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Abuse of power and discrimination in the workplace

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We are gradually coming to grips with the phenomenon of misbehaviour in the workplace as a general species of unacceptable conduct - but in what circumstances will it constitute the basis for a cause of action? Although there have been successful actions brought by the aggrieved party in similar circumstances, there is no coherent approach and the results are patchy.

In Victoria, where common law rights to sue have been severely circumscribed, there are particular difficulties with this form of abuse. This article looks at the problem from a Victorian perspective and includes reference to Commonwealth laws which might be of assistance.

Awareness of the problem

Increased attention is being given to the abuse of power in the workplace. The power which is abused may derive from a formalised hierarchy of authority or from informal "pecking orders" which become established over time.

Quiet enjoyment of the workplace is a valuable fundamental right which has long been recognised in the context of anti-discrimination law:

"A benefit of employment is the entitlement to quiet employment, that is, the freedom from physical intrusion, the freedom from being harassed, the freedom

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from being physically molested or approached in an unwelcome manner"[1].

In recent years, attention has been drawn in particular to the phenomenon of "workplace bullying", defined as

"(O)ffensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees. These persistently negative attacks on their personal and professional performance are typically unpredictable, irrational and unfair."[2]

In addition, there has been recognition of another dimension to the problem - that of systematic collective violence at work involving

"ganging up on or mobbing a target employee and subjecting that person to psychological harassment"[3]

This paper looks at some of the key issues surrounding the dilemma of workplace misbehaviour and associated matters.

Misbehaviour constituting discrimination

A logical starting point for a discussion of misbehaviour in the workplace is the array of anti-discrimination laws available to employees.

The key statutes are:

- in Victoria, the *Equal Opportunity Act 1995* (EOA)
- at Commonwealth level, the *Sex Discrimination Act 1984* (SDA)
  Disability Discrimination Act 1992 (DDA)
  Racial Discrimination Act 1975 (RDA)

The *EOA* and these Commonwealth statutes provide complaint-driven mechanisms for the filing, conciliation and hearing of complaints about work-related discrimination, including in the offering of employment.

The names of the Commonwealth statutes broadly indicate their respective targets: sex, race and disability.[4]

Under the Victorian *EOA*, the protected attributes include age, impairment, industrial activity, lawful sexual activity, marital status, physical features, political belief, pregnancy, race, religious belief, sex, parental or carer status and association with a person who is identified by reference to a protected attribute.[5]

"Quiet enjoyment of the workplace is a valuable fundamental right"

Where termination of employment is involved, the *Workplace Relations Act 1996 (Cth)* (WRA) is also an important and increasingly used avenue for redress[6]. In the context of discrimination, the WRA deals with termination of employment on certain specified prohibited grounds, including temporary absence from work because of illness or injury, union membership or non-membership, race, sex, sexual preference, age, disability, marital status, family responsibilities, pregnancy, religion, political opinion, social origin, refusing to negotiate an Australian Workplace Agreement and absence on parental leave.

There are also "freedom of association" provisions in the *WRA* which, broadly, address detrimental treatment because of membership or non-membership of a trade union or employer association.[7]

The Federal Court has power, in unlawful termination applications, to impose a penalty, reinstate or order compensation and make associated orders.[8] However, there is a ceiling on the amount of compensation which may be awarded, so in certain cases, compensation may not match what might be available through, say, the *EOA*. Under the freedom of association provisions of the *WRA*, the Court may impose a penalty, require reinstatement, order the payment of compensation and make other associated orders.[9]

Also worthy of note is the *Human Rights and Equal Opportunity Act 1986* (Cth) (HREOCA) which is in a distinct category, providing as it does a conciliation mechanism in cases where the standard statutes do not apply but other violations of human rights may occur.[10]

There is a significant degree of overlap between the legislation described above and selection of a forum may not be simple.[11]

Two sub-species of discriminatory conduct are sexual harassment and disability harassment. Both types of harassment rate a special mention in anti-discrimination statutes.

Under the *EOA*, sexual harassment is defined as the making of an unwelcome sexual advance or request for sexual favours or the engaging in any other unwelcome conduct of a sexual nature in circumstances where a reasonable person would have anticipated the other person would be offended, humiliated or intimidated. Harassment is unlawful in the offering of employment, in the course of employment and in common workplaces.[12] The definition under the *SDA* is similar.[13] The nexus between sexual harassment and workplace bullying is clear.[14]

Under the *DDA*, disability harassment in the context of employment (including offering of work, contract and commission work) is unlawful.[15] However, harassment is not defined for these purposes.

