Welcome to the revamped Volume 6, December 2013 newsletter

Introduction

Hayley Petrony – Assistant Victorian Government Solicitor

2013 has been a busy and rewarding year for the Workplace Relations and Occupational Safety team. We have grown substantially in size and depth of expertise – we now have a full complement of employment lawyers to assist you with all your workplace, anti-discrimination, and occupational health and safety matters. Our team is now very well rounded, with highly experienced senior specialist solicitors and bright young juniors on board to assist you.

We successfully resolved a number of high-profile matters for our government clients this year – most notably the favourable judgments in the Victoria Police appearance policy case, intensive enterprise bargaining negotiations on behalf of the State of Victoria, and managing the complexities of major government restructures. These, and many other successful outcomes achieved for clients over the year, remind us of the great advantage brought by our unique position within government which gives us the insight and specialist expertise to advise at all stages of the legal process, from policy and law reform through to litigation and dispute resolution.

In this Edition, we present four interesting cases: swearing in the workplace, misconduct in the workplace involving pornography, new developments in sexual harassment litigation and the consequences of failing to adhere to anti-bullying policies. We also bring you news snippets from the employment law world, and new resources and publications that you may find useful. We also present details of two seminars we will be presenting in the new year.

On behalf of Workplace Relations and Occupational Safety team, I would like to take this opportunity to wish you all a safe and happy festive season. We are all looking forward to continuing to work with you in 2014.

Hayley Petrony,
Assistant Victorian Government Solicitor

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Naughty or Nice – Swearing in the Workplace

With the holiday period fast approaching and the level of excitement in workplaces rising in sync with the thermometer, it’s fair to say that the “silly season” is definitely upon us. In this joyful context employers must, regrettably, turn their minds to the potential for their employees to behave badly.

Although most workplaces have developed practices to manage the risks associated with the silly season (most of which relate to the supervision of the consumption of alcohol at work functions and potentially over exuberant employee behaviour), there is always a risk that an employee will overstep the mark. The extent to which a mark has been overstepped can, however, sometimes be difficult to determine. An example of this may be where an employee (whose better judgement may at a given time be impaired by consumption of the fruits of the season) gives his or her honest and uncensored opinion about another employee directly to them, and in unsavoury terms.

In a recent unfair dismissal matter before the Fair Work Commission (Lee v Toll Transport Pty Ltd [2013] FWC 8616), the Commission was required to consider whether the summary dismissal of an employee was harsh, unjust or unreasonable, and thus was not unfair, in circumstances where that employee had suggested to another employee in an aggressive tone that he should join the far queue.

The dismissed employee was incensed because he felt that the other employee could have used an alternative wrapping machine. These facts are interesting as they describe a source of frustration or tension that could arise between employees in many workplaces, for example where an employee inadvertently causes a photocopier to jam, causing inconvenience to others, or where an employee leaves a mess in a common kitchen area, causing other employees to be offended at the implication that they should clean up after their untidy colleague.

In finding that the summary dismissal of the employee was not harsh, unjust or unreasonable, and thus was not unfair, the Commission in that case placed emphasis on the dismissed employee’s aggressive, highly offensive, and intimidating manner when he yelled ‘f### you’ at the other employee. It placed weight on the dismissed employee’s apparent lack of remorse for what he had done, and his dishonesty when responding to the employer’s investigation into the matter. The Commission also took into account whether swearing was commonplace in the workplace, suggesting that if it was, this may mitigate the seriousness of an employee’s misconduct should they be found to have sworn at work.

Relevantly for employers, what can be gleaned from the above case is that it is vital for employers to have, and to enforce, policies regarding appropriate workplace behaviour. Policies that provide, for example, that employees must use appropriate language in the workplace and must not act in an aggressive or threatening manner towards others can be used by employers to defend their decisions to discipline employees for inappropriate behaviour. If your agency does not have such policies, it should create them immediately, and if your agency does have such policies, then it is important to remind employees of their obligations under the policies, especially in this silly season and before major events.

