Leading From the Front: From leadership to legal

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4 March 2014
In an ideal world …

• We strive to achieve operational discipline

• Policies are not enough

• Taking steps including:
  • Doing the right thing, the right way
  • Understanding not just what to do, but why you do it
  • Seeking greater knowledge about systems, processes and hazards
  • Do what you say you will each time, even if no one is watching
Indicia of Operational Discipline

- Leadership by example
- Common shared values
- Pride in the organisation
- Sufficient and capable resources
- Strong teamwork
- Employee involvement

- Active lines of communication
- Up to date documentation
- Practice consistent with procedures
- Absence of short cuts
- Excellent house keeping
YOU NEED TO SIGN THE CORPORATE CODE OF CONDUCT.

WOW! YOU'RE TOTALLY HOT.

UM... THAT'S INAPPROPRIATE, AND YOU NEED TO SIGN THE CODE OF CONDUCT.

I DON'T HAVE A PEN. CAN YOU TAKE IT BACK TO YOUR CUBICLE AND SIGN IT FOR ME?

NO. AND I THINK YOU'RE LYING ABOUT NOT HAVING A PEN. BUT MAYBE WE CAN FIND ONE FOR YOU.

SEE IF DILBERT IS IN HIS CUBICLE. I USUALLY TAKE HIS STUFF AND BLAME THE CLEANERS.

JUST SIGN THE #%$**! CODE OF CONDUCT OR I WILL CRUSH YOUR STUPID, BALD HEAD!

DO I NEED TO READ IT?

NO, JUST SAY YOU DID.
From Leadership to Legal Topics for today

• Multiple legal obligations that flow from:
  • It's not what we say, its what we do
  • "Come to Work Expectations"
    • Legal requirements: Safety / harassment / Discrimination
    • Code of Conduct / policies
    • Contracts

• And the:
  • Impact of leadership / managers / supervisors conduct
  • Extended liability for individuals
How well do we know & manage the risks?

- What is the definition of:
  - sexual harassment?
  - discrimination?
  - bullying?
- What does our policy say? Do we act consistently?
- How will we **investigate / respond** to concerns
  - What does our policy say & do we do it?
Case Study

- Fraser-Kirk v David Jones (and others)
  - A sex discrimination case
  - A sexual harassment case
  - A misleading and deceptive conduct case
  - A breach of statutory and safe workplace case
DJ's remains relevant for today

- Key themes and risk management:
  - Culture, Leading from the top down:
    - pockets of behaviour, condoning behaviour, even from high performers, parity of treatment
  - Expectations and standards of behaviour
    - Reflected in our polices and code
    - Acting as we say we will act, not ignoring pockets
  - Managing our risks in statements we make:
    - when and what comments should be made
Discrimination
Discrimination - The Legislative Framework

State Legislation

Governing Agency:
Anti-Discrimination Commission of Qld (ADCQ) & Division of WHS

• Anti-Discrimination Act 1991
• Industrial Relations Act

Federal Legislation

Governing Agency:
Human Rights & Equal Opportunity Commission (HREOC)

• Racial Discrimination Act 1975
• Sex Discrimination Act 1984
• Disability Discrimination Act 1992
• Age Discrimination Act 2004
• Fair Work Act
**Definition:** Discrimination occurs when someone is treated unfairly or badly compared to others, often because they are thought to be different (personal attributes)

**Direct Discrimination**
Unfair treatment because of a personal attribute

**Indirect Discrimination**
An unreasonable rule/practice which disadvantages a particular group of people more than others

**Personal Attributes**
Sex, Relationship status, Pregnancy, Parental status, Breastfeeding, Age, Race, Religious belief/activity, Impairment, Political belief/activity, Trade union activity, Lawful sexual activity, Gender identity, Sexuality, Family responsibilities or Association with someone who has one of these attributes
Direct or Indirect Discrimination

- Direct Discrimination:
  - treating someone less favourably directly because of an attribute

- Indirect Discrimination
  - harder to identify
  - imposing a term, condition or standard that not all people can meet due to individual attributes
  - the term is not reasonable
Discrimination - The Multi-layered Test

• Attribute

• Directly and/or Indirectly;

• Within a 'relationship':
  • employment;
  • pre-employment;
  • goods and services.

• Defences:
  • genuine occupational requirements
Sexual Harassment
I just watched the mandatory video on sexual harassment. It worked!

In only thirty minutes, that video corrected a billion years of evolution. Do something sexy and watch me ignore it!

I probably shouldn’t have fast-forwarded through the boring parts.
Sexual Harassment Defined

1. Unwanted or unwelcome conduct
2. Of a sexual nature
3. Intended to offend and humiliate
4. A reasonable person would take it as offending and humiliating
The Reasonable Person Test

• Who is the reasonable person?
  • A Reasonable person would anticipate conduct would offend/humiliate?

• Have regard to respective:
  - Age
  - Sex
  - Race
  - Religion and
  - Bargaining Positions
Is it sexual harassment?

