

**Workplace Training Course**

**Discrimination, Harassment and  
Bullying in the Workplace**

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28 April 2011

## DISCRIMINATION, HARASSMENT AND BULLYING IN THE WORKPLACE

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### Introduction

This workshop will cover the following topics:

1. What is discrimination, harassment and bullying?
2. Key Concepts – direct discrimination, indirect discrimination and sexual harassment.
3. Discrimination legislation:
  - *Sex Discrimination Act 1984* (Cth)
  - *Disability Discrimination Act 1992* (Cth)
  - *Racial Discrimination Act 1975* (Cth).
4. The *Fair Work Act 2009* provisions
5. Responsibilities and Obligations of Employers:
  - Vicarious liability
  - *Sex Discrimination Act 1984* (Cth)
  - Minimising the Risk
  - Grievance Procedure
6. Conducting Workplace Investigations
7. Bullying and Harassment – Recent Case Examples
  - Café Vamp
  - *Bailey v Peakhurst Bowling and Recreation Club Ltd [2009] NSWSC 284* (3 November 2009)
  - *WorkCover Authority (NSW) (Inspector Maddaford) v Coleman & Ors [2004] NSWIRComm 317*
8. The Paid Parental Leave Scheme
  - Eligible Criteria
  - When do employer's have to start paying Parental Leave Pay?
  - How will parent's apply?
  - How many weeks of leave will be paid and at what rate?
  - How will employers be made aware that they have to provide Parental Leave Pay to an employee?

- Over what period must Paid Parental Leave be taken?
- How will the payments be made?
- Must employers continue to pay employees who resign and were receiving Parental Leave Pay?

**Workshop Goal**

The goal of this workshop will be to assist attendees to recognise behaviour which is contrary to equal employment opportunity and anti-discrimination legislation, understand the extent of employer's liability for workplace conduct, and how to effectively manage incidents of bullying, harassment and discrimination in your workplace.

## INTRODUCTION

### 1. WHAT IS DISCRIMINATION, SEXUAL HARASSMENT AND HARASSMENT AND BULLYING?

#### Discrimination

- 1.1 Discrimination is broadly defined by the International Labour Organisation Convention 111 as “any distinction, exclusion or preference...which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.

#### Harassment and Bullying

- 1.2 For our purposes harassment and bullying generally involves persistent behaviour (although a singular act can amount to bullying) that intimidates, demeans and/or humiliates an employee. It is often not obvious and it can be difficult for employers to know whether or not harassment or bullying is occurring in the workplace.
- 1.3 Examples of behaviour amounting to bullying can include:
- (a) attacking an employees’ capabilities or intelligence;
  - (b) underworking an employee and thereby creating a feeling of despondency;
  - (c) unfair or excessive criticism;
  - (d) publicly belittling, insulting or teasing an employee;
  - (e) teasing, taunting or practical jokes;
  - (f) psychological abuse and behaviour including ignoring or isolating a person;
  - (g) offensive language and insults or abuse; and
  - (h) changing or setting unrealistic work targets and deadlines.

#### Sexual Harassment

- 1.4 Sexual harassment is a legally recognised form of sex discrimination. Sexual harassment is conduct that is uninvited and unwelcome behaviour. Sexual harassment can take various forms including:
- (a) physical contact;
  - (b) verbal or non-verbal conduct of a sexual nature;
  - (c) the display of offensive material; and/or
  - (d) other behaviour which creates a sexually hostile working environment.

#### ***McManis v Scott Charleton (1996) 140 ALR 125***

- 1.5 In *McManis v Scott Charleton (1996) 140 ALR 125* Mr Graham McManis was a young man who was employed in a federal public service department and wished to befriend women in the department. He obtained the home telephone number of Penny who was a young woman who was employed in the department and he began making telephone calls to her home one evening. In one call he said that if she was free she could marry him. Penny complained to

her superior, and the superior issued Graham with a written order not to contact Penny outside work. Graham challenged the legality of this order in the Federal Court of Australia.

