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WILLIAMS LOVE & NICOL
LAWYERS

Workplace Relations Update

Workplace Bullying

Claims on the rise

Public awareness of bullying at work is on the rise. This has resulted in an increase in such legal claims, which have significant costs for employers: in downtime, investigation costs and often payments by way of compensation/damages, or simply for the claim to just 'go away'.

But what exactly is bullying and when does it cross the line from merely being unpleasant to actually being unlawful?

The term 'bullying' is not referred to in any state, territory or Commonwealth discrimination law. The Macquarie Dictionary defines a bully as "a blustering, quarrelsome, overbearing person who browbeats smaller or weaker people". In the workplace, bullying has come to mean unreasonable behaviour which objectively belittles a person (usually over time). It may and does manifest itself in a myriad of permutations in any workplace. What amounts to bullying in one workplace may not be considered bullying in the other.

Bullying behaviour is most clearly unlawful when it infringes discrimination law, which is the various Race, Disability and Age and Sex Discrimination Acts at a State and Federal level. Complainants can take their matter free of charge for conciliation before the Australian Human Rights Commission.

However, even where the bullying is not connected with the obvious prohibited discriminatory characteristics, employees suffering from bullying may lodge workers compensation stress claims and/or common law damages claims for employer negligence, defamation and breach of the employment contract. If the complainant's employment is terminated or they are forced to resign as a result of bullying, constructive dismissal may arise, in which case the complainant may have access to unfair dismissal laws.

Finally, the new 'adverse actions' provisions of the *Fair Work Act 2009 (Cth)* provides a whole new forum for the hearing of certain 'bullying' complaints. See the discussion of Adverse Actions over the page for a summary of how Fair Work Australia is interpreting their new jurisdiction.

Employers beware. Take complaints of bullying and harassment seriously. There are many avenues an unhappy employee may take to complain. Investigate swiftly, competently and impartially. Don't hesitate to contact **Gabrielle Sullivan** on 6263 9900 if you need any assistance in this regard.

John Wilson, Partner, WLN Employment and Industrial Law Group

Employer Alert:

OHS Update

Employers in the ACT will be aware of the *Work Safety Act 2008* (ACT), which commenced 1 July 2009. There have been some recent judicial decisions in other jurisdictions that throw light on how this Act will work in practice.

More in our next newsletter.

Employer assistance

The ACT Human Rights Commission runs Workshops which target bullying and harassment in the workplace. The next workshop is scheduled for Thursday 10 June 2010 and has a cost of $200. It's designed to help employers prevent discrimination and promote workplace equality.
See the education page at http://www.hrc.act.gov.au/ for more information.

Suggested websites:

- Australian Human Rights Commission: http://www.hreoc.gov.au/
- ACT Human Rights Commission: http://www.hrc.act.gov.au/
- Australian Institute of Management: http://www.aim.com.au/

Meet the Team

James Macken

LLB BA (Hons)

James Macken has worked in industrial relations and employment law for over 20 years, as a practitioner, specialist advocate and legal practitioner. He has represented the Australian Government as both public interest intervener and party in major cases in industrial tribunals. James has continued his specialisation in employment and industrial law, as an adviser and representative in a wide range of employment law matters.

Adverse Action under the Fair Work Act

There is much uncertainty about the scope and operation of the adverse action provisions in the *Fair Work Act 2009* (Cth) (**Act**). These provisions essentially prohibit an employer from taking "adverse action" against an employee due to the employee exercising/proposing to exercise a "workplace right". These provisions open up significant new options for employees, and make it easier for them to bring successful claims against employers due to, for example, workplace discrimination, harassment or bullying. However, one of the first cases considering the provisions, *Jones v Queensland Tertiary Admissions Centre Ltd* (No 2) [2010] FCA 399, provides some guidance and comfort to employers.

In this case Ms Jones, the Chief Executive Officer of Queensland Tertiary Admissions Centre Ltd (**QTAC**), was the subject of an investigation by QTAC following serious allegations of bullying made by some QTAC employees and the Australian Services Union (**ASU**). Ms Jones claimed the QTAC, motivated by pressure from the ASU, took "adverse action" by several acts including initiating the investigation without cause and issuing a show cause letter threatening to terminate her employment. Ms Jones asserted the QTAC took this adverse action because of Ms Jones' role as bargaining representative for QTAC and her participation in negotiations for an enterprise agreement, both of which she alleged constituted "workplace rights".

The Court found Ms Jones had the workplace rights she asserted and that QTAC took adverse action against Ms Jones, but only by virtue of the show clause letter threatening termination. As Ms Jones had a workplace right and had suffered adverse action, the onus shifted to QTAC to demonstrate the action was not taken because of her workplace right. The Court found QTAC successfully demonstrated the action was motivated by its concern for the organisation and duly investigating complaints rather than Ms Jones' workplace right.

What does this mean for you?

Although the adverse action provisions in the Act are broad, employers can take solace in the fact that this decision highlights that Courts will not take claims lightly and will require employees to prove both the workplace right and the injury constituting the adverse action. The case also illustrates that, if the workplace right and adverse action are established, the onus is on the employer to prove on the balance of probabilities that the action was not taken due to the workplace right. In this regard, it is pertinent that employers ensure all actions against employees are properly documented and for a legitimate purpose, to ensure an employer has grounds for defending any future claim of adverse action.

Mark Love

WLN Partner: Accredited Specialist in Business Law

Mark is a founding partner of Williams Love & Nicol and leads the commercial team, being an experienced practitioner in the areas of corporate insolvency, intellectual property and corporate governance. Mark is also experienced in providing general legal and strategic business advice and would be happy to hear from you.

Disclaimer: Whilst all reasonable efforts have been made to substantiate the information contained in this update it is of a general nature only. Comments do not represent specific advice therefore you should not try to act on this information, If you require personal advice you should contact Williams Love & Nicol. No responsibility can be accepted if the information is incorrect or inaccurate.