Falling Between Stools: Workplace Bullying and the New Zealand Employment Relations Context

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ABSTRACT

New Zealand workplaces are not immune to the toxicity of workplace bullying and numerous cases have come before the Employment Relations Authority and the Employment Court. However, legislation used to determine cases of workplace bullying are beset with weaknesses that limit their efficacy. This paper discusses the Employment Relations Act 2000 and the Health and Safety in Employment Act 1992 in relation to the unique characteristics of workplace bullying. In particular, we draw attention to the requirements around foreseeability, factual evidence, and the underlying approaches of the Acts, as issues that appear to inhibit a target’s ability to seek redress. As a way forward, the paper argues for an approved Code of Practice to support New Zealand’s current legislative framework.

Keywords: Employment relations, occupational health and safety, conflict resolution, performance management

In the last twenty years a considerable body of international research has provided clear evidence of the widespread extent and destructive nature of workplace bullying. Bullying can poison a workplace environment and result in significant damage to the target and witnesses. Alongside the individual damage, workplace bullying can also result in substantial direct and indirect organisational costs. New Zealand workplaces are not immune and research by Bentley and colleagues (Bentley et al., 2009a, 2009b; O’Driscoll et al., 2011) indicates that bullying is relatively commonplace. Importantly, this research also indicates that organisations have a poor understanding of workplace bullying with few having appropriate policies or prevention strategies in place (Catley et al., 2011).

In the wake of such research, workplace bullying is an issue in New Zealand that has received a considerable amount of media coverage and a degree of attention from regulatory agencies. This heightened awareness is likely to see an increasing number of employees identify themselves as targets of bullying and to potentially seek redress. Further, failure by New Zealand organisations to adequately address complaints of bullying is likely to see the redress sought by employees as involving legal action against their employer. By focusing on the legislative environment this paper does not wish to deny the importance of the work being done to identify the effectiveness of organisational interventions to prevent workplace bullying. On the contrary, primary and secondary interventions are critical to preventing and managing workplace bullying.
The focus of this paper is therefore to connect workplace bullying to the broader employment relations context and to examine the efficacy of New Zealand employment legislation with respect to workplace bullying, and psychosocial hazards generally. In doing so, we are not providing a legal analysis but one from an occupational health and safety and employment relations perspective. Specifically, we offer an analysis of two key pieces of employment legislation - the Employment Relations Act and the Health and Safety in Employment Act – and, with regard to cases of bullying taken under these Acts, we contend that both have significant limitations that inhibit their ability to provide the potential redress that targets of workplace bullying seek. Given these limitations, we propose that an approved Code of Practice around workplace bullying should be adopted in the interim until a substantive review of the legislative framework takes place.

**WHAT IS WORKPLACE BULLYING?**

Comparing prevalence rates between countries and industries is fraught with difficulties due to the variety of definitions employed and the methods and instruments used in the measurement process. Nielsen, Matthiesen and Einarsen (2010) conducted a meta-analysis of prevalence rates published in 86 different articles and concluded that the mean prevalence of bullying varied between 11% and 18%. In New Zealand, the largest study to date of workplace bullying was conducted by Bentley et al. (2009b) who examined responses from 1,728 employees drawn from the health, education, hospitality and travel industries and found that 17.8% of the sample had been bullied. As with the international literature (Einarsen, Hoel, Zapf, & Cooper, 2011), workplace bullying was reported by Bentley et al. (2009b) to have a negative effect for both the targets of bullying and the organisation. Targets were reported to have higher frequency of absenteeism, reduced organisational commitment, job satisfaction and work motivation, and have significantly lower levels of emotional well-being and higher levels of strain than non-targets. An intention to leave the organisation was also more likely to be expressed by a target than a non-target. Other significant costs included the opportunity costs of displaced time and effort to help targets cope with bullying incidents and the costs associated with investigations and potential court action.
A wide range of definitions of workplace bullying have been adopted by researchers dependent on their research perspective or professional interest (Rayner & Cooper, 2006). Despite this variety, it is generally agreed that workplace bullying consists of systematic, interpersonal potentially harmful behaviours inflicted over a period of time that forces a target into a position where they feel unable to defend themselves and which may cause severe social, psychological and psychosomatic problems in the target (Einarsen, et al., 2011). Bullying behaviours are typically conceptualised as person-related or work-related. Work-related behaviours include imposing unreasonable deadlines and/or unmanageable workloads, excessive work monitoring and assigning meaningless or degrading tasks (Einarsen, et al., 2011). Person-related bullying includes insulting remarks, excessive teasing, gossip and/or rumours, persistent criticism, practical jokes and intimidation (Einarsen, et al., 2011).