### Questions

- 1.6 What was wrong with Graham's behaviour to Penny? Did his behaviour amount to harassment?
- 1.7 Suppose Penny and Graham had been living together and had parted, could the superior validly order Graham not to contact Penny outside work?
- 1.8 How should employers and the law govern employee behaviour?

## 2. KEY CONCEPTS

### Direct Discrimination

#### ***Ansett Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237***

- 2.1 In *Ansett Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237*, Ms Deborah Wardley wanted to become a commercial airline pilot. She undertook training and applied to an airline for a job. Her scores were high in the airline's exam, but the airline refused to employ her. The airline had never employed women pilots. Deborah challenged the airline's refusal to employ her and this matter went all the way to the High Court of Australia.

### Questions

- 2.2 What is direct discrimination?
- 2.3 Was the airline's conduct unlawful?
- 2.4 How could Deborah prove that she had been discriminated against?
- 2.5 Direct discrimination is overt, and involves treating someone unfairly or unequally because they belong to a particular category of people. For example, it is direct discrimination to refuse to employ a person because she might become pregnant.

### Indirect Discrimination

- 2.6 Indirect discrimination usually is the result of apparently neutral requirements, policies, or practices, which have a disproportionate and unreasonable impact on a particular group.
- 2.7 Indirect discrimination will occur where there is a requirement that is the same for all employees, for example, but which results in an unequal or disproportionate effect on a particular group. For example, indirect sex discrimination is the unreasonable application of a policy or practice that can be met by people of one gender more often or more easily than those of the other gender. If the requirement is not reasonable in all the circumstances, it will be indirectly discriminatory.

#### ***State of Victoria v Schou (2004) 8 VR 120***

- 2.8 In *State of Victoria v Schou (2004) 8 VR 120* Ms Deborah Schou worked as a sub-editor of Hansard of the Victorian Parliament. Hansard is the written record of what is said in Parliament. In 1996, Deborah sought permission to undertake her sub-editing work from home on Thursdays and Fridays during parliamentary sitting weeks. She wished to spend more time at home as one of her two pre-school age sons was unwell. Deborah wished to use a modem and a fax machine at her home to do her work. The employer refused Deborah permission. Deborah challenged the legality of this refusal, and there were two tribunals and two court hearings.

## Questions

- 2.8 How could Deborah argue that the requirement for her to do all of her sub-editing at the Parliament House was discriminatory?
- 2.9 What is indirect discrimination and how does it differ from direct discrimination?
- 2.10 If Deborah's situation arose today with emails and with digital technology, would the court have upheld her claim?