- bear hugging - physical contact, familiarity
- shoulder massage
- "we should go out"
- "she has two good assets"
- "nice buttons"
- zipping up your pants, leaving the bathroom
- emails, text messages, MMS, your personal phone or facebook?
- Comments, remarks about a person’s sex or private life

*Poniatowska v Hickinbotham* ($466,000)
"Sexism and the City" cases

- Rich v PWC
  - claimed $11 m
- Fraser - Kirk v DJs
  - claimed $38 million +
- Airservices
  - claimed $2 m in Air traffic control
Extended liability sexual harassment

- **Alexander v Capello** [2013] FCCA 860
  - $75,000 plus interest
  - Supervisor to pay $24,300 plus interest

- **McCauley v Club Resort Holdings (No2)** [2013] QCAT 243
  - $35,490 in compensation
  - $4,500 to be paid by employee harasser

- **Ewin v Evengara (No #)** [2013] FCA 1311
  - $476,000 against independent contractor

- **N v Action Traffic Services** [2013] QCAT 565
  - $102,217 from the harasser, less employer settled sum
Bullying and harassment
You've got a problem with bullying in the workplace? Yeah, we wouldn't tolerate that...
Setting the Scene

- Case Study - Café Vamp
Setting the Scene - Café Vamp
Total: $335,000

• Company was fined $110K per breach = a total of $220K
• Da Cruz was fined $15K per breach = a total of $30K
• Smallwood was fined $45K
• Macalpine was fined $30K
• Toomey was fined $10K
Lessons from Café Vamp

• risks are real
• however not all cases are (fortunately) this extreme
• But identifies the importance of:
  • taking complaints seriously
  • Not turning a blind eye, employers must act
  • intervene early
Since Café Vamp …

- Victorian Inquiry - post Café Vamp
  - Changes to law
- Federal Inquiry - 2012 - 2013
- 2011 Work Health Safety - Harmonisation
  - Proposed Code of Practice
  - Now Guidelines
- Fair Work Commission - new bullying regime 2014
What is bullying

Federal System

- Fair Work Commission
- Fair Work Act
- Guide for preventing and responding to workplace bullying 2013
- New bullying jurisdiction from 1 January 2014

Qld System

- Workplace Health and Safety Queensland
- Work Health and Safety Act
- Prevention of Workplace Harassment Code of Practice 2004
- Continues to investigate claims of bullying and harassment
What is Bullying

At the State level:

• "Workplace harassment" is defined in the *Prevention of Workplace Harassment Code of Practice 2004* (Qld) as harassment, by a person, including an employer or co-worker that:
  
  • is unwelcome and unsolicited;
  
  • the person considers to be offensive, intimidating, humiliating or threatening;
  
  • a reasonable person would consider to be offensive, humiliating, intimidating or threatening.

• This Code and definition continue apply to all employers.
What is Bullying

At the Federal level:

• Fair Work Act and Guide for preventing and responding to workplace bullying (Bullying Guide):

"A worker is bullied at work if an individual or group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is the member, and that behaviour creates a risk to health and safety....

Reasonable management action conducted in a reasonable manner does not constitute workplace bullying"
What is Bullying - bullying guide

• **Repeated behaviour**: persistent nature of the behaviour and can refer to range of behaviours over time.

• **Unreasonable behaviour**: means behaviour that a reasonable person, having regard for the circumstances, would see as victimising, humiliating, undermining or threatening.

• **Risk to health and safety**: means the possibility that harm (death, injury or illness) might occur when exposed to a hazard.
What are the legal risks

- Disputes and conflict
- Stress claims, increased sick leave
- Workers' compensation claims
- Workplace health and safety prosecution
- Unfair Dismissal
- Discrimination complaints
- Civil proceedings for:
  - breach of statutory duty
  - failure to provide a safe place of work
  - negligence
- Assault
The legal risks are real: extension of liability

• Naidu - $1.4 million

• OHS - prosecutions - individual penalties:
  • Café Vamp - $335K:
    • Company was fined $110K per breach = a total of $220K
    • Da Cruz was fined $15K per breach = a total of $30K
    • Smallwood was fined $45K
    • Macalpine was fined $30K
    • Toomey was fined $10K
  • M A Coleman Joinery (NSW) Pty Ltd - $55K+
  • Ballarat Radio $55K, employee also $10K
Extension of liability
Fraser-Kirk v David Jones Limited and Others (NSD 964 of 2010)

- Not just a sexual harassment claim
- Claim in the Federal Court:
  - TPA case:
    - misleading statements:
      - isolated events
      - no culture of sexual harassment
    - breach of contract
  - trespass
  - safety - unsafe work environment
  - breach of SDA, Fair Work Act, Fair Trading
David Jones case - cont

• Joined:
  • all directors
  • members of senior management
  • alleged, who knew, or ought to have known

• Punitive damages: $37 million …. to charity:
  • 5% of DJs profit during years McInnes was CEO
  • 5% of McInnes remuneration

