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Resolving Workplace "Bullying"

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Introduction

This paper provides a brief definitional overview of the current law on what is popularly known as the problem of workplace bullying, and comments on how to avoid and/or resolve matters from a practising employment lawyer's perspective confronted with finding an adversarial legal solution to what is often a breakdown in workplace communication.

Bullying is a term that, I think, is particularly unhelpful (with its stark connotation of abuser and victim). It is difficult to avoid the term, given its common usage and its evident descriptive force, but the breadth of behaviours it describes often makes the term unnecessarily inflammatory. Although, Dr John Clarke, author of *Working with Monsters, archly*, suggests that bullying is a more helpful definition to calling someone a *workplace psychopath*: [1]

> Although it could be deemed spin, when responding to a claim of bullying, framing the issue in less negative terms may produce a better resolution. I recommend a focus on the behaviors in dispute (which are often mutual) and the use of terms such as: *you have made an allegation of "unprofessional behavior" or that you have raised an allegation of "negative interaction".* However, for this analysis I will adopt the in-vogue term bullying.

Definitional Issues

Unlike sexual or racial harassment, which are specifically prohibited under both employment and human rights legislation[2] (and ironically often involve some form of bullying), there is no precise legislative definition or specific statutory prohibition governing *workplace bullying* or a developed Employment Court legal test.[3]

The Employment Relations Act (ERA) does not define bullying or distinguish it from personal harassment. It is highly contextual (fact based) and is often subtle and insidiously undertaken. This is so, despite both bullying and harassment involving behaviour that is unwelcome or offensive and which is often causative of distress or detriment. Whilst the two concepts are similar and often overlap, it is vital to carefully distinguish between the two. Harassment may be a one-off incident, but a distinguishing feature of bullying is it manifests as a persistent behaviour pattern. Opportunities for widespread bullying or digital harassment are now evident with the negative use of social media.

There is also a well-developed myth that workplace bullying has been recently discovered by the media and workplace commentators. It would be safe to say that, in New Zealand at least, since the development of "constructive" dismissal as a concept to resolve an unwilling resignation,[4] there have

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[1] John Clarke, Working with Monsters February 2002, Random House, Australia.

[2] See sections 108/109 Employment Relations Act 2000 and sections 62/63 Human Rights Act 1993.

[3] Contrast this with Sweden for example where well-developed legislation governing bullying and workplace harassment exists. For a brief global comparison see Diana Ayling, "Defining Workplace Harassment: Who Is the Bully" (2002) Vol.1 No 1 NZJABR. 1.

[4] See New Zealand Court of Appeal's classic formulation of three categories of employer culpable constructive dismissal

been cases involving bullying or harassment for a significant period, but arguably not on a scale seen in the last decade. However, no research of any great depth is available to support this view.[5]

Bradbury and Hutchinson[6] suggest that Australian public-sector employers appear more prone to workplace bullying, stemming from high levels of organisational change, political interference, shifting performance expectations and vague goal settings. Recent studies, including by the New Zealand Public Service Association (NZPSA) and the New Zealand State Services Commission, report high levels of workplace bullying being at issue.[7] A recent Victoria University student research project, however, notes that few complaints in the public service are upheld and are generally catagorised by Human Resources practitioners as performance management, relationship or behavioural issues. The latter study cites data from 12 public service departments, finding 72 per cent of formal bullying complaints (111) received between 2010 and 2016 were found to be unsubstantiated.[8]

Regardless, there is constant frenetic media attention on the issue and emotive language surrounding such. An example of this, seen in a newspaper piece of hyperbole describing potential bullies, guaranteed to strike fear into the heart of any employer and have employment lawyers salivating, was: *Bunny Boilers Heat up Workplace.*[9]

In less colourful terms, Einerson and McCarthy have suggested that:[10]

> …all those repeated unreasonable and inappropriate actions and practices that are directed to one or more workers, which are unwanted by the victim, which may be done deliberately or unconsciously, but do cause humiliation, offence and distress, and that may interfere with job performance, and/or cause an unpleasant working environment.

In Sweden, pioneers of workplace harassment legal solutions, the National Board of Occupational Safety and Health neatly defines bullying as "…recurrent, reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community"[11] or to translate et Sverige: återkommande, varvid förkastliga eller negativt präglade handlingar som riktas mot enskilda arbetstagare på ett kränkande sätt och kan leda till att dessa placeras utanför arbetsgemenskapen.

