

# DEVINE LAW AT WORK



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## WORKPLACE CONFLICT - RISKS AND OPPORTUNITIES

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The workplace is a lot like a family; it is a place in which we need to get on with others and it is assumed that we will find this easy and straightforward. Instead, the reality of many workplaces is that it is often fraught with conflict. Effective working relationships are *not* happy coincidences but in fact depend on concerted and ongoing effort.

Associated with the myth that workplaces will be naturally harmonious, is the myth that all conflict is a bad thing. This myth manifests itself in a common and deeply held fear of conflict, with the consequences that many in workplace will seek to deny and suppress it. In my experience, only the rare few will be open to acknowledging it and fewer still will have the skills and commitment to managing it well. In each of these respects, what takes place in the workplace is merely symptomatic of what takes place in all other aspects of the wider Australian community.

While there is no doubt that workplace conflict poses many risks, to both employers and employees, it is also true that workplace conflict can present many opportunities which, if managed well, can be transformative, leading to a better working environment than the one which would have existed had the conflict not come to light.

### DEFINING WORKPLACE CONFLICT

#### What is workplace conflict?

The Macquarie Dictionary definition of conflict is: "*to come into collision, clash or be in opposition or at variance, disagree*". My own definition of workplace conflict is that it involves the perceived or actual clash of expectations between individuals or groups. These may be expectations about: how people should behave; how and when they should work; how much they should be paid and for what; to name a few. The expectations of everyone in the workplace interplay and the extent to which there is a clash between those expectations will impact on whether or not there is a workplace conflict. In my experience, these expectations regardless of where the power lies in the relationship between people and must be factored into the design of any strategy to minimise the risks and to maximise the opportunities associated with workplace conflict.

Broadly, workplace conflict may be categorised as either an individual conflict (e.g. interpersonal conflict) or collective/rights based conflict. Arguably, these distinctions are ultimately artificial, particularly in light of the steady move away from a collective approach in workplace relations to an individualised approach. This was a move that commenced at least 15 years ago, was cemented in the 2006 Work Choices amendments to the *Workplace Relations Act 1996* and will remain largely intact for some years to come despite the election of the Rudd Labor Government. This distinction is also artificial as most interpersonal disputes are often founded on a perception of a right that has allegedly been transgressed by another, whether or not that right is one that is protected by law.

Workplace conflict may broadly be categorised as:

- interpersonal conflicts between individuals or groups;
- alleged breaches of human rights protected by law; including freedom from race, sex, disability, age, sexual preference and marital status discrimination;
- alleged breaches of other rights protected by law, such as terms and conditions of employment sourced from awards, workplace agreements and legislation;



# DEVINE LAW AT WORK

- alleged breaches of expected conduct, which may or may not be protected by laws or company policies.

Common examples of workplace conflict include:

- conflict over conduct (not amounting to bullying);
- conflicts over performance;
- all forms of discrimination, including unlawful discrimination;
- workplace bullying;
- conflicts over terms and conditions of employment;
- conflict caused by communication and/or management style;
- conflict caused by perceived or actual unfair treatment;
- conflicts arising from differing perceptions about how work can be done, how work is distributed, how the workplace is organised and the environment of the workplace;
- conflict arising from how organisation change is managed.

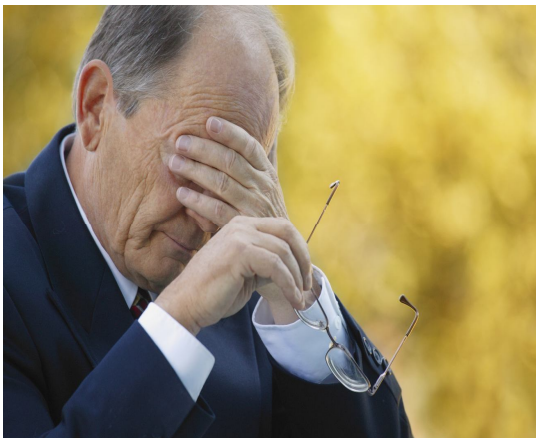
## Conflict over conduct (not amounting to bullying)

I have long remembered the observation made by a recruitment consultant I once met who said that: *"people hire on skills and sack on behaviour"*. In my experience, this is commonly the case. The issue for many workplaces is that their expectations about skills may be very clear in their recruitment processes, however their expectations about conduct may be less evident.

