Thomson Playford Cutlers

Avoiding unlawful discrimination: new challenges

Recent developments in discrimination laws mean that now, more than ever, employers need to be careful if they want to ensure both that they are providing a discrimination free workplace, and that they will be able to persuade a court or tribunal that they have complied with the law.

In this Alert, we review amendments to Federal disability and age discrimination laws; the new discrimination provisions embedded in the *Fair Work Act*; and recent sexual harassment cases.

Amendments to Federal discrimination laws

The Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth) (**Act**) has recently been passed by Parliament. The Act makes significant changes to disability discrimination and age discrimination laws.

Disability

The Act amends the *Disability Discrimination Act 1992* (Cth) (**DDA**) to place a duty on employers to make reasonable adjustments to avoid treating a person less favourably due to disability.

Example: *John is partially blind and seeking employment with Company A. In order for John to perform the job, he requires a screen magnifier for his computer monitor. If Company A chooses not to employ John because it is not willing to obtain this extra equipment, this may constitute unlawful discrimination by Company A.*

A '*reasonable adjustment*' is an adjustment that does not impose '*unjustifiable hardship*' on the person making the adjustment. Whether unjustifiable hardship would be caused is to be determined by considering the following:

- the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned
- the effect of the disability of any person concerned
- the financial circumstances, and the estimated amount of expenditure required to be made, by the person making the adjustments, and
- the availability of financial and other assistance to the person making the adjustments.

The Act also extends the coverage of the '*inherent requirements*' defence under the DDA. Before the amendments, an employer could discriminate against a person on the ground of disability in determining who should be offered employment and in dismissing a person, if (as a result of disability) the person would be unable to carry out the inherent requirements of the particular employment. The amendments extend the inherent requirements defence to most work contexts and most points in the work relationship (not just recruitment and dismissal).

The defence will not apply, however, to discrimination which denies or limits an employee's access to opportunities for promotion, transfer, training or other benefits associated with employment, except in the context of determining who should be offered a promotion or transfer.

Tips for employers: more than ever, you need to assess your workplace, and the needs of your staff or any applicants with disabilities, to see whether there are reasonable adjustments that you should be making to accommodate those needs. Part of an assessment may be a review of what the 'inherent requirements' of a particular position actually are.

It often helps to provide guidelines for managers about what they need to do to make these assessments. You may also need to review your existing policy on discrimination to ensure that it is consistent with the approach you take to this issue.

Thomson Playford Cutlers

Age

The Act also amends the *Age Discrimination Act 2004* (Cth) to abolish the 'dominant reason' test. Previously, if a person was treated less favourably for several reasons, one of which was age, the discrimination would only be unlawful if age was the dominant reason. Now, the discrimination will be unlawful even if age was only one of many reasons, and was not the dominant reason.

Tips for employers: in making decisions that impact on the employment of your staff, test your managers' reasoning to ensure that age is not one of the motivating factors.

New discrimination provisions in the *Fair Work Act 2009* (Cth)

The *Fair Work Act 2009* (Cth) (**FW Act**), which commenced operation on 1 July 2009, contains novel discrimination provisions.

The FW Act prohibits an employer in the federal industrial system from taking '*adverse action*' against an employee or prospective employee due to the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (**prohibited grounds**). This provides employees with an alternative cause of action to the ones currently available under existing discrimination laws. In some cases, it opens up complaints based on reasons that have not been available before (for example, religion in NSW; social origin in most States).

The FW Act discrimination provisions significantly depart from existing discrimination laws in relation to onus of proof. Under the FW Act, if an employee or prospective employee claims that an employer has taken adverse action for an unlawful reason, the action is presumed to be taken for that reason unless the employer proves otherwise.

By comparison, existing discrimination laws require the employee or prospective employee to prove that the action was taken for an unlawful reason. This means that it will harder for employers to defend discrimination claims brought under the FW Act than claims brought under existing discrimination laws.

Significantly, there is a six year time frame for bringing claims (other than dismissal claims) under the FW Act provisions. Since existing discrimination laws generally have a twelve month limitation period, the new FW Act provisions give employees a much longer window of opportunity to make a complaint.

