benchtv
a benchmark production

Précis Paper

Common Issues Faced by the LGBTI Community in the Workplace

A discussion about common issues faced by the LGBTI community in the workplace, and how employees & employers alike can effectively respond to them

Discussion Includes

- Background
- Types of discrimination: direct & indirect
- Making a complaint under *the Sex Discrimination Act 1984* (Cth)
- Making a complaint under the *Fair Work Act 2009* (Cth)
- Making a complaint under the *Anti-Discrimination Act 1977* (NSW)
- Takeaways for practitioners & employees
- Advice to employers: how to prevent discrimination in the workplace & avoid complaints by employees in the first place

Précis Paper

Common Issues Faced by the LGBTI Community in the Workplace

1. In this edition of BenchTV, Lucy Saunders (Reader, Greenway Chambers, Sydney) and Alana Heffernan (National Legal Counsel, Electrical Trades Union of Australia, Sydney) discuss common issues faced by the LGBTI community in the workplace, and how employees and employers alike can effectively respond to them.

Background

2. There seem to be two categories of discrimination issues that LGBTI people commonly face in the workplace:
    - direct issue
    - indirect issues

3. Direct issues can include things like access to family/carer's leave, access to opportunities/promotions etc.

4. Indirect issues are probably more cultural to the workplace, like for example being placed in uncomfortable situations. They can include either:
    - overt harassment and criticism on the basis of sexual identity, or (probably more commonly)
    - comments about personal life that are ultimately inappropriate, even if well-meaning

5. Language is a big issue that comes up in the workplace for LGBTI employees, and can often lead to feelings of exclusion (not only in terms of access to benefits, but also socially), like for example, when a colleague uses language that is ignorant or incorrect when describing someone's sexuality/gender/sex status.

6. Language in policies can also be very exclusionary. For example, the manner in which a workplace's policies are drafted can lead to members of same-sex relationships thinking that they are not entitled to the same legal rights as those held by members of heterosexual relationships.

7. Many of these types of policies would have been drafted by their organisations a number of decades ago. Although there may not be any intent to leave out LGBTI couples from the entitlements that they contain, the effect they can have upon LGBTI employees reading them is still alienating.

Types of discrimination: direct & indirect

8. There are generally two types of discrimination that are recognised in both state and federal discrimination laws – direct and indirect.

9. Direct discrimination occurs where a person who identifies as LGBTI is treated less favourably than someone who does not. The relevant test is one of comparison. The person with the 'attribute' (gay, bisexual, transgender, intersex) is compared to another person (who can be a theoretical person) without the 'attribute', whereby both persons are exactly the same, but for the 'attribute'. If, by way of this test, a person is found to be treated more favourably with the attribute taken away, direct discrimination can be made out.

10. Indirect discrimination is more nuanced. It occurs where a policy, practice or requirement appears neutral on its face but has the effect of disproportionately disadvantaging a group of people.

Making a complaint under the *Sex Discrimination Act 1984* (Cth)

11. The *Sex Discrimination Act 1984* prohibits discrimination on the basis of sex, marital or relationship status, actual or potential pregnancy, sexual orientation, gender identity, and intersex status.

12. Complaints are initially made to the Australian Human Rights Commission. Making the initial complaint does not cost anything. It is also important to note that the complaint becomes confidential after it is made.

13. Once the Commission decides to conciliate the matter (by way of a conciliation conference), the complaint becomes confidential. Before the conciliation conference is reached, the Commission often calls the complainant for a chat about:
    - what it is that the complainant seeks
    - how the complainant is hoping to resolve the matter

    The Commission will also call the respondent for a chat prior to any conference.

14. A complainant can be quite creative in what he/she seeks in the conciliation process, in that when resolution is achieved by way of agreement between two parties, the parties are not restricted to only seeking what a court can order. A court is quite limited in what it can order in relation to sexual harassment and sex discrimination complaints – it can order damages - general and compensatory - for hurt, humiliation, distress; and it can order declaratory relief - for a declaration that the defendant has engaged in unlawful conduct.

