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When the Inspector Calls

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Five key Issues

- 1 WorkSafe inspectors have broad powers including entry to premises, interviewing people and accessing / seizing documents
- 2 Not necessary to investigate every (bullying) claim
- 3 If a claim is to be investigated, be clear about the scope / parameters from the outset
- 4 Turn your mind to LPP before you commence any investigation process
- 5 Document the steps that you take (and don't take)



Case Study...



WorkSafe's Powers and Enforcement Options

- ✓ Empowered to enter premises, inspect / copy / seize documents, inspect the workplace, take photographs and recordings, conduct interviews.
- ✓ Can maintain a watching brief over the organization
- ✓ Can make recommendations
- ✓ Can issue an improvement notice (e.g. about policy, procedure, training)
- ✓ Can refer the matter to the enforcement division for a comprehensive investigation
- ✓ Can lay charges (following a comprehensive investigation)

Increased Regulator Focus on Psychosocial Hazards

Any factor or factors in the work design, systems of work, management of work, carrying out of work or personal or work-related interactions that may arise in the working environment and may cause an employee to experience one or more negative psychological responses that create a risk to their health and safety.

What is Bullying?

A worker is bullied at work if:

- An individual (or group) repeatedly **behaves unreasonably** towards the worker, or a group of workers of which the worker is a member; and
- That behaviour creates a **risk to health and safety**

It does **not** include **reasonable management action** carried out in a **reasonable manner**.

Is an Investigation Needed?

- ✓ Need to clearly understand the precise nature of the alleged conduct.
- ✓ Is there any dispute about whether that conduct occurred?
- ✓ If a process needs to be adopted, does it need to be a formal investigation? Or would an informal process be appropriate?
- ✓ If an investigation is to be conducted, should this be done internally or by an external investigator?
- ✓ What should be the scope of the investigation?

Legal Professional Privilege

Litigation and advice
privilege
'Dominant purpose'
test

WorkSafe cannot
require the production
of privileged
communications /
material

Privilege can be
easily (and
inadvertently) waived



Questions?



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Checklist – When a Bullying Complaint is Made

When receiving a complaint, an employer should consider as a minimum approach the following issues:

- ☐ What internal policies or procedures apply to this situation?
- ☐ Does the complaint raise any legal issues (e.g. criminal conduct, WHS, discrimination)?
- ☐ Is there potential for WorkSafe to become involved?
- ☐ If yes, is there a need to seek legal advice before commencing an investigation?
- ☐ Does legal professional privilege apply to the investigation?
- ☐ Do any alternatives to an investigation exist?
- ☐ Do people's expectations regarding the outcome of the investigation need to be managed?
- ☐ Do the allegations raise any sensitive organisational matters that may require a public response?
- ☐ Who should be the investigator?
- ☐ What is the scope of the investigation i.e. what exactly will the investigator be reporting on?
- ☐ Is it appropriate for the matter to be investigated internally?
- ☐ Who should be the decision-maker (i.e. the person to make disciplinary decisions)? Check that the decision-maker is aware of the issues.
- ☐ Who else needs to be informed of the complaint (e.g. business manager/line manager?)
- ☐ If the parties involved work together, can they continue to do so while the investigation takes place?
- ☐ If not, is it necessary to suspend the accused employee/s with pay pending the outcome of the investigation, or move them to another team or location?
- ☐ Do any of the parties need to be offered access to an Employee Assistance Program?
- ☐ Who will receive a copy of the investigation report?
- ☐ How will the parties be informed of the outcome of the investigation?
- ☐ What potential actions may be taken against the alleged bully?
- ☐ What other claims could be brought by the complainant or alleged bully?

Case Study

You are General Counsel at Eunomia Pty Ltd.

Two weeks ago the HR Manager reported that she verbally received a bullying complaint from the CEO's Executive Assistant Miranda Jones. She simply stated that she felt bullied and intimidated by the CEO's conduct.

The HR Manager made an appointment to speak further with Miranda the following day. However Miranda commenced sick leave and has not returned to work since.

The HR Manager does not consider it is desirable to progress the matter until the worker returns to work. You take his advice on this matter.

The CEO is currently trekking in Nepal and is uncontactable.

The Safety Manager has just called you to tell you she has received a call from Worksafe regarding a complaint made by Miranda.

A WorkSafe inspector is attending the company premises tomorrow morning.

The Safety Manager also tells you that she received a workers compensation claim from Miranda yesterday. The claim alleges that Miranda has been bullied by the CEO.

The claim simply states that the CEO "raised his voice in an operations meeting" and "questioned my professionalism".

What do you do now?