In a New Zealand context and much cited 2005 case, *Evans v Gen-I Limited, the Employment Relations*

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situations (resign or be dismissed, course of conduct with dominant purpose of coercing employee to resign or employer breach of duty leading to a resignation) in *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 and *Auckland Electric Power Board v Auckland Local Authorities Officers Union* [1994] 1 ERNZ 168.

[5] A Department of Labour Report, *"Personal Grievances conducted at the Department of Labour",* June 2007, surveying 31 mediators for disputes in on month (17 July-18 August 2006), detailed a category of 14.7 per cent of disputes in a miscellaneous category which included bullying. However, 15.3 per cent of cases were described as constructive dismissals which often include an element of harassment that has led to a dismissal.

[6] Joanne Bradbury and Marie Hutchinson (2015), vol 2, no 1 "Workplace Bullying: Modelling Construct Validity in an Australian Public-Sector Workforce", Journal of Empirical Studies, 1-16,

[7] NZ State Services Commission "Integrity and Conduct Survey 2013" (19 August 2014) <http://www.ssc.govt.nz/integrity-and-conduct-survey-2013-report>; G Plimmer, & CantalC (2016), "Bullying and Sexual Harassment in New Zealand Workplaces", Centre for Labour, Employment and Work, Wellington, New Zealand; Geoff Plimmer, Jessie Wilson, J, Jane Bryson, Stephen Blumenfeld, Noelle Donnelly, and Bill Ryan, (2013) "Workplace Dynamics in New Zealand Public Services", A survey prepared for NZ Public Service Association, Wellington.

[8] Hamish Crimp, "Effective Prevention of Public Sector Bullying: Are we there yet?" *Victoria University Centre for Labour Employment and Work* (New Zealand, 4 September 2017) at 1

[9] "*Bunny Boilers Heat up Workplace*" The Press, (Christchurch, November 19-20, 2005).

[10] Evelyn M Field, "Bully Blocking", < http://www.bullying.com.au/>

[11] Diana Ayling"Defining Workplace Harassment: Who Is The Bully*?"* (2002) Vol.1 No 1 NZJABR. 1

Authority (Gen-I) adopted a very useful definition of bullying (see also *Isaac v Chief Executive of the Ministry of Social Development* and *Kneebone v Schizophrenia Fellowship Waikato Incorporated*) as:[12]

> …something that someone repeatedly does or says to gain power and dominance over another, including any action or implied action, such as threats, intended to cause fear and distress. The behaviour must be repeated on more than one occasion and there must be evidence that those involved intended or felt fear.

Further in *Gen-I* the member cautioned that: [13]

> All behaviour needs to be looked at in the social context in which it occurs and the motivation for the behaviour is also relevant. A vulnerable person may perceive criticism of his or her work as bullying, regardless of how the criticism is couched.

On the latter point, one must add that bullying must include some element of unreasonable or unjustified behaviour with the purpose of upsetting another person, which can take many forms. It does not include raising reasonable or justified concerns about work performance. As Thomas notes "[p]roblems arising from conflicting personalities or a poor management style, are different from a person intentionally misusing power to intimidate another."[14]

As suggested above, definition is problematic – for example: has bullying got to be proven as intentional and confined to disputes between individuals, or can it also occur due to the perceived negative culture of an organisation that may value or practise a confrontational or robust management approach and, does the notion of "power imbalance" come into play?

The ERA member in *Kneebone* surmised on individual motivation that: [15] "The common theme arising from the literature … suggests a bully has a desire to exert control over others, usually demonstrates a complete lack of understanding for other people's feelings and uses intimidating behavior."

In addition to "vertical" or hierarchical bullying (which can occasionally work both ways with subordinates bullying managers), bullying by peers or "horizontal" bullying is not uncommon and the latter can prove significantly difficult to manage.

WorkSafe New Zealand/MBIE Guidelines-an Answer?'

In response to both emerging bullying claims and a focus upon health and safety, WorkSafe New Zealand (WorkSafe) via the Ministry of Business, Innovation and Employment (MBIE) issued guidelines, in 2014,[16] drawing largely on similar material published by Safe Work Australia (SWA).[17]

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[12] *Evans v Gen-I Limited,* NZERA Auckland AA 333/05, 29 August 2005; This definition was drawn from *Crime and Justice,* Vol 17 Chicago: University of Chicago Press 1993 and later adopted in *Isaac v Chief Executive of the Ministry of Social Development* NZERA Auckland AA200/08, 5 June 2008 and *Kneebone v Schizophrenia Fellowship Waikato Inc* NZERA Auckland AA31/07, 13 February 2007.

