

AUSTRALIA: WORKPLACE BULLYING

What amounts to bullying in the workplace?

Workplace complaints that include bullying and risks to health and safety from employee misconduct have become more common in recent years. There is increased regulatory and stakeholder focus on the psychological health of employees.

How should employers manage bullying allegations, to comply with their Work Health and Safety (WHS) obligations?

The answer is not always immediately apparent. Recent cases show that less egregious behaviour than previously, could now amount to bullying.

The steps employers must take in dealing with such matters are crucial and evolving.

How to assess a bullying complaint?

When assessing and responding to a complaint, the key questions are:

- Does the alleged behaviour rise to the definition of 'bullying' under local law or an applicable internal policy?
- Does the behaviour of the employee constitute 'serious misconduct'?
- What action should the employer take and who is responsible for making that decision?

What is the threshold for workplace bullying?

Cases over the last few years have found the following types of behaviour, as bullying:

In a 2015 case behaviours such as intimidation, coercion, threats, humiliation, shouting, victimisation, conspiracy to harm, and physical and verbal abuse were identified as indicative of bullying.

The Victorian Supreme Court has previously described bullying as the deliberate intent of causing physical and psychological distress, mostly using unwarranted or invalid criticism, fault finding, exclusion or isolation.

More recently, conduct that might previously have been dismissed as rudeness, incivility, or abruptness may, in fact, amount to bullying and require a more significant response.

An employee described as generally "rude" and "socially inept", was found to have failed to treat his colleague with courtesy, civility, respect and dignity. His being moved to another office, 350 kilometres away was justified on grounds of serious misconduct.

An employee found to have ignored his colleague's greetings, belittled her contributions, and did not engage in conversation with her or acknowledge her work was consider bullying.

Is workplace bullying serious misconduct?

It is uncontroversial that bullying *can* constitute "serious misconduct" but does it always?

Recent judgements and judicial comments leave little room for flexibility in the view that *all* substantiated bullying qualify as serious misconduct.

Combined with a conclusion that even a less severe category of conduct (e.g. incivility) may constitute bullying, this position raises critical questions for employers:

- If any level of bullying constitutes serious misconduct, can an employer plausibly meet its own duty of care obligations without removing the perpetrator from the workplace?
- If any level of bullying constitutes serious misconduct, is termination without notice a permissible or necessary consequence? For example, does this mean repeated rudeness justifies termination without notice?

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How should employers balance bullying allegations as misconduct and WHS risks?

Previously, bullying behaviour was regarded more as a conduct matter than a WHS matter. Now, legislative and regulatory changes and better management understanding of workplace psychosocial risks, have placed bullying squarely in the WHS world.

Accordingly, managers responsible for decisions relating to substantiated bullying must consider: (a) whether the conduct presents a risk to the health and safety of others; and (b) whether proposed response actions are compatible with an employer's ongoing WHS obligations.

To this end, employers should ensure their processes for reviewing and resolving complaints of inappropriate interpersonal behaviour that may amount to bullying, are sufficient and effective. For example:

- At what stage is your WHS team/professional engaged in the review and investigation process?
- Are WHS experts consulted in the consideration of an appropriate outcome?
- Is your review and disciplinary process conducted and documented in accordance with any applicable WHS plans, processes or policies?

It is clear now that WHS advisors should play a significant role in the assessment of conduct that may previously have been considered outside their area of responsibility.

This is a high level general update only. Legal advice should be obtained on specific circumstances.