• 15 October 2010 - settled in AHRC → $850,000
IBM and Optus

IBM

- IBM
  - $1.1 m claim for sex discrimination and bullying
  - Claimed:
    - 2 years of harassment
    - Made complaints to 4 managers
    - IBM turned a blind eye and encouraged her not to complain
  - case against company and named managers

Optus

- Unlawful termination
- Terminated after 7 months
- Suing for "bullying, suppression and victimisation" - Optus failed to protect her from a known bully
- $14.5 m for:
  - Reputation and future earnings
  - Orders to help Optus to reform its alleged dysfunctional culture
Berkeley v Pacific Brands

• $9m claim:
  • unlawful termination & punitive damages

• Allegations include:
  • being verbally abused by former manager for being late to a meeting through no fault of her own
  • culture of bullying and intimidation permeated organisation
  • 6 foot 4 inches "overweight" man "deployed" his "physicality"
  • bullied less senior employees via anger including yelling, gesticulating and slamming his fists into office furniture and equipment
  • use of foul language and his seniority
Berkeley v Pacific Brands

- Redundancy - restructure
- offered a job (promotion), she refused
- made redundant with 3 months notice
- summarily dismissed when returned computer
  - had downloaded 200 documents, including confidential documents
- Denies bullying, claim made only after termination
- Trial 9 September 2013, decision reserved
“If you keep complaining about office bullying, Bignose, I’ll have no option but to give you a wedgie.”
Condoning Unacceptable Conduct
Marilyn Barton v Baker Johnson Lawyers

• Employed as a legal secretary
• In interview - 'swears a bit'
• Subjected to verbal abusive, demeaning and belittling conduct.
• Ms Barton and other secretaries wrote a letter:
  • behaviour 'demoralising, soul destroying, vulgar, obnoxious and extremely unprofessional'
• Dismissed for being a trouble maker
• QIRC:
  • 6 months maximum compensation;
  • Reported transcript to DIR
Why is it so hard to manage these issues?

- People don't like conflict
- immediate action isn't always taken
- signs are ignored
- we are all too busy
- we use too much email
- often we turn a blind eye to a problem
The role of managers and supervisors
Where do the risks arise?

• Take complaints seriously
• Act as a leader
  • lead by example
  • do not condone / ignore bad behaviour
    • emails
    • overhearing / witnessing conduct
    • failing to act
• if you are uncertain, act early (HR/ legal)
Has a complaint been made? It doesn't have to be in writing

- I am telling you as a friend
- I don't want to do anything about it
- I don't want to make a complaint
- It's between us
- I'm ok, I can manage it
- I'll deny that I told you, I don’t to take it further

Smith v Grand Hyatt, Nikolich
Is it a complaint? How (not) to respond?

- Harley v Aristocrat Technologies
  - constructive dismissal claim
  - complaint of bullying
  - given show cause for performance
  - HRM reported no validity to bullying complaint
  - BUT HRM did not investigate complaint
- FWA awarded 6 months compensation
What causes common problems

• not intervening early
• using email to manage
• speaking on private matters in public:
  • The corridor chat
• not setting clear expectations
• not sharing information or being clear about why
• creating the impression of personal relationships
• preferential treatment
• not responding to the "B" word
• not addressing rumour, gossip and innuendo
• not maintaining directions about confidentiality
Statistically from the cases: When will things go wrong

- Performance management
- Parity of treatment and business expectations for:
  - Absences / Sick leave
  - Family Responsibilities
- Setting clear & consistent expectations:
  - papertrail
- Turning a blind eye
- Difficult "personalities":
  - Left unchecked
- Unchecked emails:
  - Managers copied into
- Participating in office gossip
- Management by email
Why is it so hard?
Because of these things you must:

- educate - what are the expected standards of behaviour and role clarity
- Intervene early - into unacceptable behaviour
- don't let things escalate
- if they do:
  - investigate it and respond
  - get particulars, not just an emotion
  - have good policies and be consistent
  - manage the papertrail and confidentiality
What can you do to manage and respond to these risks?

• Educate, Educate, Educate:
  • What is, and what is not, bullying, harassment, discrimination
  • Standards of conduct expected in the workplace
  • Communicate regularly about your standards
  • Refresh your required policies

• Walk the Talk:
  • lead from the top down

• Think about messages:
  • Dignity and Respect - Freedom from Gossip / Rumour
What can you do to manage and respond to these risks?

- **Empower employees to:**
  - fully understand their rights and responsibilities at work
  - understand what is, and what is not bullying
  - feel confident that they may report unacceptable behaviour without fear of recrimination
  - act promptly and consistently to investigate and respond / educate
- **Know the signs** of bullying/ unacceptable conduct - tearfulness, changes in personality, increase in absenteeism, high turn over
- **Don't condone bad behaviour** - a little early intervention can go a long way
- **Paper trail**
Remember the expectations

- Manager conduct at work is critical to:
  - Your employer's business success and in making it a great place to work
  - Setting an example for your colleagues
  - Demonstrating and promoting appropriate behaviour
  - Recognising unacceptable behaviour and help the business act on it
  - Developing and working towards achieving organisational discipline
Questions?
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