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SEXUAL HARASSMENT, DISCRIMINATION & BULLYING AT WORK

WHAT YOUR ORGANISATION NEEDS TO DO ABOUT IT

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SEMINAR OBJECTIVES

- Provide a practical overview of sexual harassment, discrimination and bullying laws as they affect the workplace
 - Definitions and examples: What exactly is unlawful?
 - What are the legal consequences?
- Explore what your organisation needs to do about it
 - Prevention: Your duties as an employer or manager
 - Response: Investigation and complaints handling procedures
- Q&A on these issues

1. SEXUAL HARASSMENT, DISCRIMINATION AND BULLYING - DEFINITIONS



1.1 WHAT IS SEXUAL HARASSMENT?

Unwelcome conduct of a sexual nature that a reasonable person would anticipate would offend, intimidate or humiliate.

- s 28B *Sex Discrimination Act 1984 (Cth)*
- s 58 *Discrimination Act 1991 (ACT)*

1.1 WHAT IS SEXUAL HARASSMENT?

- “Unwelcome conduct”
 - Subjective test - based on how the individual perceived and experienced the conduct in question.
- “Sexual nature”
 - All you would expect, and err on the side of caution (gestures, comments, contact, displays).
- “Offensive, humiliating or intimidating behaviour”
 - Objective test - whether a reasonable person in the same situation would have anticipated that offence, humiliation or intimidation might result.

EXAMPLE

RICHARDSON V ORACLE CORPORATION AUSTRALIA P/L [2014] FCAFC 82

- Younger female complainant; older male respondent:
 - *'We should go away for a dirty weekend'*
 - *'I'll bet your sex with [boyfriend] was hot'*
 - *'Let's go sneak into a corner'*
 - *'You know you want me'*
 - *'We have this hot love/hate thing going on'*

CONDUCT WHICH IS *NOT* SEXUAL HARASSMENT

...sexual interaction, flirtation, attraction or friendship which is welcome, invited, mutual, consensual, or reciprocated....

1.2 WHAT IS DISCRIMINATION?

- Unlawful discrimination of a person at work involves:
 - Direct: 'Unfair/unfavourable treatment' 'because' of a 'protected attribute'
 - » but exemption for: inherent requirements, genuine occupational qualification etc.).
 - Indirect: Imposing a 'condition or requirement' with which a person with a 'protected attribute' cant comply 'because' of that attribute
 - » But only applies where the condition is 'not reasonable'.
- What is a protected attribute?
 - Sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, status as a parent or carer, family responsibilities... (BHD Policy at 7.2).
- Example: Returning to work part time after parental leave?

1.3 WHAT IS BULLYING?

PART 6-4B FAIR WORK ACT 2009



- Repeated unreasonable action
 - What would a reasonable person consider to be reasonable (in all the circumstances)?
 - » E.g. abusive/offensive comments; exclusion; unreasonable work demands, excessive scrutiny etc. (BHD policy at 4.3).
- Creates a risk to health and safety
 - Does not include reasonable management action carried out in a reasonable manner.

1.3 WHAT IS NOT WORKPLACE BULLYING?

WHAT IS REASONABLE MANAGEMENT ACTION?

- Fair and appropriate rostering and allocation of working hours
- Setting realistic and achievable performance goals
- Transferring a worker to another area or role for operational reasons
- Deciding not to select a worker for a promotion where a fair and transparent process is followed
- Informing a worker about unsatisfactory work performance in an honest, fair and constructive way
- Informing a worker about unreasonable behaviour in an objective and confidential way
- Implementing organisational change or restructuring

1.4 OUT-OF-HOURS CONDUCT

- Employees are entitled to a private life.
- Out of hours conduct that may be of legitimate concern to employers:
 - Conduct that is a continuation of behaviour in the workplace or affects the workplace; or
 - Where the employer has exercised some control over either:
 - the person's off duty behaviour; or
 - the premises where the conduct occurred.

2. CONSEQUENCES



CONSEQUENCES OF SEXUAL HARASSMENT, DISCRIMINATION AND BULLYING AT WORK

- The human consequences: unhappiness, drop in productivity, absenteeism, staff turnover etc.
- The legal consequences can also be serious:
 - BHD is a WHS issue for employers
 - » Due diligence obligations for directors and officers
 - BHD can become a workers' compensation issue.
 - Stop-bullying orders can be made via the Fair Work Commission.
 - Perpetrators of discrimination and sexual harassment can be ordered by the Courts to compensate victims.

CONSEQUENCES OF SEXUAL HARASSMENT, DISCRIMINATION AND BULLYING AT WORK

- Legal consequences continued...
 - Employers can be held to be vicariously liable for sexual harassment and discrimination:
 - » Where they have failed to take all reasonable steps to prevent misconduct.
 - » Significant damages ordered in *Richardson v Oracle*:
 - Economic loss
 - Non-economic loss

3. WHAT DO YOU NEED TO DO?



3.1 CREATE RESPECTFUL WORKPLACES



3.2 WHAT TO DO ABOUT BHD: *PREVENTION*

- Model from the top down:
 - Do not engage in BHD yourself;
 - Nip minor instances in bud
- Have a written policy in place that includes:
 - Definitions of acceptable and unacceptable conduct
 - Reporting procedures
 - Complaints handling/ Investigation process
- Raise awareness of your policy with workers

3.3 WHAT TO DO ABOUT BHD: *RESPONDING TO A COMPLAINT*

Objective: Efficient and fair resolution of complaints for all parties. No reprisals or unnecessary escalation.

Process: BHD Policy clause 8

- Free to raise it directly with person concerned (if appropriate)
- Report genuine BHD concerns (like any WHS hazard)
- Particulars – asking for more details
- Flexible resolution pathways (informal resolution, investigation, mediation)
- Confidentiality and no reprisals
- 'Fair' and proportionate discipline – (intermediate steps)

SUMMARY

1. Don't engage in questionable workplace conduct – not worth the risk.
2. Don't ignore situations/complaints – resolve at appropriate level.
3. Get a BHD policy in writing and make your staff aware of its existence.
4. Be aware that employers have to manage the interests of all parties (not just complainant).
5. Follow the Golden Rule: treat people as you would like to be treated.

QUESTIONS?

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