Furthermore, in the unfortunate event that an employee does misbehave by swearing or otherwise abusing another employee at the workplace, it is important to consider whether this conduct was threatening or intimidating and whether it breaches the agency’s policies. If the answer to these queries is yes, then dismissal may be warranted in the circumstances. Of course, each case of misconduct should be considered on its merits and, ideally, legal advice sought prior to the dismissal of an employee.

“...it is important to remind employees of their obligations under the policies, especially in this silly season and before major events.”
Snippets: Employment law news in brief

Not so smart: Fair Work Commission finds that using smartphones to record conversations in the workplace may constitute misconduct

In the recent case of *Thomas v Newland Food Company* [2013] FWC 8220, Deputy President Sams refused to order the reinstatement of an employee who had covertly recorded meetings in the workplace, including the meeting in which he was dismissed. While the employee was found to be unfairly dismissed for other reasons, Deputy President Sams refused the reinstatement on the basis that such conduct ‘strikes at the heart’ and therefore breaches the mutual trust and confidence between employer and employee. Other proceedings before the Commission have described secret recordings as ‘sneaky’ and ‘seriously wrong and inexcusable … [and] a valid reason for dismissal’.

A (possible) new Fair Work Commission appeals body: Changes on the federal horizon

Federal Employment Minister Eric Abetz set a deadline of 13 December 2013 for employers and unions to state their views on the proposed establishment of a new appeals body to sit above the Fair Work Commission. Senator Abetz said that ‘the idea has been put to us fairly strongly that it would be good to have (a body) like NSW has a Court of Appeal in the Supreme Court, and to basically have a similar body in relation to matters Fair Work, so you could get a robust consistency of decision-making within the Fair Work jurisdiction’. Watch this space for further developments.

Victoria’s new workplace injury laws

In November the Victorian Parliament passed new workplace injury laws, which the government says will ‘reduce the complexity’ of the present compensation scheme. The *Workplace Injury Rehabilitation and Compensation Act 2013* will come into effect on 1 July 2014 to coincide with the new financial year.

The Assistant Treasurer, Gordon Rich-Phillips, said that the rewrite, which combines the *Accident Compensation Act 1985* and the *Accident Compensation (WorkCover Insurance) Act 1993*, significantly reduces the size and complexity of the legislation, and was ‘undertaken on a “no benefit change” basis and will continue to offer all existing entitlements and benefits currently available to injured workers and their families’.


Fair Work’s new anti-bullying jurisdiction: Just around the corner

Employers are reminded that the new federal laws conferring an expanded jurisdiction on the Fair Work Commission to intervene in bullying cases becomes operational from 1 January 2014. Under the *Fair Work Amendment Act 2013*, bullied workers may apply to the Fair Work Commission for various orders, and the Commission must commence dealing with the alleged bullying within 14 days. We will be watching this space with interest in the early months of 2014 to see how the new jurisdiction operates in practice.

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1. Senior Deputy President Drake in Lever v ANSTO (2009) AIRC 784
Pornography in the workplace: A special category of misconduct? The case of *B, C and D v Australian Postal Corporation* [2013]

**Introduction**

A recent decision of the Full Bench of the Fair Work Commission has determined that accessing, sending, receiving, or storing pornography in the workplace is not a special category of misconduct which in every case will warrant dismissal. In allowing the appeal, Vice President Lawler and Commissioner Cribb expressed concern about the ‘emerging trend’ in some cases suggesting that pornography in the workplace is ‘a separate species of misconduct to which special rules apply’.  