Workplace bullying can therefore be overt but also discrete and subtle, and heavily context dependent. Leading reviews of the literature emphasise however, that it is the perceived intent of the behaviour coupled with its persistent and unwelcome exposure that causes harm to targets (Einarsen, et al., 2011; Rayner & Cooper, 2006)

THE EFFICACY OF NEW ZEALAND EMPLOYMENT LEGISLATION

Despite the growing recognition and awareness of workplace bullying, there is no specific legislation or policy to hold organisations or perpetrators legally accountable for the harm caused by workplace bullying. The Human Rights Act 1993 was developed to promote respect and harmonious relations in New Zealand society yet its emphasis is on harassment in the form of sexual (s62) and racial (s63) discrimination (Human Rights Commission, 2008). Cases of workplace bullying typically lack such an underpinning (Needham, 2003), and therefore the Human Rights Act appears to be less well suited for workplace bullying and other psychosocial hazards. Hence, two pieces of legislation – the Employment Relations Act 2000 (ERA) and the Health and Safety in Employment Act 1992 (HSEA) – are typically relied on to investigate and determine claims.

The primary objective of the ERA is to build productive employment through the promotion of good faith in all aspects of the employment environment and the employment relationship (s3(a)). Targets who believe they have suffered harm as a result of being bullied at work can potentially lodge a
personal grievance under s103 of the ERA for unjustified disadvantage and, if the employment arrangement has since been terminated, unjustified dismissal. Whether the employers actions are justified is determined on an objective basis on “what a fair and reasonable employer could have done in all the circumstances” (s103A(2)) with consideration of the resources available to the employer (s103A(3)(a)) and the opportunity for and consideration of the employee’s response to the allegation prior to taking action (S103A(3)(b-d)). The ERA holds organisations accountable for failing to promptly and fairly follow-up complaints of bullying and focuses on secondary level intervention in bullying and resolution of complaints. If an organisation investigates a complaint, gathers evidence from all parties to determine the facts, disciplines accordingly and reports back to the complainant, they are unlikely to be held accountable for providing an unjustified disadvantage (e.g. Kent v Massey University [2009] NZERA 812). Consequently, there is no mechanism for holding organisations accountable for deficiencies in primary prevention; that is, liability for preventing bullying occurring in the first place or subsequent recurrences.

Alternatively, claims can also be brought against organisations under the HSEA for a breach of duty by failing to take all practicable steps to ensure the safety of employees while at work (s6). The legislation requires employers to have in place methods for systematically identifying existing and new hazards and regularly assessing those identified hazards (s7). Furthermore, the legislation requires organisations to eliminate, isolate or minimise hazards deemed ‘significant’ (a source of serious harm; harm dependent on extent or frequency of exposure; harm not detectable until some time after exposure) (s8-10). In determining whether all practicable steps have been taken, the Act considers the nature and severity of the harm, the employer’s current state of knowledge about the likelihood that the harm will be suffered, and the current state of knowledge about the means available and the costs of those means in preventing the harm (s2A(1)(a-e)). Amendments to the Act in 2002 integrated “physical and mental harm caused by work-related stress” into the definition of harm along with a broader definition of a hazard to include “a situation where a person’s behaviour may be an actual or potential cause or source of harm.” These amendments represented a significant step forward in acknowledging psychosocial hazards in the work environment.
Although each of these Acts takes a different approach to addressing bullying in New Zealand workplaces, the current frameworks are limited in their ability to deal with a complex phenomenon like workplace bullying where the behaviour is covert and subjective and the harm inflicted is psychological and cumulative. Considering the requirements of the ERA and HSEA alongside the unique and complex nature of bullying, raises particular concerns regarding foreseeability, factual evidence, and the underlying approach of the legislation that limit the efficacy of the existing legislative frameworks.