One of the most common complaints I hear from managers about a member of their team is that the individual concerned has "an attitude problem". When I inquire further, I almost always find that the manager is referring to the non-specific behaviour of the employee. When I inquire even further, I usually find that the manager is complaining about something that the employee is *not* doing. That is, they are not doing something which the manager *expects* them to do. This is a critical moment in which the all important questions must be asked: *"do they know what you expect?"*. The usual answer is that *"they ought to"* or *"yes, it's commonsense"*.

Human beings are extraordinary in many ways, however they do not possess the power to read minds. Accordingly, if a person or organisation does not communicate his/her/its expectations clearly and repeatedly, there is a good chance that the people working with that person or within that organisation will *not* know what is expected.

Further, everyone brings to their workplace their own expectations, values and experience. Human beings have many common traits, however, as we all know well, we are a far from homogenous group. Accordingly, there is no guarantee that just because you believe and value something that the person working with you will have the same belief or value the same things. Nevertheless, it is common for people to blame others for being different from their own expectations of how people should behave. Recognition and acceptance of workplace diversity is a fundamental step towards managing workplace conflict effectively. Following on from this is the importance of not only communicating beliefs and values but doing so in an effective manner. It is advisable for employers to set parameters on conduct and to have an easily accessed and usable mechanism for interpersonal conflicts to be managed. This can include a Code of Conduct and a Grievance Procedure. The quality and effectiveness of these systems will be determined by the thought that has gone into them and the degree of commitment the employer has to enforcing them.



## Conflicts over performance

As with conduct issues, performance problems often arise where there is a clash of expectations over what a person in a particular role ought to be doing. The starting point for avoiding problems in this domain is to ensure that the employer's expectations have first been defined and then communicated. Once this baseline is established, the employer is better able to manage performance issues by use of its performance review system, employee engagement and disciplinary procedure.

## Internal competition

Competition is perceived by many to be an effective method of achieving good results. Others perceive competition as counter-intuitive to ensuring effective results and are uncomfortable with



## DEVINE LAW AT WORK

this approach, preferring a collaborative approach. There is no doubt that both approaches can be highly motivating *and* risky, depending on where, when and how they are applied. The problem with either approach is where they are applied in blanket fashion. It makes sense to compete with your competitors in the marketplace, however adopting the same approach within a team may lead to unintended consequences; while the person who competes best may succeed, the rest of the team may fall behind and be demotivated.

### Discrimination

Very few of us enjoy being unfavourably treated based on something about us which is different from the so-called 'norm'. The nature of 'normal' is that it varies from workplace to workplace, division to division, and from time to time. It is a moveable feast and the opportunity to be discriminated against in the workplace is always present. Regardless of whether or not a certain form of discrimination is unlawful, many people find it perfectly reasonable to discriminate against others perceived on some actual or perceived trait. This can have quite negative consequences for the individual and his/her employer and evidenced in staff turnover, absenteeism, theft, decreased productivity and poor morale.



### Conflicts over terms and conditions of employment

Conflicts over terms and conditions of employment have historically been collective in nature in Australia. Of course, non-award employees have always had to negotiate their terms and conditions of employment individually, however the move towards a more individualised approach to bargaining for award employees has been steady for at least 15 years.

