

## Workplace Relations

July 2009

### Record payout for sexual harassment against a South Australian employer

A recent Federal Court decision which awarded record damages to a female employee who complained about sexual harassment in the workplace is a timely reminder of the importance of treating sexual harassment seriously.

In *Poniatowska v Hickinbotham Homes* the Federal Court awarded Ms Poniatowska damages of \$466,000 plus costs. The Court found that the employee was exposed to sexual harassment and sexually explicit language whilst working in a "robust" environment, that is, an environment where not infrequently the language was coarse, sometimes vulgar and sometimes sexually explicit.

The Court was extremely critical of the fact that once Ms Poniatowska complained of the harassment, instead of her complaints being addressed sympathetically, they were treated dismissively or only superficially addressed and without sympathy. The Court found that Hickinbotham Homes

had determined that Ms Poniatowska was a person who did not "fit" its work environment because she was a female who would not tolerate sexual harassment and the robust work environment. The Court was highly critical of the subsequent termination of Ms Poniatowska's employment and discounted the legitimacy of the grounds for the termination.

Hickinbotham Homes had no policy for discrimination in the workplace, for making complaints about the behaviour of co-workers or for the dealing with such complaints. Nor was there any evidence that, informally, there were any systems or processes in place for addressing such matters.



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#### Lessons for Employers

- Employers must take reasonable steps to prevent discrimination and harassment in the workplace.
- In addition to having detailed discrimination and harassment policies, employers must ensure that such policies are supplemented with training so that all employees can clearly understand how to make complaints and that managers understand how to deal with complaints.

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## Code of Practise to Manage Sexual Harassment

The Sex Discrimination Commissioner has released the fourth edition of 'Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers' (Code of Practice).

The Code of Practice will assist employers to manage sexual harassment. It makes recommendations for preventing and responding to unacceptable conduct.

The Code of Practice recommends five steps that employers can take to prevent sexual harassment:

1. Get high level management support for implementing a comprehensive strategy to address sexual harassment.
2. Write and implement an effective sexual harassment policy.
3. Provide regular training and information on harassment to all staff and management.
4. Encourage appropriate conduct by managers.
5. Create a positive work environment free of offensive material.

“ Treat sexual harassment seriously. ”



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### Lessons for Employers

- Treat sexual harassment seriously.
- An employer can be personally liable for the acts of the employees unless the employer has taken all reasonable steps to prevent the sexual harassment from occurring and continuing.
- The Code of Practice is a helpful guide to employers.

## South Australia Refers Industrial Relations Power to the Commonwealth

**On 9 June 2009, the South Australian Government announced that it would formally participate in a single, national system of industrial relations. It is proposed that from 1 January 2010 all employees with the exception of those employed by Government and Local Government in South Australia will be covered by the Commonwealth's Fair Work Act 2009.**

This means that for the first time employees of individuals, sole traders, partnerships and corporations that do not have sufficient trading or financial activities to qualify as trading or financial corporations, will be covered by the new Commonwealth Industrial Relations laws.

## Changes to Unfair Dismissal Laws from 1 July 2009

The most notable features of the new unfair dismissal procedures are that they will apply far more widely than the current procedures. However the new Act does not change the fundamental principle that a dismissal will be unfair where it is 'harsh, unjust or unreasonable'.

From 1 July 2009, all employers, regardless of size and provided they are constitutional corporations will be subject to unfair dismissal claims by employees with a number of important qualifications.

Certain employees cannot bring a claim for unfair dismissal, they are:

1. Employees employed for a specific task, specified period or seasonal employees.
2. Employees serving a qualifying period of 6 months, or 12 months for a small business employer.
3. Casual employees (employees without regular and systematic employment and with no expectation of ongoing employment).
4. High income earning employees – as from 1 July 2009 an employee who is not employed under Award conditions and whose remuneration exceeds \$108,300 per year is excluded.

5. Employees terminated for genuine redundancy. Note however that the employer must have considered whether re-employment within the employer's organisation or that of an 'associated entity' was possible in order for this exclusion to apply.

Under the new unfair dismissal laws, small business employers will not be liable for unfair dismissal if they can demonstrate compliance with the new Fair Dismissal Code. "The Fair Dismissal Code" simply requires giving employees both procedural and substantive fairness, ie. giving the employee the opportunity to improve or explain the poor performance.

Small business has been defined, for the purposes of unfair dismissal laws only, as a business with fewer than 15 full-time equivalent positions. Note however that this will change to 15 employees by head count as from 1 January 2011.



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### Lessons for Employers

- Employers must ensure that they provide both procedural and substantive fairness to employees being considered for termination. Developing appropriate policies and processes will assist an employer in implementing a termination.



Developing appropriate policies and processes will assist an employer in implementing a termination.



## Discrimination...the employee does not always win!

A recent case in the Victorian Anti-Discrimination Tribunal illustrates the difficulties faced by employees with long-term health problems who bring claims for discrimination. The outcome shows that discrimination claims do not always favour the employee.

The case also discusses problems experienced by employers as a result of their duty to return ill or injured employees to work.

### Background

In *Collier v Austin Health*, the employee claimed that her employer had discriminated against her due to her bipolar disorder. The employee alleged that the employer did not provide a return-to-work plan and failed to accommodate her health problems. While her employment had not been terminated, she was however not provided with work.

The Tribunal stated that the important question was whether the employee could show that her employer treated her less favourably than a worker with a comparable health problem (a "comparator").

The employee compared her treatment to:

- a co-worker who suffered a back injury and was redeployed to a suitable position
- a nurse who returned to part-time work after cancer treatment and
- treatment she had received after returning to work from an absence due to her condition in the past.

### Decision

The employee failed to show that she was treated less favourably in comparison with other ill or injured workers. The Tribunal held that there was no "proper comparator" against which the treatment of the employee could be compared. It was not possible to establish whether discrimination occurred and so the employee's claim was dismissed.



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### Lessons for Employers

- This case illustrates the benefit of having return-to-work procedures in workplace policies.
- Policies educate employees on their rights and provide employers with guidelines on how to meet their duty to employees who have been absent from work on Workcover.
- Discrimination claims can be avoided if employees are treated equally and know their rights.

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