The facts

This case concerned an appeal against an earlier decision by Commissioner Lewin. At first instance, the applicants, B, C and D had (unsuccessfully) brought an unfair dismissal claim against their employer, Australia Post, on the basis that the termination of their employment was ‘harsh, unjust, or unreasonable’ – and therefore contrary to section 385 of the *Fair Work Act* – notwithstanding the fact that the employees had indeed engaged in the misconduct in question: Mr B sent six unacceptable emails to his personal email address, and sent further emails from his personal email address to work friends at their official Australia Post email accounts. One of these emails included a video attachment depicting an extreme pornographic act. Mr C sent 11 inappropriate emails. Mr D, who was an employee but did not have an Australia Post email address, sent multiple inappropriate emails from his private account to colleagues at their Australia Post email addresses.  

Commissioner Lewin rejected the applications for unfair dismissal, finding that the employer had a ‘valid reason’ for termination as permitted under section 387 of the *Act* – namely, the inappropriate use of Australia Post systems for the transmission and storage of emails containing pornographic imagery, which was contrary to employer policy.

**The appeal**

The applicants in the appeal did not contend that the employer had no valid reason for the dismissals. Rather, the relevant question concerned the relationship between a ‘valid reason’ by which an employer may terminate an employee, and the grounds on which such termination will nevertheless be ‘harsh, unjust, or unreasonable’, and therefore unlawful.  

On appeal, the majority concluded that the first instance decision of Commissioner Lewin was incorrect, and that the termination of the employees in this instance was indeed ‘harsh’, and therefore contrary to the *Fair Work Act*. In essence, Vice President Lawler and Commissioner Cribb found that employee misconduct cases involving contravention of employer policies and the misuse of employer IT systems for the dissemination of pornographic and other inappropriate materials are not a ‘special species’ of misconduct, and will not ‘invariably’ constitute, in every case, a full defence against unfair dismissal.  

They held that, while the accessing, sending, receipt and storage of pornography will ‘typically contravene’ an employer policy and therefore ‘usually constitute’ a valid reason for termination under the *Act*, such termination will not, in every case, be justified, on the basis that:

- [It remains a bedrock principle in unfair dismissal jurisprudence of the Commission that a dismissal may be “harsh, unjust or unreasonable” notwithstanding the existence of a “valid reason” for the dismissal.](#)  

In their reasons, Vice President Lawler and Commissioner Cribb criticised the reliance on *Queensland Rail v Wake* in a number of first instance decisions involving pornography in the workplace. While in *Queensland Rail* an employee of previously good repute and long standing (27 years’ service) was validly terminated for ongoing misuse of employer IT systems, Vice President Lawler and Commissioner Cribb found that *Queensland Rail* was distinguishable from the present case – and many other cases which had relied on it – by virtue of its ‘exceptional facts’. These exceptional facts were the ‘truly extraordinary steps’ which Queensland Rail had taken over the course of several years to alert its employees to its policies concerning inappropriate use of IT systems.

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5 B, C and D v Australian Postal Corporation [2013] FWCFB 6191 per Vice President Lawler and Commissioner Cribb [3].  
6 B, C and D v Australian Postal Corporation [2013] FWCFB 6191 per Vice President Lawler and Commissioner Cribb [71].  
7 B, C and D v Australian Postal Corporation [2013] FWCFB 6191 per Vice President Lawler and Commissioner Cribb [71].  
8 B, C and D v Australian Postal Corporation [2013] FWCFB 6191 per Vice President Lawler and Commissioner Cribb [72].  
9 B, C and D v Australian Postal Corporation [2013] FWCFB 6191 per Vice President Lawler and Commissioner Cribb [41].  
Pornography in the workplace: A special category of misconduct? The case of B, C and D v Australian Postal Corporation [2013] (cont’d)

This included:
- Comprehensive policies which were painstakingly publicised;
- Training rolled out to all staff;
- Electronic ‘acknowledgement’ notifications that employees were required to accept each time they logged on to employer systems;
- Three separate email updates from the CEO concerning appropriate use of facilities; and
- An ‘amnesty’ period during which employees who had stored inappropriate content on their computers were allowed to dispose of it without penalty.¹¹

While Australia Post had relevant policies in place prohibiting inappropriate use of their IT systems, they had not taken ‘active steps’ of the kind taken in Queensland Rail which would outweigh the ‘harsh, unjust, or unreasonable’ factors at play.

