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Employment & Safety Alert

When will an employer *not* be vicariously liable for sexual harassment?

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Three recent decisions by the Administrative Decisions Tribunal of New South Wales (**ADT**) and the Queensland Civil and Administrative Tribunal (**QCAT**) have demonstrated that careful and conscientious employers will not be vicariously liable if an employee sexually harasses another employee.

Cooper v Western Area Local Health Network [2012] NSWADT

Ms Cooper and Mr Locke had been colleagues for some time and also, to some extent, friends. At a staff training day, Mr Locke gave Ms Cooper a note which contained extremely sexually explicit material. Ms Cooper made a complaint alleging that she had been sexually harassed by Mr Locke and that her employer, Western Area Local Health Network (**Network**), was vicariously liable for Mr Locke's conduct.

Mr Locke alleged that the note was drafted by a colleague and that he only gave the note to Ms Cooper to seek her opinion on it. Although the ADT found that Mr Locke did not draft the note, it still held that Mr Locke's conduct constituted sexual harassment as defined in the *Anti-Discrimination Act 1977* (NSW) (**Act**). The ADT then considered whether the Network should be held vicariously liable for Mr Locke's conduct.

Under section 53 of the Act, an act done by an employee is also taken to have been done by his/her employer, unless the employer '*did not, either before or after the doing of the act, authorise the...employee, either expressly or by implication, to do the act*'. However, the section provides that an employer is not liable if it '*took all reasonable steps to prevent the...employee from contravening the Act*'. Similar provisions exist in discrimination legislation in other Australian jurisdictions.

The Network's policies included the NSW Health Code of Conduct (**Code**) which explicitly prohibited sexual harassment. Mr Locke had been provided with the Code and affirmed receipt and agreed to be bound by it on several occasions during his employment. Mr Locke had also undertaken mandatory training during his employment on harassment, discrimination, bullying and the Code.

Once the Network was notified of Mr Locke's conduct, it interviewed the parties concerned. The Network then commenced an investigation of the incident. Within approximately one month of the incident, the Network had finished its investigation and found that the allegation against Mr Locke was sustained. The Network informed Mr Locke that he had breached the Code. The Network also took disciplinary action against Mr Locke which involved sending Mr Locke a 'first and final' warning letter.

A few months later, Ms Cooper informed the Network that she had been contacted by Mr Locke by email. At this time, the Network advised Mr Locke not to approach Ms Cooper.

Ms Cooper argued that the Network simply providing training and a Code was insufficient and that '*active steps had to be taken to ensure employees were aware of their responsibilities*'. Ms Cooper relied on the decision of *Sharma v QS Pty Ltd t/as KFC Punchbowl* (EOD) [2010] NSWADTAP 22 (***Sharma***), where the employer was found vicariously liable for sexual harassment even though it had provided its employees with a handbook which prohibited sexual harassment.

The ADT distinguished this case from *Sharma* as Mr Locke's conduct appeared to be a '*once-off incident which was quite out of character*', as opposed to the employee's conduct in *Sharma* which was '*common place*'.

The ADT held that '*it is not enough for an employer merely to institute policies; the* ***policies need to be implemented and brought to the attention of the employees in a meaningful way****. By failing to do so the employer may be found to have authorised the conduct...That is not the case here*' [emphasis added]. The ADT found that the steps taken by the Network were sufficient to fulfil its responsibility '*that its employees be aware of the various policies affecting their conduct at work and the necessity to abide by them, including penalties if they did not*'.

The ADT held that the Network was not vicariously liable, and ordered Mr Locke personally to pay Ms Cooper $10,000 in compensation.

Menere v Poolrite Equipment Pty Ltd [2012] QCAT 252

Mr Menere, an employee of Poolrite Equipment Pty Ltd (**Poolrite**) alleged that he was subjected to sexual harassment during the course of his employment. The sexual harassment involved inappropriate touching and vulgar gestures by his co-worker. Poolrite conducted an investigation and the co-worker's employment was terminated. Mr Menere suffered psychological injuries as a result of the sexual harassment and sought compensation from Poolrite and his former colleague.

QCAT found that the co-worker had sexually harassed Mr Menere as defined in the *Anti-Discrimination Act 1991* (Qld).

However, Poolrite did '*more than merely have a policy in place. It took sufficient positive steps to ensure awareness and attempted compliance with appropriate workplace practices*'. During the induction process, employees were provided with a handbook that had a section regarding harassment and workplace bullying issues, and received appropriate training on sexual harassment.

In light of this, QCAT found that Poolrite had taken 'reasonable steps' to prevent the co-worker's conduct and was not vicariously liable, and ordered the co-worker to pay Mr Menere $8,000 in compensation.

Hughes v Narrabri Bowling Club Limited [2012] NSWADT 161

An employee who worked as a casual housemaid at a motel operated by the Narrabri Bowling Club Limited (**Club**) alleged that she had been subject to acts of sexual harassment and victimised by Mr and Mrs Welsh, the persons responsible for the management of the motel. The applicant also argued that the Board of the Club was vicariously liable for the conduct of Mr and Mrs Welsh.

