STEVENS & ASSOCIATES LAWYERS

January 2024

A VISION IN THE WORKPLACE

Our January edition of Vision includes:

- Positive Duty to Prevent Workplace Sexual Harassment; and
- Substantial Penalty for Employer for Workplace Breaches.

Positive Duty to Prevent Workplace Sexual Harassment

Following the introduction of the *Anti-Discrimination and Human Rights Legislation Amendment* (Respect at Work) Bill 2022 (Cth) **(the Bill**), employers have a positive duty to prevent workplace sexual harassment and discrimination.

Background

The purpose of the Bill is to address sexual harassment in Australian workplaces through implementing 7 key recommendations of the Respect@Work: Sexual Harassment National Inquiry Report (2020) (**the Report**).

Key changes

Positive duty

The Bill amended the Sex Discrimination Act 1984 (Cth) (**SD Act**), introducing a positive duty on employers and persons conducting a business or undertaking (**PCBUs**) to eliminate:

1. workplace sexual harassment, sex discrimination and sex-based harassment;
2. conduct that amounts to subjecting a person to a hostile workplace environment on the ground of sex; and
3. certain acts of victimisation.

The positive duty was a key recommendation of the Report, led by Sex Discrimination Commissioner Kate Jenkins. This important change requires employers and PCBUs to shift their focus to proactively preventing workplace sex harassment and discrimination, rather than responding only after it occurs.

New Australian Human Rights Commission (AHRC) powers

New regulatory powers have been conferred on the AHRC to investigate and enforce compliance with the positive duty.

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From Tuesday, 12 December 2023, the AHRC was given new powers to commence an inquiry and ensure compliance when it 'reasonably suspects' an organisation is not complying with its positive duty under the SD Act.

The AHRC has been empowered to:

1. Conduct inquiries into compliance and provide recommendations to achieve compliance;
2. Issue compliance notices specifying actions to take or refrain from taking, to address non-compliance;
3. Compel the production of information and documents;
4. Enter into enforceable undertakings in which organisations agree to do, or refrain from doing, certain things;
5. Examine witnesses; and
6. Apply to the federal courts for orders to direct compliance with compliance notices, where it 'reasonably suspects' an organisation is not complying with its positive duty under the SD Act. The consent of the relevant organisation or business is not required for the AHRC to commence an investigation.

What does this mean for you?

It is critical that organisations understand their obligations to ensure they comply with the positive duty now enshrined in the SD Act.

With the introduction of the AHRC's new ability to investigate and utilise a range of investigative and enforcement powers, knowing your obligations and implementing recommended strategies to meet them is critical.

The AHRC released Guidelines for Complying with the Positive Duty in August 2023, which provide information about what the positive duty entails, who must meet it, what 'reasonable and proportionate measures' means in practice, how the duty will be enforced and additional, related legal obligations.

The Standards are:

1. **Leadership**: senior leaders must understand their obligations under the SD Act and ensure appropriate measures are in place to prevent and respond to relevant unlawful conduct. They must also ensure these are communicated to workers and regularly reviewed for efficacy.
2. **Culture:** organisations and businesses must foster a safe, respectful and inclusive workplace culture.
3. **Knowledge:** organisations and businesses must ensure a policy in relation to

respectful behaviour and unlawful conduct is developed, communicated to workers, and implemented in practice.

4. **Risk management:** organisations and businesses need to recognise the equality and health and safety risks that relevant unlawful conduct poses in the workplace.
5. **Support:** appropriate support needs to be made available to workers of all levels who experience or witness relevant unlawful conduct.
6. **Reporting and response:** appropriate options to report and respond to incidences of relevant unlawful conduct must exist, and responses to reports should be consistent, timely and minimise harm to people involved.
7. **Monitoring, evaluation and transparency:** collection of appropriate data to enable businesses and organisations to understand the occurrence of, and take action in relation to, relevant unlawful conduct in their workforce.

