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Welcome to the latest edition of Piper Alderman's Employment Matters. Read the latest news on key employment and industrial issues from our Employment Relations team.

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Workplace Relations Minister announces legislative changes - Expected mid-year

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Increase to penalties under the Fair Work Act 2009

On 28 December 2012, breaches of the Fair Work Act 2009 (Cth) civil remedy provisions became potentially more costly for employers. The Employment Relations team considers these changes.

Virgin Australia found in hairy situation

Lawyer, Katie Kossian examines the recent case of Mr David Taleski v Virgin Australia International Airlines Pty Ltd t/as Virgin Australia [2013] FWC 93.

Employer's lack of procedural fairness proves problematic for employer

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New legal claim for bullying and harassment

The Minister for Workplace Relations, Bill Shorten, recently announced the Government's intention to amend the *Fair Work Act 2009* to allow employees who allege they have been bullied at work to seek assistance from the Fair Work Commission. Complaints may be about the employer or other employees.

It is proposed that the Fair Work Commission will list the matter (most likely for a conciliation or conference) within 14 days of receiving a bullying complaint.

The Fair Work Commission will have the power to make orders to resolve the complaint and/or can refer the matter to the relevant state Workplace Health and Safety regulator (for example WorkCover or WorkSafe).

The Government proposes to adopt the definition of bullying recommended in the "Workplace Bullying - We Just Want it to Stop" report:

"Bullying, harassment or victimisation means repeated, unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety."

Excluded from the definition are reasonable management practices (such as performance management conducted in a reasonable manner).

The definition and exclusion are also consistent with the most recent draft (currently under review) of Safe Work Australia's Managing Workplace Bullying Code of Practice.

Flexible work

The Minister also recently announced that the right to request flexible work arrangements, which currently apply to employees with children under school age or who are under 18 and have a disability, would be extended to include:

- workers with caring responsibilities
- employees who are parents, or who have responsibility for the care of a child of school age
- employees with a disability
- mature-age employees
- workers experiencing family violence and workers providing personal care, support and assistance to a member of their immediate family or member of their household because they are experiencing family violence.

Currently, employers can only refuse a request on reasonable business grounds. The Government will provide further guidance to employers and employees about what constitutes 'reasonable business grounds'.

Although it appears that a right to have any refusal by an employer reviewed will not be included in the amendments, an employer's refusal of a request may be used as evidence in a discrimination claim.

Roster changes

The Minister announced that award and agreement model consultation clauses will be amended to include a new duty requiring employers to genuinely consult with affected employees about the impact of the changes on their family life *before* making any decision to change rosters or working hours.

Parental Leave

Changes were announced to improve parental leave and protections for pregnant workers. The Government intends to:

- Increase the entitlement for parents taking unpaid leave together, from 3 to 8 weeks.

- Allow parents to choose when they can take their unpaid parental leave together.
- Protect women at work by ensuring that they can transfer to a safe job where one is available, regardless of their length of service.
- Ensure that women who need to take unpaid special maternity leave, prior to giving birth, are not penalised by a reduction in their unpaid parental leave entitlements, as recommended by the independent Review Panel which reviewed the Fair Work Act.

The Government will also expressly provide employees with the right to request flexible work arrangements from their employer when they return to work after a period of parental leave.

Tips

Employers should stay tuned for our further updates on these proposed legislative changes, but be prepared to take action once the new laws are passed. At that time employers will need to review policies (Parental Leave, Anti-Discrimination and Bullying, Flexible Work, Grievance Procedures) and consider the broader consultation requirements before introducing changes to work hours or rosters. Remember, policies are only useful if employees know about them and if they are enforced. Ensure that polices are not just left on the shelf (or the intranet) but are discussed – at induction, team meetings, performance reviews and in formal training sessions.

The media coverage of the changes will likely result in increased employee awareness.

Employers should ensure that they have resources and processes in place to deal with requests for flexibility and to manage bullying complaints.

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Virgin Australia found in hairy situation

Lawyer, Katie Kossian examines the recent case of Mr David Taleski v Virgin Australia International Airlines Pty Ltd t/as Virgin Australia [2013] FWC 93.

