Cyberbullying: an employer's response spot on

In a recent Queensland District Court decision, *Robinson v Lorna Jane (Judge Koppenol, 3 November 2017),* Ms Robinson made a common law claim for psychological and physical injuries, which she claimed arose from her employment between July and December 2012 as the manager of a Lorna Jane store. It is important to note that this was a claim for breach of duty of care and negligence resulting in personal injuries, not a workers compensation claim or a claim arising out of the employment under the Fair Work Act or other legislation.

Ms Robinson's claims (she sought more than $570,000 in damages) were all dismissed, primarily due to her evidence being highly unreliable. The point of interest from an employment law point of view is her claim that she had been cyber-bullied by her manager, Ms McCarthy, who was Lorna Jane's learning and development manager.

On 20 November 2012, Ms Robinson became aware of two Facebook posts made by Ms McCarthy some weeks previously. The Facebook posts read:

"I have discovered a new name for the people I despise – I call them "generators" purely because they fill their days generating more problems for me to deal with. Generators are similar to mutants – people who are genuine oxygen thieves"

and

"What a day! It is difficult to soar with the eagles when you are surrounded by turkeys. Is it too late to pursue a different career?"

Ms Robinson believed these posts referred to her, and sent copies to Lorna Jane management. Lorna Jane immediately spoke to Ms McCarthy, who was instructed to take the posts down immediately - which she did. Lorna Jane also took disciplinary action against Ms McCarthy, removed Ms Robinson's store from her control and arranged for Ms Robinson to report to another manager.

Ms Robinson claimed to have suffered psychiatric consequences from her awareness of the Facebook posts. The Judge found that this claim had no substance. He found that Lorna Jane was neither directly nor vicariously responsible for Ms McCarthy's posts or Ms Robinson's alleged injury. It had strong social media and anti-bullying policies, which acknowledged the significance of social media bullying and instructed staff not to engage in it.

It was concluded that Ms McCarthy's knowledge and disregarding of the policy was not sufficient to hold Lorna Jane responsible.

Ms McCarthy's actions were personal, and well outside the scope of her employment (especially for a learning and development manager!). Lorna Jane had no knowledge of the posts, and had not condoned or approved them. Lorna Jane insisted on the posts being taken down as soon as it became aware of them, and took further action to separate Ms McCarthy from Ms Robinson. Ms McCarthy having complied, there was nothing more that Lorna Jane could do about the deleted posts. The Judge found that this was exactly what the company should have done.

Would Lorna Jane's prompt and firm handling of the issue have stood it in equally good stead if this situation had arisen as an anti-bullying claim, or as part of a general protections/adverse action claim?

Cyberbullying: an employer's response spot on cont.

Putting aside Ms Robinson's poor credibility, the actual connection with her workplace was tenuous - and it was not at all clear that the posts referred to Ms Robinson; so attributing them to Lorna Jane as "adverse action" taken by Lorna Jane would be difficult, and its firm handling of the issue would have underlined that.

Similarly, Lorna Jane's prompt and firm response would probably prevent an anti-bullying claim succeeding, since there would be no apparent ongoing risk in the workplace.

The lesson to be drawn from this case is that it is important to have a robust policy, and to act promptly to enforce that policy where questions of Cyberbullying arise.

If you require any assistance with social media, or bullying or harassment, policies, please contact:

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Too Clever by Half: Don't Quibble With the Cut Off Points for Drug Testing

In a recent Fair Work Commission decision *(Eather v Whitehaven Coal, Deputy President Sams, 1 January 2018),* the FWC had no sympathy for an employee whose employment was terminated when he recorded 18mcg of cannabinoids, compared to the Australian Standard of 15mcg as the maximum allowable.

Mr Eather claimed that the company's testing practice misled him; that practice being the use of screening cups for urine testing, which were only capable of registering concentrations of 50mcg or above. He claimed that this was the standard which should apply. However, the Commission held that Mr Eather was well aware, from both policy and experience, that a non-negative screening test result meant that the screening test would be sent to a lab for more precise assessment, and that this would similarly be the case for follow-up tests.

Mr Eather had a non-negative result on a random screening test, which was confirmed as 65mcg by the subsequent lab analysis. Under Whitehaven's drug and alcohol policy (which all parties agreed was not a zero tolerance policy), Mr Eather was suspended for 3 weeks with the option of taking leave without pay, or using annual leave – with the requirement being that he test clear for cannabinoids by not later than 3 weeks after the first test.

The evidence was that Mr Eather was acutely aware of the risk of losing his job at the end of the suspension, as he had informed several people that during this period he was drinking a lot of water, and exercising extensively, in order to "sweat out" the cannabinoids from his system. This was despite his evidence (found to be inherently unlikely by the Commission), that the only time he had used marijuana in over 10 years was when he happened to smoke 2 joints, 5 days before the reading of 65mcg.

Mr Eather's conduct strongly suggested that he was a regular cannabis user, with a substantial build-up of cannabinoids in his system. Deputy President Sams said:

"Regrettably, but perhaps not surprisingly, the applicant was so determined to convince the Commission he should get his job back, that his evidence was littered with implausible and fanciful explanations and blatant inconsistencies".