15. At conciliation, however, Alana has seen disputes resolved in a number of more varied ways, including:

- having a dismissal re-recorded as a resignation
- agreeing to change/implement better policies and procedures at the employer's workplace
- agreeing that the employer will invest in training at the workplace

This scope for variety in outcome is a big reason why matters tend to resolve at conciliation.

16. If a matter does not resolve at conciliation, however, it becomes high-risk for both parties. The Commission will terminate the complaint if a matter does not resolve at conciliation. It will do so on one of two bases:

- conciliation was unsuccessful
- it sees no merit in the complaint

17. If the matter is terminated on the latter basis, the complainant will have to bear the costs implications. Most of the time, complaints are terminated on the former basis. The applicant then has 60 days during which to decide whether or not they want to go to court. The applicant can take the matter to either the Federal Circuit Court, or the Federal Court.

18. From this point onwards, the matter enters a 'costs jurisdiction'. So if the applicant wins, they can recover a significant proportion of their costs from the other party. But if the applicant loses, they risk having to pay a significant proportion of the other party's costs. So the risk is high for both parties. This is particularly so for employees, who are less likely than corporate entities to be able to sustain litigation at a Federal Court level. It is very expensive, and the corporate entity is going to be in a far better position than any individual employee would be to argue and sustain its case.

19. The other difficulty with this Act is that the remedies that are available under it, at least outside of conciliation, are more or less functionally exclusively monetary, which can assist claims where the employment relationship is over, but does not provide a very good solution where the employment relationship is continuing. Here, the *Fair Work Act 2009* (Cth) is likely to be more helpful.

Making a complaint under the *Fair Work Act 2009* (Cth)

Anti-bullying jurisdiction

20. Two parts are particularly relevant, the first of which is the anti-bullying jurisdiction – by which the Fair Work Commission has the power to make orders to stop bullying.

21. Bullying is defined in this context as 'repeated unwelcome behaviour that causes a risk to health and safety'). Discrimination on the basis of sexual identity or sexuality would fairly easily fall within this definition.

22. The Commission's power to make orders is limited in one way – it cannot make orders for compensation. Its power is entirely focused on orders to change peoples' behaviour, and to require people to invest in training and implement policies, etc. So this can be a more useful avenue for employees who are continuing in their workplace, because even though technically in the Federal Court an employee can seek an injunction to stop certain behaviour, it is very expensive and time-consuming, and most often the employment relationship is completely destroyed by this stage. So injunctions are largely unhelpful for a continuing employee.

23. At least under the *Fair Work Act*, the Fair Work Commission is statutorily required to deal with the matter within two weeks. Although the Commission has in practice read the words 'deals with', at least in Alana's experience, quite loosely.

24. In reality, an employee will appear before a commissioner at least within a few weeks, in a conciliation conference similar to that which would be held before the Human Rights Commission.

25. The commissioner has very broad powers in the interim stage. There is still some contest over what a commissioner can and cannot do, in particular, whether or not a commissioner can order someone to apologise.

26. It is important to note that the anti-bullying jurisdiction is only helpful for people who are still employed. An anti-bullying claim cannot proceed if the person is no longer employed; indeed, the claim relies upon the continuing employment relationship. The bullying or harassment must be current, ongoing, and a future risk to a person's health and safety.

27. Fundamentally, this option is not meant to be punitive.

General protections provisions

28. The second relevant part of the *Fair Work Act* is the general protections provisions.

29. The general protections provisions basically provide that it is unlawful to treat someone unfavourably for certain reasons.

30. It is not unlawful to treat someone unfavourably in general – but it is if it is done for a certain reason. The *Fair Work Act* lists what these reasons are.

31. The general protections contain a section specifically relating to discrimination. In essence, it is unlawful to treat someone unfavourably because of their race, gender identity, sexuality, family responsibilities and the like. It is also unlawful to treat someone unfavourably simply because they have made a complaint or inquiry about how they have been treated at work.

32. The section operates with what is called 'reverse onus', meaning that the applicant only has to prove that:
    - they have the attribute (i.e. they identify as gender/sexuality diverse), and
    - unfavourable treatment has occurred/adverse action has been taken against them

33. The onus is then on the respondent/employer to prove that there is no nexus between the two. Of course in practice it is not as simple as this for the applicant. The applicant needs to demonstrate an apparent connection at the minimum.