For those unused to industrial negotiation, it can come as quite a culture shock. There are rules and processes common to the way in which many unions approach industrial negotiation which can not only be confronting but also very confusing to the uninitiated. Industrial relations is a serious business, however there is also a lot of theatre about it. The public face of employers and the unions is that there is a huge gulf between them, however the behind the scenes reality is that they usually end up sitting down and working together. I learned this first hand many years ago when I worked in a peak employer body. A failure to understand the rules of industrial negotiation can be a source of conflict in itself. Accordingly, employers need to obtain the assistance of either their own employees or external advisers who are familiar with how industrial negotiation works and who can effectively translate what it is all about to the employer.

For those used to collective bargaining, the prospect of individualised bargaining is also confronting and confusing. In my experience, most Australian employees, regardless of educational background or seniority within a workplace, have limited skills in workplace negotiation. This can lead to many problems, for both employer and employee. An example is the simplistic "take it or leave it" approach. This approach risks that the employee does "take it" and exhibits a passive approach which is not consistent with the "can do" approach which employers like to see in their employees. Further, the employee you really want in your workplace may just decide to "leave it". In my view, people often engage in an aggressive manner in workplace negotiation because they lack negotiation skills. They can benefit greatly from developing their skills or obtaining the assistance of advisers who can coach them and model those skills.

### Workplace bullying

While there is nothing new about workplace bullying, it has enjoyed a significant increase in its profile in the 21st century. In my view, this has been contributed to by several factors, including: the increased participation of women in the workplace in the past 40 years; the development of anti-discrimination law over the past 30 years; significant socio-cultural changes in tolerance for certain kinds of behaviour; and the increased profile of occupational health and safety law.

There is as yet no legal definition of bullying. The Concise Oxford Dictionary defines a bully as: "*a person who uses strength or power to coerce others by fear*". Anyone who has read the excellent book "Working with Monsters" by John Clarke (Random House Australia 2005) will most likely recognise the presence of what he terms the "workplace psychopath" in their workplace or in previous workplaces. These 'psychopaths' often have the characteristics highly valued by employers: high achieving; 'can do' attitude; good communication skills; rational; and, charming (at least to their bosses). While they often appear to be a star employee, they can also cause a lot of damage. In my experience, an employer will often tolerate poor conduct from these 'stars' because of the apparent value they often appear to offer an employer, without fully considering the costs associated with the damage they are causing.



## DEVINE LAW AT WORK

Examples of what *may* constitute workplace bullying include: verbal abuse; put downs and insults; teasing; unreasonable or inappropriate criticism; threats and intimidation; workplace violence; exclusion; unreasonable demands on work performance; too much or too little work; work that is demeaning having regard to the employee's skills and seniority; giving work to an employee which is beyond their skills and experience; changing work rosters deliberately to inconvenience or cause hardship; too much supervision; and, withholding support or information from an employee, which prevents them for performing well.

### Communication, management style and organisational change

While some people are comfortable with uncertainty, others have a need to know about what is happening in an organisation. In my experience, communication (or rather its lack) is a major source of conflict within the workplace. Often its consequences are beneath the radar, at other times they can flare up and be much more obvious.

An understanding of how people want to be communicated with is a key ingredient in minimising the risks associated with workplace conflict. As we shall see on following pages, *how* a person is treated will impact significantly on their perception of whether they have been related fairly. This applies whether the person is a manager or another employee.

There are many theories of people management and one of the most recognisable is the "command and control" approach. This authoritarian may have been effective in the past, however it sits less comfortably in the 21st century workplace. Often the "command and control" approach is a default approach, used in the absence of knowledge about how else to approach a matter. As an adviser in the field of workplace relations, I believe it is critically important for me to show my clients another way and support them in the transition to a more effective alternative, while learning from those who already have those skills.

### OPPORTUNITIES AND RISKS ASSOCIATED WITH WORKPLACE CONFLICT

Conflict is often seen as a negative and therefore as something to avoid. While there are many categories of workplace conflict that active steps can and should be taken to minimise the risk of, particularly those which are entirely avoidable and those which are potentially very harmful, all workplace conflict can be seen as an *opportunity*. It is not the conflict but the response to it in which the potential for advancement or damage lies.