## Sexual Harassment

### ***Matthew Clark v Burson Automotive Pty Ltd [2003] AIRC 1603***

- 2.11 This case deals with work-related sexual harassment via SMS messages where SMS messages were found to be sexual harassment. The case shows how new technologies give rise to new forms of harassment.
- 2.12 Mr Matthew Clark sought relief in relation to the termination of his employment on the basis that it was harsh, unjust or unreasonable. The employer, Burson Automotive Pty Ltd, conducted an investigation into the allegation of sexual harassment and found that the employee had engaged in the sexual harassment of a colleague. Matthew Clark's employment was terminated summarily for misconduct. The sexual harassment involved Matthew telling the colleague he had dreamed about her and slapping her on the bottom with a gasket set. Matthew also sent her an SMS message which said "hey baby". Later that day a further SMS message was sent which made reference to Matthew putting his hands up the colleague's skirt and grabbing her bottom.
- 2.13 The Australian Industrial Relations Commission found that the dismissal was justified. Importantly, the Commission stated:
- "...both s.85 of the Equal Opportunity Act (Vic) 1995 and s.28A of the Sex Discrimination Act (Cth) 1984 have three key elements in relation to what amounts to sexual harassment. They are, firstly sexual conduct, be that conduct an advance, a request for sexual favours or other conduct; secondly, the conduct is unwelcome; and thirdly, the conduct is such that a reasonable person would have anticipated that it would offend, humiliate or intimidate the victim."
- 2.14 The Australian Industrial Relations Commission also stated that:
- "...the applicant places emphasis on the fact that he considered his behaviour to be consistent with that of others in the workplace. Other witnesses described the workplace as friendly with bantering and joking common. It is important, however, without discouraging such behaviour, to ensure that it does not go beyond the bounds of friendly banter and transgress into more dangerous territory."
- 2.15 Sexual harassment is not sexual interaction, flirtation, attraction, or friendship, which is invited, mutual, or consensual and reciprocated. The intention or motive of the harasser is not relevant when determining whether the behavior was unwelcome. Sexual harassment focuses on how the conduct was perceived and experienced by the recipient, rather than the intention behind it. No intention to offend is required.
- 2.16 Sexual harassment in employment is prohibited in the following circumstances:
- (a) recruitment and selection process - specifically, sexual harassment is prohibited during job interviews;
  - (b) the course of employment - sexual harassment is prohibited at the workplace during working hours in the workplace. Sexual harassment is not, however, just unlawful

during working hours or in the workplace. Such conduct is also illegal in any work-related context (including training courses, conferences, business trips, work functions and office Christmas parties);

- (c) termination of employment - it is unlawful, for example, to dismiss an employee for objecting to sexual harassment.

2.17 Examples of sexual harassment include:

- (a) uninvited physical contact;
- (b) uninvited kisses or embraces;
- (c) unwelcome requests of sex;
- (d) sexual comments, jokes or innuendo;
- (e) making promises or threats in return for sexual favours;
- (f) intrusive questions or invitations about a person's private life;
- (g) displays or offensive or pornographic material;
- (h) sex-based insults or taunts;
- (i) unwanted invitations;
- (j) offensive communications (including letters, phone calls, faxes and email messages);
- (k) sexually explicit conversations; and
- (l) suggestive comments about a person's appearance or body.

### 3. DISCRIMINATION LEGISLATION

#### ***Sex Discrimination Act 1984 (Cth) ("SDA")***

- 3.1 The *Sex Discrimination Act 1984 (Cth)* prohibits discrimination on the grounds of sex (sections 5), pregnancy or potential pregnancy (section 7), marital status (Section 6) and family responsibilities (section 7A) in the areas of employment and superannuation (section 14), education (section 21), the provision of goods, services or facilities (section 22), accommodation and housing (section 23), buying or or selling land (section 24), and the administration of commonwealth laws and programmes (section 26). Further, an employer cannot dismiss a person from employment on the grounds of his or her family responsibilities (section 14(3A)). Indirect discrimination and how to assess the reasonableness of indirect discrimination are dealt with under section 7B.
- 3.2 The Act prohibits sexual harassment and provides that a person sexually harrasses another person if:
  - (a) the person makes an unwelcome sexual advance or an unwelcome request for sexual favours or engages in other unwelcome conduct of a sexual nature; and
  - (b) in the situation a reasonable person, having reard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

3.3 Section 28A provides that –

It is unlawful for a person to harass sexually-

- an employee;
- a co-worker; or
- a person who is seeking employment

or

- a commission agent;
- contract worker; or
- a person seeking to become an agent or contract worker.

3.4 Section 28B specifically prohibits sexual harassment in the workplace.

**Disability Discrimination Act 1992 (Cth) (“DDA”)**

3.5 Section 5 provides –

A person ("discriminator") discriminates against another person on the ground of that person's disability if, **because of his or her disability**, the discriminator **treats or proposes to treat that person less favourably** than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who does not have that disability.