The Facts

Mr Taleski was a flight attendant employed by Virgin Australia. In July 2010, he advised his supervisor that he would be growing his hair, explaining initially that he was doing so on religious grounds. In early 2011, he advised Virgin Australia that he was going to continue growing his hair because of a medical condition. Mr Taleski had come to believe that he was suffering from a body image disorder which manifested itself in a fixation about the length of his hair and anxiety about having it cut, but felt uncomfortable about disclosing this information to his employer.

In February 2011, Virgin Australia introduced a "Look Book" policy which outlined its expectations on the grooming and appearance of its employees. Relevantly, the policy provided examples of acceptable hair styles and said that men's hair was not to be longer than 2cm.

From July 2010 to October 2011, Mr Taleski and Virgin Australia were involved in protracted discussions about the length and styling of Mr Taleski's hair, and his compliance with the Look Book. During this period, Mr Taleski met with Virgin Australia several times to try to negotiate on acceptable hair styles which would meet the requirements of the Look Book, but would not require him to cut his hair. On each occasion Virgin Australia determined that the style presented was not acceptable.

Throughout this period, Virgin Australia continuously sought medical information about Mr Taleski's diagnosis and the likely timeframe within which he could comply with the Look Book. Mr Taleski provided Virgin Australia with eight medical certificates which provided information, in varying degrees, about his condition. He also advised Virgin Australia that he consented to them contacting his doctor, or alternatively, that they could supply him with a list of questions about his condition that his doctor could answer. Virgin Australia did not pursue either offer.

In April 2011, Mr Taleski was advised that he would be taken off flight duties. He appealed this decision by contacting senior management (in breach of Virgin Australia's grievance procedures) and argued that he was being subjected to discrimination when another Virgin Employee, who was also in breach of the Look Book requirements, was still allowed to fly.

Following an internal investigation, Mr Taleski made a complaint to the Australian Human Rights Commission, and the case was subject to conciliation. During that conciliation it was agreed that Mr Taleski could resume flight duties for a trial period of eight weeks, provided that he wore a wig. At the end of the 8 week period, Virgin Australia met with Mr Taleski to find out when he would comply with the Look Book by cutting his hair, at which time Mr Taleski advised that he would never do so.

On 20 October 2011, Virgin Australia terminated Mr Taleski's employment on the basis that he had failed to provide requisite medical documentation, had failed to comply with the company Look Book and had failed to follow the policies in dealing with grievances in the company.

The Decision

Looking to the reasons for dismissal, Commissioner Cribb found that five of the eight medical certificates provided by Mr Taleski provided Virgin Australia with the information it was seeking, and that in fact, despite a recommendation from his doctors that he be allowed to grow his hair, Virgin Australia ignored this advice.

Commissioner Cribb also determined that Mr Taleski had done everything he could do, within the constraints of his medical condition, to comply with the Look Book policy, and that Virgin Australia had discriminated against him because the Look Book policy was not applied in the same way to another non-compliant employee.

Commissioner Cribb also determined that Mr Taleski was not provided with an opportunity to respond to the allegations which resulted in the termination of his employment, deciding that Virgin Australia had already determined to terminate his employment.

Having regard to these factors, and due to the size of Virgin Australia's business, Commissioner Cribb determined that reinstatement, and compensation for lost wages, was appropriate in the circumstances.

The Appeal

Recently, Virgin Australia appealed Commissioner Cribb's decision and applied to prevent Mr Taleski's return to work until its appeal was determined. Deputy President Smith granted Virgin Australia's application on the condition that Mr Taleski's lost wages (in the vicinity of $26,000) were paid into an interest bearing account pending the appeal.

Lessons for Employers

Whilst Commissioner Cribb was critical of Virgin Australia's handling of this matter, it should be noted that Virgin Australia's right to have a strict policy on appropriate grooming standards was not in dispute.

The case serves as a reminder to employers that:

- policies need to be applied fairly and consistently to different employees
- the circumstances and reasons for an employee's non-compliance with company policy are relevant, and
- they should consider obtaining further medical information from an employee's treating doctor where medical reasons concerning an employee's ability to perform the the requirements of their position are raised.

