

Employment and Industrial Team Update

Discrimination: An Update

Organisations should be very much aware of their obligations on discrimination issues. Policies need to be reviewed and updated regularly, employees informed and training be undertaken.

Case law is ongoing in the area of discrimination and three recent cases give a reminder to employers and employees of their rights and responsibilities and what needs to be awareness in this crucial area of having a workplace free from discrimination in all its forms.

Perry –v- State of Queensland & Ors [2006] QADT 46

This decision was delivered on 20 December 2006. The complainant, Ms Perry, made 21 complaints of direct discrimination, victimisation and sexual harassment during her employment with the Queensland Police Service. Complaints included the following:

1. A delay in the completion of Ms Perry's performance assessment appraisal even though the supervisor completed performance assessments for male colleagues on time;
2. That Ms Perry was excluded from a staff meeting – argued to be discrimination on the basis of sex or victimisation;
3. Posters of women wearing bikinis which offended Ms Perry and about which she complained were either sexual harassment or direct discrimination on the basis of sex;
4. The inclusion in an office joke book of a photograph of Ms Perry and her husband in Canberra which had been entitled We made love in our nation's capital Forest and I which she argued constituted sex discrimination because similar jokes were not made about her colleagues' sex lives;
5. There was gossip in the office about her marriage to another police officer including a betting arrangement on how long the marriage would last which she argued was sex discrimination; and
6. The writing of a mathematical equation on a whiteboard about the amount of leave she had taken which she argued constituted discrimination on the basis of sex or impairment given Ms Perry had sustained back and neck injuries previously and had taken leave as a result.

President Dalton of the Queensland Anti-Discrimination Tribunal made findings that Ms Perry as complainant was an unreliable witness and relied on her evidence only where it was corroborated by others. Of the 21 complaints made only three were found to be established successfully.

The Canberra photograph was held to be sex discrimination as *intimate details of a male officers' domestic sexual and private life were not the subject of office banter and disrespect the way the complainant's was* – found in a general office environment of joking and teasing. Further the gossip about Ms Perry's marriage was found to be sex discrimination for the same reason as it was *outside the normal run of jokes in the office and concerned the complainant's private life*. The whiteboard mathematical equation complaint was found to constitute discrimination on the grounds of impairment because it

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was designed to make the point that the complainant took excessive leave and with less favourable treatment within s10 of the Anti-Discrimination Act 1991 (Qld).

You will note the references to joking and teasing and banter often found in male dominant workplaces. In such a culture, discrimination issues can occur. Employers must be ever vigilant of specific employees being targeted or victimised even though there is a culture of what is seemingly innocuous toying and froing.

Also of interest is the finding Ms Perry was an unreliable witness and she was only accepted where her complaints were corroborated by others. In preparing for such cases, employers must be very much aware of where evidence exists meeting a case on each and every allegation.

Lesson Learned

Be very wary of banter within the office and situations where there is a targeting of a particular employee or employees outside a group environment.

There have been two recent decisions on access of pornography via email and internet. Every employer should have an email and internet use policy and there should be regular review of that policy and of actual conduct that may be offending such policy. Amnesties should be considered on occasions and there should be consistency in application of the policy after the amnesty.

Wake –v- Queensland Rail AIRC 19 October 2006 (PR 974391)

At first instance Commissioner Bacon had found that Mr Wake's termination of employment for the storage of email containing pornographic images was harsh. The Full Bench of the Australian Industrial Relations Commission overturned that decision.

Queensland Rail had taken comprehensive action on its expectations and training for its employees on its policy. The object was to prohibit the use of email and internet to store or transmit sexually related pornographic or violent material.

The employee had stored email images firstly in late 2003 and then in late 2005 and early 2006.

The employer, Queensland Rail, had been taking steps to deal with the problem with inappropriate email use from 1999. There were electronic warnings, multiple general warnings and the employer sought specific acknowledgement of its requirements on email use in December 2004. Then in December 2005, Queensland Rail developed and published an updated policy. In addition there was a Code of Conduct which, although different in terms to the policy, reinforced the requirements of the policy. Other steps were taken by the employer to make employees aware of the policy including news information articles and information contained in pay slips.

Queensland Rail discovered the images on the employee's computer in September 2005 but did not take steps against the employee for five or six months until the next series of images were discovered.