Further:

In relation to “**circumstances that are the same or are not materially different**”, those circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

3.6 Section 6 provides –

A person discriminates against another person on the ground of that person's disability if he or she is required to comply with a requirement or condition:

- with which a substantially higher proportion of persons without the disability comply or are able to comply; and
- which is not reasonable having regard to the circumstances of the case; and
- with which the person with the disability does not or is not able to comply.

3.7 Section 15 provides –

that it is unlawful for an employer to discriminate against a person on the basis of that person's disability (or disability of that person's “associates”), in the following areas:

- the arrangements made for the purpose of determining who should be offered employment;
- in determining who should be offered employment;

- the terms or conditions on which employment is offered;
- the terms or conditions of employment that the employer affords the employee;
- denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer, training or to any other benefits associated with employment;
- dismissing the employee; and
- by subjecting the employee to any other detriment.

However, there are exemptions from the application of these requirements under certain conditions:

"...if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:

- (a) would be unable to carry out the inherent requirements of the particular employment; or
- (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer."

3.8 Section 35 prohibits discrimination on the grounds of disability in the workplace.

#### ***Anti-Discrimination Act 1977 (NSW)***

3.9 The *Anti-Discrimination Act 1977 (NSW)* is broader in its application than are the federal discrimination statutes. For example the New South Wales *Anti-Discrimination Act* proscribes discrimination on the following grounds:

- (a) racial discrimination, Part 2;
- (b) sexual harassment, Part 2A;
- (c) sex discrimination, Part 3;
- (d) discrimination on transgender grounds, Part 3A;
- (e) discrimination on the ground of marital or domestic status, Part 4;
- (f) discrimination on the ground of disability, Part 4A;
- (g) discrimination on the ground of a person's responsibilities as a carer, Part 4B; and
- (h) discrimination on the ground of homosexuality, Part 4C.

#### **4. THE FAIR WORK ACT PROVISIONS**

4.1 The new Fair Work Act discrimination provisions came into effect on 1 July 2009. The Fair Work Act provisions are broad and prohibit indirect, direct and systematic discrimination. These provisions do not require the discrimination to be deliberate (section 351 and section 772).

## 5. **RESPONSIBILITIES AND OBLIGATIONS OF EMPLOYERS**

- 5.1 Employees are required by law to not engage in conduct which is discriminatory and which is proscribed by the discrimination laws. Employees are required not to utter words or to do acts which amount to impermissible discrimination. For their part, employers are responsible to ensure that employees obey our discrimination laws. Employers uphold these laws by having in place:
- (a) an appropriate anti-discrimination or anti-harassment policy;
  - (b) that this policy is properly implemented;
  - (c) that there is an appropriate grievance procedure;
  - (d) that employees are able to access the grievance procedure; and
  - (e) the grievance procedure works effectively.

### Vicarious liability of employers for discriminatory acts

- 5.2 Where employees commit acts, usually by words spoken or through proscribed conduct, employers will be held to be liable for the discriminatory conduct. In legal parlance this is known as vicarious liability. As we will show, the discrimination statutes provide that employers will be vicariously liable for the discriminatory conduct of their employees where they have failed to take reasonable steps to prevent its commission. This requires employers to adopt a proactive approach to combat discriminatory conduct in their organisations. The following decision is a useful illustration.

### ***Gama v Qantas Airways Ltd (No2) [2006] FMCA 1767***

In *Gama v Qantas Airways Ltd (No2) [2006] FMCA 1767*, the applicant, Mr Gama, who was employed by Qantas as a licensed aircraft engineer, claimed that he was discriminated against on the grounds of race and disability. The allegations were that Qantas employees had used racist language, and that on grounds of race and disability due to work injuries suffered by him, he had been denied opportunities for training and promotion. At the time of the proceedings, the applicant was suffering from depression which he asserted had been caused by the inappropriate conduct.

It is often difficult to prove a causal nexus between discriminatory language by fellow employees and a failure to be promoted where such decisions are taken by higher ranking employees. Thus the applicant failed to prove a causal link between his failure to be promoted and the discriminatory remarks. However, the Magistrate found that the Applicant had suffered racial discrimination because of racist remarks having been made to him.

