

Employment Law Update

June 2011

Sexual harassment complaints on the rise: What do you do when you get a complaint?

There has been a noticeable increase in the number of allegations of sexual harassment over the past 12 months. This trend, commonly attributed to the publicity surrounding the David Jones/McInnes/Fraser-Kirk case in 2010, has been reported by employment lawyers generally, and has also been noticeable in our practice.

Employers need to be aware that the risk of sexual harassment or discrimination claims has increased significantly.

The issue doesn't have to be about 'mega-dollar claims' to be a significant risk. In many instances, the employer receiving a complaint of sexual harassment has never had to field such an issue before, and is starting from scratch on the necessary steps and the various risks which arise. Each situation is different and requires very careful handling, as the employer is at risk of a discrimination claim by the person claiming to have been harassed, but at the same time may face unfair dismissal proceedings or other claims in relation to the discipline, or termination of the employment, of the alleged offender.

What constitutes "fair process" as well as "adequate investigation" will differ depending on the circumstances (including the gravity of what is alleged to have happened, situation in the workplace, seniority of the employees involved, evidence available etc) but the matters to be considered include:

- avoiding prejudgment (in either direction)
- obtaining and working with reliable evidence, not rumour or assumptions
- putting allegations to the alleged offender and getting his/her response and evidence from other staff who may have witnessed the conduct at issue

- giving appropriate support to the complainant and offender and making suitable arrangements regarding ongoing relations in the workplace
- approaching things efficiently and practically (an employer is not required to act as if it is a court of law) and being seen to do so
- maintaining an appropriate level of confidentiality and addressing workplace gossip.

Of course, prevention is better than cure. What can you do in advance to minimise the chances of sexual harassment happening?

1. Have up to date policies on discrimination, equal employment opportunity, harassment and grievance handling, which are periodically refreshed for staff and which provide a reference point.
2. Ensure that managerial and supervisory staff are well aware of their obligations to deal with any harassing or potentially harassing conduct so as to intervene to stop problematic conduct before it causes a complaint.
3. Provide training periodically to refresh these issues for employees.
4. Ensure that management is seen to abide by and enforce policies, so that employees expect that offensive behaviour will not be tolerated, and that complaints will be promptly and adequately dealt with.

If you need your policies and procedures in this area refreshed, advice in relation to investigation processes, training for your staff, or assistance with an actual investigation, please contact Stephen, Anna or Enza for assistance.

Abuse of leave entitlements: honesty is the best policy

Dishonesty will very often cause such damage to the relationship of mutual confidence necessary between employer and employee that termination, even summary dismissal, will be justifiable, as in the following example.

An employer with a generous leave policy has had the termination of an employee, for abusing that policy, upheld by Fair Work Australia. In *Pearce v Nyrstar* (10 March 2011), the employer had an unlimited personal leave policy, under which employees could take as much leave as necessary, without regard to the minimum standards under the Fair Work Act, provided the employee provided the appropriate documentation.

FWA accepted that this policy operated to a great degree on trust and that the policy would be undermined if the employer could not trust employees to use it responsibly, and that it would disadvantage all employees if trust was abused.

In this case, Mr Pearce sought annual leave for a weekend, but was refused because it was not convenient for scheduled production. Mr Pearce then applied for carer's leave, supported by a medical certificate relating to time off to attend appointments with his daughter, who had suffered an injury. The leave was approved and the employer arranged replacement employees, but then heard rumours that the leave was not all that it seemed to be.

The employer engaged an investigator who provided evidence that the employee had travelled to a resort for the weekend with his family. The employee was stood down and given the chance the following day to explain. Although Mr Pearce said that he was having marital difficulties and had to make the choice of saving his marriage or attending his job, he was dismissed without notice for having claimed carer's leave under false pretences. The employee claimed that he was caring for his daughter, although not in the way anticipated by the medical certificate.

However, FWA held that use of leave as Mr Pearson had, when the medical certificate related to appointments, was at no time a legitimate use of the leave policy and was a valid reason for dismissing him, as was his dishonest response to questions about the leave. Lies were not excused by Mr Pearson being taken by surprise by the questions.

As an employer, if you think you've been lied to, consider this:

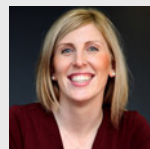
Can you prove that what the employee said was deliberately untrue, ie is there credible evidence to show this, disregarding suppositions and assumptions? Often as the employer you will bear the onus of proving dishonesty, so it is important to get the evidence straight before acting.

For assistance in handling matters concerning employee misconduct, or if you would like to discuss suspicions or the behaviour of an employee further, contact Stephen, Anna or Enza.

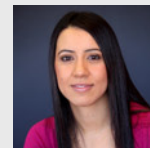
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