some more empathy for the people at the receiving end."

Stewart says typically where she sees robust management spill over into bullying there are various types of actions that could include:

- ◇ excessive micro-management
- ◇ consistent criticising of staff members' competence
- ◇ excluding employees from meetings or work activities



Jennifer Mills



Bevan Catley

- ◇ repeatedly making belittling comments
- ◇ unrealistic work expectations and impossible deadlines, and
- ◇ ignoring the employee's positive contribution and blocking promotion.

One of the most useful cases in recent years is *FGH v RST* [2018] NZEmpC 60.

The court found the employer had not bullied Ms H but it had failed to maintain a safe and healthy work environment. Although Ms H found her employer's scrutiny of her work to be "unwanted, intimidating and humiliating" it was not bullying because it was not unprofessional or hostile.

The mere fact that Ms H invoked the term "bullying" during the process did not mean there was automatically a requirement on her employer to commence an independent investigation under its harassment policy.

In context

Bullying, says Hodge, is contextual. While it might be acceptable to shout out at a construction worker who is putting others' lives at risk on site, yelling at a junior lawyer in a practice is not on.

Management actions need to be delivered in a reasonable way in the context of the workplace, says Hodge.

"Setting high performance standards is not bullying, nor is constructive feedback." Hodge has no doubt there is bullying in the legal profession. "Absolutely."

There are two sides to every story, however. "I can't tell you how many times I have gone through a list of interviews with the people supporting the complainant." The other side then presents a very different picture.

Even when bullying isn't proven, the investigation can be helpful and lead to improvements in the workplace, says Hodge.

Sometimes it leads to increased empathy and

greater awareness by the manager of how he or she is perceived.

Policies that are too prescriptive may inhibit the flexibility needed to run an efficient business. "It is all about a fair process. I don't actually believe a highly-structured, detailed policy necessarily achieves the best outcome. You can see it being constraining," he says.

Should we care?

Law firms need to take bullying seriously as a health and safety issue with serious legal and reputational consequences, says Massey University School of Management associate professor Bevan Catley.

"The key message of the Healthy Work Group New Zealand is it is not political correctness gone mad. It is not tough management and/or weak employees who lack resilience," says Catley.

"There is a long list of negative personal and organisational outcomes."

The research both internationally and in New Zealand suggests those who witness bullying also experience the same negative outcomes as being bullied themselves.

"Bullying has toxic ripples that go on and infect the rest of the organisation," says Catley. "Suddenly a lot of resource gets sucked in."

Tolerating bullying ultimately affects the ability to hire. "Word gets around. If you have a reputation for tolerating this type of behaviour or employing this type of person, you are going to struggle to win the war for talent."

Catley says the combination of business performance, and ethical and legal arguments is the reason why law firms should be concerned.

WorkSafe's Best Practice Guidelines can be found here: <http://www.business.govt.nz/worksafe/information-guidance/all-guidance-items/bullying-guidelines> ❖