CRACKING THE WHIP

The possessors of strong personalities, who have the confidence to hold and express their views, are often the least aware of the intimidating effect upon others and, paradoxically, the most terribly sensitive, and genuinely hurt, to being bulldozed by others

The basis for a moral objection to a 'bully' is supposedly their (mis)use of relative strength or power to coerce or intimidate weaker people. Yet the Shorter Oxford dictionary records that the term's original meaning was not pejorative: it meant 'sweetheart', or 'darling,' a term of endearment and familiarity. We still have the remnants of that meaning when we say, a touch enviously, 'Bully for you!' when someone has a win! And there is some reason to agree with the poisonous Auberon Waugh who, a couple of years ago, wrote a wry little piece in the Spectator praising the virtues of bullying, especially in schools, toughening up our kids for the hard world out there. Waugh, of course, believes that to survive bullying is to build character. True, if one is resilient. Bashing one's head against a wall may build up a carapace - or it might fracture, or weaken an eggshell skull under the repeated insults. Some of us are not resilient.

It's tough out there, in a world of uncertain employment, 'contracts' instead of awards, the relatively powerless negotiating from a position of relative weakness. But beggars who can't be choosers, in this situation, still have a remedy when the extreme cases occur. The courts, bless them, have started to crack down on bosses that bully, or let others bully, their people. They have begun to award real damages, for the real damage done.

We have begun to recognise why employers are responsible for preventing some kinds of bullying - sexual harassment in particular. This is not a feminist construct: sexual harassment is a particularly pernicious form of bullying, one

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with a sexual element - repeated or gross acts or words of a sexual nature that are not welcome nor invited, which a reasonable person would expect to have the effect they do - to intimidate, insult or humiliate the person subjected to them. It is bullying: the misuse of relative power to introduce a sexual element, in a frightening or shameful way. Because it is specifically prohibited under equal opportunity laws, and the courts have sheeted vicarious liability home for it, managers - especially those with US experience - are starting to count the cost of not preventing bullying.

Damages awarded in Australian courts have never reached, nor will they ever reach, the US courts' multi-million awards, in part because our courts order costs against unsuccessful applicants, and our lawyers are not entitled to act on the promise of sharing in the damages bounty in lieu of ordinary fees. We call it *champerty* and would strike off the lawyer who would take such a punt, and this has probably kept damages down, as a result. This policy is, along with other 'competition' policy change, under review by the State Attorneys General who would wish to regulate the legal profession in the same way as any other business.

The highest general damages award for sexual bullying of this kind was awarded by the Victorian Anti Discrimination Tribunal in June 1998, an award (and a finding) presently under appeal [the appeal failed]. The Tribunal had awarded Senior Constable Narelle McKenna a record $125,000 in general damages (for hurt feelings, and distress, and psychological illness, nothing else) after finding that her employer, the Victoria Police and three of its employees had been responsible for sex and marital discrimination as well as, on three occasions, sexual harassment by one of her supervisors. This had included, the tribunal found, his asking her for a 'head job' and manhandling her into a holding cell.

But the core of the facts found by the tribunal was not the 'sexual harassment' or discrimination, as such, but the bullying that followed her complaining about it. According to the tribunal, senior officers singled her out for negative

treatment: filing memos with negative remarks about her honesty on her personnel file, singling her out for extraordinary disciplinary interventions (even upgrading a disciplinary sanction without notice) without precedent, knowing that McKenna had already complained about the use of disciplinary procedures against her. McKenna had a breakdown, but did not leave the job. The Tribunal was highly critical of the Police. It found that these actions, apart from the incidents of harassment, were 'initiated, supported or endorsed at high levels in the district hierarchy,' and that the Victoria Police had taken little effective action, over several years, to implement its own anti-harassment and equal opportunity policy. (**McKenna v. State of Victoria**, 1 June 1998). The case was under appeal. But the damages award is an all-time high. Other awards have been based on lost wages, medical expenses and the like: this is pure compensation for the outrage of being subject to discrimination, bullying, and victimisation too.

Employers who have 'embraced' sexual harassment still find it hard to deal with non-sexual 'harassment' - bullying that does not have a sexual element. This kind of bullying is a far greater problem. Jokes or teasing can cause injuries or death: the classic example is some idiot lighting a flammable fluid in a workshop and an apprentice getting scorched, or the 'joke' causing offence to be taken, and a physical confrontation.