[13] *Evans v Gen-I Limited,* NZERA Auckland AA 333/05, 29 August 2005.

[14] Thomas, C, "*Workplace Bullying"* [2000] ELB 3, at 4.

[15] *Kneebone v Schizophrenia Fellowship Waikato Inc* ERA Auckland AA31/07, 13 February 2007, at [7].

[16] WorkSafe New Zealand and Ministry of Business Innovation and Employment: Bullying-Preventing and responding to workplace bullying (9 February 2014) <www.worksafe.govt.nz>.

[17] Work Safe Australia, "Guide for Preventing and Responding to Workplace Bullying and Dealing with Workplace Bullying – a worker's guide" (May 2016) Work SafeAustralia <www.wsa.gov.au>.

These guidelines are the first comprehensive attempt by a key government agency to comprehensively define the concept of what bullying entails (and what it is not). Although lengthy, they contain very useful practical advice on how employers and employees should resolve disputed matters at both the informal and formal level.

The question is, if this is a persuasive "*Bullying Bible*", prepared in part by a key government enforcement agency, how does it sit with established legal authorities, and will WorkSafe use it for definitional purposes in any potential prosecution under the recently enacted Health and Safety at Work Act 2015 (HSE Act). To date, no such investigations/prosecutions have occurred.

Some brief searches of 2015/16 ERA decisions reveal that the Authority is sometimes using the WorkSafe guidelines as an aid, but not as a definitive legal test. Various approaches are used to assess the nature and extent of bullying/harassment situations. These range from comments that "bullying is difficult to define and prove" to use of a more prescriptive test or reference to "a useful definition in the WorkSafe 2014 best practice guidelines"[18] or "[t]he actions or omission complained of are, the failure to provide a safe workplace and the adequacy of the investigation."[19] Further, one Authority member suggested that the ordinary meaning of the term bullying be used from a High Court defamation case[20], including three elements: [21]

(1) *It involves unreasonable and persistent conduct by one person against another.*

(2) *The conduct in question is unwarranted and harmful to the recipient.*

(3) *The recipient of the conduct lacks the ability to defend him or herself, possibly because of their lower status or making in the workplace environment where the conduct takes place.*

A problem is that legal practitioners already perceive a divergence between established case law and the WorkSafe guidelines regarding whether the 'intention' of the perpetrator of bullying acts must be established, and the lack of specificity of what degree of harm bullying causes. There is also the inclusion of an ill-defined category of 'institutional bullying'.[22]

The WorkSafe guidelines, in making no explicit definitional reference to the motivation of the perpetrator, arguably, adopt a wider view than existing case law.

A different perspective is that the existing '*disadvantage'* claim, s103(1)(b) ERA, allows an action where a single rather than repeated event causes the worker detriment, and the real inquiry is, then, an objective test of whether the employer's actions in resolving matters are reasonable in all the circumstances.

Are conflicting views, however, overstating the matter? The WorkSafe guidelines framing of what bullying could be is arguably just a threshold approach to determine when an employer should potentially embark upon an investigation. WorkSafe usefully identify three elements:[23]

[18] *Beckingsale v Canterbury District Health Board* [2015] NZERA Christchurch 163, at [141] – [142].
[19] *Ngahooro v Southland YMCA Education Limited* [2016] NZERA Christchurch 105, at [105].
[20] *Newton and Dunn v Leov and Leov* [2017] NZHC 2083, at [6].
[21] *Lee v GR & S Dyson Limited* [2017] NZERA, Auckland 273, at [80].
[22] Hornsby-Geluk and Webby, "Workplace Bullying – new guidelines", NZLS CLE Ltd seminar booklet September 2014; Geoff Davenport, "Bullying and WorkSafe's Guidelines – valuable but only part of the puzzle" [2017] 1 ELB 4.
[23] WorkSafe New Zealand and Ministry of Business, Innovation and Employment "Bullying — Preventing and responding to workplace bullying" (March 2017) < https://worksafe.govt.nz/>

- *repeated and unreasonable behaviour;*
- *directed towards a worker or a group of workers;*
- *that can lead to physical or psychological harm.*

One could, however, contend that using the phrase '*directed towards'* implies a conscious and intentional act. Further, it is difficult to precisely define harm, as the degree of harm is highly contextual and must be carefully assessed, as ultimately, should the Court be involved, it becomes an evidential issue, ideally requiring expert medical opinion.