Key Takeaway

The Bill places a crucial responsibility on Australian employers to proactively combat workplace sexual harassment and discrimination. The amendments to the SD Act underscore the need for employers to prioritise the creation of safe workplaces and understand their legal obligations for effective compliance with the new legislation.

If you have any questions about the Amendment and what these changes could mean for you, please do not hesitate to contact Nick Stevens, Peter Hindeleh or Josh Hoggett.

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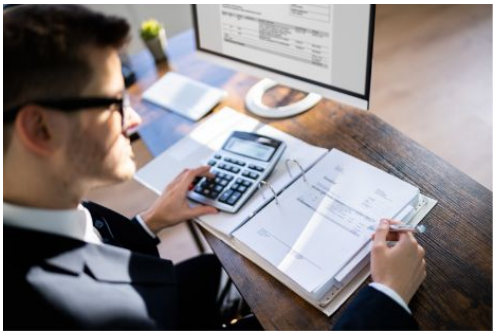

Substantial Penalty for Employer for Workplace Breaches

The Federal Family and Circuit Court has imposed a substantial $163,000 fine on Bloombird Education Pty Ltd (‘**the Company’**) for multiple workplace breaches, including the non-payment of over 500 hours of accumulated annual leave to a former employee.

Background

In the decision, Judge Nicholas Manousaridis found the childcare provider failed to pay a worker’s full entitlements upon her exit from the company in October 2022. The breaches extended to underpaying superannuation contributions, neglecting to provide employee records upon request, and failing to pay annual leave and annual leave loading.

Central to the case was the Company’s deduction of 515 hours of the employee's annual leave from her record, just nine days before her departure from the Company.

Reasoning

In the latest hearing, Judge Manousaridis addressed the penalties for these breaches.

The two penalties that were assessed were:

1. Failure to pay accumulated annual leave; and
2. Failure to pay 17.5% loading on the annual leave.

The worker, in her submissions, had argued that these two breaches would be grouped as a single contravention. However, referencing the precedent set in a similar case, Fair Work Ombudsman v Australian Wild Tuna Pty Ltd & Anor, the Judge disagreed, treating them as separate violations under the Fair Work Act 2009 (Cth) (‘the Act’).

The Judge clarified that the breaches related to two distinct legal obligations: the non-payment of accrued annual leave (under section 90(2) of the Act) and the failure to pay the required 17.5% leave loading (as stipulated in the Children's Services Award). Rejecting the notion of these

being a single contravention, he maintained the separation of these obligations in his judgment.

Final Order

The Company was found to have contravened:

Section 44 of the Act which prohibits employers from contravening the National Employment Standards due to their non-payment of annual leave.

1. Section 45 of the Act which prohibits employers from contravening any term of the relevant modern award due to their failure to pay the 17.5% loading stipulated in the Children's Services Award.
2. Regulation 3.42(3)(b) of the Fair Work Regulations which requires employers to provide a copy of the employee record with 14 days of receiving a request from an employee or former employee.

The Judge inferred that the Company's non-compliance was a result of financial incapacity to pay. Nevertheless, he emphasised that this did not diminish the deliberate nature of the breaches.

Judge Manousaridis identified the necessity for penalties at the higher end of the spectrum, considering the deliberate failure to provide employee records.

He also highlighted the need for specific deterrence, given that the Company remained active despite initially claiming that they were insolvent.

As a result, the Court ordered the Company to pay the worker a total of $136,000, with an additional $27,200 levied personally on the director.

The Court ordered $42,374 in compensation to the employee for unpaid annual leave, annual leave loading, superannuation and interest.

Takeaway

This ruling serves as a reminder to employers about the consequences of underpaying employees, particularly regarding accrued leave and providing employee records. It highlights the Courts' readiness to impose substantial fines for such violations, reinforcing the importance of adherence to employment laws and regulations.

If you have any questions about annual leave entitlements or specific requirements of modern awards and the Act, please do not hesitate to contact Nick Stevens, Peter Hindeleh or Josh Hoggett.