Importantly, the Magistrate further held that as Qantas management knew of this discriminatory treatment, and had not taken steps to stop it or to put in place remedial programs, that is they had not adopted due diligence practices, Qantas was vicariously liable for the discriminatory conduct of its employees under Section 18A of the *Racial Discrimination Act 1975 (Cth)*.

### **Questions**

- 5.3 What steps should employers take to make it clear to employees that discriminatory language or conduct will not be tolerated?
- 5.4 Should employers in their induction procedures train employees about impermissible discriminatory conduct?

Sex Discrimination Act 1984 (Cth)

Section 106

5.5 Section 106(1) of the Sex Discrimination Act 1984 (Cth) makes employers vicariously liable for discriminatory acts and/or conduct undertaken by employees or agents of the employer. However, section 106(2) makes it clear that employers will not be held vicariously liable for discriminatory acts or conduct where it can be "... established that the [employer] ... took all reasonable steps to prevent the employee or agent from ..." engaging in the discriminatory acts or conduct. The words "all reasonable steps" make it clear that employers must be proactive in making it clear that discriminatory conduct or acts will not be tolerated, and that immediate disciplinary action will be taken against perpetrators of such acts or conduct. In other words, employers are required to adopt a due diligence stance against discrimination by their employees and agents.

Minimising the Risk

5.6 In order to minimise the risk of potential actions and/or prosecutions for discriminating conduct or bullying or harassment, particularly given the operation of the doctrine of vicarious liability, employers should take all reasonable steps to prevent such conduct in their workplaces.

5.7 These steps should include:

- (a) developing and implementing an appropriate anti-discrimination, anti-harassment and anti-bullying policy;
- (b) ensuring that employees, up to the highest levels receive appropriate training in relation to the policy. This training should form part of any induction process;
- (c) establishing and maintaining an appropriate, accessible and effective grievance procedure;
- (d) where complaints have been made or where information comes to the attention of management, ensuring that appropriate processes are in place to investigate any such matters. The principles of natural justice should be followed in all formal investigations.

Grievance Procedure

5.8 In order for an employer to minimise the risk of breaching its duty of care obligations, it is critical that employees are encouraged to make complaints. An effective grievance procedure can be a valuable tool in preventing misconduct and in detecting misconduct at an early stage.

5.9 An effective grievance procedure can also assist an employer to argue that they have taken reasonable steps to prevent discrimination and harassment from occurring, and thus reduce the possibility that the employer will be found vicariously liable for the unlawful actions of its employees.

5.10 An effective grievance procedure should:

- (a) be clearly written and displayed throughout the workplace;
- (b) clearly state who is responsible for receiving complaints;
- (c) set out an informal and formal complaints mechanism;
- (d) state that employees will not be victimised or treated unfairly for making a complaint; and

- (e) state that in the event that a complaint is made, a decision will not be made regarding the allegations until the allegations have been investigated and the accused employee has been given an adequate opportunity to respond to the allegations.

5.11 An employer should keep a written record of all complaints made.

## **6. CONDUCTING WORKPLACE INVESTIGATIONS**

6.1 In circumstances of employee misconduct or where an employer receives a complaint regarding bullying, sexual harassment or discrimination from an employee, it is important that employers conduct effective workplace investigations that take into consideration the principles of procedural fairness and natural justice and other legislative requirements (e.g. unfair dismissal and surveillance laws).

6.2 Before commencing an investigation an organisation must appoint an investigator, establish the terms of reference and identify a decision maker.

6.3 Many organisations have policies which specifically define how to conduct a workplace investigation. If there is a policy in place it is important that it is carefully followed.