Unfair dismissal notwithstanding a ‘valid reason’: A balancing exercise

Crucially, the majority found that the Commissioner had also failed to give sufficient attention to the criteria for determining ‘harshness’ as required by section 387, which must then be weighed against the ‘valid reason’ for termination.

Applying the ‘harshness’ criteria, Vice President Lawler and Commissioner Cribb held that the long length of service, good disciplinary records, and harsh economic consequences for the Australia Post employees in question satisfied the test. The majority also put weight on the fact that the ‘harm’ of the misconduct was low due to the fact that the pornographic material had been distributed amongst willing recipients, and the applicants had been inconsistently treated when compared with other employees who had also sent or received unacceptable emails but had not been dismissed.

The implications: Can employers dismiss employees for distributing pornography or other inappropriate material in the workplace?

The answer is a qualified ‘yes’: termination will be valid where such conduct is contrary to strongly expressed and uniformly enforced employer policy, but only where such termination is not outweighed by the ‘harsh, unjust, or unreasonable’ factors provided for in the Fair Work Act.

While Vice President Lawler and Commissioner Cribb were careful to make clear that the ‘extraordinary’ steps taken in Queensland Rail should not be taken as a ‘minimum’, it was also held that, generally speaking, if an employer wished to ‘elevate’ the dissemination of pornography in the workplace to an order of seriousness to justify a dismissal that will likely be immune from a finding that it was harsh, unjust, or unreasonable, then:

- notions of a ‘fair go all round’ dictate that the employer must have taken adequate steps to bring home to employees that breaches will be treated seriously and will likely result in dismissal.¹²

Vice President Lawler and Commissioner Cribb were clear that their reasons should not be taken to endorse or authorise use of employer facilities to disseminate pornography, or as against the right of employers to regard non-compliance with relevant policies as a serious matter warranting dismissal.¹³

However, it is also clear from this decision that pornography in the workplace is not to be treated as a special category of misconduct, and the usual protections and safeguards for employees as provided for under the Fair Work Act will continue to apply in the specific circumstances of each case.

¹¹ B, C and D v Australian Postal Corporation [2013] FWCFB 6191 per Vice President Lawler and Commissioner Cribb [27].
¹² B, C and D v Australian Postal Corporation [2013] FWCFB 6191 per Vice President Lawler and Commissioner Cribb [67].
¹³ B, C and D v Australian Postal Corporation [2013] FWCFB 6191 per Vice President Lawler and Commissioner Cribb [121].
A recent decision in the New South Wales Court of Appeal (Oyston v St Patrick’s College (No. 2) [2013] NSWCA 310) is a timely reminder that schools, and by extension employers, may be liable for a breaching their duty of care in circumstances where they do not adequately address bullying.

Significantly, this case demonstrates that:

- A school’s failure to follow its own anti-bullying policy will be a relevant factor in assessing its liability to prevent injury to students in its care; and
- An employer’s failure to follow their organisation’s anti-bullying policy, may mean that the employer is negligent in discharging their duty of care and result in significant damages being awarded against them.

Facts

Ms Oyston, a student of St Patrick’s College, alleged that over a period of three years, she had been regularly and relentlessly verbally abused and subjected to instances of physical aggression by other students.

The College had an anti-bullying policy which set out the requisite procedure for managing and investigating a bullying complaint. Ms Oyston claimed that the College had been negligent by failing to follow those procedures in relation to the complaints she had made about being bullied and as a result, she developed a psychological injury.

Findings at first instance

At first instance, the Trial Judge found that the College was aware that Ms Oyston was being bullied, she was vulnerable, and she had suffered from anxiety and panic attacks in the past and was therefore likely to be more susceptible to psychological harm if bullied.