The WorkSafe guidelines do give useful clarity – stating that:[24]

- A "reasonable person" standard is to be applied to whether the behavior is "unreasonable".
- Repeated behaviour is behaviour that is persistent, even if it involves a range of actions over time.
- Institutional bullying (where a workplace practices, vision, culture, policies or procedures allow offensive or stress-causing behaviours to occur without concern for the consequence) is a potentially actionable form of bullying.
- Out of work behaviour (e.g. use of social media) can constitute bullying and, if so, will require investigation by an employer.
- Formal investigations into bullying claims should be undertaken by external, unbiased, qualified and knowledgeable investigators, rather than handled internally.

Potential for a Collective Approach

Aside from unions being key players in the prevention and management of workplace bullying and being used as 'intermediaries' in such disputes, 'institutional bullying' (rarely exposed, apart from a few case references to a "toxic" workplace),[25] opens space for both a potential WorkSafe investigation and potential for a collective response that unions may embrace as both an organising tool and/or legal strategy (given WorkSafe New Zealand has no exclusive jurisdiction on such prosecutions).

My observation is that New Zealand unions have, in the past, been curiously reluctant to link industrial and legal strategies. The recent care-workers' pay equity settlement is a shining example of how such can be successfully approached via litigation whilst being allied to a strong collective campaign strategy.

An intriguing development will be whether company directors can be drawn into such disputes in terms of liability under Part 2 of the Health and Safety at Work Act 2015, if they are willfully blind or actively condone bullying management cultures. Are directors of companies that hold strong anti-

[24] Ibid

[25] In *Christopher Talbot v Coriglade Limited T/A Geeks on Wheels* [2016] NZERA Wellington 142 Member M Loftus opted for: "*The plain dictionary meaning of the word hostile is antagonistic or unfriendly*."

union views capable of being deemed bullies?[26]

Further, could such claims extend to the setting of unreasonable productivity targets, intrusive workplace surveillance practices or blurred boundaries between work and home life in an ever so called 'connected' workplace.

In summary, innovative litigation possibilities may have been unwittingly created to include potential class actions on bullying claims.

Legal Consequences

Organisations failing to provide an emotionally secure and safe working environment, or not properly investigating bullying claims (under employment and health and safety legislation)[27] are vulnerable to costly legal action from disgruntled employees. The statutes that could be invoked include:

- Employment Relations Act 2000
- Health and Safety at Work Act 2015
- Protected Disclosures Act 2000
- Human Rights Act 1993
- Harassment Act 1997
- Education Act 1989
- Privacy Act 1993 and
- Harmful Digital Communications Act 2015.

There is evidence that individual workers are using litigation to remedy employer inaction. The writer's brief review of New Zealand employment decisions certainly identified a correlation between media interest in bullying, the publication of a popular *expose* book, the emergence of support websites/phone helplines[28] and the rise of litigation. Such litigation appears to have mushroomed from around 2002 when a well-publicised amendment to health and safety legislation broadened the definition of a workplace *hazard* to include "a situation where a person's behavior may be an actual or potential cause or source of harm to the person or another person."[29]

Unfortunately, litigation usually follows an employee's resignation (typically in the form of a constructive dismissal claim), and by this point matters are irretrievable. Prior to this, if left unattended, workplace bullying creates negative morale, it breeds destructive factionalism and, ultimately, it can lead to a less productive or dysfunctional workplace where, amongst other things, recruitment and retention are problematic. At worst, one commentator has suggested that bullying victims: [30]

[26] For example, Sir Peter Talley, who made a 2014 Parliamentary committee submission to changes in Health and Safety legislation claiming they had been overly influenced by unions and his group of companies, has aggressively resisted collective bargaining and union entry to plants, see Hutching, G "Affco chief exits after short spell" *The Press*(Christchurch, 24 October 2017).