Because conflict is mostly seen in a negative way, employers and employees will often put their heads in the sand and try to pretend it does not exist. In practice this will usually result in the conflict not only *not* going away but in fact growing and posing greater risks to the employer. This approach also means that the employer does not engage in the process of identifying the important information that the conflict reveals and the benefits associated with having this information. For example, knowing that a particular process or group dynamic is actually working against the interests of the employer gives the employer the opportunity to do things differently, thereby achieving a different result. Only by acknowledging the conflict can the information be gleaned and only then can the employer take corrective steps.

Seeing that conflict can be an opportunity, depending on how it is responded to, and recognising that human beings are not perfect and that our working relationships are a work in progress, also takes the "blame game" out of the equation, allowing for a more effective response. Why is it worth making the effort?. The answer to that is that all businesses I know are in the business of making money, not losing it through turnover, absenteeism, poor performance, loss of reputation; litigation; or penalties.

### THE DANGERS OF THE 'AGGRIEVED EMPLOYEE'

A security consultant once told me that the most dangerous person associated with a workplace is a former employee who has left on bad terms. Admittedly, this surprised even me who has long warned clients about what I term the 'aggrieved employee'. While I had long been aware that this is exactly the type of person who may take legal action against my client, or seek to damage my client's reputation, or make use of my client's intellectual property, I was not fully aware of the other risks such a person could pose to my client; such as through theft, property damage, physical danger and various forms of sabotage. These dangers, together with the legal risks associated with an aggrieved employee, make the case for minimising the opportunity for an employee to become aggrieved even more compelling.





# DEVINE LAW AT WORK

When I use the term 'aggrieved employee' I mean a person who has a *perception* that they have been unfairly treated. They may be a person who has left an employer on bad terms or nursing a grievance that they have not communicated. They may also be a person who chooses to stay in the workplace, also on bad terms or nursing an unvoiced grievance.

Of course, there are many people who, objectively, do not have a sound basis for being aggrieved; however, there are many people who do have cause for feeling aggrieved who are merely dismissed by their employer. This approach can have a detrimental impact on both employee and employer. Human beings are more complex than perhaps we would like them to be. Regardless of whether or not the employer or manager perceives that the person is entitled to believe they have been unfairly treated, the reality of that perception is what the employer or manager needs to deal with.

In her fascinating book "Managing Workplace Conflict—Alternative Dispute Resolution in Australia (Federation Press 2006), Associate Professor Bernadine Van Gramberg discusses the research which goes some way towards explaining why such grievances can arise in the workplace and what steps can be taken as a consequence to avoid or minimise them. In particular, she talks about three different types of "workplace justice": procedural justice; distributive justice; and interactional justice. Procedural justice goes to the issue of whether or not a fair process has been followed. Distributive justice might also be termed substantive fairness and goes to the issue of whether the outcome of the process is fair (i.e. does the punishment fit the crime?). Both procedural and substantive fairness are concepts that apply in workplace law, particularly in the area of unfair dismissal claims. However, it is the third type of justice, that many managers and their advisers may not be well aware of. Interactional justice goes to the issue of *how* the person is treated in the process. The research demonstrates that **what matters most is how they are treated** (e.g. how they are spoken to, whether a reason is given), more than the outcome.

## THE CASE FOR EARLY INTERVENTION

There is no business or other organisation which can afford the financial and other costs associated with not managing workplace conflict effectively. The workplace, like most things in life, is a work in progress. There is nothing that we can do to make a workplace perfect. However, we can do a great to ensure that there is continual improvement. While it is easy to identify the steps that can be taken to ensure improvement, it is also important to first assess what barriers there are to implementing those steps.