6.4 The investigator's role is to:

- (a) manage and coordinate an investigation in a timely and effective way, including managing parties and witnesses and their representatives or support persons;
- (b) discharge the terms of reference in a fair, objective and defensible way, ensuring natural justice principles are applied at all times; and
- (c) present the investigator's findings or recommendations to the decision maker in line with the terms of reference.

6.5 It is important when selecting an investigation that consideration be given to the following issues:

- (a) does the person have good interpersonal skills, the ability to empathise, enthusiasm and a commitment to the resolution of complaints and/or investigations, a sense of fairness and good communication and listening skills?
- (b) does the person understand the principles of procedural fairness and natural justice;
- (c) does the person have the time within his or her role to do a careful and thorough job in a timely manner?
- (d) will the person be objective and be perceived as objective?

6.6 If an internal candidate does not satisfy the above requirements it may be necessary to appoint an external independent investigator.

6.7 Investigating the complaint will ordinarily involve:

- (a) the investigator developing a thorough understanding of the terms of reference and the issues which the investigator is to resolve in the investigation;
- (b) the investigator planning the investigation before commencing (e.g. identifying witnesses, establishing the order in which the witnesses will be interviewed and identifying and requesting relevant documents);

- (c) applying natural justice to the investigation process and ensuring procedural fairness applies to all stakeholders;
  - (d) preparing accurate statements and other records, ensuring confidentiality is maintained as far as possible throughout the investigation.
- 6.8 It is important that:
- (a) all allegations are put to the alleged perpetrator and that person is given an appropriate opportunity to respond to the allegations;
  - (b) the alleged perpetrator is regarded as innocent until the allegation are proven in whole or in part; and
  - (c) complaints are dealt with in a timely manner and documented.
- 6.9 In making his or her decision, a decisionmaker may consider a range of possible outcomes including:
- (a) the allegations are not made out, in which case the accused employee should be notified immediately and reasonable steps taken to ensure the employee's reputation and ability to work effectively in the workplace is not unduly damaged;
  - (b) a conclusion that the complaint, or part of the complaint, is substantiated;
  - (c) taking disciplinary action, including counselling, warnings or dismissal;
  - (d) making amendments to the employer's policies, procedures or systems to ensure that a similar incident does not occur again; and
  - (e) implementing relevant training for employees in the organisations.
- 6.10 Where it is established that unacceptable conduct has occurred, ensuring that action is taken promptly which may include assisting the person the subject of the conduct and instituting disciplinary action against the perpetrator.
- 6.11 The standard of proof applied by investigators and relevant Courts and Tribunals in relation to administrative processes, such as workplace investigations, is the civil standard of proof "*on the balance of probabilities*." This test requires an investigator, having weighed all of the competing evidence, to decide which version of events is more probable than not to have actually occurred.
- 6.12 Once the decisionmaker has made a final decision, the investigation process should be finalised by:
- (a) communicating outcomes in an appropriate way; and
  - (b) ensuring that documents relevant to the investigation and the decision are retained, particularly if there is any possibility of future legal proceedings or other external enquiry, or if required by legislation.
- 6.13 In most cases it would be appropriate to inform the complainant and the accused employee of the outcome of the investigation and any action taken in response to that outcome. In cases where there is the potential for further legal proceedings to be conducted, providing a brief letter setting out a summary of the findings and the action taken would be appropriate. Any communication with stakeholders should emphasise the fact that the investigation process is complete and the employer considers the matter to be at an end.