At first instance Commissioner Bacon found that only six of the images were contrary to the policy and weighed them against the employee's 27 years service and assessed an inappropriateness level of the content of the emails. The Commissioner then found that the termination was harsh.

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Queensland Rail appealed. One aspect the Full Bench noted was that Queensland Rail instigated a two week clean up period in November 2004 where it called upon employees to remove inappropriate images. Although the employee thought that the images from 2003 were no longer there, it was noted that this was a relevant consideration in deciding whether this dismissal was harsh, that is that he had breached the policy in the past.

The Full Bench decided that the termination was not harsh given the policy of the employer, the conduct of the employee and the steps taken by the employer to bring awareness of the policy to all employees. Importantly the following comments from the Full Bench are applicable:-

As we indicated earlier, control of email traffic in inappropriate material is a matter of legitimate concern to employers. The Commissioner's approach might well be interpreted to mean that employees with long service ought to be immune from termination of employment unless guilty of breaches of the policy involving large amounts of "hard core" pornography. We think that an employer is entitled to take a firmer line than that. In this case the appellant went to great lengths to alert employees to the policy and to warn them that breaches would lead to dismissal. Despite this the employee breached the policy on a number of occasions in a substantial way.

The Full Bench also did not view favourably the assessment system undertaken by the Commissioner on the images.

Further comment from the Full Bench of interest:-

For a number of years the appellant has had a firm and well publicised policy prohibiting the use of its electronic communication system to store or transmit material which is sexually related, pornographic or violent. Obviously each case is to be decided on its merits, but in general it is in the public interest that, subject always to considerations of fairness, the Commission's decision should support employers who are striving to stop inappropriate email traffic.

Budlong –v- NCR Australia Pty Ltd [2006] NSWIR Comm 288, 3/11/06

This is a New South Wales Industrial Commission decision where the Commissioner at first instance upheld the employer's decision to dismiss the employee but on appeal the Full Bench of the Commission found that the dismissal was harsh.

Mr Budlong had been dismissed for breach of the employer's code of conduct after pornographic images were found on his computer. The employee stored hundreds of emails in a folder on his computer which he had titled **Amusements**. But for one email, Mr Budlong had not forwarded these emails onto any other people.

The employee argued there was a culture of pornographic emails being regularly shared, in particular amongst a group of managers of which he was one. The argument was raised why it was unfair to single him out for dismissal.

The employee conceded a breach of the employer policy. Evidence was led that the group of managers had been largely made redundant, leaving Mr Budlong with an opportunity to **mend his ways**. The images were also found to be at the **extreme end**. The employee was also aware that the employer had warned and dismissed another employee for similar actions to those of Mr Budlong.

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The Full Bench overturned the dismissal and found that it was harsh. It accepted that Mr Budlong had been caught up in a culture where pornographic emails were exchanged. The Full Bench noted *senior managers not only condone the practice but actively encouraged ... participation.*

The Full Bench did not agree with the argument of the employer that its policy was a **zero tolerance** policy. The Full Bench found the policy/code of conduct did not extend to pornographic images stored on computers. With respect to the other employee dismissed there had been then no warning to employees about reasons and putting them on notice about consequences of breach of the policy. The Full Bench pointed out *the flow of pornographic emails ... continued unabated.*

The Full Bench also compared the employers by the Wake decision with QR being far more diligent than NCR.

The Full Bench also commented on the delay in terminating Mr Budlong after finding the images.

Lessons Learned

Employers must be vigilant to make employees aware of the policy, continue to reinforce the policy, train on the policy and then act on it and then make employees aware that it has been acted upon. Amnesties might be considered and then investigations undertaken for breaches after that time. Policies should be reviewed to make sure that they are up to date with current cases as decided. In particular, once a breach is found, the employer should not risk waiting time to undertake an investigation and act upon a breach.

For further information about discrimination and policy issues concerning discrimination matters, please do not hesitate to contact the Employment and Industrial Team:

Christopher Campbell – (07) 3223 64403
ccampbell@qmtlaw.com.au

Shelley Clark – (07) 3223 64405
sclark@qmtlaw.com.au

Rebecca Nichols – (07) 3223 6415
rnichols@qmtlaw.com.au