[27] Section 6(a) and (d) Health and Safety in Employment Act 1992 defines broad duty that all employers must take all practical steps to provide and maintain for employees a safe working environment, and to ensure employees are not exposed to hazards whilst at work.

[28] Andrea Needham, *Workplace Bullying – The Costly Business Secret* (Penguin Books, New Zealand, 2003); phone-helpline 0800 ZERO BULLY and www.beyondbullying.co.nz.

[29] Ibid.

[30] Sigrid Hempelmann, Workplace Bullying [2003] 7 ELB, at 96.

> …often are afflicted with enormous psychological and physical problems, such as high stress levels, anxiety and sleep disturbances. Ill health, especially gastro-intestinal diseases, severe tiredness and panic attacks are other and more serious consequences. One German study found that 75% of all recipients of workplace bullying have a post-traumatic stress disorder. Sometimes workplace bullying even leads to suicide…Further it is said that the longer the recipient must endure bullying conduct the worse the effects become.

Most studies focus upon the impact on individuals and definitional issues make exact quantification of the extent of the problem difficult to assess as much is self-reported. Whilst some may yawn and think bullying may be just the *new black,* it is also evident that, unlike issues such as recruitment and retention, skills assessment or absenteeism, the costs and extent of bullying are less measurable.

One commentator suggests that the dearth in human resource management research (outside psychological based studies) has not alerted senior managers to consider the issue of broader concern in terms of tangible productivity costs, and that there is a tendency not to research poor managerial performance. Further, most popular literature concentrates on victims rather than strategies managers can adopt to avoid bullying flourishing in their workplaces.[31] It has usefully, perhaps, been suggested that turning the focus of research onto "the characteristics of bullies and bullying behavior...may provide better insight for policy-makers."[32]

Individual Employee Liability?

An employment relationship is defined in the ERA as principally between an employer and employee; and an employer is generally or ultimately vicariously liable for an employee's acts. However, Schofield suggests an employee may be jointly and severally liable with the employer. [33] Potential avenues for prosecuting individuals exist under health and safety legislation taking the approach that a bully is not engaging in all practical steps to keep co-workers safe or under s132(2) Employment Relations Act as an aiding and abetting action.

Resolution Strategies

Like all employment problems, a prophylactic approach is highly recommended. Creating a holistic climate where bullying cannot flourish is clearly *best practice* approach, which is generally linked to promotion of workplace ethics/values, such as respect, tolerance and empathy (and by implication not rewarding or tolerating bullying behavior or confusing it with *firm* management).

A 'values' approach should arguably work well in, for example, the Public Service/Health or Education sectors where promotion of such is already endemic. There are simple measures that the private sector can easily adopt. It may be as easy as ensuring that open communication or constructive criticism is valued rather than discouraged. Other measures to improve workplace culture include:

- Ongoing monitoring of a workplace climate; this is a key to identifying negative trends using appropriate surveys, focus groups or carefully facilitated discussions to gain feedback and crucially devise measures to get meaningful information on the performance of managers or

[31] Dianna J Kelly, "Reviewing Workplace Bullying: Strengthening Approaches to Complex Phenomenon", (2005) Journal of Occupational Health and Safety-Australia and New Zealand, 21 (6), 551-564.
[32] Ibid.
[33] Simon Schofield "The Workplace Bully" [2015] 2 ELB 18.

just to determine whether a healthy and open climate exists and what makes it so.

- Placing a "training" premium on encouraging people to develop good interpersonal skills, ensuring managers have well-developed dispute resolution skills that are gained from both practical experience and training opportunities. Sit in with managers and watch how they resolve conflict, then debrief and deconstruct with them on what strategies worked and what failed.

- Do not neglect encouraging people to resolve interpersonal conflict and ensure training opportunities address communication issues, such as constructive criticism, assertiveness, negotiation skills and where appropriate, anger management.

- Pro-active training of both managers and staff on their rights and responsibilities

- Be aware that certain staff may be vulnerable and require additional assistance to cope with bullying – they may lack the skills to respond, due to previous negative workplace experiences or life events (remember bullying, be it domestic or school bullying, is common in the community).

- Be sceptical and inquisitive; avoid simply blaming victims as being too sensitive or, on the other end of the spectrum, unquestionably accepting victim complaints.

- Recognise that those subjected to complaints may also be vulnerable.