## **7. BULLYING AND HARASSMENT – RECENT CASE EXAMPLES**

### **Café Vamp**

- 7.1 The Café Vamp case involved the prosecution of:
- (a) the sole director of a company that operated a café in Hawthorn, Victoria; and
  - (b) three employees of the company.
- 7.2 The prosecution was launched by WorkSafe Victoria under the Occupational Health and Safety Act 2004 (Vic).
- 7.3 The prosecution was brought sometime after a young female employee in the café committed suicide.
- 7.4 The Magistrate found that the young female employee had been subjected to a range of repeated direct physical and non-physical bullying behaviour including:
- (a) direct verbal insults;
  - (b) offensive and degrading sexual comments about her physique and appearance;
  - (c) kicking and spitting on her;
  - (d) putting fish sauce and ratsak in her bag;
  - (e) slapping her sunburnt skin;
  - (f) damaging her clothes and possessions; and
  - (g) throwing food at her.
- 7.5 The Magistrate found that:
- (a) the working environment at the café was poisonous;
  - (b) that the persistent bullying of the young female employee was in the worst category;
  - (c) nothing was done by the employer to stop it.
- 7.6 Fines imposed included:
- (a) a \$220,000 fine to the operating company;
  - (b) a \$30,000 fine to the director of the company;
  - (c) a total fine of \$85,000 imposed on the 3 employees.
- 7.7 The fines were some of the highest ever imposed for such a prosecution.
- 7.8 WorkSafe has a dedicated unit to deal with complaints of bullying and harassment and WorkSafe is very active in the field.

### ***Bailey v Peakhurst Bowling and Recreation Club Ltd [2009] NSWSC 284 (3 November 2009)***

- 7.9 The case involved an action in tort for workplace negligence, bullying and intimidation and harassment of a employee of the Club by the Club manager.

7.10 This resulted in the employee suffering severe psychological injuries including post traumatic stress disorder.

7.11 The employee was awarded \$507,550 in damages plus costs.

***WorkCover Authority (NSW) (Inspector Maddaford) v Coleman & Ors [2004] NSWIRComm 317***

7.12 This case involved charges against the defendant company and 2 company directors in their personal capacity for breach of the *Occupational Health and Safety Act 200* (NSW).

7.13 The decision at first instance by Chief Industrial Magistrate Miller was that there was a failure to ensure a working environment that was safe and without risk to health.

7.14 The case involved an incident at a factory where a 16 year old employee was physically restrained by a group of other employees in what was described as “an initiation.”

7.15 First instance conviction of \$24,000 against the defendant company but only \$1000 each against each company director in their personal capacity.

7.16 WorkCover appealed to the NSW Industrial Relations Commission in Court Session on inadequacy of the penalty against the directors.

7.17 The appeal was upheld and the individual director penalties were increased to \$9,000 and \$12,000 respectively.

7.18 It was held that a serious risk exists where there is an obvious and foreseeable risk to safety.

7.19 Conduct which has a foreseen consequence involves a higher level of criminality and culpability.

**8. THE PAID PARENTAL LEAVE SCHEME**

8.1 The Scheme provides government funded Parental Leave Pay at the National Minimum Wage for a maximum period of 18 weeks.

8.2 The Paid Parental Leave period can start from the date of birth or adoption, or a later date.

8.3 Parental Leave Pay is taxable.

8.4 All working parents including full-time, part-time, self-employed, casual, contract and seasonal employees, will be entitled to Parental Leave Pay, if they meet the eligible criteria.

**Eligible Criteria**

8.5 Employers are only required to provide Parental Leave Pay to an employee if their business has an Australian Business Number and if the employee:

- (a) has a child born or adopted on or after 1 July 2011;
- (b) has been working for you for more than 12 months prior to the expected date of birth or adoption;
- (c) will be your employee for the period of the Parental Leave Pay;
- (d) is an Australian based employee; and
- (e) is expecting to receive at least 8 weeks Parental Leave Pay.

When do Employers have to start paying Parental Leave Pay?

- 8.6 From 1 January 2011 to 30 June 2011, employers have the option to choose whether or not to provide Paid Parental Leave to their eligible employees.
- 8.7 On 1 April 2011 the first claims for Parental Leave Pay can be lodged by employees for children due to be born or adopted from 1 July 2011.
- 8.8 On 1 July 2011, Employers will be responsible for providing Parental Leave Pay to eligible longer term employees for children born or adopted from 1 July 2011.

How will parents apply?