The Trial Judge also found that the College was aware that bullying was taking place across the College more broadly, which it had recognised and responded to by putting in place the anti-bullying policy. However, in requesting that teachers ‘keep an eye out’ for bullying, rather than actively complying with the anti-bullying policy, the College had breached its duty of care to Ms Oyston which had resulted in Ms Oyston’s psychological injury.

Findings on appeal

On appeal, the College submitted that it was not responsible for Ms Oyston’s injury for two reasons. First, the College claimed that even if it had investigated and acted upon Ms Oyston’s complaint, this would not have reduced or eliminated the bullying behaviour of the perpetrators. Second, it claimed that enforcing strict anti-bullying measures would have caused resentment amongst the perpetrators and caused them to increase their bullying of Ms Oyston.

The Court of Appeal rejected those arguments and confirmed that the College’s passive response to the bullying was insufficient, and that there was little doubt that Ms Oyston’s psychological injuries were materially contributed to by the bullying she endured as a consequence of the College breaching its duty of care (i.e. failing to actively implement its anti-bullying policy).

In the Court’s view, the psychological injury would otherwise not have occurred, or at the very least, would have been minimised.

Importantly, the Court noted the Trial Judge’s finding that the College’s anti-bullying policy demonstrated an awareness on the part of the College that bullying was taking place and of the impact of bullying upon individual students. Further, the Court held that if the College had taken the necessary steps as set out in the anti-bullying policy, the culture of bullying at the College would have either ceased or would have been substantially reduced to the benefit of all students. As part of its duty of care to its students, the College was required to take such action as was reasonably necessary to ensure that, what it had recognised to be culture of bullying at the school, was eradicated. In those circumstances, that included actively implementing the College’s anti-bullying policy.

The Court calculated damages at $133,571.60, which included compensation for the erosion of Ms Oyston’s psychological resilience and loss of future earnings due to her injury.

Case flash: School liable for failing to uphold its own anti-bullying policy
Workplace sexual harassers be warned: New developments in the admissibility of “tendency” evidence against serial perpetrators of workplace sexual harassment – Report from a seminar at the Centre from Employment and Labour Relations Law

Introduction

On Friday 15 November the Centre for Employment and Labour Relations Law at Melbourne Law School hosted a special seminar on ‘Litigating Sexual Harassment Matters’. Ms O’Brien shared her experiences litigating sexual harassment matters over the past 25 years, including as lead counsel for the plaintiff in the high profile Robinson v Goodman and Rivers case, which settled in August this year for a healthy (undisclosed) sum. Critical to the favourable outcome for Ms Robinson was the admission of ‘tendency’ evidence from two former female employees who alleged similar conduct against Mr Goodman.

This case marks a new development in the jurisprudence concerning sexual harassment matters: the question of the admissibility of tendency or similar fact evidence in civil proceedings of this nature had previously not been considered by the courts.

The allegations

Ms Robinson alleged that she was subjected to persistent verbal and physical sexual harassment by Mr Goodman over a period of about nine months. In her interlocutory judgment, Justice Mortimer described the nature of the conduct allegedly perpetrated by Goodman in the instant and prior cases.

It included:

- Touching female employees’ bodies without their consent;
- Calling female employees pet names or nicknames that were unwelcome, of a sexual nature and/or insulting;
- Making unwelcome statements about female employees’ sex lives, the sex lives of their partners or relatives, or his own sex life;
- Requiring some female employees to adopt the role of his wife or partner during sample shopping trips, including using such occasions to purportedly legitimise other unwelcome conduct of a sexual nature including calling them names such as ‘hun’, ‘honey bun’ and ‘honey’ and touching, asking about or commenting on their bodies in a suggestive, sexual way;
- Requiring or requesting some female employees to try on or model clothing samples including jeans, underwear and swimwear in front of him at the premises of the second respondent, at times or in locations when other staff were not present, despite the female employees’ hesitation or objections.