### Barriers to effective management of workplace conflict

Just some of the barriers include:

- a lack of clarity within the business about its approach to workplace conflict;
- differing values and beliefs throughout an within each part of the business;
- the workplace culture of the business— for example, one that is endemically aggressive or one that promotes a "don't do" approach;
- a lack of awareness that workplace conflict, in particular workplace harassment, is and can be a problem;
- low prioritisation of so called 'soft' problems—in my experience soft problems are usually require a lot of hard work;
- a lack of awareness about why workplace conflict can be bad for business;
- a 'bandaid approach' to the problem, in particular a view that the imposition of policies and procedures that ban the behaviour will be sufficient;
- a lack of systems;
- a lack of awareness of what can be done to effectively manage workplace conflict.

### The importance of getting information before acting

One morning I received a call from a new client asking me to attend a conciliation conference in an unfair dismissal that was being held the same morning. I attended and was told that the applicant had been instantly dismissed when he lashed out one morning at work, punching and knocking out another employee. On its face, it appeared to a matter which warranted instant dismissal.

However, when the conciliation conference commenced the applicant said that he had punched the other employee after he had been the subject of bullying by that person for more than six months. He had sought the assistance of management, however they had not responded. On the morning in question he had snapped. I took my client aside and asked them whether they agreed with his account. They did, so I immediately recommended that they settle the claim with him. Fortunately for them, they did so.

To me, this is a clear cut example of why it is so important for employers to speak with employees and get their side of the story before they make a decision about whether or not to dismiss them.



# DEVINE LAW AT WORK

## Essential Ingredients

In my view, the following are the essential ingredients that a workplace needs to have in order to be highly effective in minimising the risks and maximising the opportunities associated with workplace conflict:

- a workplace culture which recognises that the role of manager includes people management and that this is a daily responsibility;
- Managers who are well trained and supported in people management, including the fundamentals of human and organisational behaviour;
- Managers who are well educated about the financial and other costs of workplace conflict;
- Managers who are well educated about workplace law, in particular the legal risks posed by workplace conflict;
- Managers who are well educated about industrial negotiation, where applicable;
- Managers and other staff who are equipped in at least medium level and preferably high level written and oral communication skills;
- Managers and other staff who are equipped in conflict resolution skills;
- clearly defined expectations concerning duties and performance standards for all roles in the workplace;
- Managers/supervisors who are well trained in performance management;
- regular and 360 degree performance review;
- a mechanism by which the employer can keep abreast of workplace issues (e.g. surveys, suggestion box, consultative committees);
- induction for all new employees and refresher training for all current employees in key aspects of workplace law (e.g. their duties) and company policies and procedures;
- active and ongoing engagement of employees;
- clear, customised, integrated and effectively implemented company policies and procedures (e.g. grievance procedure, disciplinary procedure, dispute resolution procedure, Code of Conduct, exit interviews);
- workplace diversity training for all employees;
- a fair go all round—this means that fairness must be applied by the employer and employees alike.

## Conclusion

The good news is that much can be done to effectively respond to workplace conflict and turn risks into opportunities. Above all, effective management of workplace conflict requires a commitment to the hard work of people management and an understanding of the complexity and diversity of people and the importance of communication as an essential tool in minimising conflict. Better that the resources of a business are dedicated to the continual improvement of that business instead of reacting against the many costs associated with ineffective management of workplace conflict.



*Devine Law at Work is a law firm and consultancy which specialises in Australian workplace law and workplace relations and is in the business of helping people work together for better results. Elizabeth Devine founded Devine Law at Work in 2002 to realise an ambition to practice workplace law in a holistic manner; bringing together skills and expertise in the law, adult education, communication (including negotiation, conflict resolution and facilitation) and business development. Elizabeth has practiced law for 17 years and has specialised in workplace law and workplace relations for 12 years. Elizabeth is passionate about enhancing the knowledge of others about workplace law and regularly presents to a broad range of corporations and business, professional and industry groups. A professional speaker and enthusiastic educator, Elizabeth is well known for her engaging, easily understood and approachable style.*