**Foreseeability**

Recent research has found that workplace bullying is severely underreported. For example, Keashly and Neuman (2004) found that only 53% of targets reported the bullying to their direct supervisor and only 15% lodged a formal complaint. Similar studies have identified that few targets of bullying voice a complaint for fear of being subjected to further harm and/or because they perceive the organisation as being unable and unwilling to resolve the complaint in a fair and timely manner (Bentley et al., 2012; Djurkovic, McCormack, & Casimir, 2008; Ferris, 2004; Huntington et al., 2011). A further concern in this regard is that, in many contexts, the alleged perpetrator is in a position of greater formal or perceived power and, in some cases, the reporting channels are such that the target is required to report their complaint to the bully themselves (Rayner & Keashly, 2005). Researchers suggest that underreporting is a key factor influencing organisations limited understanding of the phenomenon and its prevalence (Bentley, et al., 2009b). Accordingly, managers often dismiss bullying as a personality clash and a problem to be resolved by the individuals involved, rather than the organisation (Ferris, 2004). Lack of government initiatives not only contribute to underreporting but allow employers to be apathetic in managing bullying in their organisations.

However, the ERA and HSEA not only require targets of bullying to have made a complaint about the behaviour, but require them to provide a thorough account of the systematic behaviours they have been exposed to. Consideration of the resources available to the employer within the ERA is raised in several cases whereby it has been determined that the organisation was not liable as they were not provided with all of the information required to investigate the allegation (Corneal v General...
Distributors Ltd trading as Woolworths at Gull [2007] NZERA 395) or the complaint did not reach the level of management required to investigate complaints as outlined in the employee’s employment agreement (Harris v Talley’s Group Ltd [2010] NZERA 364). Further, considering that bullying is severely underreported, it is likely that other serious cases may not have sought redress through the legal system due to the requirements of the existing legislation. Thus, the requirement on the target to provide the employer with sufficient resources to investigate the case is an apparent concern.

Identifying hazards and potential harms associated with workplace bullying, as required by the HSEA, is complex due to the discrete nature of the behaviours involved and the harm stemming from the subjectively constructed perceptions of intentions behind the behaviours which targets are subjected to (Keashly & Neuman, 2004). However, aligned with concerns of underreporting, research in New Zealand and globally suggests that organisations generally have a poor understanding of the phenomenon and its prevalence and consequences (Bentley, et al., 2009b). Several cases have highlighted the lack of understanding of bullying by New Zealand employers in regards to the current legislative framework. One such case is Tanner v Todd and Pollock Haulage (2006) Ltd [2011] NZERA 320, in which the defendant gave evidence that, as the employer, the matters were becoming more than he had the knowledge to deal with and he subsequently suggested the applicant seek legal advice. However, the existing legislation, coupled by the absence of government policy to assist or encourage related learning, shields organisations in that it requires Authority consideration of the employers ‘current state of knowledge’. As stated in Attorney-General v Gilbert [2002] NZCA 55, “the contractual obligation requires reasonable steps which are proportionate to known and avoidable risks”. Hence, the current requirement of an employer to obtain knowledge of the hazard lies with the target or witnesses in bringing the hazard to the employer’s attention.