- Promote awareness of recognising and dealing with bullies.[34]

- Make bullying (emphasise that it is unprofessional behavior) a specific disciplinary or misconduct issue in your employment agreement or code of conduct.[35]

- Professionally, promote bullying as being a breach of ethical behavior or the expressed company values.

- Crucially, spend time on devising robust performance assessment and performance management systems that are *collaborative* as many alleged bullying cases stem from dissatisfaction with the limitations of assessment processes or performance management strategies.

- Ensure that, in any process, the provision of regular, constructive feedback and support and guidance precedes firmer management. Do not just leave feedback to an annual appraisal.

- For managers, place greater emphasis when recruiting or training on successful people management skills and subject managers to regular and safely conducted employee feedback measures (not just anonymous surveys).

[34] See for example Len Leritz, "Taking the Bull Out of The Bully", in Ira G Asherman, The Negotiation Source Book Second Edition (2001) Human Resource Development Pr ,at 359-365.

[35] In New Zealand, education unions are insisting on such clauses, see for example Barnardos New Zealand/NZEI Te Riu Roa Collective Employment Agreement which at clause 10.0 specifies *"Harassment or Bullying by a staff member…will not be tolerated and appropriate action will be taken to remedy any complaint".*

Zero Tolerance

There are significant problems with employers simply claiming they have a *Zero Tolerance* policy approach to bullying as such grandstanding is hard to define or contextualise, and it leads to all types of litigation problems – ranging from claims of lack of flexibility in penalties to employers making themselves a sitting target if they fail to apply zero tolerance in a consistent or "zealous" fashion. It is a lazy and thoughtless approach that ignores the need to tackle the behaviors that create bullying.

What Maketh The Bully?

Setting aside Dr John Clarke's views on workplace psychopaths, little research has been done to understand why people engage in bullying behaviors.

Policy Suggestions

From a legal perspective, extreme caution needs to occur in devising an integrated policy on how complaints are handled and/or investigated; such should ideally include:

- A clear and precise definition of what bullying is – the WorkSafe NZ guideline is a great starting point but look wider; Ayling[36], adopting a European Union agency definition, suggests it should:
    - focus on unacceptable behaviour;
    - apply to a wide range of employees;
    - acknowledge health and safety as an issue;
    - impose a test of 'reasonableness'; and
    - explain key terms.

Other measures should include:

- An identified respected/trusted and approachable contact person trained to assist and encourage people to resolve initial concerns (usually not someone from Human Resources).

- A referral or employee assistance service to give support and/or counselling options (ideally a service that is not just *victim focussed*).

- Emphasis upon early resolution by the provision of a neutral facilitator to, where appropriate, utilise conciliation strategies and to, in some cases, determine whether the root of a problem is properly described as bullying and if it has reached a threshold where further investigation is necessary.

- Openness to utilising an independent and neutral investigator should such be required. The investigator should ideally be practically experienced in the psychology of bullying issues and whilst, being a fact-finder (not a decision-maker), they should not be afraid of making suggested recommendations for resolution, including wider workplace culture observations.

[36] Diana Ayling "Defining Workplace Harassment: Who Is The Bully*?"* (2002) Vol.1 No 1 NZJABR. 1.

- The contractual facility to suspend a person, subject to serious accusations, and/or the flexibility to re-deploy either the accused or complainant (noting the latter should not generally be forced to re-locate).

- The opportunity for both accuser and accused to have input into an investigation report.

- A range of sanctions short of dismissal to deal with culpable bullies and flexible measures to resolve the aftermath of an investigation, such as transfers, conciliation, team-building, coaching, training opportunities and ongoing monitoring.

Is Mediation a Magic Bullet?

A cautionary word about the use of mediation – is it an appropriate tool to resolve bullying, per se, given it usually involves an abusive misuse of power? In general, I would not pressure an individual complainant to attend mediation before some work has been done to categorise how serious the issue is. Arguably, an employer can only encourage rather than mandate the use of mediation.

Mediation is often suggested as a tool to re-integrate someone back into a team after an allegation has been investigated, but a caution has to be that there is the potential for bullies to garner support from their acolytes and *gang up or mob* a bullying target during a 'confidential' mediation session, or to dump on that person their own stored up grievances, which may lack relevance or deflect from the ideal focus being on tackling the bully's style of management or lack of communication skills or basic empathy.

