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Discrimination: not all offensive behaviour is discriminatory

We often focus on the headline discrimination cases such as DJs and Ms Fraser-Kirk, but lower level cases are just as instructive on practical aspects of avoiding discriminatory behaviour.

In a recent Federal Magistrates Court case, Ms Noble sued her manager, Mr Baldwin and her employer, RNP, for discrimination. She alleged that Mr Baldwin looked at her breasts whenever he spoke to her, regularly touched his genitalia in her presence, brushed himself against her breasts and other women's breasts, engaged in discussion of women's sexual desires and orientation, and suggested he employed women based on the size of their breasts.

The allegations of physical contact and looking at Ms Noble's breasts were borne out to a limited extent, and were not cancelled out by the fact that Ms Noble had sent some unsavoury emails herself and, after drinking at a work social function, had behaved inappropriately with the MD. Her behaviour did not indicate that it was such a "robust" work place that Mr Baldwin could think, or in fact any reasonable person would've thought, that his conduct was acceptable. A reasonable person in the circumstances would have expected Ms Noble to be offended.

On the other hand, brushing past other women's breasts was deemed not relevant as it was not sexual harassment of Ms Noble. Mr Baldwin touching himself was also not specifically directed at Ms Noble, and while potentially offensive, was not sexual harassment of her. Similarly, comments about other women's breasts were not sexual harassment of Ms Noble because there was insufficient evidence that the remarks were unwelcome.

Importantly, the Magistrate said that the legislation is not intended to make every remark of a mildly sexual character an instance of sexual harassment. However the comments regarding selecting employees based on breast size clearly were demeaning and unwelcome to Ms Noble, and amounted to discriminatory or harassing behaviour.

Ms Noble had originally complained about Mr Baldwin's behaviour in 2005 and RNP had dealt with the complaint entirely appropriately, in a timely fashion, thoroughly and acceptably to Ms Noble. However, the Court felt that was not sufficient for the company to claim that it had taken "all reasonable steps to prevent" sexual harassment. RNP had not introduced relevant policies or training until sometime later, and Mr Baldwin's behaviour deteriorated again after a temporary improvement in 2005. RNP was therefore found to be vicariously liable for Mr Baldwin's conduct.

The Court was also not satisfied that Ms Noble had suffered substantial economic loss because of the discrimination and harassment: she had chosen to resign and had other issues in her life which had impeded her obtaining replacement employment. Since much of the conduct of which Ms Noble complained was not infact unlawful conduct, it was not possible for her to prove that her medical and drinking conditions were caused by the discriminatory conduct. As a result, Ms Noble was awarded $2,000 damages, and Mr Baldwin and RNP had to pay half of Ms Noble's costs in the case.

What can be learned from this case?

This case took five hearing days, and would have required a lot of preparation on both sides: the outcome could be seen as entirely disproportionate to the costs incurred.

For Ms Noble, the half of her costs she had to pay herself was probably more than the damages awarded - a rather pyrrhic victory. From RNP and Mr Baldwin's point of view, they saw off a large part of Ms Noble's complaint, but at very substantial cost (their own legal costs and half of hers).

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Discrimination: not all offensive behaviour is discriminatory cont.

RNP would have been in a much better position to resist the complaints if, after warning Mr Baldwin once, it had monitored his behaviour so that either his unattractive behaviour was avoided, or he moved on. RNP would also have been much better off if it had more to say about introducing anti-discrimination policies and related training.

Does your workplace have sufficient policies in place, or conduct anti-discriminatory training? For more information on anti-discrimination and sexual harassment policies, and how you can implement and enforce them in your workplace, contact one of our experienced workplace lawyers today on ph 02 9635 6422 or email Stephen Booth at sbooth@colemangreig.com.au.

Employees behaving badly: does an outburst of temper justify dismissal?

Lynette Steele sued a registered club for compensation for unjust dismissal. The dismissal related to repeatedly loud, abusive comments to other members of staff, within the hearing of club patrons, after Ms Steele arrived at work and was unhappy with the state in which her workplace had been left by a prior shift.

Ms Steele agreed that, in part, she was upset because after her first outburst, a co-worker had suggested that she must have been "baking cookies" containing marijuana (which was said to be part of her culinary repertoire).

Ms Steele lost her case because a number of independent witnesses confirmed her loud and abusive behaviour.

FWA referred to an old case which decided that *"a single outbreak of bad temper, in company … with regrettable language"* was not in itself a sufficient ground for dismissal.

However, FWA decided that:

"While an isolated outburst might be understandable in certain circumstances , it must be emphasised that employees should not, as a general rule, get angry and aggressive about problems in the work place; let alone confront other employees about their own problems….the applicant had a simple and longstanding practice to adopt - contact the duty manager. It was not for her to berate and abuse a fellow employee".

The conclusion that termination was justified was strongly supported by what FWA described as *"a truly breathtaking record"* showing an *"appalling litany of warnings and counselling"* (at least 18 warnings) over many years. This included two written warnings in the year prior to the final incident.

Ms Steele objected to these prior warnings being taken into account, because she did not accept the basis for them and had not signed the written warnings. However, FWA held that against such an appalling background, she had to prove that the various warnings were substantially unjustified, not just assert it.

Ms Steele also had the nerve to argue that by giving so many warnings, but not taking any action previously, the company had effectively condoned her conduct, and couldn't complain now. She said that she should've been given a final warning - but FWA rejected that, saying that warnings must mean something to have any practical effect, and to deter others. Requiring another warning would have undermined the club's disciplinary process.

Employees behaving badly: does an outburst of temper justify dismissal? cont.

Ms Steele also criticized the process by which she was terminated. However, as she had been advised of the issues (and it was not necessary to give her everything in writing), suspended prior to a meeting, and had two representatives with her at the termination meeting, FWA was not impressed by this argument either.

Can any lessons be taken from this case?

As an employer, you need to be wary of terminating employment because of an isolated incident of bad temper (depending on the circumstances of course), particularly if the employee apologises promptly and appropriately.

However, you are entitled to be assertive about disciplinary processes where there are repeated infringements and, indeed, you need to apply those processes in order for your disciplinary processes to have teeth and credibility.

For more information on the termination process and your rights as an employer, contact our Employment Law team on ph 02 9635 6422 for advice.

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