Justice Mortimer allowed the applicant to call evidence, from a former Rivers employee, that Mr Goodman allegedly:

- Required her to accompany him on visits to rival stores to sample women’s underwear and pretend to be his wife or partner on such visits;
- Touched her regularly around the waist during the store visits;
- Called her ‘Madam Lash’ regularly;
- Commented on the shape of her bottom on a number of occasions while watching her try on clothing in front of him; and
- Asked her about the shape of her breasts, including whether they were like pancakes or ‘Norwegian ones that point upwards’.

Her Honour held that these allegations were sufficiently similar to allegations made by Ms Robinson to warrant them being admitted into evidence. In Robinson’s case, the conduct occurred over a nine month period, and culminated in an alleged sexual assault by Goodman during a ‘fit’ session in which he forced Robinson to model underwear for him under false pretences.
Workplace sexual harassers be warned: New developments in the admissibility of “tendency” evidence against serial perpetrators of workplace sexual harassment – Report from a seminar at the Centre from Employment and Labour Relations Law (cont’d)

Tendency evidence and the significance of this case

‘Tendency evidence’ under section 97(1) of the Evidence Act 1995 (Cth) is evidence of the character, reputation or conduct of a person which is sought to be used to prove that a person ‘has or had a tendency to act in a particular way.’ Given that such evidence – for example, prior convictions for similar conduct – is potentially highly prejudicial to a party in a proceeding, tendency evidence is generally inadmissible, except in some very limited circumstances. This includes where the evidence is of ‘significant probative value’ – that is, highly relevant to determining whether or not a contested fact occurred.

Justice Mortimer observed that tendency evidence in a case of this kind was novel [at 30]:

So far as I am aware, this is the first case in which the Court has been asked to decide on the admission of contested tendency evidence in a proceeding dealing with allegations of sexual harassment. As I have stated above, in my opinion authorities from both this Court in the trade practice areas, and from the field of the criminal law, can assist in considering this application.

Her Honour carefully assessed each Item sought to be adduced against the ‘relevance’ and ‘probative v prejudicial’ tests in ss 55, 56, 97 and 135 of the Evidence Act 1995 (Cth).

Justice Mortimer considered both criminal and civil authorities on the interpretation of s 97, and held that much of the evidence was admissible, largely on the basis of the striking similarity of the allegations made by the two former female employees. Tendency evidence that was too far in the past, too dissimilar to allegations made in the instant case by Robinson, or too general, was excluded.

The significance of admitting the tendency evidence is clear: within hours of this interlocutory judgment, the parties had settled on terms which were much more favourable to the plaintiff than the first offer. We can also expect Justice Mortimer’s guidance to be of great significance in future cases of this type.

Sexual harassment litigation: Concluding observations from Fran O’Brien SC

From her 25 years as a practitioner in this area of law, Ms O’Brien concluded that there are several distinctive categories of workplace in which sexual harassment cases occur.

These include workplaces with a ‘high status’ offender who, by virtue of their position, acts with impunity; workplaces which are steeped in a dysfunctional culture; and workplaces in which isolated incidents of sexual harassment occur, in spite of good organisational cultures and due diligence of the employer.

According to Ms O’Brien, it is cases of this last type that means that – unfortunately – we will not be seeing the end of this type of litigation any time soon.

Finally, Ms O’Brien observed that in her experience, the Sex Discrimination Act 1984 (Cth) is imperfect in a remedial sense, in that it allows only for individual remedies. In cases in which the sexual harassment arises from systemic organisational dysfunction, the Court has no power to order – for example – policy review or retraining of senior management, unlike under other regulators like as the Fair Work Ombudsman. This is also true for applicants seeking redress from the Australian Human Rights Commission,15 which provides only for individual remedies. In this way, Ms O’Brien suggested that the formal anti-discrimination instruments may be but one avenue an aggrieved plaintiff may consider in securing redress for sexual harassment in the workplace.

