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Webinar Q&As: Employment Relations National Seminar Series | Bullying, Discrimination and Harassment

Piper Alderman provides the Answers in response to the Questions received during our Employment Relations National Seminar Series | Bullying, Discrimination and Harassment webinar on 3 March 2022.

To view the on demand webinar, please register here.

Q1: Do the new anti-sexual harassment provisions in the Fair Work Act also include volunteers?

A1: The definition of 'worker' for the purposes of Part 6-4B of the Fair Work Act 2009 (Cth) (the anti-bullying and anti-sexual harassment jurisdiction) includes volunteers.

This Part of the Act specifically states that 'worker' has the same meaning as in the *Work Health and Safety Act 2011* (Cth) and that this includes an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a **volunteer**.

Q2: How should an employer respond when an employee raises concerns regarding bullying or harassment but then does not provide you the information you need to effectively investigate the matter.

A2: This can be a common problem experienced by employers, particularly when a complainant becomes fearful of reprisals and provides very minimal information, or they want to maintain a sense of control over their complaint. Sometimes employees (through no fault of their own) simply fail to understand the level of detail required to properly deal with a complaint.

In these circumstances it is important to remember that the employer has the primary duty of care to provide a safe working environment and if it becomes alerted to potential risks to health and safety at work, in the form of bullying and harassment, it must take steps to eliminate those risks. Employers have a fundamental responsibility to respond in an effective and thorough manner (in accordance with its policies and procedures) to any allegations raised.

Where an employee provides limited information, depending on the circumstances employers should consider the following actions:

1. Engage with the employee to try to better understand whether they are intentionally not providing the information needed (and why this might be the case), or whether they are perhaps under a misapprehension that they have provided enough information. Provide responses to any concerns or misunderstandings.
2. Explain (gently) that the employer has a responsibility to respond effectively to all allegations raised and that it will need additional information from the employee in order to do this. Explain that once the Employer becomes aware of any allegations, it must act in accordance with its statutory obligations (including under the *Sex Discrimination Act 1984* (Cth) and the applicable Work Health and Safety legislation). By raising a complaint, the employee is putting the employer on notice that there may be a risk to the health and safety of all employees in the workplace.
3. Explain to the employee that the process of managing complaints will be directed by the employer in accordance with any applicable workplace policies in place and mindful of the employer's statutory obligations.
4. Reassure the employee that their complaint will be dealt with fairly in accordance with any applicable workplace policies in place and will be treated seriously by the employer.
5. Offer the employee support options, such as the ability to have a support person with them while they provide further information about the allegations, and the ability to access any Employee Assistance Program in place.

6. Encourage the employee to provide the information needed, but also make it clear to them that an investigation may still proceed, even if they decline to provide the information required (for example, by exploring whether there is other evidence that could assist such as CCTV footage, electronic evidence including email communication, or eyewitness accounts).
7. Reassure the employee that their complaint will be dealt with on a sensitive basis, and that any victimisation will not be tolerated and should be immediately reported so that it can be dealt with. Do not promise complete confidentiality where you cannot guarantee it (for example, if the matter ends up in litigation or disclosures need to be made elsewhere).

However, ultimately it will be important to take into consideration whether the employee has the capacity (whether mentally or physically) to participate meaningfully in an investigation. For some employees this may not be the case and the investigation will need to proceed without further information (noting that evidence is sometimes available through other sources).

Q3: Does “the workplace” extend to social media, particularly where bullying/harassment/discrimination occurs via correspondence outside of the workplace and in their own time, however the relationship between the two parties exists solely due to their shared employer?

A3: This is an area of the law that is still evolving. However, recent decisions tend to support an inference that the “workplace” will extend to social media in the event of work colleagues engaging in inappropriate conduct such as bulling/harassment/discrimination via social media.