The author, however, has observed a suitably skilled mediator or facilitator deployed to resolve a bullying issue, particularly where the victims are a collective group. In addition, as many bullies fail to have insight into the impact of their behaviour, a skilled mediator can assist in bringing the perpetrator around to the idea that something is amiss, or impressing upon the complainant that early resolution is possible. This process can be achieved in a confidential manner, preserving the dignity of all parties. Care is required if a perpetrator of abuse is unwilling to accept criticism (in denial) or combatively insists upon specific examples being laid out in an open fashion, or the complainant is unwilling to resolve matters.

Mediation works well if utilised early in a dispute, as trying to resolve factual disputes or formal investigation prior to mediation often hardens attitudes or encourages disputation over past events. Mediation is also useful after an investigation, if a finding is that work must be done on repairing workplace relationships. For a useful discussion on mediation as a problem resolution mechanism see Morris.[37]

Problems can occur where a mediator or employer initially gathers information and perhaps conceals the identity of complainants or proceeds on hearsay. Ultimately, an alleged bully may be facing disciplinary proceedings, so it is essential that procedural fairness requirements are carefully adhered to.

Mediation or facilitation should be used sparingly as a useful precursor to a formal investigation but always get prior *buy in* from all parties, and ensure that the mediator is crystal clear about what

[37] Grant Morris, "Eclecticism vs. Purity Mediation Styles used in New Zealand Employment Disputes", (2015) 33(2) *Conflict Resolution Quarterly* 203-227.

resolution techniques they will utilise (preferably get all parties to sign a prior agreement, including reporting provisions). Consider using practitioners of *Transformative Mediation,* as sometimes mediation is aimed primarily at *conflict settlement* rather than *conflict resolution.* Sadly, given the current adversarial nature of dispute resolution and the lack of skilled practitioners, other solutions should be considered. MBIE mediators tend to be overwhelmed with dispute resolution work and, correspondently, wait time for mediation is a barrier to quick a resolution, and specialised private mediation can be costly.

Conducting an Investigation

Should the prophylactic approach fail, and you are faced with a complaint, it is essential to consider an initial investigation at the earliest opportunity to guide what intervention strategy is appropriate.

In a 2016 ERA case, *Anngow v Bed Bath & Beyond NZ Limited* that deemed the employer as having failed to properly investigate a complaint (and finding an unjustified action causing disadvantage), the Authority member, Peter van Keulen, outlines a very useful contextual and practical guidance on essential steps for an investigation, noting first that the statutory good faith duty "…requires more from an employer when investigating a serious complaint regarding bullying and harassment."[38]

If a more formal investigation proceeds, and a complaint is not evidently frivolous or vexatious, I recommend a mutually agreed and suitably qualified external party, and there being agreed terms of reference on the scope of such an investigation. Often, it is a costly investment, but it will nearly always be worth it, and it best avoids litigation.

Managers investigating their peers or even those they supervise face the risk of claims for perceived and actual bias. From a complainant's perspective, an unbiased investigation is a signal that the complaint is being treated seriously and, if the concern is found groundless or amenable to another solution, it is generally more palatable if such an outcome is directed by a neutral party.

There was ongoing litigation where a large employer tried to impose three internal investigators that became the subject of separate and costly legal challenges and dragged out the complaint for over a year. The cost of litigation far outweighed the cost of engaging an experienced investigator at the outset and the subsequent damage to workplace relations was incalculable.

Findings

In terms of dealing with inconclusive outcomes or mixed findings, it never ceases to amaze how some employers, fearful of litigation, rather than call "a spade a spade", find instead that a person must address their *style* of communication, needs coaching or upskilling, but falls short of being defined as a bully or a perpetrator of unprofessional conduct. It is not, in my experience, unusual to find that bullying has occurred in cases where the perpetrator may be popular or has faithful acolytes and the complainant is not universally respected – caution is often required in such situations and a skilled neutral investigator may spot such trends.

A delightful non-sequitur was when an employer investigation, finding that no bullying had occurred, but the manager complained of, was directed to engage a professional coach to "…assist her with perceived non-emotive interactions with others." Unsurprisingly, in anticipation of the complainant's reaction, the employer also directed that the complainant be "…provided with professional anger management intervention."

[38] *Anngow v Bed Bath & Beyond NZ Limited* [2016] NZERA Christchurch 76, at [63] – [66].

