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HUMAN RESOURCES & INDUSTRIAL RELATIONS

*“Empowering businesses through practical and strategic IR & HR solutions”*

## Employee Relations Newsletter

Edition 65

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### Introduction

In this edition, I explore the latest bullying claim arbitrated by Fair Work, and provide an overview on matters that have drawn my attention...enjoy!

Work-related mental injury resulting in psychological harm is the second most common cause of workers' compensation claims in Australia, after manual handling. It currently accounts for 11 per cent of workers' compensation claims in Victoria, and one of the leading causes is work-related stress. Bullying claims are usually the catalyst for these claims.

In my “shortcuts” section, I have provided links to a number of interesting articles found:

- Workplace safety fine quadrupled on appeal.
- (More) HR coping criticism.
- Stay on a disciplinary matter to allow for bullying investigation.
- Good faith bargaining.
- Part-time sick leave v overtime.

Further, I have appended “HR Actions” for 2017 identifying changes to legislation that may be of interest to my readers.

**And** please visit my website [gregreiffelconsulting.com.au](http://gregreiffelconsulting.com.au).

### Bully (reasonable management action)

John Krnjic [2017] FWC 3688 (AB2016/497). Gregory, C. 12 July 2017

This matter involves a Mr John Krnjic who works part-time as a Team Member for Bunnings. Mr Krnjic made application to the FWC for a “stop bullying order”, alleging he had been bullied at work by his Team Leader. Mr Krnjic has been off work since June last year after he was suspended following a complaint made by his team leader. and remains off work on unpaid sick leave, which is supported by on-going medical certificates.

The Commissioner was very thorough in his consideration of this matter, citing many case precedents and adding a number of his own observations, I believe that this may well be seen as the decision that practitioners will go to relating to bullying (notwithstanding that such matters going to arbitration is a rarity in itself). In saying this, the decision was very technical in its nature, focusing on the meaning of words “reasonably” and about what constitutes “repeatedly behaving unreasonably.”

Whilst finding there was no breach to the bullying “law”, the Commissioner did comment that Bunnings management could have done better in handling this matter. In the Commissioner’s own words: “this matter involves two strong personalities who both have a genuine commitment to their work.”. The team leader, being new to the role, being described as a “micro manager” and the applicant, having a strong personality and did not appreciate scrutiny in his work.

Mr Krnjic also alleges he has been bullied by management at the Store. He has also made complaints in the past about other employees during his employment with Bunnings, however, none of those individuals remain in employment at the Northland Store.



The Commissioner considered:

*"I have no reason to doubt that Mr Krnjic **believes** [my emphasis] he has been bullied by being singled out and treated differently from other employees. However, that of itself is not sufficient to establish he has been "bullied at work" in the context of the legislative framework contained in the Act of that legislation, and the authorities that have considered how those provisions should be applied".*

Further considerations were:

s.789FF requires that various pre-requisites be satisfied in order to establish that a worker has been "bullied at work."

- That the employee "reasonably believes that he or she has been bullied at work." This in turn requires that not only must the belief be actually and genuinely held, but it must also be a reasonable belief when viewed objectively and not something that is, for example, based on an irrational or absurd view.
- That "an individual" or "a group of individuals" have repeatedly behaved unreasonably towards the employee, and "that behaviour creates a risk to health and safety.
- That "reasonable management action carried out in a reasonable manner" does not constitute bullying at work.

In summary, the Commissioner made the following points:

- It is first necessary to establish the existence of repeated unreasonable behaviour. This can extend to encompass a range of behaviours over different periods of time.
- Secondly, "unreasonable behaviour" can be viewed as behaviour that a reasonable person would consider to be unreasonable.
- ..."repeatedly behaving unreasonably" ...should first be considered in terms of the intention to prevent bullying at work [and] "unreasonableness" should not be limited to something which is, for example, irrational, bizarre or so unreasonable that no reasonable person could have contemplated that course of action.
- Thirdly, for conduct to be considered to be reasonable it does not have to be the best or the preferred course of action. The test instead involves consideration of whether something was done reasonably, and not whether it could have been done in a more reasonable or different way.
- Finally, it is necessary to establish that the relevant behaviour "creates a risk to health and safety." This requires that there be some causal link between the behaviour and the risk to health and safety when viewed in a common sense and practical way.

## Conclusion

Whilst this decision was in Bunnings favour, it was very "technical" in its content and did not mention whether Bunnings had in place an anti-bullying policy and, if so, was it followed?

Do not hesitate to contact me should you require any assistance in this area or other "people" issues.

## Shortcuts

### Workplace safety fine quadrupled on appeal.

The fine for a Bright earthmoving company has been more than quadrupled by a judge in a strong message for other businesses that risk the safety of employees.

Stadelmann Enterprises will now have to pay \$175,000, increased from the original Magistrates' Court fine of \$40,000, following an appeal by the Department of Public Prosecutions.



