

The right to join – or not join – a union is a fundamental freedom under industrial relations laws.

The *Fair Work Act 2009* (the Act) enshrines protection of freedom of association as do various anti-discrimination laws. The [Code for the Tendering and Performance of Building Work 2016](#) likewise requires ensuring freedom of association as key component of Code compliance.

While freedom of association covers both the decision to join, or not join, a union, when freedom of association issues are raised in the legal setting (which is rare), these are typically in the form of us assisting clients in relation to allegations made by an employee (or union) that the employer has been victimising employees due to their union activities.

However, when delving into these issues, the answer is rarely so black and white. [Bullying at work](#) involves a worker (or group of workers) behaving unreasonably towards another worker (or group of them). What constitutes ‘unreasonable behavior’ is deliberately broad to ensure that any behaviour can be captured.

Bullying is not acceptable, no matter the motivation

A recent [case](#) before the Fair Work Commission determined that an employee had not been unfairly dismissed because he had overstepped the line in trying to push another employee to joining the union. The decision confirmed that an employer is entitled to discipline (and in this instance terminate) an employee on the basis that they had bullied their coworker.

However, the Commission is alive to the need to balance lawful union activity with the right to an employee to not be bullied. In terms of lawful union activity, the Commission found an employee was

plainly within his workplace rights to assist the union’s endeavours to organise the workplace and more particularly he was plainly within his workplace rights to approach [the employee] about joining the union as well as doing so as persuasively and passionately as he could, within the bounds of what might be considered reasonable

However, in this case, the employee overstepped the line because he had made repeated approaches to the employee and, during these approaches, displayed anger and frustration, threatened the employee about his future employment, and that he may be isolated in the workplace.

This meant the employee had breached the co-worker’s rights to not join a union, and to not be bullied at work. He also noted that the employer has a [duty of care](#) to ensure employees are not bullied at work.

Note: The Commission placed significant weight on a “meticulous and balanced” external investigation the employer undertook. This is crucial because in all instances taking action in this matter will require balancing of the above competing interests, and evidence will be crucial to this determination. We deal with the potential risks of regarding process and adverse action, below.

What about union officials doing the same thing?

While employers have the ability to sanction employees who act inappropriately, often clients are concerned about external conduct that has the same effect. This could be union officials attending the workplace, or employees of other businesses working at the same site.

The Act’s anti-bullying provisions apply to any “individual”, and not just to employees. The Commission has already determined that anti-bullying orders can apply to [union officials](#) provided the bullying occurs “at work”, such as in the context of conduct on a picket line.

Previous decisions of the Commission have held that anti-bullying orders can also apply to [employees](#) who are union members too.

A cautionary note

Although it is possible to dismiss a worker in the above circumstances, unfair dismissal laws require an employer to consider a [range of factors](#), including ensuring procedural fairness and mitigating circumstances. Failing to properly investigate and undertake the necessary processes can leave a business exposed.

More importantly, the Act provides [specific protection](#) against an employer taking [adverse action](#) because a worker engages (or does not engage) in lawful [union activity](#). It is common when union membership is in issue that adverse action issues are raised. Since there is a [reverse onus](#) of proof, and the protected workplace right needs to only be an [operative reason](#) for taking the action, caution is recommended.

In all cases, Fair Work Lawyers recommends taking advice before making a decision to terminate especially if union membership is a potential live issue.

Need more information

If you would like further information or advice about Freedom of Association, or managing employees, please contact the team at Fair Work Lawyers.



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