



WORKLOGIC

NEWSLETTER

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“If an employee wants to talk to a manager behind closed doors, it is unlikely that they want to complain about the state of the kitchen on level 4. There is probably good reason for their desire for secrecy.”

We Welcome Lisa!

We welcome Lisa Klug, Consultant, to Worklogic.

Lisa is an experienced lawyer, manager and trainer. Lisa started her career as a litigation lawyer in major commercial law firms where she was principally involved in insurance litigation and advising on workplace-related legislation. More recently as a manager of a strategic function in a commercial law firm, she has gained first-hand experience of workplace issues including accommodating flexible working arrangements, return to work after maternity leave, performance management, and staff retention. Lisa is also an advanced legal researcher and an effective and engaging trainer.

In her own time she loves to dance Argentine tango and classical ballet, ride her road bike and spend time with her young family.

Lisa is enjoying working with Worklogic's clients to find proactive solutions to their more complex workplace issues.



Borderline - Bullying or Banter?

“But I was just joking!”

Some respondents to a complaint of bullying will protest: “It was just a joke” or “These sorts of things have always gone on around here”. They might even claim that highly inappropriate behavior is best-practice management.

So when is a joke not a joke?

Jokes, banter, pranks, initiation games or taunts can all constitute forms of bullying if the behavior is repeated, unreasonable and creates a risk to health and safety. The intention of the perpetrator is not a factor when determining whether or not a person has been bullied, so labeling the behaviour as a “joke” is no excuse. Where a reasonable person, having regard to all the circumstances would expect such jokes or banter to victimize, humiliate or undermine or threaten another, then the “intention” of the bully to have a joke for their own amusement or the amusement of others is irrelevant.

Jokes, depending on the circumstances, could be possibly discriminatory (e.g. ageist, racist, disability-phobic) or amount to sexual harassment.

Some “joking” bullying is far more subtle and ambiguous.

Most of us would agree that wantonly or intentionally cruel, degrading or hostile jokes are clearly unwelcome and likely to humiliate. In contrast, good natured

or inclusive teasing or ribbing that is amusing to all present is much less likely to humiliate. But lying between these two extremes of behavior is a murky borderline that is very difficult to pin down.

Case law and guidelines

Shedding some rays of light on this shadowy area are some recent cases and various State Guidelines on bullying that may assist in gaining a broader understanding of what is, and what is not, bullying.

In *Brown v Coles Group Supply Chain Pty Ltd*, *Fatialofa v Coles Group Supply Chain Pty Ltd PR982461 (24/07/08)* Commissioner Cargill implied that the use of swear words in a joking manner, which she noted was common practice on the night shift in that workplace would not, without more, ordinarily be enough to justify a dismissal. In this case, however, the taunts could not be excused as part of friendly banter. They included calling a worker, “hairy arms, poking him in the stomach, making threatening facial expressions, calling him “camel f---er, wog, you Muslims are bomb-makers and trouble makers”.

A second employee in that case often laughed while these derogatory remarks were being made and allegedly once walked like a monkey. Commissioner Cargill found that this laughing condoned



the behaviour of the principal offender and “was in itself harassment”, however ultimately she found that sacking the second employee was disproportionate to the gravity of that conduct.

In 2006 a UK worker, Ms Green, was awarded damages of nearly \$2 million (Aus) as a result of bullying and harassment she encountered while working at Deutsche Bank¹. The conduct was by a group of four women who worked in close proximity. Conduct by the four women in relation to Ms Green included ignoring her, bursting out laughing when she walked by, making lewd remarks, and hiding her post. Ms Green’s complaint was not effectively managed when she raised it and the conduct continued until the four women left the organization.

Worksafe Victoria's Prevention of Bullying and Violence at Work – Guidance Note does not specifically identify jokes or taunts in their non-exhaustive list of the types of behaviour that could be considered bullying. Relatively straightforward examples of workplace bullying are provided, such as verbal abuse or excluding or isolating employees.