34. It can be quite hard for the applicant to demonstrate the existence of the necessary causal link. A classic example of this difficulty is exemplified in the case of *Construction Forestry Mining and Energy Union v Endeavour Coal Pty Ltd* [2015].

35. There is some ambiguity about whether adverse action encompasses indirect discrimination.

36. Where an employee has a clear-cut case of discrimination, he/she is advised to pursue action under the *Sex Discrimination Act,* rather than under the general protections provisions of the *Fair Work Act*, because the definition of 'adverse action' under those provisions is so broad.

37. Time limits are also a very important consideration. The *Sex Discrimination Act* was very quietly changed in April last year to reduce the time limit for making a complaint to the Australian Human Rights Commission from one year to six months. The six month time limit within which complaints are to be made under federal law is the same under NSW law.

38. Sexual harassment is defined as unwelcome sexual conduct, which in the relevant circumstances, a reasonable person would anticipate the possibility that the person being harassed would feel offended, humiliated or intimidated. This is not a very high bar.

39. Sexual harassment can also include vilification. Vilification is unlawful in a number of states in Australia, including NSW, but not federally. Vilification occurs where a person commits a public act that could incite or encourage hatred, serious contempt or severe ridicule towards a person/s because of their sexuality.

40. For general protections claims, the time limit depends on the particular circumstances. If it is dismissal related, the time limit is 21 days, without any possibility of extension. Time limits for complaints made to the Australian Human Rights Commission or the NSW Anti-

Discrimination Board, however, can be extended. The Presidents of these organisations retain a discretion to grant an extension of time.

Making a complaint under the *Anti-Discrimination Act 1977* (NSW)

41. The NSW act is similar to the federal acts already discussed in the rights that it creates for someone who is being treated less favourably. But the process and outcomes that can be sought under the NSW act are very different.

42. The complainant has 6 months within which to file its complaint with the Anti-Discrimination Board.

43. The Anti-Discrimination Board has a very similar conciliation process to that of the Human Rights Commission. The NSW act does not attract the same confidentiality laws as the federal acts do. So complainants are able to talk to the media in the lead-up to conciliation. The actual conciliation conference itself is, however, confidential.

44. If the complaint is not resolved at the conciliation conference, it goes to the NSW Civil and Administrative Tribunal (NCAT). It is also not a costs jurisdiction (unless an award of costs against an individual is in the interests of justice, which employers rarely succeed in arguing).

45. Technically lawyers are not supposed to be allowed in NCAT.

46. The biggest issue that people rub up against is the cap on damages that they can seek. Currently the cap is set at $100,000, which, if a person's legal costs are not being paid, is not very much at all. The cap is rather arbitrary, and it has not increased over the last few years.

47. Most NSW workers have a choice between making a complaint under the federal *Sex Discrimination Act/Fair Work Act*, or under the NSW *Anti-Discrimination Act*, except for state government employees.

48. NSW government employees are restricted to complaints under the NSW *Anti-Discrimination Act*. But they also have some industrial rights under the NSW *Industrial Relations Act*. These rights can relate to, among other things:
    - unfair dismissals (21 day drop dead time limit)
    - victimisation

Takeaways for practitioners & employees

49. Employees, with the exception of state government employees, need to consider a whole range of factors in deciding which path to go down in making their complaint. The key consideration should be what orders the employee seeks.

50. If the employee seeks a monetary order for an amount significantly over $100,000, he/she is better off in the federal system. If he employee seeks a non-monetary order/intends to continue employment in the same workplace, the anti-bullying provisions of the *Fair Work Act* may be the better option.

51. So employees (with the exception of state government employees) have a decision to make between the three options discussed:
    - action under the *Sex Discrimination Act 1984* (Cth)
    - action under the *Fair Work Act 2009* (Cth) (under anti-bullying jurisdiction or general protections provisions)
    - action under the *Anti-Discrimination Act 1977* (NSW)

52. Some other key considerations the employee should have regard to include:
    - the nature of what has happened/the conduct that has occurred (i.e. was it a dismissal? was it harassment? etc.)
    - when the conduct occurred (in order to know whether any time limits apply)
    - what result the employee seeks (monetary or non-monetary)
    - the employee's capacity to spend money on pursuing action
    - what the risk is for an adverse costs order to be made against the employee
    - the complexity of the claim

53. While NCAT can be quicker, and generally does not involve many lawyers, complex matters that come before it often receive unpredictable outcomes – whereas the Federal Court specialises in dealing with complex matters of this kind.