Under the *EOA* the Victorian Civil and Administrative Tribunal may, where a complaint is upheld, order that a person:

- refrain from acting in contravention of the Act; and/or
- pay within a specified period an

amount fit to compensate the complainant for loss or damage or injury suffered in consequence of the contravention.
- do anything specified in the order with a view to eliminating future contravention or redressing circumstances that have arisen from the contravention.[16]

Under the *SDA*, *DDA* and *RDA*, the HREOC may make a broad range of "declarations", including that:
- the conduct complained of is unlawful;
- the respondent should perform any reasonable act to redress any loss;
- the complainant be re-employed or promoted by the respondent; and
- damages by way of compensation be paid.[17]

There are still difficulties with the enforcement of decisions of the Human Rights and Equal Opportunity Commission (HREOC) following the decision in *Brandy v HREOC*.[18] There, the High Court held that the HREOC could not make its determinations enforceable by the then-used device of registering them in the Federal Court. Enforcement of determinations is currently effected by asking the Federal Court for an order to enforce the determination by conducting a "de novo" hearing.[19]

Although anti-discrimination laws provide a response to the phenomenon of bullying in the workplace, the coverage they provide is limited, in the sense that only persons with certain attributes in certain fields of activity are protected.

But whatever their shortcomings, these laws do give aggrieved workers the right to assert not only that the treatment they have received is unacceptable socially but also unlawful.

Harsh, unjust or unreasonable dismissal

Where bullying leads to termination of employment, it may be possible to use those provisions of the *WRA* which provide for the making of an application alleging harsh, unjust or unreasonable termination.[20] The mechanisms and remedies are similar to those involving termination of employment on discriminatory grounds, but the matter is heard by the Australian Industrial Relations Commission rather than the Federal Court.[21]

Vilification, "hate crimes" and employment

There will be occasions when laws relating to vilification, hatred and the like intersect with misbehaviour in the workplace.

The *RDA* makes it unlawful for a person to do an act "otherwise than in private" which is reasonably likely in all the circumstances to offend, insult or humiliate another person or group of people, where that act is done because of the race, colour or national or ethnic origin of the other person or group. The definition of circumstances in which an act is taken not to be done in private is wide enough to catch many workplaces.[22]

"There is ... a growing awareness that violence at work is a structural, strategic problem rooted in wider social, economic, organisational and cultural factors"

Vicarious liability, associate liability and discrimination

Where the perpetrator of discriminatory or harassing conduct is an employee or agent and the discrimination occurs in the context of employment, his/her employer or principal may be found to be vicariously liable.[23] Other players in the piece, such as trade unions, may also be caught.[24] However, it is a defence if the employer or principal can show it took reasonable steps to prevent the action occurring (or, in the case of the *DDA*, also exercised due diligence).[25]

The success or otherwise of the defence depends upon a number of factors. The mere existence of an equal opportunity policy will not be enough to deflect vicarious liability.[26] Even where there is a policy, care should be taken to examine its implementation and coverage in the light of the particular circumstances of the case.[27] Action taken by an employer after the event will not assist in establishing that reasonable steps have been taken.

Also relevant in this context is the idea of "accessory liability", which is attracted in various cases where a person incites, causes, instructs, induces, aids or permits another to commit the act.[28] This may operate to cover the actions of those who, though not direct participants in discrimination or harassment, were instrumental in the perpetrator's carrying out of the conduct complained of.

The *Accident Compensation Act* 1985 (VIC)

A claim may be made under the *Accident Compensation Act 1985 (Vic)* (ACA) for compensation for physical or mental injury arising out of or in the course of employment where the employment is a significant contributing factor.[29] This would include injury arising from workplace misbehaviour. Where stress is the manifestation of the injury, the limitations concerning this should be noted - stress arising out of reasonable action taken in a reasonable manner to transfer, demote, discipline, redeploy, retrench or dismiss the worker, for example, is excluded from compensation.[30] The complication is that the line between bullying and legitimate discipline or other specified action is a fine one indeed and the trauma of proving unreasonable action will often deter the aggrieved worker from pursuing the matter.

Misbehaviour as an occupational health and safety issue

There is an implied term in all contracts of employment that the employer will provide a safe workplace for employees.[31]

This is echoed in occupational health and safety legislation. In Victoria, the *Occupational Health and Safety Act 1985* (OHSA) obliges the employer to provide and maintain, so far as is practicable, a working environment for employees that is safe and without risks to health.[32]

There are mechanisms supported by the *OHSA* which may be of use in combating the problem at an enterprise level. Health and safety representatives can be appointed[33] and committees established[34] to deal with health and safety issues.

These measures have been effective in framing standards of behaviour and procedures for grievance resolution. The options available to such committees include the identification of risk factors, controlling the risk and establishing ▶

workplace training and complaint procedures.[35] There is also scope for provisional improvement notices (PIN notices) to be issued by health and safety representatives where, in the opinion of that representative, a person is or has contravened the *OHSA*.[36] There is no reason why such a notice cannot be issued in respect of an individual who is perceived as a health and safety risk.

The *OHSA* is, of course, targeted more to prosecution of employers and practical measures rather than to compensation for the individual affected.[37]

Nevertheless, a demonstrated breach of the *OHSA* would be of obvious tactical benefit in seeking individual redress for such an employee, whether informally or in the context of a discrimination action. Moreover, the value of a program designed to eliminate the problem should not be underestimated.