Factual evidence

Although researchers have attempted to objectively measure bullying prevalence, bullying is a subjective phenomenon in which the cause of harm is based largely on the target’s perceptions (Mayhew et al., 2004; Neidl, 1996; Saunders, Huynh, & Goodman-Delahunty, 2007). Further, researchers have acknowledged that the harm experienced by a target of bullying is often unable to be
located in a single episode and is instead inflicted as an accumulation of numerous systematic behaviours that, experienced in isolation, are unlikely to cause significant harm (Keashly & Neuman, 2004). Thus, behaviours such as being given unmanageable workloads or unreasonable deadlines are unlikely to provide strong evidence towards a target’s case unless the accompanying context is considered (Archer, 1999; Cowie, Naylor, Rivers, Smith, & Pereira, 2002; Hoel & Beale, 2006).

However, the legislative framework as it stands struggles to acknowledge harm induced from cumulative behaviours that, in isolation, are seemingly trivial. In this sense, weight is not given to the context in which the events occurred or the persistency of behaviours as a source of subjectively-constructed harm. Hence, the often discrete and subtle nature of bullying is such that the target’s ability to provide sufficient factual evidence to support their claim is likely to be problematic in cases of other than extreme bullying. These discrepancies between the academic literature and the current legislation are highlighted in the case of Kent v Massey University [2009] NZERA 812 in which the Authority states “Ms Kent’s reliance on her perceptions and feelings does not assist her, in establishing as a matter of law and fact, a personal grievance”. Similarly, the Authority in Crutchley v Chief Executive of the Ministry of Social Development [2008] NZERA 196 states “Mr Crutchley has marshalled meagre and subjective evidence to support his allegations…He was relying on his own perceptions”. The point of this observation is not to argue that these determinations are unjust but instead, it is to support the argument that the subjective nature of bullying is relevant to cases that have come before the Authority, yet the existing legislation is unable to recognise its significance.

Unlike many other complaints that may be heard by the Authority or employment courts, a target of bullying has been exposed to numerous discrete and subtle behaviours over a period of months or even years. Concerns in regards to the accuracy of recalling historical events as evidence is highlighted in several cases, especially considering the nature of bullying is such that, to parties other than the target, the behaviour at the time may have been perceived as trivial, or ‘normal’. For example, as stated in Corneal v General Distributors Ltd trading as Woolworths at Gull [2007] NZERA 395, “the witnesses who came to the Authority gave their recollection of the events as best they could recall them. While over time these recollections may have been coloured by the witnesses’ experiences since then, that is
not to say that they are not genuine”. Consequently, cases demonstrating conflicts of evidence provided by the parties are common and the Authority or courts are required to determine the facts based on the balance of probabilities. For instance, in the same case the Authority found “where there are conflicts between the evidence of the witnesses…I prefer that of Woolworths’ witnesses. Ms Corneal was very ill at the time of the events in questions and therefore this is likely to have affected her memory”. Further, witness reluctance to speak up against the organisation is observed in several cases (McCullough v Otago Sheetmetal and Engineering Ltd [2008] NZERA 413; Nafoi v Complete First Aid Supplies Ltd [2010] NZERA 510). Such reluctance, coupled with the often covert nature of bullying, may mean few witnesses to corroborate the target’s account but a number of witnesses to corroborate the bully’s account of ‘normal’ or ‘unintentional’ behaviour towards the target.

**The underlying approach of the ERA and the HSEA towards workplace bullying**

Although the ERA and HSEA both have similar weaknesses in the context of workplace bullying, they each capture a well-recognised concern of the academic literature – respectively, the need for HR to resolve conflict promptly and fairly, and the need for a preventative approach to the management of bullying. Also applicable to the wider scope of psychosocial hazards at work, the primary focus of the ERA is not whether the applicant is able to provide sufficient evidence to prove that they have been exposed to behaviours that constitute bullying, but instead whether they can provide sufficient evidence that the organisation has subjected them to disadvantage by taking unjustified actions in investigating and resolving their complaint. The focus of the ERA is therefore rehabilitative and at a tertiary level in that it compensates targets for the harm and humiliation suffered and disciplines employers for inadequate intervention and resolution processes after a complaint has been raised. However, such an approach does not prevent the target from suffering harm or the organisation incurring harm-related costs, nor does it encourage organisations to be proactive in implementing primary preventions.

