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JMail—Workplace Law

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Employer vicariously liable for discrimination

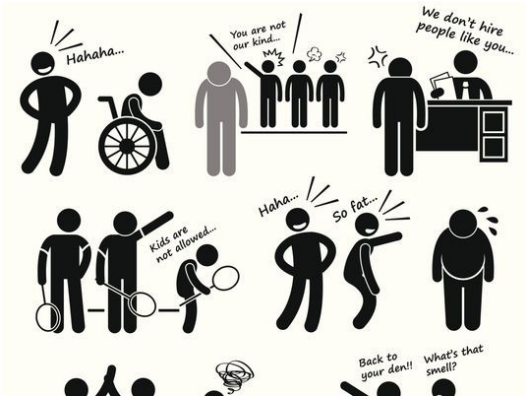
Under discrimination laws an employer can be held vicariously liable for the actions of its employees if it fails to take all reasonable steps to prevent the conduct from occurring.

A tribunal recently warned all employers that they must not only have anti-discrimination policies in place but they must also ensure that the policies are *"communicated effectively"* to all employees or else the company can be held to be vicariously liable for discrimination.

The Northern Territory Anti-Discrimination Tribunal found that the *"mere existence"* of an employer's policies and procedures manual and a clause in its employment contracts obliging workers to represent the organisation in a professional and respectful manner at all times, were insufficient to show that the employer had taken all reasonable steps to prevent the discriminatory conduct from occurring. The conduct involved issues in relation to race discrimination.

Commissioner Rice stated *"I have no evidence before me of any provision of any discrimination training, any development and implementation of an equal employment opportunity management plan, or any publication of an anti-discrimination policy…The mere existence of policies are insufficient."*

Commissioner Rice then stated that there was no evidence *"whether and how the employer communicated its policies effectively to executive officers and whether those officers accepted responsibility for promulgating the policies and for advising of the remedial action when breached."*



Frances Newchurch v Centreprise Resource Group Pty Ltd, Mr Graham Ride & Ms Sarah Ride [2006] NTAD Comm1.

Message for Employers

Employers must not only have in place discrimination policies, but the employees must be regularly and properly trained in relation to those policies.

How we can assist?

We can assist employers in ensuring that their bullying, harassment and discrimination policies are up to date and comply with recent legislation and case law. We can also attend site and train your staff in relation to those policies.

Should we be able to assist you further, then please do not hesitate to contact Steve Gifford (Partner) on 07 3004 0966.

Don't jump the gun on suspected criminal activity

Don't jump the gun and pull the trigger.

Recently the Fair Work Commission found that an employer dismissed an employee in circumstances where it could not have *"reasonably concluded that the worker was involved in criminal activity or that he was dishonest or not forthcoming with the employer's management about these matters."* Mr. Carrick was a long term employee and there was no evidence that his conduct or work performance had ever been an issue. He was entitled to the benefit of the doubt and he did not receive this benefit. Instead, the employer formed an adverse view about the fact that the employee had been charged with a criminal offence and set out to dismiss him. The Court also considered the dismissal harsh in light of his quadriplegic disability.

Henry Carrick v Life Without Barriers [2015] FWC 8980

Message for Employers

The lesson for employers is not to jump the gun in relation to suspected activity. Depending on the nature of the allegations, employers should consider suspending the employee pending its own investigation into the matter.

Dismissal for work capacity dishonesty

"The employer could no longer have the necessary level of trust in the employee whose on-going employment was profoundly linked to the workers compensation system which had been abused"

The case of *Harvey v GM Holden [2016]* FWC 804 Mr. Harvey lodged a claim for a lower back injury in 2003 of which he subsequently suffered many work-related aggravations.

On 29 June 2015, Mr. Harvey attended his doctor and advised that his back injury had been aggravated again. He was certified totally unfit for work until 18 July 2015. During this time, Holden obtained surveillance of Mr. Harvey completing a significant number of manual labour activities that were inconsistent with his alleged incapacity to work. The surveillance tapes were provided to him and he was afforded an opportunity to respond. The behaviour resulted in Holden's dismissal of Mr. Harvey.