Other States, however, have specifically articulated that joking behaviour can amount to bullying. These guidelines also shed some light on when jokes or pranks are bullying behavior:

ACT	Verbal abuse, initiation pranks, humiliation through sarcasm, displaying written or pictorial material which may degrade or offend certain employees.	<i>Workcover's Guide to Preventing Workplace Bullying (July 2004)</i>
NSW	Baiting or unreasonable teasing e.g. singing derogatory songs and inserting the person's name, cruel nicknames, nasty practical jokes.	<i>Prevention of Workplace Bullying - A tool for change to the legal workplace, Law Society of NSW 2003</i>
QLD	Constant ridicule and being put down, sabotaging someone's work such as withholding or supplying incorrect information, hiding documents or equipment or not passing on messages, humiliating a person through gestures, sarcasm, criticism and insults.	<i>Prevention of Workplace Harassment Code of Practice 2004, Department of Employment and Industrial Relations)</i>
WA	Teasing or regularly making someone the brunt of pranks and practical jokes.	<i>Prevention and management of violence, aggression and bullying at work - code of practice: Resources Safety, Department of Consumer and Employment Protection, Western Australia 2007</i>

There are bound to be differences of opinion as to what is funny and what is not - individual senses of humour often vary wildly! This is a reflection of the many and varied sensibilities and work cultures to be found in Australia. There is, however, an "acceptability" threshold. When crossed, "harmless" jokes which are objectively unreasonable and that might harm or offend any person

are likely to be found to be workplace bullying - with very serious repercussions for those involved.

If any of the behaviours listed above, or mentioned in Browns' case, sound familiar, you may wish to consider making your employees aware about what is and is not acceptable behavior in your workplace.

¹ Green v DB Group Services (UK) Ltd [2006] EWHC 1898 (QB)

Employee Comments “Off The Record” - Is There Any Such Thing?



Often as workplace mediators and investigators, we are asked by an individual employee “Can I tell you something off the record?” If you hear this phrase, be on the alert.

Most managers have been in this situation. An employee comes into your office and closes the door. She says Ed uses inappropriate language and makes racist “jokes”, both in the workplace and when speaking with clients. Someone told her that Ed inflates his time sheets so that clients are overcharged. When she entered the room, the employee’s frustration and disgust was clear, but once she has unburdened herself, she says “You won’t tell Ed I told you all this, will you?”

Employees often keep upsetting facts and rumours to themselves, and avoid revealing them to their colleagues or to HR staff. Their fear of the personal consequences, or their reluctance to raise concerns about a colleague, often stops them from actually raising the matter internally. Often they have a genuine fear of reprisals or backlash from the people

they accuse. When talking to a trusted outsider or a colleague, however, the need for some employees to unburden themselves is too great.

“Off the record” is a phrase often used in the context of journalism, in which a code of practice exists in relation to protecting anonymous sources. The Code of Ethics of the Australian Journalists’ Association states that journalists should “aim to attribute information to its source”, and that:

“Where a source seeks anonymity, do not agree without first considering the source’s motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.”¹

There have been many infamous incidents where well known people – usually politicians – have made statements which they believed to be “off the record”, only to find that their understanding of the phrase was different to that of the journalists who were present. Peter Costello famously spoke of challenging John Howard in an “off the record” dinner with three journalists in 2005, and was forced to answer embarrassing questions when the story surfaced in 2007.² Barack Obama’s foreign policy adviser stepped down after it was reported that she called Hillary Clinton a “monster”. Her words to a reporter from the Scotsman were “She is a monster, too – that is off the record – she is stooping to anything”.³ A debate followed about whether the adviser’s claim of “off the record” after she made the comment was sufficient to keep the remark out of the newspaper.⁴

Many employees feel that by telling someone else on an “anonymous” basis about another person’s behaviour in the workplace that person can share the burden of that knowledge. They may not be aware, however, of the possible limitations that an employer may face in responding to claims made by an “anonymous source”.