Complainant's Obligations

In a commonsense approach, most legal authorities have generally found that a failure to adequately inform an employer of the existence of a problem or an identifiable hazard is fatal to a successful bullying or constructive dismissal claim, but this is not an absolute rule (see below), as ignoring explicit bullying where an employer has constructive knowledge of such may lead to liability.

The Employment Court has directed that *"the obligation on an employee [who has been subjected to workplace bullying] is to bring the concerns to the attention of the employer."*[39] It is also not generally adequate to raise a bullying issue then resign before the employer has had time to investigate and attempt to resolve matters.[40]

It is also vital that the behavior complained of is adequately described and placed in context – it is not enough for an employee to just say that they felt bullied by X. One example highlights a novel GP diagnosis that a patient was absent from work due to "workplace bullying"!

Most employees opt to pursue "constructive" dismissal and/or disadvantage claims alleging they had to resign because of ongoing bullying and/or their employer's failure to resolve matters or that they were not provided with a safe work environment. It is, thus, crucial that once a complaint is brought to an employer's attention, a careful and timely response happens to avoid workplace disruption and litigation.

Employer Obligations

Once aware of a potential bullying situation (and this includes cases where the employer ought reasonably to have been aware of the situation),[41] an employer under health and safety legislation has a duty to take all reasonable and practical steps – akin to a tortuous duty of taking reasonable care to prevent bullying and harassment.

The current approach of WorkSafe New Zealand to bullying is somewhat tentative, with an educative rather than prosecutorial attitude being adopted, but it has progressed somewhat from it being merely catogorised as amongst *Psychosocial Issues*, including excessive hours and stress under the previous enforcement agency. [42]

Again, unlike sexual harassment and the currently topical profile of the #MeToo awareness campaign, where active deterrent is encouraged or seen almost as a positive duty to prevent repetition, [43] case law has commented little yet on the employer's duty to adopt initial preventative measures or actively

[39] See *McGowan v Nutype Accessories Limited* [2003] 1 ERNZ 120 and *Harbord v Waste Management Limited* NZERA WA 30/05, 23 February 2005.
[40] See for example *Nicholl-Jones v The Loaded Hog Auckland Ltd Bar and Brewer,* NZERA AA 171/03, 9 June 2003.
[41] Section 2A Health and Safety in Employment Act 1992.
[42] Ibid, but note that the NZ Labour Department did not pursue any prosecutions for workplace bullying, but has done so for an issue of workplace stress (*Department of Labour v Naldor & Biddle (Nelson) Ltd* DC, Nelson CRN 04042500, 13 April 2005, Judge McKegg). See "Occupational Health Tools "Psychosocial Issues" <www.osh.govt.nz> Interestingly material prior to 2002, including "A Guide for Employers and Employees on Dealing with Violence at Work", Occupational Health and Safety and Health Service, Department of Labour Wellington, January 1995, reprinted December 1997 which primarily had as a focus on external factors such as harassment from clients or customers.
[43] See section 117 of Employment Relations Act which details requirement to carry out an investigation and put in place steps to prevent repetition and see negative connotation placed upon employer's failure to develop policies after a complaint was identified in *Mohi v Parts and Services Ltd* NZERA, AA175/05, 11 May 2005.

promote policies to discourage bullying.

By analogy, in the education sector (pre-school through to tertiary sector), awareness of bullying of students is widespread so the holistic approach to devising preventive strategies and monitoring effectiveness of such is not a foreign discipline with similar principles applying to protect students. However, a significant contextual factor in educational settings is also the potential for students or indeed parents/caregivers to bully educators.

Conclusion

Sadly, we are currently stuck with the term bullying and all its negative connotations. The challenge for all parties is to try and actively reframe the issue and focus upon tackling negative behaviours. This involves adopting sound preventative strategies and new ways of resolving complaints/conflict.

Creating a positive workplace culture and having clear dispute resolution processes is the obvious place to start. An adversarial legal process is the least useful resolution tool.

Finally, perhaps our cousins across the ditch have it right with terminology. The most colourful policy response is at Arup Australasia Engineering where they have a *No Dickheads* policy and the sage advice of Dale Paulson, a dry Aussie Human Resources researcher: [44] "Jerks generally cannot be rehabilitated…It is best not to hire them in the first place…The next best thing is not to promote them!"

[44] Fiona Smith "Show respect or be shown the door" *The Press* (Christchurch, June 28, 2008).