There are some limits on the new provisions, however. The FW Act states that the new prohibition on '*adverse action*' does not apply to any action that is '*not unlawful*' under a State or Territory anti-discrimination law. It remains to be seen whether this means that only conduct explicitly permitted by State legislation is exempted from the '*adverse action*' provisions, or whether the exemption also applies where the State legislation says nothing explicitly, but might be held to implicitly permit an action by an employer.

The FW Act also prevents employees from double-dipping – they may not seek a remedy under these provisions if they have made an application under another discrimination law, unless that application was withdrawn or failed for want of jurisdiction.

The new provisions are 'civil remedy provisions'. This means that an employer can be prosecuted for breach by an employee, or by the Fair Work Ombudsman.

Tips for employers: it is a good time to review your discrimination policies and procedures generally, to ensure they cover all forms of unlawful discrimination. With the new six year time frame and reverse onus of proof, it is also important to review record-keeping protocols. This will ensure you have records that will assist in proving that the action was not taken for an unlawful reason, and will also be useful if an employee brings a claim some years down the track.

Recent sexual harassment cases

Two recent decisions in sexual harassment cases have shown a growing willingness by the courts to impose large penalties on employers who breach sexual harassment laws.

Poniatowska v Hickinbotham [2009] FCA 680 (23 June 2009)

A consultant was awarded $466,000 damages after the Court found that she was the victim of both sexual harassment and sex discrimination. The consultant had received several emails and text messages from a colleague inviting her to have a sexual relationship with him. A second colleague had sent the consultant an explicit photo message showing a man receiving oral sex from a woman with the message '*U have 2 b better*'. The second colleague had then pestered the consultant by calling her and requesting sex. The behaviour of both colleagues was held to amount to sexual harassment.

The situation was found to have been poorly managed by the employer, which failed to conduct a proper investigation into the consultant's complaints and further dismissed the consultant under the guise of her poor performance. The Federal Court held that the dismissal amounted to sex discrimination by the employer as it had treated the consultant less favourably than it would have treated a male making such a complaint. Using very unusual reasoning, the Court held that the employer had '*determined that* [the consultant] *was a person who did not fit its work environment because she was a female who would not tolerate sexual harassment and the robust work environment*'.

The decision is to be appealed.

***Whitlock v Bunnings, DP and DF* [2009] QADT 14 (22 May 2009)**

Bunnings was ordered to pay an employee $150,000 damages and indemnity costs. The Queensland Anti-Discrimination Tribunal found that a colleague had repeatedly asked the employee for cuddles and dates. The same colleague had also asked the employee if she was wearing any underwear, touched her leg and attempted to kiss her through her car window.

The Tribunal found that Bunnings had not dealt adequately with the employee's complaint; in particular, the operations manager had not taken it seriously. During a meeting in which the employee had raised the complaint with the operations manager, the manager had begun a webcam conversation with a man who had subsequently begun masturbating.

The majority of the amount awarded was indemnity costs. The Tribunal made this award because it found that Bunnings had unreasonably persisted with the defence of its case despite the probability that the outcome would be in the employee's favour.

Tips for employers: These cases reinforce the need for employers to deal with complaints of sexual harassment thoroughly and seriously at the workplace level. If your grievance resolution procedure has not been reviewed recently, now would be an excellent time.

Authors:

Jacquie Seemann - Partner
+61 2 9020 5757

Bridget Gurry - Lawyer
+61 8 8236 1129

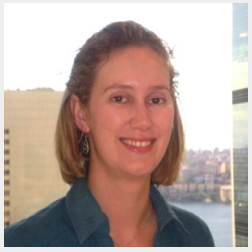
For more information on this topic please contact:

Mark Branagan
Partner
+61 3 8080 3638
mark.branagan@thomsonplayfordcutlers.com.au

Jacquie Seemann
Partner
+61 2 9020 5757
jacquie.seemann@thomsonplayfordcutlers.com.au

Tony Vernier
Partner
+61 2 8248 3471
tony.vernier@thomsonplayfordcutlers.com.au

Jacinta Lane
Senior Associate
+61 3 8080 3648
jacinta.lane@thomsonplayfordcutlers.com.au



Jessica Lee
Senior Associate
+61 2 8248 3472
jessica.lee@thomsonplayfordcutlers.com.au

Lincoln Smith
Senior Associate
+61 8 8236 1139
lincoln.smith@thomsonplayfordcutlers.com.au