The reality is that once the employee has told the employer (or a consultant working for their employer) about a particular matter, it can’t be taken back: the employer has knowledge of the matter from then on. By informing their employer of a particular fact or belief, the employer cannot simply ignore what has been said. Depending on the nature of the information that the employee discloses, the disclosure may raise issues for the employer, including:

- Occupational health and safety obligations, if the employer has been put on notice that a risk exists in the workplace;
- Privacy concerns, particularly if the disclosure includes information about the personal life or health situation of another individual;
- Whistleblower protection; and
- Concerns for the wellbeing of all the employees involved including the employee making the disclosure.

It can be hard for employees to resist disclosing salacious allegations and heartfelt confessions. For this reason, we suggest that whenever an employee asks to go “off the record” or asks “Can you stop taking notes for a minute?” they are told politely that in most circumstances, there is no such thing as off the record.

There are, of course, situations in which employees can remain anonymous (such as under whistleblower protection policies), but this can be difficult for the employer to determine quickly. In our experience, it will rarely be appropriate to promise anonymity before knowing what the allegations are.

The employee should be told that the employer might need to act on anything he or she says to the employer. If, as a manager, you need to take action on what an employee tells you, you might not be able to guarantee anonymity. Explain to the employee that some complaints raise serious matters which the company must responsibly deal with – such as sexual harassment, fraud or other legal and business risks – and that by taking action, the employee's name may have to be revealed.

If the employee says that the matter is important but they are too fearful to tell you, talk to them about their fears, about any policies you may have about expectations of behaviour (including any zero tolerance about victimisation), and encourage them to speak to Human Resources. Some clients of Worklogic

have referred the employee directly to the employer's lawyers, so that the lawyer can advise the employer on the potential risks and how best to liaise with the employee.

Some other practical tips in dealing with employee complainants who want to remain anonymous:

- Take notes of everything the employee tells you, including the time and date of the meeting;
- Don't assume that the employee has a strong basis for their allegations, but equally, don't assume that the employee is lying and ignore the complaint; and
- Act promptly, but don't be rushed into action – think about what the next steps should be, and what internal and external advice you need.

If an employee wants to talk to a manager behind closed doors, it is unlikely that they want to complain about the state of the kitchen on level 4. There is probably good reason for their desire for secrecy – the seriousness of their allegations. So if the employee seeks anonymity, proceed with caution.

Useful Tip:

If the employer and employee both want a particular discussion to be off the record – for example, discussions about the employee resigning and taking a departure package, or “without prejudice” attempts to settle a dispute – we recommend that the employer gets legal advice. There's nothing worse than attempting to negotiate a settlement with an employee, then having it come back to bite you after settlement discussions fail.

¹ See <http://www.alliance.org.au/resources/media/>

² See e.g. Matt Price, “Shocker, on or off the record”, The Australian, 16 August 2007. <http://www.theaustralian.news.com.au/story/0,25197,22252979-15262,00.html>

³ <http://thescotsmen.scotsmen.com/latestnews/Obama-aide-quits-after-making.3857275.jp>

⁴ <http://www.guardian.co.uk/media/greenslade/2008/mar/10/wasthescotsmenrighttopubl>



WORKLOGIC

Worklogic Consulting specialises in preventing and resolving disputes within organisations, sexual harassment, misconduct, bullying and discrimination. Our goal is to assist organisations to minimise and manage inappropriate conduct in the workplace, before negative behaviours become entrenched and before complaints escalate outside the company.

Our services include:

- Fact-finding investigations;
- Conflict resolution through mediation;
- Drafting and reviewing employment policies;
- Audits in relation to employee complaints, discrimination, bullying and other areas of concern - a "health check" of your organisation against best practice benchmarks;
- Training programs to help staff understand their responsibilities in the workplace, and the organisation's expectations regarding appropriate employee behaviour;
- Trouble shooting the "hard cases" in human resources; and
- Research and consulting projects, such as diversity and culture change programs, focus group facilitation and organisational surveys.



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