Legal Solutions newsletter

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News

New protection against discrimination

Amendments to *Sex Discrimination Act 1984* (Cth) that came into effect on 1 August 2013 will now make it unlawful to discriminate against a person on the basis of sexual orientation, gender identity and intersex status.

The Act provides protection from discrimination for people who identify as men, women and neither male nor female. It does not matter what sex the person was assigned at birth, or whether the person has undergone any medical intervention.

As the Commission notes, discrimination on the new grounds is unlawful in the same circumstances as for other grounds already covered by the Act, including sex, pregnancy, breastfeeding and family responsibilities. However, the new changes do not affect the existing grounds and they will continue to operate unchanged.

As is currently the case under the Act both **direct** and **indirect discrimination** is unlawful.

Direct discrimination is treating another person less favourably on the basis of their sexual orientation or gender identity or intersex status, than someone without that attribute would be treated in the same or similar circumstances.

Indirect discrimination is imposing, or proposing to impose, a requirement, condition or practice that has, or is likely to disadvantage people with a particular sexual orientation or gender identity or intersex status, and which is not reasonable in the circumstances.

And finally the Act includes provisions that allow for exemptions in certain circumstances. Some of the existing provisions will now apply to the new grounds as well as introducing new exemptions.

The Act also qualifies the exemptions for religious organisations to the effect that it does not apply to conduct connected with the provision of Commonwealth-funded aged care services.

For more information, the Commission has produced an information sheet which can be downloaded from their website—

http://goo.gl/Gy4Qv2

As Workforce Legal Solutions has pointed out on previous occasions, besides real hardship and real harm to your employees, organisation's runs the risk of hefty legal costs, reduced productivity and damage to the workplace environment as well as the organisation's reputation.

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

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Recent Cases

Mrs Karen Harris v WorkPac Pty Ltd [2013] FWC 4111

"The workplace comprises of persons of different ages, workplace experience and personalities – not divine angels." These enlightening words from the Fair Work Commission will long echo in a ruling that has significant ramifications for businesses. In effect, the Comission has said, workplaces should make it a practice to develop a little bit of resilience.

In this case, Karen Harris, an employee of mining recruitment firm WorkPac, was accused of bullying by another employee, Rachel Maye. The bullying allegedly took the form of swearing, being insensitive and embarrassing Ms Maye in front of other employees, among other incidents.

In early December 2012, Ms Maye resigned from her position and participated in an exit interview in which she indicated that she kept a "note book" of her interactions with Ms Harris and gave evidence of specific incidents that had occurred and which had been recorded from July 2011. Ms Maye alleged that she had made a number of complaints during her employment some even 17 months ago.

A day after Ms Maye's resignation, Ms Harris was advised that she was required to attend a meeting to discuss the serious concerns that management had in relation to allegations relating to the treatment of Ms Maye. On the day of the meeting which was attended with a support person, Ms Harris was subsequently advised that her employment was to be terminated immediately for bullying which WorkPac considered a form of gross misconduct.

The Commission found there were several problems with the accusations. There was no documentation of bullying incidents ever taking place; the incidents themselves had occurred over a year before the complaints were investigated; and the investigation occurred after the alleged bullied employee had left the company.

The Commissioner also found while the concept of "anything goes" at the workplace is clearly wrong, it's important businesses don't confirm bullying behaviour as anything that hasn't been investigated properly, and happened "some time ago".

It was found that Ms Harris was unfairly dismissed from her employment.

The two lessons from this case is, firstly, paperwork, paperwork, paperwork. Complaints of any type — including bullying — requires written evidence. Also, it is extremely important that complaints are investigated as soon as possible, not seven incidents and 17 months later after they come to light during an employee's exit interview.

James Hutchinson v Monash Health [2013] FWC 8173

Is an undischarged bankrupt excempted from making an application for an unfair dismissal? This was the question the Commission had to answer.

