



City of Darwin loses bid to suppress bullying report

Date: Tuesday November 6, 2018

The law recognises the severe impact that [workplace bullying](#) and harassment can have on workers' health and wellbeing. For example, victims are now able to apply to the Fair Work Commission to seek a 'Stop Bullying Order' if they feel that they are at risk of ongoing harm because of the bullying.

Unfortunately, bullying is still prolific in many Australian workplaces. Clients often seek advice from our solicitors at Hall Payne as a result of the adverse impacts associated with workplace bullying and harassment.

History of Matter

We recently supported three employees in relation to a bullying claim involving their employer, the City of Darwin, and another employee, Ms King. The facts of this matter are complex and spanned over a period of two years. In 2016, Ms King had made complaints to the Council about inappropriate conduct involving our clients. The Council engaged an external law firm to conduct an investigation into her allegations.

The external law firm interviewed several witnesses, including our clients, and upon completion of their comprehensive investigation, they concluded that Ms King's complaints **had merit and were substantiated**. Our clients had compelling corroborating evidence to support their version of events, however were disbelieved by the investigator. Our clients were subjected to disciplinary action as a consequence.

An application was filed in the Fair Work Commission seeking Orders to Stop Bullying in an attempt to protect their employment from being further jeopardised. Those applications were discontinued when an outcome that suited all parties was negotiated.

Ms King then filed her own application seeking Orders to Stop Bullying. It was in this application that the outcome of the investigation, including the reasons that were relied on by the investigator, became critical to our clients' case.

The Council tried to rely on legal professional privilege – unsuccessfully

Our clients sought a copy of the investigation report from the Council, but the Council refused to release the report claiming it was protected by 'legal professional privilege'.

Legal professional privilege is a concept where a party is protected from disclosing certain communications (including documents) if those communications occurred between solicitors and their clients. In most law suits, the parties are obliged to provide to each other all relevant material/documentation in their possession, unless it is covered by legal professional privilege.

To prove that a communication/document is protected by legal professional privilege, a party needs to demonstrate that the communication was obtained for the predominant purpose of providing legal advice or was made in 'contemplation of litigation'. Privilege can be 'waived' by the consent of the relevant party or by other means.

The FWC Commissioner finds in favour of our clients

In our clients' case, Commissioner Nick Wilson accepted our submission and found the Council had waived its privilege because there had been "*more than a summary communication of [the report's] contents*" to Ms King and our clients.

In other words, by providing Ms King and our clients with much of the contents and findings of the investigation report, the Council had effectively 'waived privilege' and therefore the report should be disclosed.

The Commissioner also found that the report was not obtained for the predominant purpose of providing legal advice, but was designed to gather facts and ascertain whether Ms King's allegations could be substantiated. Such a process could have been conducted by anyone, and did not necessarily need to be performed by a lawyer.

This is an excellent outcome for our union and its members.

The Commissioner's ruling can be found at:

[Gaynor King \[2018\] FWC 6006 \(26 September 2018\)](#)

If you are the victim of workplace bullying and/or harassment, you should seek legal advice as a matter of priority. Bullying should not be tolerated in Australian workplaces, and at Hall Payne we can work with you to discuss your potential rights and entitlements.

If you're experiencing workplace bullying and/or harassment, or any other employment law related problems, and you want to consider your options, feel free to get in touch with today's blog writer, Solicitor in [Employment & Industrial Law, Kris Birch](#).

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