

Broadening the scope for workplace harassment and discrimination claims

The recent high profile case commenced by Sally Berkeley against Pacific Brands claiming \$9 million for bullying and harassment in the workplace, and the earlier highly publicised case of Kristy Fraser-Kirk and David Jones, have served to highlight to many employers why it is necessary to take a proactive and vigilant approach to discrimination and harassment in the workplace at every level of the organisation.

A proactive approach is now even more necessary in light of the Federal Government's recent key changes to the Sex Discrimination Act 1984. These changes include introducing new grounds of discrimination in the workplace and broadening the scope of behaviour which will be classed as sexual harassment. It is imperative that employers are aware of these changes to the law and have appropriate policies and procedures in place in the workplace to address these issues.

CHANGES TO THE SEX DISCRIMINATION ACT

Sexual harassment: catching more conduct

One of the major changes to the Act was to modify the test for determining when a person has been sexually harassed to catch a broader range of conduct. The new test asks whether a reasonable person would anticipate 'the possibility' that the person harassed would be offended, humiliated or intimidated by the conduct in question.

This is in contrast to the old test which required that a reasonable person would be offended, humiliated or intimidated by the conduct. The changes also aim to protect employees from sexual harassment in a broader range of workplace contexts by also now including:

- Sexual harassment from co-workers, supervisors, colleagues in other organisations or customers and clients; and
- Harassment or discrimination by way of technologies such as social networking websites, e-mail, SMS communications and mobile telephone cameras.

Guidance to determine whether conduct is sexual harassment

The Government has introduced into the Act a range of circumstances which are to be considered when deciding whether conduct is sexual harassment. The list of circumstances is intended to assist employers in developing effective policies to prevent sexual harassment and to be a guide for the Court.

The list of potentially relevant circumstances includes pertinent characteristics of the victim including the gender, marital status, age, race, ethnicity and sexual preference of the victim, as well as the nature of the relationship between the two people. The inclusion of this list of circumstances is designed to take into account factors that might help to explain why the individual victim regarded the conduct as unwelcome and inappropriate. It may also assist in capturing conduct which would not have satisfied the previous test for sexual harassment,

Discrimination on the ground of 'family responsibilities': widening the circumstances

Another key change to the Act was to broaden the circumstances in which an employee can be discriminated against on the grounds of 'family responsibilities'. Family responsibilities means responsibilities of an employee to care for or support a dependent child, or any other immediate family member who is in need of care and support.

Previously, the prohibition on discrimination on the grounds of family responsibilities only protected employees from termination of their employment on the basis of their family responsibilities. Since the amendments, the Act now protects both men and women from direct discrimination on the ground of family responsibilities in all areas of work,

Examples of the type of conduct which may now be discriminatory include:

- A decision not to hire any person with family responsibilities due to their family responsibilities, or
- Terminating a person's employment before they return to work from parental leave as the employer considers that the employee's family responsibilities will interfere with their work.

Discrimination on the ground of breastfeeding

Breastfeeding has been introduced as a new ground of sex discrimination. The Act now prohibits both direct and indirect discrimination on the basis that a woman is breastfeeding. The type of conduct which may be discriminatory on this ground includes:

- An employer who refused to hire a woman who is breastfeeding, or
- Imposing a requirement on all employees that they must not take any breaks for set periods during the day where that would particularly disadvantage women who need to express milk.

UPDATING POLICIES AND TRAINING EMPLOYEES

In view of these changes to the law, it would be timely for employers to take this opportunity to review their current workplace policies and procedures on discrimination and harassment and consider whether any amendments are required. It is also worth considering re-training employees to ensure that they understand what is, and is not, acceptable conduct in the workplace and what recourse they have if they are experiencing inappropriate behaviour.

As highlighted by the high profile cases like the recent David Jones matter, a failure to keep up to date with changes in the law in this area, including modifying workplace policies and procedures and training employees accordingly, may lead to expensive, time-consuming and potentially damaging litigation.

This article was prepared for the Master Builders Association by Jackson McDonald senior associate Joanne Alilovic, solicitor Claire Sharpe and law graduate Heather McIntyre.