In this case, Monash Health sought to have the application for relief from unfair dismissal on the grounds of jurisdictional objection, arguing that as an undischarged bankrupt, any application for relief had to be made by the Trustee and not by the applicant, Mr James Hutchinson.

As the Deputy President concluded, the risk in a case of a bankruptcy seeking remedy for unfair dismissal is making a "half way house" whereby the dismissal is found to be harsh, yet the Comission is barred from considering compensation in lieu of reinstatement on the basis of the applicant being an undischarged bankrupt.

In reaching his ruling that the Applicant is not prevented from making an application for an unfair dismissal remedy, Deputy President Smith took the view that employment is not usually referred to, or known as, property and therefore any "legal" interest an employee has in his or her employment is not a property interest.

Virgin Australia International Airlines Pty Ltd T/A Virgin Australia v David Taleski [2013] FWCFB 4191 24 July 2013

In a previous issue of *Legal Solutions newsletter,* we reported on the airline employee dismissed for growing his long hair.

David Taleski was given his marching orders by Virgin Australia for failing to comply with "The Look Book". Mr Taleski had no aspirations to look like Fabio, but argued that he needed to grow his hair long as a method of coping with a body image disorder. So for over 15 months, Mr Taleski and Virgin had been splitting hairs. To try to overcome the impasse Mr Taleski even took to the skies wearing a wig.

After Mr Taleski was dismissed, the matter was referred to Fair Work Commission to rule on the curly case. The unfair dismissal case took a year, two failed marathon conciliations and reams of evidence, much of it relating to haircuts, "The Look Book" and wigs. Eventually, the Comission ruled that Mr Taleski be reinstatement with $26,000 compensation but was granted a stay to appeal.

The trouble started in July 2010 when Mr Taleski told Virgin he would be growing his hair longer than the stipulated collar-length for religious reasons, but soon afterwards said the new hairstyle was due to a medical condition that he was uncomfortable discussing.

During the next 13 months, Mr Taleski provided Virgin with five medical certificates which, he argued, proved he was suffering from body dysmorphia disorder. Virgin never accepted that the certificates provided a diagnosis that explained the attendant's persistent refusal to cut his hair.

After he was grounded because of his hair in April 2011, Mr Taleski suggested a slicked-back ponytail look as a compromise, only to be rebuffed, even though the section in "The Look Book" for females allows ponytails to be worn.

Mr Taleski was allowed to return to the skies wearing a wig between July and October 2011, despite his worries the hairpiece would expose him to ridicule and interfere with his hair transplant.

Virgin sacked Mr Taleski in October 2011 claiming that he had failed to provide medical evidence when asked for; that he persistently refused to conform to "The Look Book"; and had behaved improperly by trying to involve the airline's chief executive.

Fair Work commissioner Anna Lee Cribb in January found Mr Taleski's hairpiece could confirm with "The Look Book" because the manual was effectively silent on the matter of a wig.

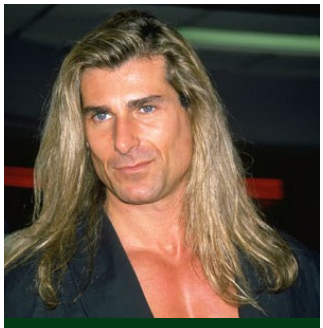
She also found that the attendant had provided medical evidence to back his claims of body dysmorphia disorder and although Mr Taleski was not entitled to go over his managers' heads in the dispute, his conduct did not warrant dismissal.

Virgin sought an appeal against the decision on five grounds. Senior Deputy President Jennifer Acton wrote in her judgment that;

"No significant errors of fact have been established and we do not consider it is in the public interest or otherwise to grant permission to appeal."

It should be mentioned that the Commission did not set a precedent that long hair can now be worn, rather that an exemption was being made.

Please contact Workforce Legal Solutions on (03) 9505 6221 should you require assistance in terminating staff, regardless how 'curly' the issue.



Long hair is in thanks to Fabio