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Hot off the press: Useful new resources and publications on employment law

Safe Work Australia publishes new anti-bullying guides

Safe Work Australia has published a new guide, the Guide for preventing and responding to workplace bullying. The Guide includes:

- Advice on what workplace bullying is;
- Guidance on how bullying can be prevented;
- Steps employers should take to respond to any allegations which may arise.


Draft General Protections Benchbook published

The Fair Work Commission has published a draft General Protections Benchbook for public consultation to assist parties lodging or responding to general protections applications under the Fair Work Act 2009 (Cth). Consultation is open until 27 December 2013.

For more information, and to review the draft Benchbook, visit: http://benchbooks.fwc.gov.au/generalProtections/

Further Information

Hayley Petrony, Assistant Victorian Government Solicitor
T: 03 9032 3011
E: hayley.petrony@vgso.vic.gov.au

Vicki Moulatsiotis, Principal Solicitor
T: 03 9032 3012
E: vicki.moulatsiotis@vgso.vic.gov.au

David Catanese, Principal Solicitor
T: 03 9032 3040
E: david.catanese@vgso.vic.gov.au

Alice Felman, Senior Solicitor
T: 03 9032 3015
E: alice.felman@vgso.vic.gov.au

Katherine Francis, Senior Solicitor
T: 03 9032 3037
E: katherine.francis@vgso.vic.gov.au

Chris Jensen, Senior Solicitor
T: 03 9032 3016
E: chris.jensen@vgso.vic.gov.au

Romina Woll, Senior Solicitor
T: 03 9032 3026
E: romina.woll@vgso.vic.gov.au

Jade Birman, Senior Solicitor
T: 03 9032 3010
E: jade.birman@vgso.vic.gov.au

Nicoire Lorenz, Solicitor
T: 03 9032 3003
E: nicole.lorenz@vgso.vic.gov.au

Matthew Minucci, Solicitor
T: 03 9032 3014
E: matthew.minucci@vgso.vic.gov.au

Matt Garozzo, Solicitor
T: 03 9032 3006
E: matt.garozzo@vgso.vic.gov.au

Dr. Rosemary Robins, Solicitor
T: 03 9032 3036
E: rosemary.robins@vgso.vic.gov.au

Erin Richardson, Paralegal
T: 03 9032 3037
E: erin.richardson@vgso.vic.gov.au
The rate of claims against Public Sector employers under the General Protections provisions in the *Fair Work Act* 2009 has been steadily increasing in recent years. Notably, the majority of these claims are “adverse action” claims related to an employee's dismissal.

Unlike many other individual employment rights, a contravention of the General Protections provisions in respect of an employee can lead to not only an award of damages or reinstatement, but also the imposition of penalties against the employing entity. Furthermore, proceedings against employing entities can be commenced by the employee concerned, a Union or by the Commonwealth workplace relations regulator, the Fair Work Ombudsman.

The Fair Work Ombudsman has a broad range of investigative and prosecutorial powers under the *Fair Work Act* 2009, and at this seminar we will hear directly from Phoebe Nicholas, Principal Lawyer – General Protections at the Fair Work Ombudsman, regarding the Ombudsman’s approach to enforcement of the General Protections provisions and how they relate to the Victorian Public Sector.

**Speakers**

David Catanese, Principal Solicitor, Victorian Government Solicitor’s Office

Phoebe Nicholas, Principal Lawyer – General Protections Fair Work Ombudsman


As public sector bodies and entities we need to consider a drive towards greater efficiency and productivity. The privilege of resource allocation of public funds should never be far from our minds.

In this workshop, we discuss some of the macro-issues that managers face and provide a user-friendly risk assessment analysis that will assist and drive effective workplace decision making.

**Speakers**

Hayley Petrony, Assistant Victorian Government Solicitor

Alice Felman, Senior Solicitor, Victorian Government Solicitor’s Office

Romina Woll, Senior Solicitor, Victorian Government Solicitor’s Office

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