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Failure to provide medical evidence for excessive sick leave: a valid reason for dismissal

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In the recent decision of *Ahern v BM Alliance Coal Operations Pty Ltd* [2013] FWC 659, the Fair Work Commission upheld the dismissal of an employee who was continually absent from work on sick leave, to the point where formal final warnings on reliability and absenteeism were issued.

Troy Ahern suffered from bipolar disorder, and was an "Assistant Shot-firer" at the BMA Blackwater Mine in Queensland. He provided information to BMA about the disorder in accordance with BMA's required procedure. His disorder resulted in "significant absences" from work, which were paid as annual leave.

Mr Ahern was subsequently placed on a performance management plan to address his continued absences from work and increase reliability, culminating in a Final Warning on 16 December 2011. As part of Mr Ahern's performance management plan, he was required to contact his supervisor as soon as possible if he could not attend work. Further, Mr Ahern was required to provide a medical certificate or, if not reasonably practicable, a statutory declaration for every absence. These directions were consistent with clauses in the BMA Workplace Agreement dealing with absenteeism.

On 6 July 2012, Mr Ahern went home sick with the flu. He was unable to attend the next day, and advised his supervisor of this. Mr Ahern was unable to schedule a doctors' appointment until 10 July, although an appointment was not booked at the time. Mr Ahern returned to work on 8 July, and promised his supervisors that he would get a medical certificate on the 10th.

However, Mr Ahern never went to the doctor, and instead provided a statutory declaration to his employer on his next day of work, being 13 July. Later that same day, Mr Ahern was directed in writing to show cause why his employment should not be terminated.

Mr Ahern was dismissed on 26 July 2012.

BMA submitted to the Commission that it terminated Mr Ahern because of his non-compliance with the final warning direction to provide medical evidence for work absences, and for the inconsistency in his reasons for not complying with his employer's directions.

The Commission held that there was a valid reason for terminating Mr Ahern's employment, as BMA made "significant attempts to outline their expectations regarding absenteeism and reliability". Commissioner Spencer found that there were alternatives open to the Applicant to obtain a medical certificate.

The evidence before the Commission showed that Mr Ahern was very casual and relaxed about the final warning direction, and it was found that he should have taken greater steps to comply with the directions, rather than just assuming that a statutory declaration would be fine.

The Commission dismissed the application, ruling Mr Ahern's dismissal was not unfair.

Whilst the *Fair Work Act 2009* (Cth) protects employees from dismissal on account of a temporary absence due to illness or injury (through the Act's *General Protections* provisions), employees who choose to ignore their employer's directions to produce medical evidence in a timely manner put their employment at risk. This case serves to remind employers that it is important to carefully monitor employees' absence due to illness or injury, and to establish clear procedures and processes regarding the employer's expectations about the sufficiency of medical evidence in support of their absence.

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Increase to penalties under the Fair Work Act 2009

On 28 December 2012, breaches of the Fair Work Act 2009 (Cth) civil remedy provisions became potentially more costly for employers.

Under the *Fair Work Act*, a Court can make orders for breach of a ‘civil remedy provision’, which is in effect a monetary penalty for breach of the Act. The Act sets out a range of maximum penalties that may be assigned to a particular breach of the legislation.