Mr Eather claimed that he understood that he only needed to be under the 50mcg level at screening, not under the 15 mcg level used for lab tests. Whitehaven's policy referred to "Australian Standards" without referring specifically to the 15mcg limit. However, the Commission took the view that from past experience as an employee in the mining industry, Mr Eather was well aware of the lab testing which would follow a negative screening test, and of the lower level which applied for lab testing.

The Commission also took the view that it was not an attractive position to quibble about higher levels being OK, given the safety issues which were involved in having someone potentially affected by marijuana on a dangerous worksite.

Mr Eather had substantial "sympathy" factors in his favour, including needing to support 6 children, and the scarcity of work in a regional town. However, given both the unreliability of his evidence and his willingness to take a chance on the test results whilst mounting specious arguments about unfairness; and despite the apparent fact that he was a long term and habitual user of marijuana, those factors cut no ice with the Commission.

Too Clever by Half: Don't Quibble With the Cut Off Points for Drug Testing cont.

Whitehaven's policy was upheld because:

(a) it operated in a safety critical environment;
(b) the policy was clear enough and well known;
(c) it's process in dealing with Mr Eather had been scrupulously fair; and
(d) Mr Eather's claims were inherently unlikely, and his criticisms of the policy were too clever by half.

The lesson employers can draw from this case is that when fairly applied, a clear and well-communicated drug and alcohol policy will be enforced due to the safety implications of a breach of that policy - even where an employee may be able to mount sympathy factors for being given another chance.

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FWC reinforces importance of consultation to "genuine redundancy"

Employers have been put on notice to take a more cautious and methodical approach to consultation with employees before redundancies after the Fair Work Commission reasserts the importance of proper consultation processes.

What is a genuine redundancy?

Under s389 of the Fair Work Act, an employee's dismissal will only be a case of genuine redundancy (and therefore exclude the possibility of an unfair dismissal claim) if:

- changes in the operational requirements of the business mean the employee's job is no longer required to be performed by anyone; and
- the employer has complied with any obligations under an award or enterprise agreement to consult the employee about the redundancy.

The award obligation to consult means that an employer must consult with employees whenever there is a major workplace change that will significantly affect them, such as a redundancy. .But what exactly does "consultation" mean?

Particularly when only one or a few employees are affected, it is easy to take a cursory approach to consultation. Often, employers assume too easily that the employee/s will have nothing useful to say about the reasons for redundancy, and underestimate the significance of the redundancy for each employee (or over-estimate the extent to which "getting a redundancy" makes an employee feel better about it). However, a recent case has provided a strong reminder that care needs to be taken about consultation if the employer is to pass the "genuine redundancy" test.

An expensive example of insufficient consultation

The recent case of *Buttar v PFD Food Services Pty Ltd* (FWC 2017) shows that it is not enough to take a "tick the box" approach when it comes to consultation.

Mr Buttar's position was made redundant by PFD after a legitimate restructure of the business meant his role no longer existed. Under the Seafood Processing Award, PFD was supposed to discuss any major workplace changes with employees as soon as practicable after a definite decision was made, and to provide all relevant information in writing and take steps to mitigate any adverse impacts – the standard modern award requirements The issue was whether PFD had discharged its obligation to consult with Mr Buttar about the changes and his redundancy.

PFD' s General Manager met with Mr Buttar and informed him in general terms that there was going to be a restructure that may affect him, but with no further specifics. Once it became clear to Mr Buttar that he was being dismissed, along with others, he was not provided with any further opportunity to respond.

The Commission found that this did not amount to meaningful or sufficient consultation, and referred to the case of *CEPU v Vodafone Network* (2001), where the meaning of consultation was explained in these terms:

FWC Reinforces Importance of Consultation to "Genuine Redundancy" cont.

"Consultation is not perfunctory advice on what is about to happen. This is a common misconception. Consultation is providing the individual or other relevant persons with a bona fide opportunity to influence the decision maker."

That doesn't mean that consultation operates to prevent management from making organisational decisions. It is intended to make the decision making process as informed as possible, for both parties, especially when an employee's employment prospects may be affected. In *CEPU v Vodafone*, the court also stated, *"the opportunity to avoid or mitigate the effects of a termination cannot be underestimated by those who wield power over those and their families who will be the subject of the exercise of that power".*

The general nature of the information provided to Mr Buttar could reasonably have led him to believe the unspecified restructure may not affect him at all, and that he could continue working without any concerns for his job security. PFD also failed to allow Mr Buttar to influence the employer's decision with possible alternatives, as there was insufficient information to give him anything to respond to. The Commission also noted that there was nothing to prevent the General Manager from conducting a proper consultation with Mr Buttar at any time on that day or during the week.

As PFD did not discharge its consultation obligations, Mr Buttar's dismissal was not a "genuine redundancy". PFD should have provided Mr Buttar with full details, *in writing*, of how the restructure would affect him personally and given him an opportunity to comment.

The Commission then turned to whether the dismissal was "harsh, unjust or unreasonable". Because Mr Buttar was refused a support person, and was and not consulted individually, it held that his dismissal was unfair. As a result, the Commission ordered PFD to reinstate Mr Buttar and to pay compensation for his lost earnings.

The bottom line for employers?

The key takeaway from this case is that meaningful consultation processes are very important when conducting redundancies. Short-circuiting the process opens up the risk of a claim in the FWC.

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