The Tribunal held that a vulgar comment made by Mr Welsh to the employee constituted sexual harassment as defined in the *Anti-Discrimination Act 1977* (NSW) (**Act**), however the Tribunal dismissed the complaint regarding victimisation.

After the employee complained of the sexual harassment, three Club committee members attended the motel the following morning and spoke with Mr Welsh after speaking to the housemaids about their comments or complaints regarding Mr Welsh. Each staff member was provided with a handbook regarding behaviour in the workplace. Although no evidence was presented regarding the contents of this handbook, the Tribunal stated that '*the committee members responded swiftly to* [the employee's] *complaints and that their intervention the following day resulted in no further incidents of sexual harassment.* ***It is difficult to envisage what more an employer could have done, short of prevention.*** *Further, it was the first occasion on which a complaint was brought to their attention*' [emphasis added].

In these circumstances, the Tribunal held that the Club was not vicariously liable for Mr Welsh's conduct, and ordered Mr Welsh to pay the applicant $7,500 in compensation.

Comparison: unsuccessful attempts to argue the 'reasonable steps' defence

The cases described above are noteworthy because they follow a large number of cases in which employers have not been successful in their attempts to make out the defence. Some illuminating examples stress the need both for suitable policies and adequate training.

1. Inadequate policies

In *Grogan and ors v First Rate Leisure Pty Limited and ors* [2007] NSWADT 294, an employer was held vicariously liable for the conduct of its employees which amounted to unlawful racial discrimination.

The Tribunal considered the evidence of steps taken by the employer to train its security staff about anti-discrimination law and its application to the operations of the business. The employer provided each employee with an 'Induction Manual' (**Manual**) at or about the time of employment. However, the Tribunal found that the Manual did not contain adequate instructions to employees regarding their responsibilities and duties to prevent acts of unlawful discrimination.

In *Asnicar v Mondo Consulting Pty Ltd* [2004] NSWADT 143, the Tribunal held that what are 'reasonable steps' will vary depending on the size of the employer or principal:

- in small businesses '*where a friendly and informal atmosphere often exists*', there should be a clear policy

statement so that such an atmosphere is not open to abuse (*Bevacqua v Klinkert & Ors (No 1)* (1993) EOC 92-515); but

- for a large company, 'all reasonable steps' includes not only developing a policy, but also training staff, especially managers, in the policy (*Caton v Richmond Club Limited* [2003] NSWADT 202, where the Respondent was a club), and communicating the policy to senior management, who should accept responsibility for promulgating the policy and for advising on remedial action to be taken (*Evans v Lee & Anor* (1996) EOC 92-822, where the Respondent was a bank).

The Tribunal in *Asnicar* held that '*no matter how small an employer or principal is, the case law indicates that taking 'all reasonable steps' requires the employer or principal to have taken* ***active steps***' [emphasis added]. In this case the employer only had six staff members. As it did not have a sexual harassment policy before the incident, it was found vicariously liable for the sexual harassment of an employee by a co-worker.

2. Inadequate training

In *Hunt v Rail Corporation of New South Wales* [2007] NSWADT 152, RailCorp was held vicariously liable for the sexual harassment of an employee by a colleague which involved incidents of graffiti and placing a pornographic magazine under an employee's door. The Tribunal held that it was '*not enough that RailCorp has policies that prohibit...discrimination and sexual harassment in the workplace...Employers need to adequately inform their staff of those policies and to properly explain the implications for their breach*'.

After the incidents of sexual harassment occurred, RailCorp held briefings about:

- issues of previous harassment;
- what constitutes inappropriate behaviour;
- human resources policies dealing with issues of harassment; and
- that harassment, could result in the termination of employment.

However, the Tribunal held that it was a '*fundamental flaw*' that the briefings did not involve **all** staff and were not compulsory because '*it meant that it was possible that some staff, perhaps those who were least aware of anti-discrimination, sexual harassment and bullying policies, were able to avoid attending the briefing sessions*'. RailCorp's failure to meet its duty was evidenced by the fact that, despite all of the investigations and briefings that RailCorp undertook, the graffiti kept reappearing.

Although RailCorp commenced an investigation to discover the perpetrator of the pornographic magazine incident, because it was clear that the perpetrator was a RailCorp employee, RailCorp was held vicariously liable as '*it failed to take the steps reasonably expected to fill the gaps in the training of its staff about what behaviour it sanctioned and what behaviour it didn't*'.

In *Caton v Richmond Club Limited* [2003] NSWADT 202, an employer was found vicariously liable for sexual harassment. The Tribunal held that '*where potentially discriminatory conduct is not recognised as such by persons in management, that suggests that such management has insufficient understanding of the conduct, its status at law and its possible consequences. This suggests such people in management have had inadequate training on the matter and their responsibilities in relation to such in the workplace*'.

Practical tips for employers

Employers should ensure that their policies regarding discrimination, harassment and bullying are practically implemented in the workplace. This involves providing regular compulsory staff training, especially for management, and emphasising that staff will be disciplined if they do not adhere to policies.

Although the size of a business affects what is considered to be 'reasonable steps' by an employer, small business employers are expected to take some steps to prevent discrimination, harassment and bullying in the workplace.

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