

Episode 76: Summary

Episode name: Building Back Better: Creating and Amending Workplace Policies in the New Employment Age

Guest(s): Nicola Martin

What area(s) of law does this episode consider?

Best practice bullying, discrimination and harassment policies and employment dispute resolution.

Why is this topic relevant?

In 2020 and 2021, an astonishing 8.6% of people responded to the University of South Australia's *Workplace Barometer* saying they had been bullied at work. Incidentally, this was highest among government employees.

Similarly, more than a quarter of people reported suffering gender or racial harassment at work and just over 16% reported suffering sexual harassment.

With this in mind, workplace policies are an important part of modern employment and can assist employees and employers to understand their legal rights and obligations at work - as well as who to talk to and what to do when things go wrong.

What legislation is considered in this episode?

Fair Work Act 2009 (Cth) (**Fair Work Act**)

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (Cth) (**Respect at Work Act**)

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) (**Secure Jobs, Better Pay Act**)

What are the main points?

- People may assume that due to COVID and hybrid workplaces instances of bullying and harassment would have decreased, however, they are still ever present and done in different ways.
- Helpfully for lawyers, however, interactions through technology are recorded. Meaning gathering evidence for these investigations is easier.
- Traditionally work health and safety legislation has targeted physical injuries in the workplace, however, recently there has been a shift in focus to psychological harm as evident in the *Respect at Work Act*.
- It has been difficult to attract and retain staff during COVID, resulting in staff being overworked or under-resourced. According to Nicola, this could constitute a psychosocial risk or even bullying.
- The *Secure Jobs, Better Pay Act* amends the *Fair Work Act* to strengthen sexual harassment provisions. The definition of serious misconduct was amended to include sexual harassment as an example of serious misconduct.
- Coupled with the *Respect at Work Act*, persons conducting a business or undertaking will have a positive duty to take reasonable and proportionate measures to eliminate sex discrimination and sexual harassment.

- What is considered “*reasonable and proportionate*” will vary from company to company.
- The *Respect at Work Act* opens a new regime in the Fair Work Commission that allows employees to apply for a stop sexual harassment order, which is similar to a stop bullying order.
- In the *Fair Work Act*, bullying is defined as repeated and unreasonable behaviour which causes a risk to a person's health and safety. Generally, a one-off incident will not be sufficient to constitute bullying.
- Discrimination is when somebody is treated less favourably and it links to a protected attribute, so you're treated less favourably *because* you have a protected attribute. For example, age, sex or disability.
- Indirect discrimination is where an employer applies a condition or a policy or a requirement, which on its face may look fair and reasonable, but could or does have a disproportionate impact on a person or a group of people with a protected attribute.
- Harassment in of itself is not unlawful. Certain types of harassment can be unlawful, such as those covered under the disability discrimination legislation and racial discrimination legislation.
- A good bullying, discrimination and harassment policy sets up expected standards of behaviour within the workplace and is easily understood.
- It should cover contractors, temporary staff, clients and visitors and should include examples. Policies should not be contractual in nature to allow for easy updating the policy without having to seek the consent of employees as parties to the contract. Ensure these changes are communicated.

What are the practical takeaways?

- Don't just look at bullying, discrimination and harassment policies as a compliance issue. It relates to the culture of the business and creating a better workplace environment for employees.
- Employers should look at their risk assessments, processes, procedures and policies to ensure that, as far as reasonably practicable, they're taking steps to reduce psychosocial risks.
- If employers do not wish to amend the appropriate workplace behaviour policy, still look to implement a hybrid work or working from home policy that reminds employees that the standards of conduct expected in the workplace are just the same as when you are working from home.
- To meet the new positive duty to take reasonable and proportionate measures to reduce sexual harassment in the workplace, an employer should conduct a risk assessment, identify areas of concern in the organisation and conduct training to address it.
- Ensure you have written agreements with contractors that contain a provision that states that they are expected to comply with the principles, policies and

procedures that relate to work health and safety and appropriate workplace conduct.

- Conduct continuous training regarding work health and safety policies, beyond just having an employee sign an agreement at the commencement of employment. Where possible, conduct the training face-to-face although, if required, online courses and modules will suffice.
- Despite wanting a matter to remain confidential, if an investigation has commenced where multiple employees are being interviewed, it is likely to get out. If the investigation has been handled properly, then it will likely reflect well on the organisation.

Show notes

[Dollard, M.F., Owen, M., Afsharian, A., & Potter, R. \(2021\). *Bullying and Harassment in Australian Workplaces 2021: Australian Workplace Barometer Fact Sheet*, University of South Australia, Psychosocial Safety Climate Global Observatory](#)