Workplace bullying receives more direct focus under the HSEA, especially considering the recent amendments, in that it requires organisations to identify and monitor hazards in the workplace, and eliminate, isolate or minimize those hazards deemed significant. Further, the Act states that a
significant hazard can mean “hazard that is an actual or potential cause or source of harm, the severity of whose effects on any person depend (entirely or among other things) on the extent or frequency of the person’s exposure to the hazard” – a definition closely mirroring the nature of bullying. However, although the Act aims to address the need for a more preventative approach to the management of workplace bullying, organisations are insulated by the law’s requirement to consider the employer’s current state of knowledge. Although limited, this protection lowers the efficacy of the legislation in protecting targets and allows employers to take an apathetic approach to the management of bullying in their organisations.

Moreover, unlike a personal grievance which can be lodged by an individual employee at minimal cost, the cost and complexity of bringing a private prosecution under the HSEA outweighs the level of compensation awarded. Instead, the target can lodge a complaint with the Department of Labour’s (DoL) labour inspectors but it is the DoL who determines whether or not the claim warrants an investigation of the organisation’s health and safety standards. Yet, for the DoL to pursue legal action, the requirement is often a serious incident or a mass of complaints and thus, many claims are unlikely to meet the Department’s threshold for action. There are also further unknown implications for the efficacy of the HSEA as a result of the disestablishment of the Department of Labour by the New Zealand Government. As of July 1\textsuperscript{st} 2012 the functions of the Department of Labour will be integrated into a new ‘Super Ministry’ – the Ministry of Business, Innovation & Employment.

Although the existing HSEA has weaknesses in terms of its efficacy in protecting targets of bullying, it has been developed to encourage a preventative approach to managing health and safety in the workplace. This approach is aligned with recent research which encourages primary prevention through the lens of impacting organisational structures and processes. As it stands, the legislation only requires organisations to reasonably identify the bully as a hazard; yet, the perspective from which the Act has been developed, with consideration of supplementary policy, has the potential to send a strong message of encouragement to employers to take a proactive approach to primary prevention.
WHERE TO FROM HERE?

Taking guidance from international recommendations

Increasing acknowledgement of workplace bullying as a global issue has seen recent action initiated by global institutions and national and local governments throughout the Western world. For example, several European institutes have developed the European Framework for Psychosocial Risk Management (PRIMA-EF) framework to encourage policy development at national and organisational levels (Leka & Cox, 2008). The framework incorporates an assessment of risks to enhance understanding and details suggested preventative actions. Similarly, the World Health Organisation has published a report to raise awareness of psychological harassment in the workplace proposing preventative action at a primary, secondary and tertiary level (Cassitto, Fattorini, Gilioli, & Rengo, 2009). At national government level, numerous European countries (e.g. Sweden, France, Norway, Denmark, the Netherlands) have enacted legislation that requires employers to prevent psychological harassment and, although none have yet been enacted, several US state governments have considered bills to criminalise bullying. In Australia, the Victorian government has recently criminalized serious bullying under the Crimes Act 1958 that allows individual perpetrators to be held accountable for their behaviour; similar legislation is also being pushed by the Employer’s Chamber of Commerce and industry groups to be adopted by Australia’s Federal Government.

