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NEWS

News

New Guideline on Sexual Harassment

The Victorian Equal Opportunity and Human Rights Commission has launched a new guideline on sexual harassment in the workplace.

The new guideline was drafted to assist managers and employers to understand their responsibilities in not only responding to issues that arise, but to take steps to prevent sexual harassment in the workplace occurring.

"The law specifically requires organisations to take proactive steps to eliminate sexual harassment in the workplace – simply responding to complaints that may arise is no longer enough."

The Commission said the guidelines will help employers understand it is the responsibility of the management and leadership teams to set the culture and ensure that offensive behaviour does not occur and to eradicate sexual harassment from our workplaces.

The Commission warned that when workplaces do not respond appropriately to harassment, or make clear that it is unacceptable, the harassment can escalate.

The new guideline outlines appropriate policies and complaints handling procedures in place, as well as training staff and monitoring the execution of these policies and procedures to ensure they are effective.

As the Commission pointed out, besides real hardship and real harm to your employees, your organisation runs the risk of hefty legal costs, reduced productivity and damage to the workplace environment as well as the organisation's reputation. In addition, courts or tribunals may consider whether an employer has complied with the guideline when hearing a complaint of discrimination. It applies to all employers in Victoria, regardless of size.

Please contact Workforce Legal Solutions on (03) 9505 6221 should you require assistance in updating or developing your sexual harassment policy and procedures in line with the new guideline.

To save time and your sanity, we have managed to navigate the web and locate the new guideline which can be accessed here: http://goo.gl/eN2Pz

Victorian Equal Opportunity & Human Rights Commission

New Fair Work (Political) Appointees

Workplace Relations Minister Bill Shorten recently announced the appointment to the Fair Work Commission of eight new appointments, including four with strong Labor links. None of the eight appointees were from an active current role in industry or from among employer bodies.

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Workforce Legal Solutions Pty Ltd (ABN 86 837 599 520)
PO Box 1270, Darling Vic 3145 • T 03 9505 6221 • F 03 9563 5667 • www.workforcels.com

New Fair Work appointees, *(left)* Messrs. Catanzarti, Lawrence and Johns (Photos courtesy Fairfax Media and Twitter)

Among the two new Vice-Presidents appointed is Joe Catanzarti, a partner with the law firm Clayton Utz; and Adam Hatcher, SC a former Labor candidate and industrial relations barrister who has represented unions.

The four Deputy Presidents appointed were Ingrid Asbury, Anne Gooley, Val Gostencnik and Jeff Lawrence, the former secretary of the ACTU (2007-12).

Nick Wilson and Leigh Johns, currently CEO of the Fair Work Building and Construction inspectorate were appointed Commissioners.

Mr Shorten said the eight appointments had followed an independent merit-based selection process, in consultation with shadow workplace relations spokesman Senator Eric Abetz and the states and territories.

Recent Cases

Kaizen Hospitals (Malvern) Pty Ltd; Kaizen Hospitals (Mountain District); Kaizen Hospitals (Essendon) Pty Ltd [2013]
FWCFB 1846
26 March 2013

In this rare and highly unusual case, a board and CEO were caught napping and allowed a senior manager to not only draft, devise and negotiate three Enterprise Bargaining Agreements, but then have each certified and approved before the Fair Work Commission.

And what does the same board do when it suddenly realises its name is proudly aside three brand new spanking EBAs without its apparent knowledge? Cry foul and try have them overturned…

The essence of the case was the appellant's argument that the EBAs were invalid on the basis that they were unauthorised by the board and CEO.

Senior Deputy Presidents Ian Watson, Jonathan Hamberger and Commissioner Helen Cargill upheld Deputy President Hamilton's approval of the three Kaizen Hospital deals that were signed by Mr S Subramanian whose represented the group as "Corporate Management Victoria and Hospital Director of Essendon Private Hospital."

The first attempt to have the EBAs approved hit a snag when the bargaining agent appointed to assist Mr Subramanian were not legally appointed.

Whether or not Mr Subramanian had contractual responsibility to negotiate the EBAs was a matter the Commission found was not of public interest but concerned the internal control processes of the group.

The irony is not lost on the meaning of "Kaizen" — Japanese for "improvement" or "change for the better".

The lesson from this case is always ensure that you have appropriate authority to act on behalf of the organisation lest the process turns out to be crook.

Barbara Catto v Inglewood & District Health Service [2013] FWC 1764
25 March 2013

In this matter, the respondent lodged an unfair dismissal case after subsequently reneging on a verbal agreement to accept a redundancy package.

The interesting aspect of this case deals with the grey area of law when, during negotiations at a meeting both parties verbally agree, but subsequently one party reneges and refuses to sign the agreement in writing.

This is an area of relevance to employers who negotiate verbally with the intention of producing the agreement in writing for signature.

Commissioner Bissett cited *Masters v Cameron* where the High Court held that when parties reach agreement they do so in any one of three classes; the parties agree and intend to be immediately bound; the parties agree on all terms, *"but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document";* or the parties do not intend to agree until they execute a formal contract.

The Commissioner did not find any evidence that either parties, most importantly, the applicant made any indication prior, during or at the conclusion of the meeting that the agreement was subject to conditions.

When undertaking negotiations, it is important to establish whether the agreement verbally negotiated will be subjected to conditions such as the signing of a written agreement.

Ms Jennifer Fisher v ANZ Banking Group Limited
[2013] FWC 347
6 March 2013

Hidden deep down in this complex case involving ANZ and the dismissal of a long-serving employee is a paragraph that managers should take note;

"ANZ submitted that [the Applicant] had made derogatory comments about [her branch manager] to another member of the staff. Whilst this activity should not be encouraged or condoned it is hardly a sackable offence. Such comments are part of the Australian culture and have many variations. If every Australian worker who made derogatory comments about their boss was sacked then the unemployment rate would be exponentially higher than it is today."

The case highlights the inherent risks of managers in large corporations handling complex human resource issues in particular those involving terminations.

The applicant was dismissed for breaching ANZ's relevant policy relating to serving family members. Though Commissioner Riordan determined both parties accepted as fact that the breaches did occur, he found the Applicant was denied procedural fairness. The most serious was that *"the disciplinary meeting … was conducted in a manner where by ANZ tried to trick or 'catch' Ms Fisher with inconsistent answers. I am satisfied that was an attempt at entrapment … and a breach of the principles of procedural fairness."*

Because of the remote location of her employment, being a loyal and dedicated employee of 32 years' standing with no prior warnings; as well as her advanced age and unlikelihood of finding further employment, the Commission ordered the Applicant's reinstatement while noting the branch manager will be moving to a new role. However, the Commission did note that the Applicant can be put on notice that a further breach of policy would lead to her dismissal.

Always take care when handling disciplinary matters involving termination after careful consideration of all facts, including that the employee has been given procedural fairness.

Please contact Workforce Legal Solutions on (03) 9505 6221 should you require assistance in terminating staff on the basis of misconduct.