

Article by F.Dunstone – Workplace Advisor

In this case update, the NRA Legal team reviews the recent Fair Work Commission decision on 16 November 2015 of *Sharon Bowker, Annette Coombe and Stephen Zwarts v DP World Melbourne Limited T/A DP World; Maritime Unions of Australia, The, Victorian Branch and Others* [2015] FWC 7312. This decision provides much-needed insight into the scope of the stop bullying orders that the Commission may impose.

Since the anti-bullying jurisdiction's inception on 1 January 2014, a worker in a constitutionally covered business who reasonably believes that he or she has been bullied can apply to the Fair Work Commission for an order to stop bullying. Bullying will have occurred when a person or a group of people repeatedly behaves unreasonably towards a worker or a group of workers at work and the behaviour constitutes a risk to health and safety.

The most recent quarterly report (April – June 2015) from the Fair Work Commission recorded 163 applications for an order to stop bullying at work. Despite many of the applications being solved prior to proceeding, several were heard and decided by the Commission.

FACTS

Three employees, two of DP World and another of the Maritime Union of Australia, experienced serious and repeated instances of bullying. The Commission found that Ms Bowker and Ms Coombe were bullied at work during the period of mid-2013 to July 2015, and that Mr Zwarts was bullied at work during the period of August 2013 to July 2015. The instances were significant, with the Applicants collectively raising in excess of 212 complaints and concerns, and alleging 37 instances of bullying behaviour.

DECISION

Despite each of the Applicants receiving a full bill of health to return to work, they still expressed serious reservations about their capabilities to return. Deputy President Gostencnik reasoned that this was because there was still a high risk that these workers would continue to be individually bullied. The reasons for this finding are as follows:

- A prevailing culture or paradigm where employees do not make complaints or verify complaints for fear of being labelled a ‘lagger’ or being ostracised in the workplace (“Code of Silence”). Despite efforts being taken to address this, the Deputy President identified this as an enduring issue.
- There were inadequate workplace investigations, incomplete investigations and delay. There was consistent evidence of the employer’s investigations lacking vigour, reliability, credibility or consistency. In effect, this has hindered the Applicants from being able to move on from the bullying, and their fear of the risk of being bullied at work had increased as more and more incidents are identified as time goes on.
- The employers have failed to create adequate return to work plans (RTW) and risk assessments to facilitate the return to work of each applicant.

THE ORDER

The Commission is permitted to make a stop bullying order pursuant to section 789FF of the *Fair Work Act 2009 (Cth)*. The orders proposed by the Deputy President at paragraph [116] are some of the most detailed seen in the anti-bullying jurisdiction to date, and are as follows:

1. “DP World is to arrange for a Work Safe Victoria inspector to attend a meeting separately convened with each Applicant and DP World representatives in order to review and finalise:
 - a. The risk assessment that has been prepared for each Applicant; and
 - b. The RTW plan for each applicant.
2. DP World will implement any further control measures or any other steps identified and included in the risk assessments or RTW plans in the following meetings.
3. Once the Applicants return to work, DP World is to actively monitor the effectiveness of the control measures and other steps identified in the risk assessment and RTW plans applicable to each Applicant and take reasonably practicable steps, after consulting the relevant Applicant, to alter or strengthen any control measures as may be necessary having regard to the circumstances of each Applicant while at work.
4. DP World is to inquire into, arrange for and commission, the training of any of its management personnel who are, or are likely to be required by DP World, to investigate complaints about workplace bullying at WS Terminal. The training is to include a focus on forensic investigative techniques including obtaining and managing of information,

interviewing complainants, interviewing witnesses, manner of questioning and active listening, observing and assessing.

5. In conjunction with the training referred to above, DP World is to commission the preparation and deploy for use by managers, of a workplace investigation instruction manual.
6. DP World is to review and amend its *DP World Employee Handbook 2013* and its *Workplace Behaviour Policy* to ensure that these instruments make clear that:
 - a. Workplace bullying is an occupational health and safety issue;
 - b. Investigating workplace bullying complaints is one of the actions taken by DP World to comply with its obligations to provide and maintain a safe working environment under applicable OHS legislation;
 - c. Employees have a duty under OHS legislation to co-operate with DP World in any action it takes to comply with its OHS obligations, including action to investigate allegations of workplace bullying;
 - d. Employees also have a contractual duty to co-operate with DP World by providing honest answers to questions when asked and to follow lawful and reasonable directions given by DP World;
 - e. DP World expects that employees will comply with [c] and [d] above when asked to participate in any investigation or inquiry into a workplace bullying complaint or to provide information in relation to such an investigation or inquiry; and
 - f. A failure by an employee to comply with [c] or [d] above may lead to disciplinary action and in cases of serious failures, to dismissal.
7. DP World will develop and deploy training, training materials and other information reasonably necessary to support and reinforce the review and amendment of the *DP World Employee Handbook 2013* and the *Workplace Behaviour Policy*.
8. DP World is to review, in consultation with the Applicants, the recommendations contained in the Security Risk Assessment prepared by Matryx Consulting Pty Ltd in April 2015, and give consideration to whether any further measures recommended by Matryx Consulting Pty Ltd, but not implemented by DP World, should be implemented.”

TAKE AWAY POINTS

- Employers must comprehensively address workplace complaints and issues
- The starting point for employers is a comprehensive policy, but that is not the end of the story
- Employers should consider the extent to which stop bullying orders may impact the workplace, and take preventative measures
- Employers should be mindful of their duty of care and the safety of all employees
- employers should be aware that incidents outside of work can be considered workplace incidents
- Update your social media policy
- Employers should consider ways in which they can engage with employees in relation to their social media accounts.

[Click here](#) to access the full decision.

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