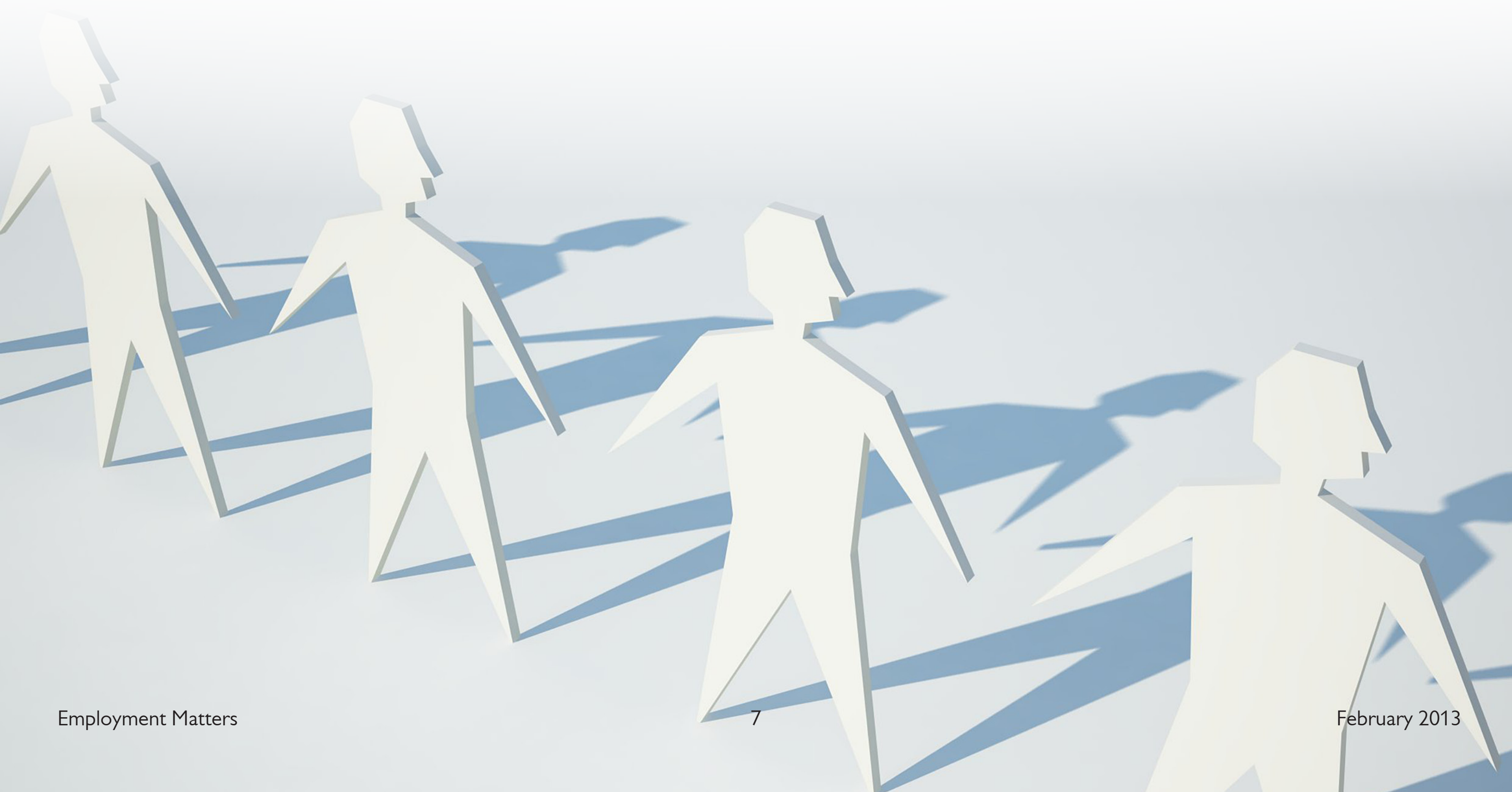
The maximum amount of a penalty under the *Fair Work Act* (and most other pieces of federal legislation), is expressed as a number of “*penalty units*”, rather than a dollar figure. For instance, the maximum penalty for a contravention of the National Employment Standards is 60 penalty units for an individual, and 300 penalty units for a corporation.

Following the passing of the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth), the value of a single penalty unit has increased from $110 to $170.

Importantly, the change in penalty units will only apply to breaches of the *Fair Work Act* (and all other pieces of federal legislation) committed after 28 December 2012.

Penalty units are now also subject to review every three years due to these amendments.

Using the example above, a 60 penalty unit contravention will rise from $6,600 to $10,200, and a 300 penalty unit contravention will rise from $33,000 to $51,000.



Employer's lack of procedural fairness proves problematic for employer

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Bell and another v Boom Logistics Limited [2013] FWC 81 (14 January 2013)

Background

Mr Chris Bell (a crane operator) and Mr Tyson Mackay (a trainee dogman) worked for Boom Logistics Limited (Boom) at its operation in Moranbah in Central Queensland. Mr Bell was also the president of the CFMEU lodge and the work health and safety representative.