- 8.9 Your employee discusses their leave intentions with their employer.
- 8.10 Your employee lodges a claim with the Family Assistance Office, up to 3 months before the expected date of the birth or adoption.
- 8.11 The Australian Government will then decide whether the employee is eligible and whether the employer is required to provide Parental Leave Pay.

How many weeks of leave will be paid and at what rate?

- 8.12 The Scheme will provide a maximum of 18 weeks government funded leave at \$570 per week before tax.
- 8.13 The 2010 National Minimum Wage Order has been set at \$569.90 a week, calculated on the basis of a week of 38 ordinary hours, or \$15 per hour. Parental Leave Pay is calculated at the hourly rate of \$15.

How will employers be made aware that they have to provide Parental Leave Pay to an employee?

- 8.14 The Family Assistance Office will provide an employer with notice (generally electronically) to advise that it is required to provide Parental Leave Pay.
- 8.15 The Employer registers for Centrelink Business Online Services and pre-register for the Paid Parental Leave Scheme.

Over what period must Paid Parental Leave be taken?

- 8.16 Parental Leave must be taken over one continuous period of up to 18 weeks.

How will the payments be made?

- 8.17 The Parental Leave Pay will be made in instalments to the employer by the Family Assistance Office, who will then pay these to the employee.
- 8.18 Employers do not have to provide Parental Leave Pay to their employees until after they have received required funds from the Family Assistance Office.
- 8.19 Parental Leave Pay will be paid in accordance with an employer's normal payroll practices and the employee's usual pay cycle with the employer withholding Pay As You Go (PAYG) amounts as normal.
- 8.20 Employers are not required to make superannuation contributions on Parental Leave payments.

- 8.21 Parental Leave Pay is an addition to any other obligation an employer may have to their employees for example:
- (a) under the National Employment Standards; and
  - (b) under a current modern award to provide an entitlement such as paid maternity leave.

Must Employers continue to pay employees who resign and were receiving Parental Leave Pay?

- 8.22 No.
- 8.23 Employers will only be required to pay employees who intend to return to work.
- 8.24 Woman employees who resign, but meet the eligibility criteria, will be paid by the Family Assistance Office.



### **Employer Checklist**

- 1.1 Discrimination, harassment and bullying are unlawful. Effective management of harassment and discrimination requires vigilance and a review of workplace practices. Any instances need to be addressed promptly.

The recommended risk management approach is:

- (a) Identify hazards – conduct an internal audit and review incident reports;
- (b) Assess risks – assess what needs to be controlled and what mechanisms are in place;
- (c) Control risks – implement measures to reduce or eliminate risks;
- (d) Respond to Complaints – an investigation to establish whether the behaviour can be substantiated should be undertaken;
- (e) Investigation – an investigation should be conducted by an impartial person applying the principles of natural justice.

### **Investigation**

- 1.2 Any investigation into a reported incident of workplace harassment or discrimination should be conducted promptly and thoroughly. The investigation and its outcome should always be documented. The principles of natural justice should be followed in all formal investigations and will include:

- (a) innocent until all allegations are proven correct;
- (b) allegations need to be put to the alleged offender with that person being given a chance to explain themselves;
- (c) any disciplinary action needs to be commensurate with the seriousness of the complaint; and
- (d) mitigating factors should also be taken into account.

- 1.3 At the end of the investigation, recommendations should be made with respect to the action to be taken. For instance an investigation may find that the report is not substantiated, consequently, no further action is to be taken. If it is substantiated, then the matter needs to proceed to disciplinary action.

The options for proving a complaint can vary from case to case, but may include:

- (a) gaining commitment from the offender to cease the behaviour;
- (b) running an awareness update;
- (c) reviewing the Company's Policies and Procedures;
- (d) provide mediation to the parties (where agreed);

- (e) provide interpersonal skills and communication training to all staff;
- (f) offer support and counselling to the affected person;
- (g) discipline the perpetrator.