54. Employees are advised to move relatively quickly with these matters. The fresher it is, the more likely an employee will be able to properly prepare the evidence it will need to rely upon.

<u>Advice to employers: how to prevent discrimination in the workplace & avoid complaints by employees in the first place</u>

55. First of all, an employer needs to be motivated to prevent these sorts of claims from occurring.

56. Employers have vicarious liability under various laws. The liability is worded differently under the different laws, but the general gist is that an employer is liable for the conduct of its employees, so long as the conduct occurs in connection with the workplace.

57. So vicarious liability is the relevant motivation for employers to put policies and procedures in place in their workplace, because it limits their liability under this legislation. Not only does the implementation of policies and procedures help prevent the conduct from happening in the first place, evidence of the employer having done so will also come of great use if ever the employer finds itself being sued on the basis of vicarious liability and has to defend itself against a claim that such conduct had occurred.

58. Quite often employers do not have adequate policies, procedures, and inductions in place, if at all. Smaller employers often mistakenly think that they are not required to have any policies in place at all. Larger employers often think that they can get away with simply showing a new employee their policy, getting them to sign off on it, and never having to bring it up again.

59. But there have been a number of cases that have gone through the Federal Court system in which it was held that having a policy that prohibits discrimination or harassment in the workplace is not enough to reduce liability if they do occur – an employer needs to ensure regular training.

60. So merely having policies in place will not be sufficient; employers need to take steps to ensure that people are aware of them and understand how they work, which cannot be guaranteed from an employee simply reading a policy - there needs to be proper, engaging training. In Lucy's opinion, the best way to do this is by regularly reviewing policies and training, which has the effect of reminding employees of both the existence and substance of these policies.

BIOGRAPHY

Lucy Saunders

Reader, Greenway Chambers, Sydney

Lucy Saunders specialises in employment law, industrial relations, workplace health and safety disputes, and related matters. She is a member of the NSW Bar Association's Industrial, Employment and Health and Safety Committee, and edits the Thompson Reuters publication 'the Employment Factbook'. She also accepts briefs in general commercial areas, including building and construction matters.

Before coming to the bar spent five years as a senior legal officer at the Australian Manufacturing Workers Union, managing a team of lawyers and co-ordinating its industrial litigation practice in NSW and on a national level. In this role she regularly appeared as an advocate in various state and Federal Courts and tribunals, particularly the Fair Work Commission and the Federal Circuit Court.

Alana Heffernan

National Legal Counsel, Electrical Trades Union of Australia, Sydney

Alana Heffernan is the National Legal Counsel of the Electrical Trades Union of Australia. She represents union members and officials in relation to a broad range of industrial and employment issues including dismissals, discrimination, disputes, adverse action complaints, workplace investigations, disciplinary proceedings and contract issues. She is experienced in appearing before the relevant courts and tribunals, as well as negotiating out of court settlements.

Alana has a particular interest in anti-discrimination law and has actively advocated for amendments to anti-discrimination law to include protections for victims of domestic violence. These proposed amendments have been supported and advocated for by various community and legal peak bodies, as well as the Australian Council of Human Rights Agencies. She is an experienced advocate and her history in employment relations is diverse, having worked in private practice, for trade unions and for community organisations.

In addition to her work at the ETU, Alana is a member of numerous professional associations, such as the Sydney Gay and Lesbian Business Association and the Industrial Relations Society of NSW.

BIBLIOGRAPHY

Cases

Construction Forestry Mining and Energy Union v Endeavour Coal Pty Ltd [2015] FCAFC 76

Legislation

Fair Work Act 2009 (Cth)

Sex Discrimination Act 1984 (Cth)

Anti-Discrimination Act 1977 (NSW)

Industrial Relations Act 1996 (NSW)

Whitlock v Bunnings, DP and DF [2009] QADT 14