In September 2011, Boom received a complaint of serious misconduct from an employee. The conduct complained of included assault, slashed tyres, urinating in other employees' boots, discriminatory and derogatory names, widespread drug use, cover-up of serious workplace health and safety incidents and employees being treated poorly because they were not members of, or because they did not support, the CFMEU.

In response to this complaint, in November-December 2011, Boom conducted bullying and harassment training and commissioned an external consultant to investigate the allegations. The external investigator produced a report and noted, amongst other things, that a toxic work environment existed at the Moranbah site. Relevantly, the investigator noted that there had been eight allegations made against Mr Bell, and whilst many of the incidents had in fact occurred, it wasn't possible to determine who was responsible for them. Nevertheless, the investigator recommended that Mr Bell be transferred to another site or that Boom negotiate the termination of his employment.

After receiving the investigator's report, in late April 2012, Boom met with the CFMEU and agreed that there would be a 'line in the sand'. A 'line in the sand' toolbox meeting was also held with staff, in which Boom noted that going forward, the work culture would need to change and that unacceptable behaviour would be subject to serious disciplinary action. This was confirmed by Boom in a letter sent to all employees.

Mr Christopher Zuniga, also an employee of Boom, lived in shared accommodation with Mr Mackay and another employee, Mr Alcock. He alleged that on 23 April 2012, Mr Bell, in front of Mr Mackay and Mr Alcock, farted in his face and subjected him to offensive and racial abuse (the First Incident). He also alleged that after a football match and drinking session with Mr Mackay and Mr Alcock at their shared residence, Mr Bell took to cooking Mr Zuniga's food in the early hours of 26 April 2012 (the Second Incident). He stated that this behaviour had occurred after continued bullying and harassment.

On 29 April 2012, Mr Zuniga made a formal complaint to Boom about the behaviour and on 3 May 2012 Mr Bell and Mr Mackay were summarily dismissed. Mr Alcock received a written warning for failing to report the First Incident and for participating in the Second Incident.

Shortly thereafter, Mr Bell and Mr Mackay filed applications for unfair dismissal.

The Findings

Commissioner Booth heard both unfair dismissal applications together, and found that both men had been unfairly dismissed.

In reviewing the available evidence, she noted that Mr Bell, Mr Mackay and Mr Alcock had all denied the First Incident, and that Mr Zuniga was unable to substantiate his claims with evidence. She therefore found that the First Incident could not be made out.

In looking at the Second Incident, Commissioner Booth made a distinction between out of work conduct that is likely to affect the employment relationship, and that which would not. She went on to find that Mr Mackay was entitled to invite his friend, Mr Bell, to his home, and even if the events of the night damaged the relationship between the employees, it didn't affect the employer's interests. She concluded that the Second Incident was not a valid reason for dismissal.

Commissioner Booth also determined that the procedure employed by Boom in terminating Mr Bell and Mr Mackay was "clearly defective". In particular, Commissioner Booth noted that the men were called into separate meetings where they were told the proposed reason for the meeting. They were then allowed a short break (but did not have a meaningful opportunity to respond) before each was provided with a pre-prepared notice of termination. Commissioner Booth commented that the poor work environment did not relieve Boom of its statutory obligations in regard to unfair dismissals, and did not justify the termination of employees who were merely suspected of misconduct.

Commissioner Booth evaluated the evidence provided by Boom and noted that there had been friction between Mr Bell and Boom management, that Mr Bell had a disciplinary history and noted the recommendations made in the external investigators report. In light of these factors she determined that Boom management had lost confidence and trust in Mr Bell, and that reinstatement would not be an appropriate remedy. She sought submissions from the parties on the question of appropriate compensation.

Turning to Mr Mackay, Commissioner Booth determined that reinstatement was appropriate in the circumstances. In making this decision she had regard to the fact that Mr Mackay was young and inexperienced and had shown remorse for his role in the Second Incident. She also had regard to the fact that Mr Alcock had only received a written warning for his role in both incidents, and regarded that to have been the appropriate action to be taken for the relevant conduct. Finally, she considered that whilst reinstatement might be difficult or embarrassing for Boom, it did not constitute a loss of trust and confidence.

