

## Workplace Relations Alert September 2010

### How to avoid a David Jones type sexual harassment claim

In August 2010, Kristy Fraser-Kirk lodged a landmark sexual harassment claim against her employer, David Jones; the former CEO of David Jones, Mark McInnes; and individual board members, seeking compensation and punitive damages of up to \$37 million. Ms Fraser-Kirk has alleged that Mr McInnes made repeated and unwanted sexual advances towards her, and that David Jones knew about his conduct and did nothing to rectify it.

Ms Fraser-Kirk's claim against David Jones is unique, not only because of the amount of the damages she seeks, but also because she seeks 'punitive' damages linked to both David Jones' profits and Mr McInnes' own salary.

This case has engendered a high degree of public discussion about sexual harassment in the workplace. This level of public awareness makes it more important than ever for employers to take practical steps to minimise the risk of an employee bringing such a claim.

#### What are 'punitive damages'?

'Punitive damages' will generally only be awarded if there is an intentional element to the harm caused. They are awarded to punish the perpetrator. In contrast, the more

usual 'general damages' are awarded as compensation, focusing on factors such as recovery for loss of earnings, pain, suffering or loss of dignity, hurt and humiliation.

Traditionally, Australian courts have been hesitant to award punitive damages, especially in sexual harassment and discrimination cases. It will be interesting to see whether David Jones is found to have knowingly allowed Mr McInnes' conduct to occur, and whether this will be deemed to warrant punitive damages.

#### The Fraser-Kirk claim

Ms Fraser-Kirk has claimed that:

- the conduct of Mr McInnes and the inaction by David Jones constituted deceptive and/or misleading conduct contrary to the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1987* (NSW). This includes the way in which David Jones represented itself to Ms Fraser-Kirk through its workplace policies (in particular its code of conduct);
- the conduct was deliberate and in disregard of her rights including at common law, under the *Crimes Act 1900* (NSW), the *Occupational Health and Safety Act 2000* (NSW), and her contract of employment; and
- David Jones breached its duty of care as an employer.

At this stage, the claim does not include a complaint under the *Sex Discrimination Act 1984* (Cth). However, Ms Fraser-Kirk has foreshadowed the possibility that she will seek further redress under that Act.

## Lessons for employers

Irrespective of the ultimate decision, the damage to David Jones' brand and reputation has been done. No company would wish to be in the retailer's shoes.

So, what can employers do to protect their business and reputations against similar claims? We recommend the following:

- a) review all workplace policies and procedures to ensure compliance with discrimination law, safety laws and the Fair Work Act;
- b) ensure ongoing communication of policies, including the consequence of breaches, to all staff and managers through regular distribution and mandatory workplace training and testing - it is not sufficient to offer training regarding the policies only at induction. Ensure the training and testing are tailored for staff in different roles;
- c) provide regular reports to the board as to completion of training and testing, dissemination of policy and number and types of incidents. Particular attention should be given to reinforcing the company policy around key risk areas, eg office social functions;

- d) ensure that management decisions (such as recruitment, promotion and deciding which positions should be made redundant) are properly documented;
- e) have a well publicised whistleblower policy;
- f) ensure that there is a grievance procedure in place, and that this procedure is followed;
- g) ensure that all policies are applied and enforced consistently across the workplace;
- h) respond to employee grievances promptly; and
- i) ensure that detailed written reports of complaints and resulting investigations are kept.

Please let us know if you would like our assistance to implement any of these steps, or to review your current policies and procedures.

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