In line with global institute initiatives, Codes of Practice for preventing psychosocial hazards in the workplace are becoming a more common government response. Ireland has enacted an approved Code of Practice specifically for workplace bullying which is governed by existing workplace health and safety legislation (Health and Safety Authority Ireland, 2002) and Australia are not far behind, having released a draft Code in 2011 (Safe Work Australia, 2011). A typical approved Code of Practice includes information on what workplace bullying consists of, why it goes unreported, what employers should do to prevent it (including developing a policy, consulting employees, training and monitoring) how to respond to incidents, and other legal considerations. The Code, designed to support existing health and safety legislation in determining claims, informs organisations of the nature and risk factors associated with workplace bullying and recommends a preventative approach to its management.
An argument for the development of a New Zealand Code of Practice

Unlike Ireland and Australia, New Zealand has no government policy specifically addressing workplace bullying to supplement the HSEA. Guidelines may be published in the near future but there appears to be little inclination to enforce these, or to develop an approved Code of Practice to provide employers with required standards of preventative action to address bullying in their workplace. Hence, the existing legislation is currently all that targets have to fall back on and the lack of other government policy and awareness initiatives result in employers taking only those measures that are required to meet statutory minima.

Initial scholarly thinking around workplace bullying has shifted from where bullying was thought to stem largely from individual risk factors of those involved (Coyne, Seigne, & Randall, 2000; Einarsen, Raknes, & Matthiesen, 1994; Matthiesen & Einarsen, 2001; Zapf, 1999) to acknowledgement of the role that organisational structures and processes play in its development (Hauge, Skogstad, & Einarsen, 2009; Hoel & Salin, 2003; Notelaers, De Witte, & Einarsen, 2010; O'Driscoll, et al., 2011; Salin, 2003). Hence, the HSEA parallels the recent literature in terms of its view that bullying is a problem ‘of’ the organisation, not simply ‘for’ the organisation, and it is therefore management’s responsibility to identify, investigate, and resolve. However, current legislation and government policy does not recognise workplace structures and processes that encourage bullying to develop. The HSEA appears to be the legislation most suitable for recognising these risk factors but, as it stands currently, the legislation is inaccessible to individual claimants and organisations are rarely held accountable for bullying under the Act due to their ability to claim they did not foresee the hazard.

The implementation of an approved Code of Practice does not govern the decisions of legislative authorities. However, as stated in Safe Work Australia’s Draft Code, an approved Code of Practice may be regarded by the Authority or courts “as evidence of what is known about a hazard, risk or control and [the courts] may rely on the code in determining what is reasonably practicable in the circumstances to which the code relates” (Safe Work Australia, 2011). For both the ERA and HSEA, the approach taken is the same regardless of the nature of the employment dispute or OH&S claim.
and, as previously discussed, this creates weaknesses in the efficacy of the existing legislation in addressing claims of bullying due to the concerns with foreseeability and factual evidence. However, developing a Code of Practice would ensure that organisations have the knowledge and skills to identify hazards that are likely to contribute to bullying and to take the appropriate steps prevent and intervene in bullying in their workplace. A Code of Practice would therefore provide employers with a required standard of preventative action which, when considered in conjunction with the HSEA, is likely to enhance its efficacy in terms of widening the scope of the employer’s current state of knowledge and limiting unforeseeable risks.

CONCLUSION

Despite a growing body of research and keen interest from practitioners, many organisations are seemingly unwilling or unable to effectively investigate and resolve complaints. As a result, a number of organisations are finding themselves before legislative authorities for subjecting targets of bullying to an unjustified disadvantage or failing to provide a safe working environment. However, the current legislation and government mechanisms appear to have weaknesses in terms of their efficacy in protecting targets of bullying; organisations are shielded by the target’s inability to provide sufficient factual evidence and by their inability to foresee the hazard or the harm occurring. Such protection is not only unhelpful, but does not protect targets from harm or the organisation from harm-related costs.

A number of jurisdictions have taken considerable steps in recent years towards addressing bullying at both a national, local and organisational level by enacting specific legislation or developing specific Codes of Practice. The findings of New Zealand prevalence studies are a clear indication of a significant problem, yet legislation and government mechanisms are currently deficient when addressing the unique and complex nature of workplace bullying. The argument for an approved Code of Practice to compliment the HSEA is not only supported by recommendations of recent research in that it encourages a holistic preventative approach to addressing workplace bullying, it also informs employers of the nature of bullying and thus moderates the weaknesses observed in determining claims under the existing legislative framework.
REFERENCES