The FWC held that Mr. Harvey's behaviour in undertaking various manual labour activities represented a valid reason for the termination of his employment. Mr. Harvey was dishonest to both his doctors and employer regarding his capacity. Further, the Commission advised that the extent to which Mr. Harvey's activities demonstrated that he could have undertaken modified duties at work rather than being certified as unfit for any work, represented a fraudulent claim for workers' compensation benefits.

Despite Mr. Harvey's long, unblemished work history, his age, his back condition and the prospect of receiving a $180,000.00 redundancy package in 2017, the FWC decided the dismissal was not unfair given the gravity of Mr. Harvey's conduct and the extent to which that conduct generated a loss of trust in the employment relationship.

Message for Employers

It is important that an employer provide the employee with an opportunity to respond before dismissal.

How can we assist?

If you suspect an employee is fraudulently claiming workers' compensation benefits, seek advice from us regarding the appropriate procedure for investigating your suspicions.

Fixing the habitually late employee

"Don't you hate when people are late to work. And they always have the worst excuses. Oh, I'm sorry I'm late, traffic. Traffic, huh? How do you think I got here; helicoptered in!?" (Ellen DeGeneres)

Rooney v Pickles Auctions [2016] FWC 858 involved an application for unfair dismissal brought by Todd Rooney against his employer, Pickles Auctions Pty Ltd ("Pickles"). Mr. Rooney was dismissed on 17 June 2015 after sleeping through his alarm and arriving at work more than one hour after his scheduled starting time of 8am. Mr. Rooney had a documented "history of poor attendance, primarily involving his failure to attend at or before the scheduled commencement time". Furthermore, Mr. Rooney had been provided with at least six formal written warnings, three of which were issued in the six months prior to the dismissal, along with evidence of numerous verbal warnings and reprimands about his failure to arrive at work on time.

Taking into account the number of formal warnings issued to Mr. Rooney, the FWC held there was a valid reason for the dismissal of Mr. Rooney. The Commission saw the incident on 17 June 2015 as the "straw that broke the camel's back". Mr. Rooney's application was dismissed.

Message for Employers

Are you sick and tired of workers continually coming into work late? Sometimes, even your best employees can be prone to lateness. Persistent tardiness is not something you have to put up with in your workplace. It can significantly affect the success of your business and needs to be addressed in a proactive manner.

How can we assist?

We can help you draft appropriate warning letters and advise you on any termination questions you may have.

Swearing culture ain't no saviour

The case of *Jamin Horner v Kailis Bros Pty Ltd [2016]* FWC 145 concerned an application for unfair dismissal lodged by Mr Horner for verbally abusing his supervisor in front of other employees and repeatedly using the 'f' word in an aggressive fashion.

This event occurred on the background of a workplace culture of swearing. However, it was accepted that "*there was a difference between swearing as part of a conversation as opposed to swearing at someone*". The FWC noted it was clear that the supervisors and managers were aware of the swearing at the workplace and rarely took any action. It was also noted that employees had not received training regarding the use of offensive language in the workplace. However, despite this the FWC found that Mr Horner's language directed at his supervisor was unduly abusive and aggressive. The FWC assigned no weight to the fact that Mr Horner had apologised for his conduct.

The Commission was satisfied that Kailis Bros had a valid reason to terminate Mr. Horner's employment. This finding was based on the fact that Mr. Horner had previously received a letter of warning for yelling and directing inappropriate remarks towards another employee. This warning advised Mr. Horner that if this behaviour was repeated, or a similar event occurred, then it may result in the termination of his employment.

The FWC went on to say that if it was the first time Mr. Horner had sworn at his supervisor, then the dismissal would have been considered harsh. Equally, if there had been evidence that other staff had, on more than one occasion, sworn at other employees in the manner in which Mr. Horner did and had not been disciplined or sacked, then the dismissal would have been considered harsh.

