



Express law *fast track information for clients*

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Liability of employer for unlawful discrimination in workplace

The Federal Court has held that an employer can be liable for unlawful sexual harassment engaged in by an individual employee where the applicant establishes that:

- **the employee did sexually harass the applicant contrary to the provisions of the *Sex Discrimination Act 1984 (SDA)*, and**
- **the employer is deemed to be liable for the unlawful conduct of the employee in accordance with section 106 of the SDA.**

Ingram-Nader v Brinks Australia Pty Ltd

[2006] FCA 624 (26 May 2006) (Coward J)

The Court held that the employer can be the only respondent to the court proceedings. The employee alleged to have engaged in unlawful conduct need not be a respondent (jointly with the employer) to the court proceedings.

The case reinforces the need for employers to have in place adequate programs for the prevention of sexual discrimination and harassment within the workplace, including mechanisms for the reporting and investigation of alleged incidents of sexual harassment.

Legislation

Sexual harassment, as defined by the SDA, is unlawful. Certain discrimination is also unlawful under the SDA. Complaints of sexual harassment or discrimination can be made to the Human Rights and Equal Opportunity Commission (HREOC) in accordance with the provisions of the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act).

Generally the President of HREOC is required to enquire into complaints and attempt to conciliate them (see section 46PF). The President can terminate complaints on various grounds, including where the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation (see section 46PH of the HREOC Act.)

There is no time limit for the making of complaints to HREOC. However, the President may terminate a complaint on the ground that the complaint was lodged more than 12 months after the alleged unlawful discrimination took place.

Where a complaint has been terminated, the complainant can then commence proceedings in the Federal Magistrates Court or Federal Court within 28 days of the issue of the notice of

termination. Court proceedings for unlawful conduct in breach of the SDA are generally confined to matters the subject of the complaint to HREOC. The proceedings can allege unlawful discrimination by one or more of the respondents to the terminated complaint (see section 46 PO of the SDA). A 'respondent', in relation to a complaint, is defined by section 3 of the SDA to mean the person or persons against whom the complaint is made.

Section 106 of the SDA provides that in certain circumstances the employer may be liable for conduct of its employees which amounts to unlawful discrimination. Section 106 provides:

- (1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:
 - (a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or
 - (b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

- (2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

Complaint

In the present case the complaint was made to HREOC in December 2004. It related to alleged sexual harassment in the period from December 1998 to August 2004. The complaint was against the employer and against several former work colleagues of the complainant.

The employer was not aware of any complaints of sexual harassment before being advised of the complaint to HREOC. The alleged individual harassers were no longer employees.

The complaint was terminated by the President of HREOC. The applicant did not institute proceedings in the Federal Magistrates Court within the prescribed period of 28 days. The applicant commenced proceedings out of time and sought an application for extension of time to commence the proceedings.

Decision of Federal Magistrate

Federal Magistrate Driver refused the applicant's application for an extension of time within which to commence the proceedings in the Federal Magistrates Court. He did so on various grounds. He held as follows on what he referred to as the issue of 'vicarious liability'.

The complaint to HREOC was against the employer only even though it was a complaint of sexual harassment by reason of the applicant's sexual preference. No complaint having been made against the alleged harassers, no proceeding can now be brought in this court against those persons. The jurisdiction of the court is limited to considering the claim against the harasser's employer and would be based on asserted vicarious liability.

Decision of Federal Court

The Federal Court allowed the appeal from the decision of Driver FM. One ground on which the appeal was allowed was an error by Driver FM on the issue of 'vicarious liability'. On this issue the Federal Court held as follows.

- The liability of an employer for the conduct of unlawful conduct of an employee depends on section 106 of the SDA, not on common law principles of vicarious liability.

- The effect of section 106 is to deem the employer liable for the unlawful conduct committed by individual employees without the need to prove the elements of vicarious liability against the employer.
- The effect of section 106 is to render the employer severally liable for the unlawful conduct of its employee. The Court therefore rejected an argument that section 106 makes an employer jointly, but not severally liable, such that Order 6, Rule 5 of the Federal Court Rules would apply. That Rule provides that a party, which is jointly but not severally liable for relief, may apply for a stay of proceedings until all other persons jointly liable are joined to the proceedings.
- The result under the SDA was consistent with common law principles for vicarious liability of employers for tortious conduct of employees. At common law a vicariously liable employer is a joint tortfeasor with the individual employee. At common law joint tortfeasors are jointly and severally liable for any loss occasioned by their tortious conduct.

Comments

Conduct involving alleged unlawful sexual harassment can often involve only two individual employees, the alleged perpetrator and victim. In such cases, the facts relevant to the allegations are peculiarly within the knowledge of the two individual employees.

Where a complainant to HREOC alleges unlawful sexual harassment or discrimination by an individual fellow employee, that employee should be a respondent to the complaint (see the definition of respondent in section 3). Such an individual employee should be identified by HREOC as a respondent to the complaint.

In any cases where the employer is a respondent to a HREOC complaint, the employer can seek an amendment to the complaint to add as a respondent an individual employee who has allegedly engaged in unlawful conduct. Section 46PF(3) of the HREOC Act enables any complainant or respondent, with the leave of the President, to amend a complaint to add, as a respondent, a person who is alleged to have done the alleged unlawful conduct.

Even where an individual employee allegedly responsible for unlawful conduct is a respondent to a complaint before HREOC, this does not necessarily mean that the individual employee must be a respondent in any court proceedings.

Where an individual employee who has allegedly engaged in unlawful conduct is not named by an applicant as a respondent to court proceedings, the respondent employer could seek orders to have the employee joined to the proceedings as a respondent. In cases where an individual employee is not made a respondent (for example, because the employee is deceased or cannot be located), it might be difficult for the respondent employer to adequately defend the proceedings against it.

It is in the interests of employers to seek to ensure that complaints of unlawful harassment and discrimination are made and resolved in a timely fashion. This will assist employers in resisting deemed liability for the conduct of its employees.

Text of the decision is available at:

http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/624.html

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