Common law breach of statutory duty

The prospect of claiming damages at common law for injury arising out of or in the course of or due to the nature of employment in Victoria on or after 12 November 1997 has been virtually extinguished by the *Accident Compensation Act 1985*.[38]

Further, breach of statutory duty, which might be thought to have been available in instances of breach of the *OHSA*, is precluded by that Act.[39]

Criminal Law

Although discussion of the criminal law is beyond the scope of this paper, it should not be forgotten that, in appropriate circumstances, the criminal law may also be applicable.[40] Indeed in appropriate cases, it may assist the evidentiary aspects of a discrimination or similar complaint to be able to show that the aggrieved person reported the matter to the police.

Conclusion

The curtailment of common law rights in Victoria has had a significant effect on the rights of those who have suffered substantial harm as a result of workplace harassment. Workers are thrown back on a mixture of legal regulators which may or may not address their particular concerns. Such a response is inadequate.

In the words of a recent ILO study:

"There is ... a growing awareness that violence at work is not merely an episodic, individual problem but a structural, strategic problem rooted in wider social, economic, organisational and cultural factors; that violence at work is detrimental to the functionality of the workplace, and that any action taken against such violence is an integral part of the organisational development of a sound enterprise. Violence at work is seen as a major problem that has to be tackled, and tackled now."[41] ■

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This article is a modified version of a paper presented to a LAAMS seminar on Hate Crimes.

Footnotes:

1. Nathan J in *R v Equal Opportunity Board and another; ex parte Burns and another* [1985] VR 317 at 329
2. "Violence at Work" Chappell and Di Martino; International Labour Office, Geneva 1998; at p 11
3. As above
4. ss5-7A *SDA*; s9 *RDA*; ss5-9 *DDA*;
5. See s6 EOA.
6. s170CK *WRA*
7. An application for relief may be made to the Federal Court, which can make a range of orders including the imposition of a penalty: Part XA; sub-ss298T, 298U, *WRA*
8. s170CR, *WRA*.
9. s298U, *WRA*.
10. Note, however, that "discrimination", for these purposes, relates to a "distinction, exclusion or preference" on grounds defined via s 3(1) *HREOCA* , which specifies some grounds but also includes the potential for the adoption of regulations to declare additional grounds. At present, grounds covered include race, sex, religion, political opinion, social origin, age, sexual preference, criminal record, marital status, disability and trade union activity (reg 3 and 4 *HREOC* regs)
11. For a discussion of the application and interaction of the laws see "High Roads. Low Roads and Detours - Strategic Considerations in Discrimination Law", Andrades C, Law Institute Journal of Victoria; Apr 99.
12. ss85, 86, 87 EOA
13. s28A SDA
14. W v Abrop P/L & Ors ; 27 May 1996; extracted at (1996) EOC 92-858; HREOC Atkinson C
15. ss 35, 36 DDA
16. s136 *EOA*
17. Section 25Z *RDA*; s81 *SDA*; s103 DDA.
18. (1995) 183 CLR 245.
19. Part III Div 3A *RDA*; Part III Divs 3A and 4 *SDA*; Part 4 Divs 3A and 4 *DDA*.
20. S170 CE *WRA*
21. s170CH *WRA*
22. s 18C *RDA*
23. s106 *SDA*, ss 18A, 18 E *RDA*, s 123 *DDA*, s 102 *EOA*
24. *Horne & Anor v Press Clough Joint Venture & Anor (1994) EOC 92-591*
25. s 103 *EOA*, s 18E *RDA*
26. See for example *Rabel v Whitehorse City Council & Ors* no 143/97; 19.02.98 Anti-Discrimination Tribunal
27. *Evans v Lee* 1996 EOC 92-822
28. S105 SDA, 17 RDA; DDA 43, 122
29. s5 (definition of injury); 82 *ACA*
30. s82(2A) ACA
31. *Hamilton v Nuroof (WA)* (1956) 96 CLR 18
32. s 21 OHSA
33. s 30 OHSA
34. s 37 OHSA
35. See for example the South Australian Workcover Corporation Publication "Guidelines for Reducing the Risk of Violence at Work."
36. s 33 OHSA
37. s48 OHSA
38. s 134A *Accident Compensation Act 1985*
39. s28 OHSA
40. See *Bennett v Everitt* (1988) EOC 92-244 (HREOC); *Singh v Velios* 4 June 1998; Industrial Relations Court
41. "Violence at Work" Chappell and Di Martino; (cited above) at p 145.

CORRECTIONS
August Plaintiff

Dr Keith Tronc

In the article by Dr Keith Tronc, "How Many Teachers Is Enough?" there was a factual error made on page 18 in the discussion of the case *Warren v Haines*. The judgment was described as having been overturned on appeal. In fact the primary judgment was not overturned on appeal and the decision actually referred to in the article was the minority dissenting judgment. The author of this article sincerely apologises for this mistake.

Editor's note

The editor's note on page 9 was actually meant to accompany the case note by Irene Lawson on page 29. Her case note was on *Naxakis v Western General Hospital & ANOR* (1999) HCA 22 (13 May).