

Article Information

Author: Penny Brooke

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Application for an order to stop bullying used to halt disciplinary action

A recent order made by the FWC, in Lynette Bayly [2017] FWC 1886, preventing an employer from taking action in relation to an employee's alleged misconduct until that employee's application for an order to stop bullying had been determined.

It happens often enough that when an employer starts investigating a complaint made by one employee against another, the employer uncovers allegations of misconduct involving the employee who made the initial complaint. It is also a common occurrence that when an employee is presented with allegations of misconduct or inappropriate behaviour, they make allegations of a similar nature against another employee (most often their manager). Employers in this situation find themselves entangled in a web of allegations that they need to investigate. Investigations in these type of scenarios are required to ensure that the employer is maintaining a work culture that they are happy with and to protect themselves from any associated legal risks, such as unfair dismissal, adverse action or discrimination claims.

Until recently the FWC's anti-bullying jurisdiction had not interfered with an employer's management prerogative to investigate alleged misconduct by its employees and discipline employees accordingly. However, this changed on 4 April 2017 when Commissioner Hampton, in an application for an order to stop bullying made by Lynette Bayly, ordered Bendigo TAFE and three individuals, being the Chief Executive Officer, Chief Operating Officer and the Chief Organisational Capability Officer, not to:

1. take any further steps to finalise the investigation of Ms Bayly;
2. impose any disciplinary sanction against Ms Bayly in or in connection with that investigation; and/or
3. terminate Ms Bayly's employment,

until the application for an order to stop bullying had been determined, or the FWC ordered otherwise.

Background

Ms Bayly made an application for an order to stop bullying against her employer and three individuals after Bendigo TAFE sought to finalise an investigation report into allegations of misconduct against her. Ms Bayly asserts that, amongst other things, the allegations against her were only made as a consequence of the complaint that she had made against one of the individuals named in her stop bullying application and that those allegations, and any investigation into them, are acts of unreasonable behaviour constituting workplace bullying under the *Fair Work Act 2009* (Cth) (**FW Act**).

These allegations were denied by Bendigo TAFE and the three named individuals.

The investigation into Ms Bayly's alleged misconduct commenced in January 2017 and draft findings had been put to Ms Bayly for her response. Before Ms Bayly responded she was certified unfit for work due a depressive illness between 30 March and 23 April 2017. She sought an undertaking from her employer that no further action would be taken until she was fit to return to work. Bendigo TAFE did not provide that undertaking, and instead confirmed its previously issued direction for Ms Bayly to attend a meeting on 3 April where it intended to make a decision about the alleged misconduct on the basis of the information it had before it. Ms Bayly successfully sought an interim order preventing Bendigo TAFE and the three named individuals from taking any such action.

Interim Orders

In deciding to issue the interim orders, Commissioner Hampton concluded, on the limited evidence before him, that there

was a sufficient likelihood of Ms Bayly establishing that she was the victim of bullying.

In making this decision, Commissioner Hampton placed a significant amount of weight on the fact that there was a very real prospect that Ms Bayly's employment would be terminated if the investigation was finalised, and that could deprive her of the capacity to have her stop bullying application heard and determined. The interim orders had the effect of requiring Bendigo TAFE to continue to employ Ms Bayly when ordinarily it would be open to it to decide to terminate her employment. Nevertheless, Commissioner Hampton was satisfied that the prejudice suffered by Ms Bayly warranted this course of action. In addition to his assessment that Ms Bayly had a prima facie case, Commissioner Hampton took the following matters into consideration in reaching this conclusion:

1. the FWC should be able to determine Ms Bayly's application before her current medical certificate expired;
2. Ms Bayly had been stood down on full pay for a period leading up to Commissioner Hampton's decision; and
3. Bendigo TAFE is a large employer.

It is unknown whether Ms Bayly's application for an order to stop bullying has proceeded to a final hearing before the FWC.

What does this decision mean for employers?

Employers can take comfort in Commission Hampton's urging of a cautious approach in issuing such interim orders, and that the FWC is unlikely to make such orders where a disciplinary process is involved in the complaints of workplace bullying, without anything more compelling.

Notwithstanding the above, this decision demonstrates the FWC's preparedness to interfere in management prerogative where there is a real prospect of an employee's employment being terminated in circumstances where there is a question as to whether that employee is the subject of workplace bullying. As such, it is likely that we will see an increase in the number of applications for orders to stop bullying in the context of disciplinary action, as a way to postpone or even prevent such action being taken.

Employers cannot prevent an employee from making an application for an order to stop bullying, but they can put themselves in the best position possible to oppose such an order being made. As we discussed in our earlier article, [Fair Work Commission hands down first formal bullying ruling](#), the practical approach for employers in managing the risk of a stop bullying application has not changed. What employers need to do is:

1. Put in place policies that confirm expected standards of conduct, and identify what will happen in the event the standard is not met. Policies should allow for the employer to have flexibility in how different issues might be investigated or dealt with on a case-by-case basis.
2. If an employer receives a report of an inappropriate workplace incident between two employees, they should investigate the complaint in accordance with its policies and procedures.
3. If the allegation of bullying is substantiated, the employer should then consider what measures it might take to objectively resolve the issues, or otherwise consider whether it is necessary to limit or prevent continuing interaction between those two employees.
4. Employers should also be reminded to establish or strengthen their anti-bullying policies, procedures and training as a means of reducing the potential for any anti-bullying orders being made.

Should you have any questions concerning how the decision may affect your business, please contact a member of Piper Alderman's Employment Relations team.