There have been decisions in which an employee’s use of social media (outside of work hours) has adversely impacted their employment. For example in a decision last year (*Mr Matthew Thompson v 360 Finance Pty Ltd* [2021] FWC 2570) an employer was able to successfully defend an unfair dismissal claim from a finance broker employee who posted sexually-explicit memes to social media.

More recently, an employee of a union was unsuccessful in his unfair dismissal claim against his employer for racist and homophobic posts to Facebook (*Conrad John Corry v Australian Council of Trade Unions T/A ACTU* [2022] FWC 288).

These cases also highlight the importance of a well-drafted and comprehensive social media policy that sets out the employer’s expectations/boundaries for social media usage and the importance of training/education for staff about appropriate use of social media.

Q4: If an employee is harassing another employee completely outside of any work event i.e. inappropriate texts or stalking over the weekend does that also constitute potential harassment.

A4: It certainly can, and such a scenario warrants further consideration by an employer.

Importantly, if an employee approaches their employer to make an allegation that they are being harassed and stalked outside of the work environment, the employer should look at what steps it can take to support the employee to report this conduct to the Police if they wish to do so (noting stalking is a criminal offence in all Australian states and territories). In most cases a workplace investigation into the conduct will also be warranted (particularly if physical text messages exist) as the alleged perpetrator’s conduct is likely to be a breach of workplace harassment and code of conduct policies.

The Employer should also consider and take practical steps to ensure any risks to the employee’s health and safety at work are eliminated or minimised.

The decision of *Abdul Soomro v Murray’s Australia Pty Ltd T/A Murray’s Australia* [2016] FWC 8211 involved a male employee stalking and harassing his female colleague by sending repeated unsolicited and inappropriate text messages both during work hours and outside of work hours. Vice President Watson stated, “*Whether* [the messages] *were outside of work or not, they were clearly of an inappropriate nature; they related to contact that was clearly unwelcome and related to and had implications for the relationship between employees of Murray’s. These were legitimate considerations of Murray’s in considering whether Mr Soomro’s conduct amounted to misconduct in relation to his contract of employment*.”

These can be extremely difficult situations to manage, particularly if the alleged perpetrator is performing well and behaving appropriately at work. Advice should be sought early on.

Q5: Looking at Keron v Westpac, is the pendulum swinging too far?

A5: The inappropriateness of the particular misconduct in this decision is relatively straight forward. There have been

many decisions over the years where misconduct that occurred after official work events conclude has been sufficiently connected with the employment to warrant dismissal.

Where this decision is perhaps a little different is that we see the decision of Keron v Westpac as an example of the Fair Work Commission setting a high standard of behavioural expectations and conduct on behalf of the employer, namely cautioning against the holding work-related events where excessive consumption of alcohol is permitted.

This decision appears to reflect what is happening at a broader societal level in Australia, which is that all forms of unwelcome conduct of a sexual nature are no longer being tolerated, and that employers are expected to ensure workplace events do not increase the risk of such behaviours occurring.

Q6: How often should we be training our staff on these requirements?

A6: We recommend staff be trained in the areas of bullying, harassment and discrimination at least once every two years, and whenever the relevant workplace policies are updated. If cultural issues emerge, training should be done as a matter of priority to address those concerns.

Q7: What are some practical ways to train our teams?

A7: A: Training can be done on site, in an external (neutral) location, in a face to face setting, or remotely on-line. Some employers run their own training sessions because they have internal expertise. Others look to engage external training providers. There are many ways to ensure employees receive adequate training. There are also extensive resources available on websites such as the Australian Human Rights Commission, and Safe Work Australia. Should your organisation be considering rolling out new training sessions on this important topic, please feel welcome to contact a member of Piper Alderman’s Employment Relations team to discuss how we might be able to assist.

Disclaimer: The contents of this Q&A are intended only to provide a summary and a general overview on issues of interest. The responses are not intended to be comprehensive, they do not constitute legal advice and do not take into consideration your specific circumstances. You are encouraged to seek legal advice from a member of Piper Alderman’s Employment Relations team before relying on any of the content.