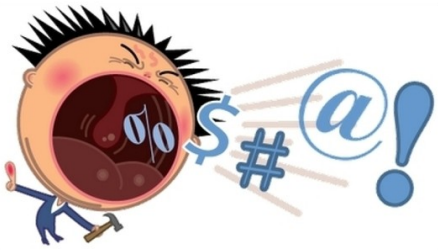
Message for Employers

Whilst a culture of swearing may exist in the workplace, this does not mean that abusive behaviour or language should be tolerated. This type of conduct, if left unaddressed, can cause significant problems for your business and may lead to claims of bullying and harassment.

This case shows that consistent treatment is a crucial factor for the FWC in deciding whether a dismissal for abusive conduct is harsh or unfair.

How can we assist?

If you are concerned that swearing is becoming an issue in your workplace, we can help you implement policies regarding offensive/abusive language and train your staff in these policies. We can also assist you with drafting appropriate warning letters and advise you in relation to termination.



No exclusion zone no excuse

A worker of Visy was struck by a reversing front-end loader (FEL) and killed. The worker operated the boom gate to allow the entry of a semi-trailer into the yard site and walked to a position in the yard where he directed the truck driver where to park and unload. Whilst the truck was unloading, the deceased worker was struck by the reversing FEL and suffered fatal crush injuries.

At the time of the incident, in breach of Visy's policies:

1. No traffic controller was present to ensure that safe distances were maintained between pedestrians and FELs. No traffic controller had been present for several months prior;
2. There were no physical barriers to protect pedestrians (either employees or truck drivers) performing duties within the yard from being struck by mobile plant;
3. There were no exclusion zones marked out by the use of painted zones on the floor of the yard;
4. There were no areas within the yard within which mobile plant could operate in which pedestrians could not enter without authorization;
5. Two way radios were not used to allow communication between employees within the CPY;
6. The FEL was operating within 10 m of an unloading truck; and
7. The FEL was operating within 10 m of pedestrians, being the deceased worker and the truck driver.

Further, the reversing alarm on the FEL was not audible when it was operating above idle.

Following the incident, Visy took a number of steps to develop a safe system of work for operating mobile plant within the yard. Measures include installing concrete barriers within the yard, designating exclusion zones with red paint, engaging a permanent traffic controller, creating a restricted area within the Yard in which pedestrians could not enter without permission and revising and updating Site Rules and Safe Work Practices. The approximate annual cost to Visy of this was $692,000. Further, Visy paid for the funeral expenses.

On sentencing the company, the Judge stated "The failures were endemic and were apparent at each level of the offender's operation. Management failed to provide the physical barriers and the painted exclusion zones, the supervisors failed to enforce the systems...." Further the company had been on notice of the lack of systemic controls in the yard as a result of an incident that took place previously when a truck driver's foot was run over by a reversing FEL.

The company had prior offences and received a $412,500 fine after 25% discount was applied for an early guilty plea.

WorkCover v Visy Paper Pty Ltd [2015] NSWSC 284

"The failures were endemic and were apparent at each level of the offender's operation..."

Jensen McConaghy LAWYERS

Relationship. Resolution. Result.

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Jensen McConaghy are workplace law and defendant insurance litigation experts based in Brisbane. We are market leaders, with the largest statutory insurance practice in Queensland and a team of talented lawyers with many years' experience in bringing about desirable outcomes for clients.

Our expertise is demonstrated by our enviable track record in public, products and property liability, compulsory third party, workers' compensation, commercial insurance and workplace law claims.

Are you sick of paying too much on legal spend? Are you receiving service that is of value?

Whether you are a small expanding business that is looking to employ a human resources professional or you are a larger business with a dedicated human resources team, we can offer your personnel 24/7 telephone access to our lawyers for all your workplace law needs and all for a very generous and competitive fixed monthly fee retainer.

This not only ensures that your business has certainty of legal spend for workplace law issues, but it also means that your personnel will receive fast and efficient service that is of value. Too often lawyers are preoccupied with focusing on selling their time which is what often transpires under the traditional hourly rate charging method. Under our proposal, we don't have this issue and we stay completely focused on providing valued service to our clients.

If you would like to know more about our proposal, then please contact Steve Gifford on 07 3004 0966 or sgifford@jensenmc.com.au.