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LEGAL PRACTICE

Case Law update

A recent Federal Court decision has considered the adequacy of an employer's sexual harassment policy in the context of a sexual harassment complaint.

In *Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2)*[1], the Federal Court examined the adequacy of Boral Timber's ('Boral') sexual harassment policy in the context of the appellant's complaint that she had been sexually harassed and then victimised and discriminated against by others because she complained of sexual harassment.

In 2009, the appellant complained to her employer that one of her colleagues, Mr Urquhart, had groped her. She alleged that after making the complaint, no action was taken (until her union became involved), and that she experienced retributive harassment by other employees.

In the Federal Circuit Court, the appellant contended, amongst other things, that Boral was vicariously liable for the conduct of its employees. The Federal Circuit Court found that in developing a sexual harassment policy and by conducting training sessions, Boral had taken all reasonable steps to prevent Mr Urquhart from engaging in sexual harassment and was therefore not vicariously liable.

On appeal, one of the questions for the Federal Court was whether Boral had in fact taken all reasonable steps to prevent the sexual harassment. The appellant argued that merely devising and communicating a policy is not sufficient to constitute all reasonable steps'. Boral contended that the policy was 'substantial' and all employees who gave evidence were aware of it.

Boral's 'policy' was titled 'Working With Respect'. It involved a training session with 'notes contained in a slideshow'.[2] Evidence given by a Boral representative about the policy was that it involved employees attending a day of training at work, during which presenters referred to a Power Point slideshow and discussed inappropriate behaviour in a workplace.[3] It was reinforced periodically at site meetings and toolbox talks.[4]

In examining the policy and considering the reasonableness of the steps taken by Boral to prevent the sexual harassment, the Federal Court observed that:

- *What must be taken is all steps that are reasonable to take. What steps are reasonable will depend upon the whole of the circumstances, including the size of the organisation,*

[1] [2020] FCAFC 13.
[2] [2020] FCAFC 13 at [51].
[3] Two other policies had been implemented, but they were not considered to have been in evidence.
[4] [2020] FCAFC 13 at [69].

the nature of its workforce, the conditions under which the work is carried out and any history of unlawful discrimination or sexual harassment.[5]

- *The focus is upon preventative steps taken before any relevant act occurs. However, in some circumstances, the way a complaint is dealt with after the act may have relevance to the question of whether all reasonable preventative steps were taken.*[6]

- *The employer must demonstrate that the steps it relies upon were adequately communicated to the particular employee who did the unlawful act. Where the employer relies upon workplace policies, it may be necessary to demonstrate not only that the policies were communicated to the relevant employee, but that they were periodically reinforced.*[7]

- *The significance of effective policies and training includes that they deter unlawful discrimination and sexual harassment. They do so through education both about the effects of such acts upon victims and about the consequences for the perpetrators and their employers.*[8]

The Federal Court observed that only two of the slides touched on sexual harassment,[9] and there was no evidence that the training included any statement that disciplinary action would be taken in cases where sexual harassment was proven, and what that disciplinary action would be.[10] There was also no evidence that the training '*included advice to the effect that sexual harassment is against the law and that Boral would take sexual harassment seriously because it could also be liable for sexual harassment by an employee.*'[11]

These deficiencies led the Court to finding that the training lacked 'any substantial deterrent effect'[12] and the appeal was allowed. In allowing the appeal, the Federal Court said this:

> *[81] The paucity of evidence as to the steps actually taken to convey the seriousness and consequences of sexual harassment to employees, including Mr Urquhart, leads to the conclusion that Boral failed to establish that it took all reasonable steps to prevent Mr Urquhart from engaging in the sexual harassment.*

This case is an important reminder that all employers need to develop, implement and maintain sufficient sexual harassment policies. A failure to do so could render the employer vicariously liable for the conduct of its employees.

Gilshenan & Luton are recognised experts in the area of workplace investigations, criminal law, and professional misconduct. For further inquiries or assistance, please contact Sarah Ford, Associate, Gilshenan & Luton Legal Practice, on 3361 0248 or sford@gnl.com.au.

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[5] [2020] FCAFC 13 at [61].
[6] [2020] FCAFC 13 at [62].
[7] [2020] FCAFC 13 at [64].
[8] [2020] FCAFC 13 at [66].
[9] The slides showed only that sexual harassment was defined and examples were provided.
[10] [2020] FCAFC 13 at [80].
[11] [2020] FCAFC 13 at [80].
[12] [2020] FCAFC 13 at [80].