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The company pleaded guilty to failing to provide a safe workplace after an incident on September 25, 2015, where a 17,000-kilogram excavator was overloaded onto a trailer and came loose, causing two employees in a truck to run off into a ditch on Back Porepukah Road.

### **(More) HR copping criticism.**

[http://www.mondaq.com/article.asp?articleid=596486&email\\_access=on&chk=1240595&q=644109](http://www.mondaq.com/article.asp?articleid=596486&email_access=on&chk=1240595&q=644109)

### **Stay on a disciplinary matter to allow for bullying investigation.**

In the recent decision of *Lynette Bayly* [2017] FWC 1886, the Fair Work Commission (FWC) issued interim orders preventing the employer from finalising a workplace investigation or imposing any disciplinary action until the employee's workplace bullying application is heard.

[http://www.mondaq.com/article.asp?articleid=596484&email\\_access=on&chk=1240593&q=644109](http://www.mondaq.com/article.asp?articleid=596484&email_access=on&chk=1240593&q=644109)

### **Good faith bargaining.**

The Fair Work Commission (FWC) has recently confirmed that, following a period of bargaining in good faith, an employer is entitled to cease negotiations and put its best and final offer to its employees for a vote.

[http://www.mondaq.com/article.asp?articleid=596480&email\\_access=on&chk=1240589&q=644109](http://www.mondaq.com/article.asp?articleid=596480&email_access=on&chk=1240589&q=644109)

### **Part-time sick leave v overtime**

[http://www.mondaq.com/article.asp?articleid=600496&email\\_access=on&chk=1244605&q=644109](http://www.mondaq.com/article.asp?articleid=600496&email_access=on&chk=1244605&q=644109)

*Until next time...*

**Greg Reiffel**

Principal Consultant



## Workplace Changes 2017

<b>Salary cap for unfair dismissal:</b>	\$142,000 (up from \$138,900: employees paid more than \$142,000 base salary per annum, and not covered by an award, cannot claim unfair dismissal - base salary does not include 9.5% superannuation and at-risk remuneration, but does include the value of other guaranteed monetary or non-monetary benefits)
<b>Filing fee for dismissals, general protections and anti-bullying applications:</b>	\$70.60 (up from \$69.60)
<b>Compensation Limit for dismissals</b>	\$71,000 (6 months' remuneration - up from \$68,350)
<b>National Minimum Wage:</b>	\$694.90 per week (up from \$672.70 per week) or \$18.29 per hour (up from \$17.70 per hour)
<b>Award Minimum Wage:</b>	All award pay rates increased by 3.3% effective 1 July
<b>Superannuation Guarantee Percentage:</b>	\$52,760 per quarter - \$211,040 per annum (earnings above which are not subject to compulsory contributions)
<b>Redundancy tax concessions:</b>	In a genuine redundancy payment, \$10,155 plus \$5,078 per completed year of service, is tax free
<b>Eligible Termination Payment cap:</b>	\$200,000 (concessional tax treatment below this amount, highest marginal tax rate above)
<b>Fair Work Information Statement:</b>	This must be given to all employees on commencement of employment. <a href="#">View the updated version for 2017-18</a>
<b>Point for attention:</b>	Beware of paying less than the National Minimum Wage to any employee not covered by any age or disability-related percentage rate

### Changes to penalty rates

The Fair Work Commission issued a decision in February 2017 regarding changes to penalty rates under modern awards. The decision highlighted the belief that Sunday and public holiday penalty rates did not achieve the purpose of modern awards and therefore, it was decided to reduce these rates progressively over 3 or 4 years.

On 1 July 2017, penalty rates for employees covered by the General Retail Industry Award, the Fast Food Industry Award, Hospitality Industry Award, Restaurant Industry Award and the Pharmacy Award will be reduced.

### New workplace laws

There are also two new proposed workplace laws, which haven't yet come into effect, but are likely to in the coming months.

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 aims to ensure the Fair Work Act is equipped to deal with deliberate and persistent non-compliance, as some employers believe they are unlikely to get caught or the penalty is too low to worry about in the current Act. In response, this Bill seeks, amongst other things, to increase maximum civil penalties, place greater liability on franchisors and holding companies when they knew or ought to have known their franchisees or subsidiaries were non-compliant, and provide the FWO with powers to gather evidence in line with other regulators such as the Australian Securities and Investment Commission (ASIC).



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The Fair Work Amendment (Corrupting Benefits) Bill 2017 aims to improve governance of registered organisations. It introduces criminal offences for giving or receiving a "corrupting benefit" and when employers pay employee organisations or prohibited beneficiaries' illegitimate payments or a party receives any prohibited payment. Additionally, individuals bargaining for enterprise agreements must disclose certain financial benefit

Visa changes: Go to [https://www.border.gov.au/Busi/visas-and-migration/visa-entitlement-verification-online-\(vevo\)](https://www.border.gov.au/Busi/visas-and-migration/visa-entitlement-verification-online-(vevo))

**Source: Mondaq**