In other cases the managers themselves may perpetrate the harassment or bullying. Where is the line drawn between 'firm management' and hounding?

The Industrial Relations Commission in Melbourne dealt with one example of an unfair dismissal claim caused by bullying in June 1997 (**Dillon v. Arnotts Biscuits Limited** U No. 31680 of 1997 10 September 1998.) Then, a woman resigned from her job as a packer because of prolonged bullying by her supervisor, 'to the point of reducing her to tears. She came back from a work-related illness, to be put to work at a workstation by herself, facing a blank wall with her back to her fellow employees. The supervisor was said to have singled Ms Dillon out for special treatment to 'toughen her up'. She resigned,

but the Commissioner found she had been constructively dismissed, and ordered her reinstated.

Another case, involving massive damages against the employer for failing to provide a safe system of work or protect the employee, was heard in April 1998 in the Supreme Court of Queensland. A newspaper owned by Midwest Radio Ltd employed Ms Arnold. The court found her manager regularly subjected her to offensive behaviour - he did the same to other employees, but targeted her more. His language was 'aggressive, bullying, abusive, belittling and sarcastic,' the court said, and 'often expressed in or accompanied by foul language. He had threatened her employment: once he had called her and another worker in to his office and given each the opportunity of sacking the other. He was in the practice of putting staff 'on their second or third warning', though they had not previously been 'warned'. He had had tried to cause trouble by playing one staff member against another, including telling another worker untruthfully that Ms Arnold had made a sexual harassment complaint about him (he knew the man had previously been the subject of a sexual harassment complaint in another job.) He had aggressively tried to humiliate a gay fellow worker, in Ms Arnold's presence, calling him a 'poofter' and dumping his desk-top contents on the floor and making him pick it up, and making homophobic remarks. She was permitted, the court said, to rely on his offensive conduct to other staff members as adversely affecting her, though not directed at her. Finally, the manager refused to allow Arnold to take leave to see her de facto husband's father, who was dying, saying that it was 'out of the question', 'too close to Christmas', and though she was entitled to compassionate leave he was not going to give her any. The father died two days later. So she left, got ill, and sued. Note: she sued. She did not complain of sexual harassment or discrimination. She sued, in the ordinary courts, and she proved that in allowing her to be hounded by bully the employer had failed to provide a safe system of work, and was in breach of its statutory duty under the Queensland Workplace Health and Safety Act 1989.

The Supreme Court found that Ms Arnold was not likely to work again. She was entitled to rely on her psychiatric injury, alone, as the basis of her claim that the employer had failed to take reasonable care to avoid injury to an employee, and had unreasonably exposed the plaintiff to a foreseeable risk of injury. She may have been vulnerable, but employers must take their staff as they find them: there was a causal relationship between her illness, and the manager's behaviour. Though the manager was entitled to use a 'strong hand' to turn a loss-making venture into a profitable one, his treatment was well outside acceptable parameters.

Damages were awarded in the total amount of $572,512.87. This included general damages of $65,000 (note, less than Senior Constable McKenna's), loss of earnings, including superannuation of $75,000, future economic loss of $160,000, past carer costs of $120,000 and future carer costs $100,000. Fortunately for the employer, the court contemplated but did not award aggravated or exemplary damages, because of a lack of evidence that the company knew enough, or when, of the offending manager's conduct to put it under a duty to take remedial action.

The case was later overturned on an unrelated legal point, but the sheer level of damages raises an important issue about corporate responsibility for humane management of staff. It may be that all the emphasis on sexual harassment has unintentionally desensitised some to the need to prevent **all** bullying, including bullying under the guise of 'strong management', and especially of young and inexperienced, or ill or vulnerable staff.

When does firm management become harassment and unfair treatment? When anyone who is not caught up in the Terror would say that the methods used are unlikely, logically, to achieve the stated aims. Humiliation and intimidation is not, it seems, likely to result in increased productivity. And if you think otherwise and they sue - not in the specialist tribunals, with their statutory limits, but in the real courts, with real damages, and lawyers who are prepared to wait for their fees until you get your award - well bully for them.