The Appeal

Following Commission Booth's decision, Mr Bell appealed the decision and argued that reinstatement was an appropriate remedy for his unfair dismissal application.

Boom cross-appealed Commission Booth's decision on the termination of both Mr Bell and Mr Mackay.

Boom also made an application seeking to prevent Mr Mackay from returning to work until the appeal had been determined by the Full Bench. This application was rejected by Justice Boulton on the basis that the evidence provided by Boom showed that the appeal against the reinstatement of Mr Mackay would have little prospects of success.

Mr Bell's appeal, and Boom's cross-appeal have yet to be determined.

Lessons for Employers

This case highlights the need for employers to:

- ensure that procedural fairness is applied in disciplinary processes to ensure that all allegations are properly investigated and that all affected parties have an opportunity to respond to allegations made, and
- ensure that there is consistency in disciplinary processes, having regard to each employee's history of employment and their involvement in the alleged conduct.

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What are "all reasonable steps" to prevent harassment? Check the guidelines

Senior Associate, Penny Brooke and Lawyer, Emily Haar consider the recent decision of the Federal Court where an employer was vicariously liable for the sexual harassment of their employee.

In the recent decision of *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102, the Federal Court found that Rebecca Richardson was sexually harassed by her colleague Randol Tucker throughout 2008. Mr Tucker had made crude suggestions of a sexual relationship between himself and Ms Richardson from their first face to face meeting, while they both worked on a project in Melbourne for Oracle.

Ms Richardson at first attempted to deal with the situation herself, but after a number of incidents she spoke with her manager, who then referred the incidents to the Human Resources department. An investigation followed, and Mr Tucker was given a "first and final warning" about his conduct. During the investigation Ms Richardson and Mr Tucker continued to work together. Eventually Ms Richardson found work with another company and left Oracle.

While it was clear on the facts that Mr Tucker sexually harassed Ms Richardson, the main question for the Court was whether Oracle was to be held vicariously liable for that harassment.

Under section 106 of the *Sex Discrimination Act 1984* (Cth), an employer is automatically vicariously liable for any breach of the Act by an employee, unless the employer takes "all reasonable steps" to prevent the breach. Justice Buchanan explained that this is a "difficult" test to satisfy.

Oracle sought to rely on their "Code of Ethics and Business Conduct", which stated that harassment was prohibited, as well as requiring employees to undertake online sexual harassment training every two years. However, the Court found that Oracle's harassment policy was inadequate, particularly because Oracle introduced a new "Workplace Diversity Policy" for their Australian employees in November 2008, after the incidents in question, which required face-to-face harassment training.

Justice Buchanan found that the online training package in place was inadequate because it did not meet the minimum standard set out in "Sexual Harassment in the Workplace: A Code of Practice for Employers" (2004 Guidelines), published by the Human Rights and Equal Opportunity Commission, the predecessor to the Australian Human Rights Commission (AHRC).

It was relevant that the online training package did not advise in clear terms, as required by the 2004 Guidelines, that sexual harassment is unlawful, or that sexual harassment can lead to legal action taken against the harasser as well as the employer company.

Because Oracle could have implemented measures similar to those in the 2004 Guidelines prior to the 2008 incidents, Justice Buchanan found they had not taken "all reasonable steps". Oracle was therefore held to be vicariously liable for Mr Tucker's harassment of Ms Richardson.

This case is a reminder to employers that they need to keep in mind the material published by the AHRC in implementing policies and procedures to deal with harassment and discrimination in the workplace. It is clear from Justice Buchanan's decision that the Guidelines published by the AHRC can be taken into account by the Court in determining whether an employer took "all reasonable steps" to prevent harassment or discrimination.

The current Guideline, "Effectively preventing and responding to sexual harassment: A Code of Practice for Employers", is available from the AHRC at: http://www.humanrights.gov.au/sexualharassment/employers_code/index.html. While these Guidelines are not legally binding, in light of Justice Buchanan's decision, they now set a minimum standard for employers in preventing harassment and discrimination in the workplace.

If you have any concerns about the strength of your business' harassment and discrimination policies, please contact a member of Piper Alderman's Employment Relations team.

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